

HUMAN RIGHTS AND CRIMINAL PROCEDURE

The case law
of the European Court
of Human Rights



2nd edition

Jeremy McBride

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Introduction

This is the second and expanded edition of a handbook intended to assist judges, lawyers and prosecutors in taking account of the requirements of the European Convention on Human Rights and its Protocols (“the European Convention”) – and more particularly of the case law of the European Court of Human Rights (“the European Court”) – when interpreting and applying codes of criminal procedure and comparable or related legislation. It does so by providing extracts from key rulings of the European Court and the former European Commission of Human Rights (“the former European Commission”)¹ that have determined applications complaining about one or more violations of the European Convention in the course of the investigation, prosecution and trial of alleged offences, as well as in the course of appellate and various other proceedings linked to the criminal process.

The use of extracts from these rulings to illustrate the various requirements of the European Convention governing the operation of the criminal process reflects not only the fact that the mere text of the latter is insufficient to indicate the scope of what is entailed by that instrument – particularly as that is in many respects heavily dependent on the interpretation given to its provisions by the European Court and the former European Commission – but also because the circumstances of cases selected give a sense of how to apply the requirements in concrete situations.

The relevance of the European Convention to the interpretation and application of codes of criminal procedure and comparable or related legislation arises both from provisions in the former that explicitly set out requirements with respect to the operation of the criminal justice system and from many other provisions that give rise to a range of implicit requirements that will also need to be taken into account.

The explicit requirements come primarily from the right to liberty and security in Article 5 and the right to a fair hearing in the determination of a criminal charge in Article 6 but also from the right of appeal in criminal matters, the right to compensation for wrongful conviction and the right not to be tried or punished twice in Articles 2, 3 and 4 of Protocol No. 7 respectively.

1. The former European Commission had a role in implementing the European Convention until the coming into force of Protocol No. 11 but its rulings on a number of important points relating to the criminal process remain authoritative. This handbook assumes a basic familiarity with the European Convention system.

The implicit requirements in the European Convention stem particularly from the right to life in Article 2 and the prohibition of torture and inhuman treatment and punishment in Article 3 (which are of significance for matters such as the use of force in law-enforcement action, the investigation of alleged offences and the conduct of interrogation); the right to respect for private and family life, home and correspondence in Article 8 (which not only sets important limitations on the way in which offences can be investigated and evidence gathered but is also relevant to the restrictions to which persons arrested and remanded in custody can be subjected and the publicity that can be given to certain aspects of criminal proceedings); the right to freedom of expression in Article 10 (which is relevant not only to the reporting of criminal proceedings but also to the limits that can be imposed on criticism of the criminal justice system, especially as regards its operation in a given case); the right to the peaceful enjoyment of possessions in Article 1 of Protocol No. 1 (which must be respected in the course of law-enforcement action and may also be relevant to measures taken to secure either evidence of the commission of an offence or the proceeds derived from this); and the right to freedom of movement in Article 2 of Protocol No. 4 (which can affect restrictions imposed on suspected offenders in the course of an investigation of an offence or pending its trial).

It may well be that the terms of the codes of criminal procedure and comparable or related legislation reflect and embody many, if not all, of the requirements of the European Convention regarding the criminal process. However, it is the manner in which they are applied in practice that will determine whether or not the requirements of the European Convention are actually observed. Having regard to the way in which the European Court and the former European Commission have interpreted and applied the provisions of the European Convention in specific circumstances may thus provide a useful guide when it comes to interpreting and applying codes of criminal procedure and comparable or related legislation, thereby ensuring that the commitment made in Article 1 of the European Convention to secure the rights and freedoms set out in it is properly fulfilled.

In considering the relevance of the European Convention to criminal justice it should not be overlooked that the rights and freedoms which it guarantees – notably those with respect to assembly, association, expression, private life and religion in Articles 8 to 11 but also the prohibition of retrospective liability and penalties in Article 7 – can also set substantive limits on the scope of criminal law.² These limitations are not, however, dealt with in this handbook because its focus is only on the operation of the criminal process where there is no question about the admissibility of imposing criminal liability.

Similarly, the handbook does not take account of the way in which these rights and freedoms, as well as the right to life and the prohibition of torture and inhuman or degrading treatment or punishment, may not only require various acts and omissions

2. See, for example, *Korbely v. Hungary* [GC], 9174/02, 19 September 2008 (Article 7), *A. D. T. v. United Kingdom*, 35765/97, 31 July 2000 (Article 8) and *Ahmet Arslan and Others v. Turkey*, 41135/98, 23 February 2010 (Article 9).

to constitute criminal offences³ – with the penalties actually imposed reflecting the gravity of the conduct concerned⁴ – but also can impose constraints on the penalties for other offences,⁵ as well as the manner in which these are executed.⁶

In addition it should be noted that the understanding of what constitutes a “criminal” offence for the purpose of the European Convention is not restricted to the particular conception of this under the law of any state bound by this instrument. Like many other provisions in the European Convention, a “crime” is something that has been given an autonomous meaning by the European Court and the former European Commission. This has the consequence that, while the classification of something as “criminal” under national law will be decisive in attracting the application of the various requirements of the European Convention to the relevant proceedings, the fact that certain proceedings are not so classified under national law will not preclude those requirements from being considered applicable to them.

Thus, as the extracts in the first section of this book illustrate, the factors considered particularly important in this context will be whether or not the norm in question is generally applicable, whether the purpose of the penalty imposed was compensatory or punitive in character, whether or not the penalty involved imprisonment or was in some other respect (such as payment of a substantial sum of money) severe or burdensome. The application of these criteria has resulted in at least certain prison disciplinary offences, road-traffic regulatory offences and tax surcharges being treated as “criminal” for the purpose of the European Convention. This treatment does not mean that such matters have to be classified as “criminal” for the purposes of national law. However, the manner in which they are handled does need to ensure that a similar level of protection is available in proceedings with respect to them. As a consequence, codes of criminal procedure and comparable or related legislation may not be the only relevant national procedural standard when it comes to fulfilling the requirements of the European Convention in proceedings that will be regarded as “criminal” by the European Court.

It is, of course, important to bear in mind that the extracts do not seek to deal with every detailed aspect of the requirements of the European Convention. This would be impossible, not only because of the constraints of space but also because the case law of the European Court and the former European Commission has not dealt with every possible problem that could arise in interpreting and applying the European Convention in the context of criminal process. New questions will undoubtedly arise as criminal justice systems are expected to deal with the changing character of criminal activity. Moreover, the European Convention is itself a living instrument and this may result in the way in which its provisions are interpreted and applied being revised – invariably in a more exacting manner – as the European consensus

3. See, for example, *Hristovi v. Bulgaria*, 42697/05, 11 October 2011 (Article 3) and *Söderman v. Sweden* [GC], 5786/08, 12 November 2013 (Article 8).

4. See, for example, *Okkali v. Turkey*, 52067/99, 17 January 2006 and *Gäfgen v. Germany* [GC], 22978/05, 1 June 2010.

5. See, for example, *Vinter and Others v. United Kingdom* [GC], 66069/09, 9 July 2013 (irreducible life imprisonment), *Murat Vural v. Turkey*, 9540/07, 21 October 2014 (length of prison sentence) and *Grifhorst v. France*, 28336/02, 26 February 2009 (amount of fine).

6. See, for example, *Muršić v. Croatia* [GC], 7334/13, 20 October 2016 as regards prison conditions.

as to what is required evolves.⁷ Subject to these qualifications, the extracts have been selected with a view to giving a good indication of the scope of the requirements of the European Convention as presently established.

The organisation of the handbook does not follow the order of the provisions of the European Convention. Instead it follows the different stages of the criminal process, starting with the investigation stage and covering the various obligations entailed in this, the initial use of apprehension and custody, preventive measures and detention on remand, the process of gathering evidence and interrogation, as well as charging, plea-bargaining and the discontinuance of proceedings before trial. It then turns to the trial stage, looking at requirements relating to the court and a public hearing, the approach to the burden of proof and the standards applicable to evidence, in particular those regarding witnesses and admissibility. This is followed by consideration of the specific rights of the defence, the rights of victims of alleged criminal offences, the use of trial *in absentia* and the standards governing a judgment and its consequences. Thereafter it deals with appeals, the reopening of proceedings, the requirement of trial within a reasonable time and various obligations relating to payment of compensation and costs. It concludes by dealing with a number of specifically child-related issues that have arisen with respect to the application of the European Convention.

The following paragraphs give an overview of the main elements that the European Convention requires in the criminal process, and what they entail. It is important to note that, while the criminal process follows a sequence of stages, some aspects of particular rights and freedoms under the European Convention may be engaged in more than one of those stages, and so the application of the requirements to which they give rise cannot be rigidly compartmentalised.

Questions about the duties governing a criminal investigation – particularly its thoroughness, effectiveness and independence – have arisen especially in the context of allegations of unlawful killing and ill-treatment contrary to Articles 2 and 3, but the standards established are increasingly invoked where other rights and freedoms under the European Convention are affected. Moreover, these standards are also applicable to alleged offences in general, not least because their commission can affect many substantive rights under the European Convention and the failure to deal with them appropriately can result in the violation of the right to an effective remedy under Article 13.

The right to liberty and security under Article 5 establishes a strong presumption in favour of suspected offenders remaining free. This imposes important obligations as regards the initial apprehension and custody of such persons and the use and duration thereafter of detention on remand. The need for reasonable suspicion is a continuing requirement but is not of itself sufficient, with the European Court being concerned especially about the exercise of power that is arbitrary and the need for continued detention being for reasons that are not only admissible but also objectively

7. See, for example, *Borgers v. Belgium*, 12005/86, 30 October 1991, as to the impartiality requirement in Article 6, and *Selmouni v. France* [GC], 25803/94, 28 July 1999, as to what amounts to torture.

substantiated. Furthermore, the overall length of detention pending trial must be closely scrutinised, with particular implications for the diligence in processing a case.

Whenever someone is detained, the exercise of effective judicial control is seen under the European Convention system as a vital safeguard not only of the right to liberty and security but also against the possibility of improper treatment in circumstances where an individual is especially vulnerable. As a result Article 5(3) imposes a requirement of automatic and prompt judicial supervision of the justification for the loss of liberty following the initial apprehension and custody of a suspected offender. Thereafter Article 5(4) requires that there be a genuine ability for a person subject to detention to challenge its legality – entailing the fulfilment of many specific conditions in order to ensure its effectiveness – so long as it lasts during the criminal process and after this has been concluded.

Although the assistance of a lawyer is a potentially key element of the ability of someone to defend him or herself in the actual trial, the potential for the interests of the defence to be prejudiced at a much earlier stage of proceedings has led the European Court to find that such assistance will generally be needed even during the initial interrogation. Wherever the right to be assisted by a lawyer arises, there is a need to ensure that the possibility of having access to one is unimpeded and can take place in a manner allowing advice to be given in confidence. Furthermore, the right to assistance may entail a duty for the state to secure and pay for the services of a lawyer where this cannot be afforded by the person concerned. This will be especially so where the competence of the accused and/or the consequences of conviction are such that the provision of legal assistance in this manner is in the interests of justice. However, the right to legal assistance – whether or not provided by the state – does not mean that it cannot be regulated, particularly where prejudice to the proceedings could result.

The gathering of evidence to support a prosecution can affect many rights under the European Convention. In particular the prohibition on torture and inhuman treatment precludes the use of certain interrogation techniques, and concern for voluntariness will also exclude both criminal sanctions being employed in a manner that leads a person to incriminate him or herself and the use in certain circumstances of techniques of entrapment and incitement. However, there are circumstances in which evidence can be obtained against a person's will through searches and medical examination, provided certain safeguards are observed. Moreover, even where evidence may have been obtained in breach of the right to respect for private life, the principal consideration governing its admissibility will be the impact of this on the overall fairness of the proceedings.

The last consideration – fairness – will inform the evaluation of many aspects of a trial and (if one is held) an appeal. Although there are particular standards concerning matters such as the adequacy of time to prepare one's defence and the summoning and cross-examination of witnesses, the case law demonstrates that the actual impact of a failure to observe them in a given instance will be the principal concern of the European Court. However, that court has the advantage of hindsight in making this assessment whereas assumptions that a certain ruling will

not be prejudicial might not be so wisely made by a court where the proceedings have still to run their course.

Fairness will never be achieved in circumstances where there is no equality of arms between the prosecution and defence in criminal proceedings. A lack of such equality will be found where, for example, expert witnesses are not neutral but effectively prosecution-minded, where the defence does not have full access to the case file and where the prosecution can make submissions at first instance or on appeal to which the defence cannot respond.

In any prosecution the presumption of innocence puts the burden of proof on the prosecution; this means that an accused cannot be compelled to incriminate him or herself and that there must be evidence to substantiate a conviction. At the same time the drawing of presumptions from certain circumstances and a requirement that an accused explain a particular situation will not necessarily be objectionable so long as certain safeguards exist. However, the presumption of innocence also has implications for statements by officials before trial, the conduct of the judge in the course of it and the treatment of someone after an acquittal or discontinuance of proceedings.

A fundamental consideration in any trial will be the independence and impartiality of the court. This has implications for the safeguards for judges against improper pressures as well as circumstances which may give rise to both actual bias on their part or – more commonly – well-founded apprehension that this might exist, possibly as a result of their prior involvement in the proceedings, connections with the prosecuting body or a victim, or the influence of press coverage.

On top of all the different standards governing the conduct of criminal proceedings in order to ensure fairness, a key consideration of the European Convention is that a person should be tried within a reasonable time. This obligation – which is extensively breached in practice – applies to both trial at first instance and the different levels of appeal, as well as the overall length of the entire proceedings in a particular case. No particular period is prescribed as “reasonable” because the circumstances of cases inevitably differ. However, while complexity may explain some lengthy proceedings, inactivity in conducting them and delay as a result of inadequate resources are not acceptable excuses.

All these issues are seen in the various extracts from the rulings of the European Court and the former European Commission. The extracts have been chosen to illustrate different facets of the requirements of the European Convention concerning the various issues relevant to the conduct of criminal proceedings. All footnotes and, in almost all instances, text in [square] brackets are editorial. Space constraints have allowed only limited extracts to be chosen and, as a result, references to the case law, parts of sentences and even whole paragraphs have often been omitted. This has been done in a manner which hopefully still gives a sense of the essential reasoning and the specific context of the ruling while at the same time endeavouring not to misrepresent the stance of the European Court or the former European Commission. It should be borne in mind that there are often other cases that can exemplify but also, to a certain extent, qualify the particular issues being addressed.

The full text of all the rulings from which the extracts have been derived can be found in the HUDOC database of the European Court (www.echr.coe.int/ECHR/EN/hudoc), generally in both English and French but in some instances only in one of these languages. The case names of rulings that involve an admissibility decision rather than a judgment are followed by “(dec.)”⁸ Where a case has more than one application number only the first one is included.

The extracts are from rulings up to 31 December 2016.

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8. In the one instance where a report of the former European Commission is involved, the case name is followed by “(rep.)”.

Chapter 1

Criminal charge

► ***Ezeh and Connors v. United Kingdom* [GC], 39665/98, 9 October 2003**

82. ... it remains undisputed that the starting-point, for the assessment of the applicability of the criminal aspect of Article 6 of the Convention to the present proceedings, is the criteria outlined in *Engel and Others* ...:

82. ... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. ...

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. ...

86. In addition, ... the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative ... This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ...

90. The offences with which the applicants were charged were classified by domestic law as disciplinary ...

Thus ... the adjudication of such offences ... was designed to maintain order within the confines of the prison.

100. In explaining the autonomous nature of the concept of "criminal" in Article 6 of the Convention, the Court has emphasised that the Contracting States could not at their discretion classify an offence as disciplinary instead of criminal, or prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, as this would subordinate the operation of the fundamental clauses of Article 6 to their sovereign will. The Court's role under that Article is therefore to satisfy itself that the disciplinary does not improperly encroach upon the criminal ...

101. ... misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that "some matters may be more serious than others", that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the Rules might also amount to an offence under the criminal law so that, theoretically at least, there was nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.

102. Moreover, criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence ...

103. ... the offences in question were directed towards a group possessing a special status, namely prisoners, as opposed to all citizens. However, ... this fact renders the nature of the offences *prima facie* disciplinary. It is but one of the "relevant indicators" in assessing the nature of the offence ...

104. Secondly ... the charge against the first applicant corresponded to an offence in the ordinary criminal law ...

105. Thirdly, the Government submit that disciplinary rules and sanctions in prison are designed primarily to ensure the successful operation of a system of early release so that the "punitive" element of the offence is secondary to the primary purpose of "prevention" of disorder. The Court considers that awards of additional days were, from any viewpoint, imposed after a finding of culpability ... to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners. It does not find persuasive the Government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives not being mutually exclusive ... and being recognised as characteristic features of criminal penalties ...

106. Accordingly, the Court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants were charged are to be regarded as "criminal" for Convention purposes, clearly give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

107. The Court finds it therefore necessary to turn to the third criterion: the nature and degree of severity of the penalty that the applicants risked incurring ...

120. The nature and severity of the penalty which was "liable to be imposed" on the applicants ... are determined by reference to the maximum potential penalty for which the relevant law provides ...

The actual penalty imposed is relevant to the determination ... but it cannot diminish the importance of what was initially at stake ...

124. The Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability ...

128. In the present case, it is observed that the maximum number of additional days which could be awarded to each applicant by the governor was 42 for each

offence (Rule 50 of the Prison Rules). The first applicant was awarded 40 additional days and this was to be his twenty-second offence against discipline and his seventh offence involving violent threats. The second applicant was awarded 7 additional days' detention and this was to be his thirty-seventh offence against discipline. The awards of 40 and 7 additional days constituted the equivalent, in duration, of sentences handed down by a domestic court of approximately 11 and 2 weeks' imprisonment, respectively, given the provisions of section 33(1) of the 1991 Act ...

The Court also observes that ... nothing was submitted to the Grand Chamber, to suggest that awards of additional days would be served other than in prison and under the same prison regime as would apply until the normal release date set by section 33 of the 1991 Act.

129. In these circumstances, the Court finds that the deprivations of liberty which were liable to be, and which actually were, imposed on the applicants cannot be regarded as sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them ...

130. ... the Court concludes ... that the nature of the charges, together with the nature and severity of the penalties, were such that the charges against the applicants constituted criminal charges within the meaning of Article 6 of the Convention, which Article applies to their adjudication hearings.

► ***Matyjek v. Poland (dec.)*, 38184/03, 30 May 2006**

49. The Court observes that there exists a close connection between lustration proceedings and the criminal-law sphere. In particular, the Lustration Act provides that matters not regulated by it are subject to the relevant provisions of the Code of Criminal Procedure. Consequently, the Commissioner of Public Interest, who is empowered to initiate the lustration proceedings, has been vested with powers identical to those of the public prosecutor, which are set out in the rules of criminal procedure ... Similarly, the position of the person subject to lustration has been likened to that of an accused in criminal proceedings, in particular in so far as the procedural guarantees enjoyed by him or her are concerned ...

50. The Court also notes that the organisation and the course of lustration proceedings, as governed by the Act, are based on the model of a Polish criminal trial and that the rules of the Code of Criminal Procedure are directly applicable to lustration proceedings ...

51. In sum, although under the domestic law the lustration proceedings are not qualified as "criminal", the Court considers that they possess features which have a strong criminal connotation.

52. The Court reiterates that the second criterion stated above – the very nature of the offence, considered also in relation to the nature of the corresponding penalty – represents a factor of appreciation of greater weight. In this regard the Court finds that the misconduct committed by the applicant consisted of his having lied in a declaration which he had a statutory obligation to submit. ... The Court considers that the offence of making an untrue statement in a lustration declaration is

very similar to the above-mentioned offences. Moreover, according to the ordinary meaning of the terms, it is analogous to the offence of perjury ...

53. The Court also notes that the legal provision infringed by the applicant ... is directed at a vast group of citizens, born before May 1972, who not only hold many types of public functions, but also wish to exercise professions ... The lustration court decides whether the person subject to lustration violated the law by submitting a false declaration. If such a finding is made, the statutory sanctions are imposed. Thus, the lustration procedure in Poland is not aimed at punishing acts committed during the communist regime ... In the light of the above, the Court considers that the offence in question is not devoid of purely criminal characteristics.

54. As regards the nature and degree of severity of the penalty that the applicant suffered in the application of the Act, the Court first notes that the Act provides for an automatic and uniform sanction if the person subject to lustration has been considered by a final judgment to have lied in the lustration declaration. A final judgment to that effect entails the dismissal of the person subject to lustration from the public function exercised by him or her and prevents this person from applying for a large number of public posts for the period of 10 years. The Court observes that the moral qualifications, of which the person who has lied in the lustration declaration is automatically divested, are described broadly as: unblemished character, immaculate reputation, irreproachable reputation, good civic reputation, or respectful of fundamental values. The obligation to demonstrate those qualifications is necessary in order to exercise many professions, such as those of prosecutor, judge and barrister. That list is not exhaustive however as the Act refers to other statutes that may, as a prerequisite for exercising a public function, require one of the above-mentioned moral qualifications.

55. It is true that neither imprisonment nor a fine can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character.

56. ... the applicant, who is a politician, as a result of having been deemed a "lustration liar" by a final judgment, lost his seat in Parliament and cannot be a candidate for future elections for 10 years. In this connection the Court reiterates that the purpose of lustration proceedings is not to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State, since admitting to such collaboration – the so-called "affirmative declaration" – does not entail any negative effects, but to punish those who have failed to comply with the obligation to disclose to the public their past collaboration with those services ...

57. The Court considers that, given its nature and duration, the sanction provided by the Lustration Act must be considered as detrimental to and as having serious consequences for the applicant.

58. Having weighed up the various aspects of the case, the Court notes the predominance of those which have criminal connotations. In such circumstances the Court concludes that the nature of the offence, taken together with the nature and severity of the penalties, was such that the charges against the applicant constituted criminal charges within the meaning of Article 6 of the Convention.

► ***Jussila v. Finland* [GC], 73053/01, 23 November 2006**

29. The present case concerns proceedings in which the applicant was found, following errors in his tax returns, liable to pay VAT [value added tax] and an additional ten per cent surcharge ...

35. ... No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6 ...

37. ... it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive.

38. The second criterion, the nature of the offence, is the more important. The Court observes that ... it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not persuaded ... that VAT applies to only a limited group with a special status: as in the previously-mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* ... as regards the third Engel criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.

► ***Storbråten v. Norway* (dec.), 12277/04, 1 February 2007**

... two measures were imposed on the applicant in two separate and consecutive sets of judicial proceedings.

First, a two-year disqualification order was imposed on him under section 142(1), points 1 and 2, of the Bankruptcy Act on account of certain conduct in relation to his bankruptcy, notably with reference to tax and VAT offences and book-keeping offences in contravention of Articles 286(2) and 288 of the Penal Code. Thereafter, he was prosecuted on three counts, all connected to the bankruptcy, namely failure to comply with the book-keeping requirement in breach of Article 286 of the Penal Code and of the relevant provisions of the Accounting Act 1977; failure to declare business turnover in violation of section 72(2) of the Value Added Tax (VAT) Act 1969; and failure to submit tax declarations in breach of section 12-1(1)D of the Tax Assessment Act 1980.

It is undisputed that at least some of the acts had constituted the basis not only for the disqualification order but also for the criminal prosecution ... From the outset the Court observes that the disqualification order was imposed at the end of a procedure conducted under the Bankruptcy Act which had predominantly civil-law features and which was not regarded as a “penal procedure of [the respondent] State” ...

... as illustrated by the sequence of events in the applicant’s case, a disqualification order intervening at an early stage would play a supplementary role to criminal prosecution and conviction at a later stage with the possibility then of stripping the offender of his or her rights under Article 29 of the Penal Code, as opposed to continuing the disqualification order. Whilst a disqualification order would be lifted in the event of an acquittal or discontinuation of the criminal proceedings, the institution of such proceedings was not a direct and inevitable consequence of disqualification. Nor would the latter be considered to be part of the sanctions under Norwegian law for the offences in respect of which the applicant was tried in the criminal case ...

As to the nature and degree of severity of the measure, it should be noted that a disqualification order entailed a prohibition against establishing or managing a new limited liability company for a period of two years, not a general prohibition against engaging in business activities. In the view of the Court, the character of the sanction was not such as to bring the matter within the “criminal” sphere. Although a disqualification order, which was to be entered on a special public register for such measures, was capable of having a considerable impact on a person’s reputation and ability to practise his or her profession ..., the Court does not find that what was at stake for the applicant was sufficiently important to warrant classifying it as “criminal”. This is not altered by the fact that more severe measures could be imposed under section 142(4) extending to existing positions and honorary posts in other companies ...

Against this background, the Court arrives at the same conclusion as the Norwegian Supreme Court, namely, that the imposition of a disqualification order did not constitute a “criminal” matter for the purposes of Article 4 of Protocol No. 7 to the Convention.

It may in addition be noted that the two measures not only pursued different purposes – prevention and deterrence in the case of the first and also retribution in the case of the second – but also differed in their essential elements ... For instance, while subjective guilt was not a prerequisite for the application of section 142(1) item 1 of the Bankruptcy Act in the first set of proceedings, it was a condition for establishing criminal liability in the second set; whereas reasonableness of the sanction was a condition in the former context, it was not in the latter.

► ***R. v. United Kingdom (dec.)*, 33506/05, 4 January 2007**

... the Court observes that the police decided not to prosecute, and the applicant was so informed; instead they issued a warning to the applicant in respect of the offences which he had admitted committing. The question arises in this case whether the criminal charge thereby was dropped or was in fact determined.

The Court will have regard, in this context, to the three guiding criteria as to whether there has been a determination of a criminal charge: the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable ... It notes, as to the first, that according to domestic law, a warning is not a criminal conviction. As to the second, the purpose of the warning is, largely, preventative and does not pursue the aims of retribution and deterrence. Lastly, no fine or restriction of liberty is imposed. The applicant in this case was required to sign on a register and was referred to the youth offending team for possible intervention, measures which the Court finds preventative in nature ... The Court finds therefore that the warning applied to the applicant did not involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. Nor did it involve any public official declaration of guilt of criminal offence which could offend Article 6 § 2.

► ***Salov v. Ukraine, 65518/01, 6 September 2005***

66. In this connection, the Court notes that on 31 October 1999 the Kyivsky District Prosecution Service of Donetsk instituted criminal proceedings against the applicant on charges of interfering with voters' rights. Those proceedings ended on 15 September 2000 with the ruling of the Donetsk Regional Court upholding the applicant's conviction on the initial charges brought by the prosecution under Article 127 § 2 of the Criminal Code. As to the remittal of the case for additional investigation on 7 March 2000 by the Kuybyshevsky District Court of Donetsk and the subsequent quashing of that resolution by the Presidium of the Donetsk Regional Court on 5 April 2000, the Court does not consider it necessary to separate this part of the applicant's criminal trial from the remainder of the criminal proceedings in their entirety as such a separation would be artificial. From the Court's point of view, the remittal of the case for additional investigation marked a procedural step which was a precondition to a new determination of the criminal charge ..., even though it contained no elements of a final judicial decision in a criminal case and did not constitute the final determination of the charges against the applicant, an issue that should be considered in more detail in the examination of the merits of the applicant's complaints under Article 6 § 1 of the Convention. Taking into account the importance of these procedural decisions of the Kuybyshevsky District Court of Donetsk and the Presidium of the Donetsk Regional Court and their influence on the outcome of the proceedings as a whole, the Court considers that the guarantees of Article 6 § 1 must be applicable to these procedural steps.

67. In these circumstances, the Court accepts that when the applicant's case was remitted for additional investigation on 7 March 2000 and that resolution was quashed on 5 April 2000 he could be considered the subject of a "charge" within the autonomous meaning of Article 6 § 1. Accordingly, this provision is applicable in the instant case.

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE OF PROCEEDINGS (Discontinuance, Reasons for discontinuance suggesting guilt), p. 188 below

Chapter 2

Investigation

DUTY TO CONDUCT THOROUGH AND EFFECTIVE INVESTIGATION

► ***Kaya v. Turkey*, 22729/93, 19 February 1998**

89. ... The autopsy report provided the sole record of the nature, severity and location of the bullet wounds sustained by the deceased. The Court shares the concern of the Commission about the incompleteness of this report in certain crucial respects, in particular the absence of any observations on the actual number of bullets which struck the deceased and of any estimation of the distance from which the bullets were fired. It cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions unanswered ...

► ***M. C. v. Bulgaria*, 39272/98, 4 December 2003**

181. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

182. That was not done in the applicant’s case. The Court finds that the failure of the authorities in the applicant’s case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on “direct” proof of rape. Their approach in the particular case was restrictive, practically elevating “resistance” to the status of defining element of the offence.

183. The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors ...

► ***Ramsahai and Others v. Netherlands* [GC], 52391/99, 15 May 2007**

329. The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons ... or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai’s body by the bullet ..., have not been explained.

330. What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later ... Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation ...

332. There has accordingly been a violation of Article 2 of the Convention in that the investigation into the circumstances surrounding the death of Moravia Ramsahai was inadequate ...

338. Whilst it is true that to oblige the local police to remain passive until independent investigators arrive may result in the loss or destruction of important evidence, the Government have not pointed to any special circumstances that necessitated immediate action by the local police force in the present case going beyond the securing of the area in question ...

339. ... In addition, as stated by the Minister of Justice to Parliament, the State Criminal Investigation Department are able to appear on the scene of events within, on average, no more than an hour and a half. Seen in this light, a delay of no less than fifteen and a half hours is unacceptable.

340. As to the investigations of the Amsterdam/Amstelland police force after the State Criminal Investigation Department took over, the Court finds that the Department's subsequent involvement cannot suffice to remove the taint of the force's lack of independence ...

► ***Dimitrova and Others v. Bulgaria*, 44862/04, 27 January 2011**

79. The Court notes that the relevant domestic authorities ... concluded that Mr B.I. was solely responsible for the death of Mr Gerasimov, whom he had killed when reacting disproportionately to an attack, with one blow to the head. The Court is struck by the fact that in reaching that conclusion the authorities manifestly failed to take into account important evidence collected during the investigation. The Court refers, first of all, to the results of Mr Gerasimov's post-mortem, which found a multi-fragment fracture of the skull, numerous wounds on the head and wounds and bruises on the body ... Mr Gerasimov's hospital report of 31 May 2003 also indicated that he had four wounds to the head ... For the Court, these findings alone, indicative of repeated blows and not of a single one, as accepted by the authorities, would have been sufficient to refute their version of the events. Furthermore, Mr Gerasimov's post-mortem found a multi-fragment fracture with a depression of the parietal bone ..., which might indicate that he had been hit in the back of the head with considerable force. These elements, indicative of a possible deliberate attack, square poorly with the authorities' conclusion that Mr B.I. had acted in self-defence.

80. In accepting that Mr Gerasimov and his companions had been the ones to start the fight and that, therefore, Mr B.I. had acted in self-defence, the authorities disregarded another important circumstance, namely that after the fight it was Mr Gerasimov's companions who alerted the police ... When they reached a petrol station and asked the staff to call the police, they were nervous and said that he had

been beaten up ... At the same time Mr B.I. and his companions went into hiding ... Although they alleged later that they had been attacked, they never reported the attack to the police and did not request that it be investigated. These elements could have been indicative of the two groups' attitude to the events, but again the authorities seemed to have disregarded them.

81. The authorities' version of the events also failed to explain why Mr B.I. and his companions deliberately drove to the place where Mr Gerasimov and his companions were. If Mr B.I. had indeed, as Mr Z.E. supposed ..., intended to ask if they had seen Mr N.S.'s horse, still it is not clear why it was necessary for the four of them to leave the main road and drive along a dirt road to reach the place where the others were working. In adopting the version disputed by the applicants, the authorities failed to take into account other relevant facts established during the investigation, namely, that Mr N.S. had admitted that the group had been carrying wooden bats, that two bats and a knife had been found in his car ..., and that, furthermore, it was the van used by Mr Gerasimov and his companions which had been seriously damaged Although this evidence could be seen as disproving the authorities' conclusions, they disregarded it completely. Furthermore, they never sought to explain how Mr Gerasimov had suffered numerous wounds and bruises or why there had been blood in the van used by him and his companions, which was not his but could have been Mr B.I.'s ...

82. For these considerations the Court is of the view that the authorities failed to carry out a thorough, objective and impartial analysis of the relevant evidence gathered during the investigation of Mr Gerasimov's death. Therefore, the investigation itself could not have been thorough and objective. This in principle would have been sufficient to justify a conclusion that there was a breach of Article 2 of the Convention. Nevertheless, the Court considers it necessary to indicate other deficiencies in the investigation.

83. It notes that it has not been informed of any investigative steps aimed at establishing the possible involvement in Mr Gerasimov's death of Mr B.I.'s companions ... While ... it is not for it to interfere with the lines of inquiry pursued by the investigators, the Court notes that there were strong indications that the three of them might have also been implicated, which the authorities manifestly failed to account for ... However, notwithstanding the existence of evidence indicating that the three of them could have been involved and their own suspicious behaviour, and the investigator's initial assessment that there existed a reasonable suspicion that they could have acted as accessories in Mr Gerasimov's beating up, which led to their arrests, they were never investigated ...

84. The Court sees other reasons to doubt the comprehensiveness of the investigation. It notes that in its decision to drop the initial charges against Mr B.I. the Pernik regional public prosecutor's office relied on the testimony of Mr K.G. The latter had been an eyewitness to the fight and had testified that he had recognised Mr B.I. and seen him grappling with someone else, who had then delivered a blow with a knife ... However, the prosecuting authorities did nothing to verify this key testimony, regardless of the fact that its credibility could appear doubtful, given that he had observed the fight from a considerable distance while driving ... Moreover, although

the prosecuting authorities found a knife ..., they did not take fingerprints from it, did not verify whether it had been the one Mr B.I. had been stabbed with and did not attempt to explain how it had ended up in Mr N.S.'s car. In the Court's view these were obvious and available investigative steps which could have shed light on the circumstances of Mr Gerasimov's death.

85. Also, the prosecuting authorities did not seek to explain the inconsistencies in the testimonies of Mr B.I., who admitted initially to having hit Mr Gerasimov, several days later denied this, and during his last examination on 10 December 2003 acknowledged that he "might have" done it ... Furthermore, he stated initially that he had been stabbed by Mr Gerasimov, but later on explained that someone had "almost" stabbed him, the knife only cutting through his clothes ...

86. ... As discussed in the preceding paragraphs, the Court is not satisfied that the authorities carried out a thorough and objective investigation, as required under Article 2 of the Convention, because they failed to take available investigative measures and manifestly disregarded important evidence.

87. Moreover, the Court considers that the applicants, as the next of kin of Mr Gerasimov, could not participate effectively in the investigation into their relative's death, as also required under Article 2 of the Convention ... It already found that the hypothetical possibility for them to appeal against the Pernik regional public prosecutor's office's decision of 25 May 2004 did not amount to an effective remedy within the meaning of Article 35 § 1 of the Convention ... Accordingly, it does not consider that such an appeal would have given the applicants any meaningful opportunity to participate in the proceedings.

88. Nor does the Court consider that the applicants were given any other opportunity to participate and express their views. They could not request to be designated civil parties, because domestic law at the time did not provide for such a possibility, the case never having reached the trial stage ... Moreover, they did not participate in the procedure whereby the Pernik Regional Court approved the plea agreement between Mr B.I. and the prosecution, because the domestic court did not invite them to make submissions, as it was authorised to do ... In fact, the applicants' views were never sought and never taken into account by the domestic authorities. The applicants were not even formally informed of the outcome of the investigation and only found out about it later through publications in the media ...

89. To sum up, the Court considers that the investigation of Mr Gerasimov's death was not thorough, nor was it objective. Moreover, the applicants were not given any meaningful opportunity to participate in it. Therefore, the investigation into Mr Gerasimov's death carried out by the national authorities fell short of the requirements of Article 2 of the Convention ...

► ***Cobzaru v. Romania*, 48254/99, 26 July 2007**

88. ... Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to

combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment ...

89. ... when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events ...

90. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ...

91. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use its best endeavours and is not absolute; the authorities must do what is reasonable in the circumstances of the case ...

95. ... the expression of concern by various organisations about the numerous allegations of violence against Roma by Romanian law enforcement officers and the repeated failure of the Romanian authorities to remedy the situation and provide redress for discrimination does not suffice to consider that it has been established that racist attitudes played a role in the applicant's ill-treatment.

96. ... contrary to the situation in the case of Nachova and others ..., the prosecutors in the present case did not have before them prima facie plausible information of hatred-induced violence requiring investigation into possible racist motives in the events.

97. However, the Court observes that the numerous anti-Roma incidents which often involved State agents following the fall of the communist regime in 1990, and other documented evidence of repeated failure by the authorities to remedy instances of such violence were known to the public at large ... Undoubtedly, such incidents, as well as the policies adopted by the highest Romanian authorities in order to fight discrimination against Roma were known to the investigating authorities in the present case, or should have been known, and therefore special care should have been taken in investigating possible racist motives behind the violence.

98. Not only was there no attempt on the part of the prosecutors to verify the behaviour of the policemen involved in the violence, ascertaining, for instance, whether they had been involved in the past in similar incidents or whether they had been accused of displaying anti-Roma sentiment, but the prosecutors made tendentious remarks in relation to the applicant's Roma origin throughout the investigation ...

100. In the present case, the Court finds that the tendentious remarks made by the prosecutors in relation to the applicant's Roma origin disclose a general discriminatory attitude of the authorities, which reinforced the applicant's belief that any remedy in his case was purely illusory.

101. Having regard to all the elements above, the Court finds that the failure of the law enforcement agents to investigate possible racial motives in the applicant's ill-treatment combined with their attitude during the investigation constitutes a

discrimination with regard to the applicant's rights contrary to Article 14 taken in conjunction with Articles 3 in its procedural limb and 13 of the Convention.

► ***Identoba and Others v. Georgia*, 73235/12, 12 May 2015**

75. The Court observes that the criminal complaints into the ill-treatment of the participants of the march, including the thirteen individual applicants, by counter-demonstrators as well as the purported inaction of the police in the face of the violence, were filed the day after the incident, on 18 May 2012. Subsequently, all of the applicants again requested, on 3 and 5 July 2012, the initiation of an investigation of the two above-mentioned facts ... However, the relevant domestic authorities, instead of launching a comprehensive and meaningful inquiry into the circumstances surrounding the incident with respect to all of the applicants, inexplicably narrowed the scope of the investigation and opened two separate and detached cases concerning the physical injuries inflicted on two individual applicants only. Even in those separate criminal cases, no significant progress has been made for more than two years. The investigations are still pending at the early stages and the applicants have not even been granted victim status ... The only tangible result was the administrative sanctioning of two counter-demonstrators, who were punished for minor breach of public order by a fine of some EUR 45 each ... However, given the level of the unwarranted violence and aggression against the applicants, the Court does not consider that such a light administrative sanction was sufficient to discharge the State of its procedural obligation under Article 3 of the Convention.

76. Bearing in mind the factual circumstances of the acts that constituted the violence perpetrated against the applicants, the Court notes that there are quite a few provisions in the Criminal Code of Georgia which could have constituted a more appropriate ground for launching a criminal investigation into the violence ... Furthermore, it should have been possible for the investigation to narrow down the pool of possible assailants. First, it was a well-known fact that representatives of two religious organisations ... had participated in the counter-demonstrations and, secondly, video recordings of the clashes had captured clear images of the most aggressive assailants from those two religious groups ...

77. More importantly, the domestic criminal legislation directly provided that discrimination on the grounds of sexual orientation and gender identity should be treated as a bias motive and an aggravating circumstance in the commission of an offence ... The Court therefore considers that it was essential for the relevant domestic authorities to conduct the investigation in that specific context, taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question. The necessity of conducting a meaningful inquiry into the discrimination behind the attack on the march of 17 May 2012 was indispensable given, on the one hand, the hostility against the LGBT [lesbian, gay, bisexual, transgender] community and, on the other, in the light of the clearly homophobic hate speech uttered by the assailants during the incident. The Court considers that without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes ...

78. The Court accordingly considers that the domestic authorities have failed to conduct a proper investigation of the thirteen applicants' allegations of ill-treatment.

IMPARTIALITY

► *Daktaras v. Lithuania*, 42095/98, 10 October 2000

44. ... the impugned statements were made by a prosecutor not in a context independent of the criminal proceedings themselves, as for instance in a press conference, but in the course of a reasoned decision at a preliminary stage of those proceedings, rejecting the applicant's request to discontinue the prosecution.

The Court further notes that, in asserting in his decision that the applicant's guilt had been "proved" by the evidence in the case file, the prosecutor used the same term as had been used by the applicant, who in his request to discontinue the case had contended that his guilt had not been "proved" by the evidence in the file. While the use of the term "proved" is unfortunate, the Court considers that, having regard to the context in which the word was used, both the applicant and the prosecutor were referring not to the question whether the applicant's guilt had been established by the evidence – which was clearly not one for the determination of the prosecutor – but to the question whether the case file disclosed sufficient evidence of the applicant's guilt to justify proceeding to trial.

45. In these circumstances the Court concludes that the statements used by the prosecutor in his decision of 1 October 1996 did not breach the principle of the presumption of innocence.

► *Vera Fernández-Huidobro v. Spain*, 74181/01, 6 January 2010

110. It is true that Article 6 § 1 of the Convention guarantees the right to an "independent and impartial tribunal" and that the concept of "tribunal" does not extend to the investigating judge, who is not required to decide upon the merits of a "criminal charge".

111. However, insofar as the steps taken by the investigating judge directly and inevitably influence the conduct, and hence the fairness, of the subsequent proceedings, including the actual trial, the Court considers that, while some of the procedural safeguards provided for by Article 6 § 1 might not apply at the investigation stage, the requirements of the right to a fair trial in the broad sense necessarily imply that the investigating judge should be impartial ... It also stresses the importance of the investigation stage for the preparation of the trial insofar as the evidence obtained during that stage determines the framework within which the alleged offence will be examined during the trial ...

112. In this regard, the Court notes that Spanish law requires the investigating judge, who is responsible for gathering evidence both in favour of and against the accused, to satisfy criteria of impartiality. Through its system of the collective enforcement of the rights that it enshrines, the Convention, in accordance with the principle of subsidiarity, strengthens the protection of those rights provided at national level ...

113. The Court notes in this regard that the Constitutional Court acknowledged in its judgment that the investigating judge was both the director of the investigation and responsible for procedural safeguards; the adoption by the investigating judge of certain interlocutory measures affecting the fundamental rights of a person subject to a criminal investigation require that he or she, like any other judge, be objectively and subjectively impartial. This question is all the more important in the instant case since central investigating judge no. 5 detained the applicant pending trial without bail and the applicant was tried and convicted at a single level of jurisdiction by the Supreme Court.

114. In the light of the foregoing, taking into account the specific features of Spanish law in this regard, in particular regarding the requirement of impartiality of the investigating judge, the Court concludes that Article 6 § 1 applies to the investigative procedure conducted by central investigating judge no. 5 of the Audiencia Nacional.

STATEMENTS TO THE MEDIA

► *Karakaş and Yeşilimak v. Turkey*, 43925/98, 28 June 2005

50. The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected ...

52. The Court observes that in the present case the police organised a press conference, in a context independent of the criminal proceedings, where they gave information about the detainees to the journalists and allowed them to take pictures.

53. ... While it is true that, following the press conference, two newspapers published the names and photographs of the two applicants and stated that they had been arrested by the police as members of Dev-Sol when preparing to hold a demonstration, the Court does not find it established that the police stated that the applicants were guilty of the offences in respect of which they had been arrested or that in the press conference they had otherwise prejudged the assessment of the facts by the competent judicial authorities.

54. Having regard to the foregoing, the Court considers that the applicants' right to be presumed innocent has not been violated ...

► *YB and Others v. Turkey*, 48173/99, 28 October 2004

49. The content of the press release issued by the police and distributed to the press referred to the applicants, without any qualification or reservation, as "members of the illegal organisation", namely the MLKP. Similarly, the press release stated that it had been "established" that those arrested had committed several offences at various locations in the province of İzmir ... In the Court's opinion, these two statements could have been construed as confirmation that, according to the police, the applicants had committed the offences of which they were accused.

50. Taken as a whole, the attitude of the police authorities, insofar as it entailed a prior assessment of the charges which the applicants might face and provided the press with an easy physical means of identifying them, was incompatible with the presumption of innocence. The press conference had, firstly, encouraged the public to believe that the applicants were guilty and, secondly, had prejudged the assessment of the facts by the competent judicial authority.

► ***Khuzhin and Others v. Russia*, 13470/02, 23 October 2008**

95. ... the Court observes that a few days before the scheduled opening of the trial in the applicants' case, a State television channel broadcast a talk show, in which the investigator dealing with the applicants' case, the town prosecutor and the head of the particularly serious crimes division in the regional prosecutor's office took part. The participants discussed the applicants' case in detail with some input from the show's presenter and the alleged victim of their wrongdoings. Subsequently the show was aired again on two occasions during the trial and once more several days before the appeal hearing.

96. ... all three prosecution officials described the acts imputed to the applicants as a "crime" which had been committed by them ... Their statements were not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicants but represented as an established fact, without any qualification or reservation, their involvement in the commission of the offences, without even mentioning that they denied it. In addition, the town prosecutor Mr Zinterekov referred to the applicants' criminal record, portraying them as hardened criminals, and made a claim that the commission of the "crime" had been the result of their "personal qualities" – "cruelty and meaningless brutality". In the closing statement he also mentioned that the only choice the trial court would have to make would be that of a sentence of an appropriate length, thus presenting the applicants' conviction as the only possible outcome of the judicial proceedings ... However, having regard to the contents of their statements as outlined above, the Court finds that some of their statements could not but have encouraged the public to believe the applicants guilty before they had been proved guilty according to law. Accordingly, the Court finds that there was a breach of the applicants' presumption of innocence ...

116. ... Without his consent, the first applicant's passport photograph was taken by the police from the materials in the criminal case file and made available to a journalist, who used it in a television show. The Court finds that there has been an interference with the first applicant's right to respect for his private life.

117. ... where a photograph published in the context of reporting on pending criminal proceedings has no information value in itself, there must be compelling reasons to justify an interference with the defendant's right to respect for his private life ... Even assuming that Article 139 of the RSFSR [Russian Soviet Federated Socialist Republic] Code of Criminal Procedure could be a lawful basis for granting the press access to the case file, in the instant case the Court does not see any legitimate aim for the interference with the first applicant's right to respect for his private life. Being in custody at the material time, he was not a fugitive from justice and the showing of his photograph could not have been necessary for enlisting

public support to determine his whereabouts. Nor could it be said to have bolstered the public character of judicial proceedings because at the time of the recording and the first airing of the television show the trial had not yet begun. Accordingly, the Court finds that in the circumstances of the present case the release of the first applicant's photograph from the criminal file to the press did not pursue any of the legitimate aims enumerated in paragraph 2 of Article 8.

► ***Turyev v. Russia*, 20758/04, 11 October 2016**

20. The prosecutor's words printed in the *North Star* were far from discreet or circumspect. He identified the applicant by his first initial and full second name and labelled him the "murderer" of one victim and "complicit in the murder" of the other victim. This is more than, as the Government say, mere facts found by the investigation, this is an unqualified declaration of guilt.

21. ... prosecutors do not lose their freedom of speech by being prosecutors, the more so since their silence could create an information vacuum that might be filled by irresponsible sources. However, a prosecutor's words come from an authority and are particularly persuasive in the public's eye. The prosecutor's outspoken comments were clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.

22. The Court also notes that the prosecutor's own superior found the interview unethical.

23. There has therefore been a violation of Article 6 § 2.

PRESERVING SECURITY

► ***Craxi v. Italy*, 34896/97, 5 December 2002**

105. As to the applicant's allegation that the prosecution deliberately and systematically disclosed confidential information to the press, the Court notes that the applicant has produced no evidence that the prosecuting authorities were responsible for any such disclosures or breach of their duty in order to tarnish the public image of the applicant and the ISP.

► ***Apostu v. Romania*, 22765/12, 3 February 2015**

122. The Court's role in the present case is to examine whether the leak by the authorities of information from the applicant's criminal file, followed by its publication in newspapers, infringed the applicant's right to protection of his private life.

123. ... In the case at hand, although not without relevance for the criminal proceedings, the content of the recordings gave away information on the applicant's private affairs and thus put him in an unfavourable light, giving the impression, before the national authorities had even had the possibility to examine the accusations, that he had committed crimes. Moreover, part of the telephone conversations published were to a certain extent of a strictly private nature and had little or no connection with the criminal charges against the applicant ...

124. In the Court's opinion, the leak to the press of non-public information from the criminal file can be considered, in the circumstances of the case, namely given the subsequent publication, to have constituted an interference with the applicant's right to respect for his private life.

125. ... once the information had been published, the applicant found himself with no means to take immediate action to defend his reputation, as the merits of the case were not under examination by a court, and the authenticity or accuracy of the telephone conversations and their interpretation could thus not be challenged. It has also established that the applicant had no means whatsoever of complaining against the authorities about the said leak ...

126. It can thus be concluded that the applicant suffered harm on account of the interference with his right to respect for his private life by the leaking to the press of excerpts from his telephone conversations ...

128. The Court notes that the publication of the material in question did not serve to advance the criminal prosecution. The information would have become accessible at the latest when the prosecutor deposited the case file with the court's registry. Moreover, some of the conversations published in the press were of a private nature and their publication in the press did not correspond to a pressing social need. It follows that the leak was not justified.

129. The Court reiterates that by its very nature the procedure for telephone tapping is subject to very rigorous judicial control and thus it is logical that the results of such an operation should not be made public without an equally thorough judicial scrutiny ...

130. It is to be noted that the public's access to information from a criminal case file is not unlimited or discretionary, even once the case has been lodged with a court. According to the applicable rules and regulations, the access of the press to the files concerning proceedings for the confirmation or authorization of telephone interceptions and recordings is limited ... Moreover, the judges might decide, in justified circumstances, not to allow a third party access to the case files. The Court cannot exclude that a judge dealing with such a request may undertake a balancing exercise of the right to respect for private life against the right to freedom of expression and information. Thus, the access to information is legitimately subject to judicial control.

131. However, no such possibility exists if, as in the present case, the information is leaked to the press. In this case, what is of the utmost importance is, firstly, whether the State organised their services and trained staff in order to avoid the circumvention of the official procedures ... and, secondly, whether the applicant had any means of obtaining redress for the breach of his rights.

132. In the light of the above considerations, the Court holds that ... the respondent State failed in their obligation to provide safe custody of the information in their possession in order to secure the applicant's right to respect for his private life, and likewise failed to offer any means of redress once the breach of his rights had occurred. There has consequently been a violation of Article 8 of the Convention.

► ***Bédat v. Switzerland* [GC], 56925/08, 29 March 2016**

68. While emphasising that the rights guaranteed by Article 10 and Article 6 § 1 deserve equal respect in principle ..., the Court reiterates that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent ... It emphasises that the secrecy of investigations is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests. Such secrecy is also justified by the need to protect the opinion-forming and decision-making processes within the judiciary.

69. In the instant case, even though the impugned article did not openly support the view that the accused had acted intentionally, it was nevertheless set out in such a way as to paint a highly negative picture of the latter, highlighting certain disturbing aspects of his personality and concluding that he was doing “everything in his power to make himself impossible to defend” ...

It is undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused’s representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition.

70. ... The risk of influencing proceedings justifies per se the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information.

The lawfulness of those measures under domestic law and their compatibility with the requirements of the Convention must be capable of being assessed at the time of the adoption of the measures, and not, as the applicant submits, in the light of subsequent developments revealing the actual impact of the publications on the trial, such as the composition of the trial court ...

71. The Federal Court was therefore right to hold ... that the records of interviews and the accused’s correspondence had been “discussed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court” ...

76. The Court has already examined under Article 8 the issue of respect for an accused person’s private life in a case involving a violation of the secrecy of judicial investigations. In *Craxi v. Italy (no. 2)* ... it held that the national authorities were not merely subject to a negative obligation not to knowingly disclose information protected by Article 8, but that they should also take steps to ensure effective protection of an accused person’s right to respect for his correspondence.

Consequently, the Court considers that the criminal proceedings brought against the applicant by the cantonal prosecuting authorities were in conformity with the positive obligation incumbent on Switzerland under Article 8 of the Convention to protect the accused person's private life.

Furthermore, the information disclosed by the applicant was highly personal, and even medical, in nature, including statements by the accused person's doctor ..., as well as letters sent by the accused from his place of detention to the investigating judge responsible for the case. The Court takes the view that this type of information called for the highest level of protection under Article 8; that finding is especially important as the accused was not known to the public and the mere fact that he was the subject of a criminal investigation, albeit for a very serious offence, did not justify treating him in the same manner as a public figure, who voluntarily exposes himself to publicity ...

78. At all events, as regards the particular circumstances of the present case, it should be noted that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability. Moreover, there is nothing in the case file to suggest that he was informed of the publication of the article and of the nature of the information which it provided. In addition, he was probably suffering from mental disorders, thus increasing his vulnerability. In those circumstances, the cantonal authorities cannot be blamed for considering that in order to fulfil their positive obligation to protect M.B.'s right to respect for his private life, they could not simply wait for M.B. himself to take the initiative in bringing civil proceedings against the applicant, and for consequently opting for an active approach, even one involving prosecution.

CRITICISM OF OFFICIALS

► *Lešník v. Slovakia*, 35640/97, 11 March 2003

57. While the applicant's statements in respect of the professional and personal qualities of the public prosecutor concerned could be considered as value judgments which are not susceptible of proof, the Court notes that the above-mentioned letters also contained accusations of unlawful and abusive conduct by the latter. Thus the applicant alleged, in particular, that the public prosecutor had unlawfully refused to uphold his criminal complaint, had abused his powers and had in that context been involved in bribery and unlawful tapping of the applicant's telephone. Those allegations are, in the Court's view, statements of fact which the domestic courts rightly requested the applicant to support by relevant evidence ...

58. However, the domestic courts found, after examining all the available evidence, that the applicant's above statements of fact were unsubstantiated. There is no information before the Court which would indicate that this finding was contrary to the facts of the case or otherwise arbitrary ...

59. Those accusations were of a serious nature and were made repeatedly. They were capable of insulting the public prosecutor, of affecting him in the performance

of his duties and also, in the case of the letter sent to the General Prosecutor's Office, of damaging his reputation.

60. Admittedly, the applicant's statements were aimed at seeking redress before the relevant authorities for the actions of P. which he considered wrong or unlawful ... the Court notes, however, that the applicant was not prevented from using appropriate means to seek such redress ...

63. Although the sanction imposed on the applicant – four months' imprisonment suspended for a probationary period of one year – is not insignificant in itself, ... it is situated at the lower end of the applicable scale ...

65. There has consequently been no breach of Article 10 of the Convention.

► ***July and SARL Liberation v. France, 20893/03,***
14 February 2007

65. In the present case the Court observes that the applicants were convicted for publishing an article about the organisation and content of a press conference held – the day before the article was published – by civil parties who were critical of a criminal investigation, of interest to the media, concerning the conditions and causes of the death, in suspicious circumstances, of a French judge posted to Djibouti. It further notes that the purpose of the press conference was to make public a request – submitted on 13 March 2000 by one of the civil parties (the judge's widow) and addressed to the Minister of Justice – for an examination by the General Inspectorate of Judicial Services of the conditions in which the judicial investigation was being handled. ...

68. With that in mind, the Court finds that, in convicting the applicants, the Versailles Court of Appeal took the view that two passages of the impugned article damaged the "honour and reputation" of the two judges initially responsible for the case, in that the passages accused the judges of showing "bias" when taking evidence from a material witness in the case and of conducting an investigation in a manner described as "*rocambolesque*" (farcical),...

70. The Court observes that the Court of Appeal, in rejecting the defence of good faith, criticised the journalist, firstly, for "prefer[ring] not to report on the subject in the form of an interview", pointing out that she had "opted for a compromise solution" which "facilitated her task" and that she should have indicated that "she would ensure that the persons thus criticised had the opportunity to reply", whereas – the Court emphasises – it is not for the domestic courts to substitute their own views for those of the press as to the reporting technique that should be adopted by journalists to impart information, as Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed ...

73. ... It takes the view that the impugned article is a report of a press conference held on 13 March 2000 in a case that had already been covered by the media and was known to the public. Concerning the precautions taken, the Court observes that the article properly uses the conditional tense, with inverted commas in various places in order to avoid any confusion in the reader's mind between the source of the remarks and the newspaper's analysis, citing each time the names of the persons

speaking for the reader's information, such that it cannot be maintained, as the Court of Appeal did, that some passages were imputable to the journalist, and therefore to the applicants. In addition, the article does not reveal any personal animosity towards the above-mentioned investigating judges, as the trial and appeal courts recognised.

74. Moreover, the offended individuals are members of the judiciary. Consequently, whilst it cannot be said that they knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions ... , civil servants acting in an official capacity, as in the present case, may nevertheless be subject to wider limits of acceptable criticism than ordinary citizens ... The Court thus concludes that the reasons given by the Court of Cassation to dismiss the applicants' appeal on points of law were not relevant or sufficient, because they are incompatible with the above-mentioned principle. The offended individuals, both civil servants belonging to "fundamental State institutions", were subject in that capacity to personal criticism within the "admissible" limits, and not only in a theoretical and general manner.

75. The Court lastly refers to the argument raised by the Court of Appeal to the effect that the remarks of one of the speakers at the press conference had been distorted, as regards the use of the adjective "*rocambolesque*", and that this showed the applicants' lack of good faith. Whilst that word was actually used at the press conference, the Court observes that there is still some doubt as to its precise formulation. The Court of Appeal was of the view that the remark, as made by the person concerned, "had not reflected an unequivocal desire to denounce his colleagues' manner of investigation". The Court notes in particular that the use of this adjective, which is admittedly not very complimentary, but which has for a long time been part of everyday language, was attributed by the article to one of the participants in the press conference and was not assumed personally by the journalist.

76. In any event, the Court takes the view that the applicants, in publishing the article, did not even have recourse to a degree of "exaggeration" or of "provocation", which is nevertheless permitted in the exercise of journalistic freedom in a democratic society, and thus did not overstep the permissible limits of such exaggeration or provocation. The Court does not find the offending remarks – which were reported – to have been "manifestly abusive" in respect of the judges in question ... , in particular as regards the adjective "*rocambolesque*" (*farcical*). In its view, the reasons given by the domestic courts on this point for their finding of a lack of good faith are not easy to reconcile with the principles relating to the right to freedom of expression and to the role of the press as "watchdog" ...

77. In the light of the above, and in particular the context in which the impugned comments were uttered, the judgment against the applicants for the offence of defamation cannot be considered proportionate and therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention. ...

Chapter 3

Preventive measures

EMPLOYMENT RESTRICTION

► *D. M. T. and D. K. I. v. Bulgaria*, 29476/06, 24 July 2012

110. The Court accepts, as suggested by the Government, that the suspension of the applicant from his duties during the criminal proceedings against him was intended to prevent any attempt to pervert the course of justice. At the material time the applicant was head of the Interior Ministry's Economic Crime Department in Sofia and was charged with soliciting bribes in connection with his office ... In that context the Court considers that suspending the applicant from his duties pursued the legitimate aim of preventing disorder and crime.

111. As regards the necessity of such interference in a democratic society, the Court observes that the applicant's suspension lasted from 11 August 1999 to 9 December 2005, a period of six years and four months. As the applicant was suspended because of the criminal proceedings against him, it appears that the duration of the suspension was closely linked to that of the criminal proceedings concerned. Accordingly, any unwarranted delay in the criminal proceedings would also prolong this coercive measure. In its *Karov* judgment ..., the Court ... found that the impugned measure was a normal and inevitable consequence of the criminal proceedings against the applicant, even though the length of those proceedings was excessive. The Court sees no reason to depart from that finding in respect of the applicant's suspension as such ...

113. The most restrictive aspect of the situation the applicant complains of is the fact that he was unable to seek other employment, even in the private sector, during his temporary suspension from his duties. The Court reiterates that this restriction was the result of the civil servant status he continued to enjoy even though he was temporarily suspended ... While such a restriction might normally be justified by the concern to prevent conflicts of interest in the civil service, the Court considers that the application of this general ban in the applicant's particular case – that of a civil servant suspended from duty for over six years – placed an excessive burden on him. The authorities have given no convincing explanation for their refusal to dismiss the applicant from his job at the Interior Ministry, which would have allowed him to seek employment elsewhere. The Court is not convinced that such a possibility would have perverted the course of the criminal proceedings against the applicant. The prolonged effect of the suspension to the applicant's detriment amounted to an excessive burden that affected his private life. The Court is of the view that this restriction cannot be considered to have been necessary and proportionate to the legitimate aim pursued by the opening of the criminal proceedings, or as a normal and inevitable consequence thereof.

114. The Court accordingly finds that the restrictive measures complained of did not strike a fair balance between the interests of the applicant and those of society in general and that there has been interference with the applicant's private life without sufficient justification for the purposes of the second paragraph of Article 8 of the Convention.

SUSPENSION OF PARENTAL ACCESS

► *Schaal v. Luxembourg*, 51773/99, 18 February 2003

46. The "necessity" of such interference must be "assessed in the light of the circumstances obtaining at the time when the decisions were taken". The provisional refusal to grant the applicant access could be justified only if it was "motivated by an overriding requirement pertaining to the child's best interests" ...

47. In the instant case the applicant stood charged with the rape and sexual assault of his daughter. So, pending the outcome of the criminal proceedings, the child's interest made the suspension of access legitimate and consequently justified the interference with the applicant's right to respect for his family life. Up until the outcome of the criminal proceedings, therefore, the interference was "necessary for the protection of the rights of others", namely the daughter, C.

48. However, it was also in the child's interest that the family bond be allowed to develop again as soon as the precautionary measures no longer appeared necessary ... While it is clear that the right of access was suspended while the investigations into the accusations of the applicant's wife were still in progress, unreasonable delays in the criminal proceedings had a direct impact on the applicant's right to family life ... Because of the above-mentioned shortcomings in the proceedings concerned, the Luxembourg authorities cannot be considered to have taken all the necessary steps that might reasonably have been expected of them in order to restore the applicant's family life with his young child in the interest of both of them ...

49. Regard being had to the particular circumstances of this case, the Court finds that there has been a violation of Article 8 of the Convention in this respect.

TAKING OF PROPERTY

► *Raimondo v. Italy*, 12954/87, 22 February 1994

24. Mr Raimondo complained of the seizure on 13 May 1985 of sixteen items of real property and six vehicles ...

27. ... the Court finds that the seizure was provided for in section 2 ter of the 1965 Act ... and did not purport to deprive the applicant of his possessions but only to prevent him from using them ...

... seizure under section 2 ter of the 1965 Act is clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view

of the extremely dangerous economic power of an “organisation” like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.

Accordingly, on this point no violation of Article 1 of Protocol No. 1 ... has been established.

► ***Dogmoch v. Germany (dec.), 26315/03, 8 September 2006***

... the Court notes that the attachment order was made by a criminal court in the context of criminal investigations in respect of S. and K. and two alleged co-offenders. However, in the District Court’s decision of 8 May 2000 and the Regional Court’s decision of 16 June 2000 the applicant was explicitly named as a person charged with a criminal offence ...

The Court notes that the attachment order was a provisional measure taken in the context of criminal investigations and primarily aimed at safeguarding claims which might subsequently be brought by aggrieved third parties. If no such claims were forthcoming, the order could, furthermore, have safeguarded the subsequent possibility of forfeiture of the assets. Such forfeiture would, however, have to be determined in separate proceedings following a criminal conviction. There is no indication that the attachment order as such had any impact on the applicant’s criminal record. In these circumstances, the Court considers that the impugned decisions as such cannot be regarded as a “determination of a criminal charge” against the applicant within the meaning of Article 6 §§ 1 and 3 of the Convention.

► ***Yasar Kemal Gökçeli v. Turkey, 27215/95, 4 March 2003***

44. The Court notes that the interim measures provided for in Turkish law do not imply a finding of guilt as such but are intended to prevent the committing of criminal acts. That being so, the related proceedings do not concern the “determination of a criminal charge” ... In the instant case, however, the problem concerns not only the proceedings to have the book seized but also the subsequent proceedings brought against the applicant ...

46. The Court notes that by virtue of Articles 28 of the Constitution and 86 of the Code of Criminal Procedure, publications may be seized by judicial decision following the opening of an investigation or proceedings relating to offences defined by law. In the instant case it was clearly a matter of an interim measure with a view to proceedings being brought subsequently. In spite of certain of the terms used in the order of 2 February 1995, which in fact found the request for seizure to be “in conformity with the law” ..., the Court considers that this decision of the judge of the National Security Court, on an urgent application, referred to a “state of suspicion” and did not contain a finding of guilt. Moreover, the subsequent proceedings ... did not reveal any prejudice.

47. A distinction must be made between decisions that reflect the feeling that the person concerned is guilty and those which describe only a state of suspicion. The former violate the presumption of innocence, while the latter have been found on several occasions to be compatible with the spirit of Article 6 of the Convention ...

48. In these circumstances and considering the proceedings as a whole, the Court can find no violation of the presumption of innocence in the present case. Accordingly, there has been no violation of Article 6 § 2 of the Convention.

See also DETENTION ON REMAND (Use of alternatives), pp. 84-96 below

Chapter 4

Initial apprehension and custody

OCCURRENCE

► *Shimovolos v. Russia*, 30194/09, 21 June 2011

48. The Court notes, firstly, that the length of time during which the applicant was held at the police station did not exceed forty-five minutes ...

49. The Court reiterates that in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance. ... Article 5 of the Convention may apply to deprivations of liberty of even of a very short length ...

50. ... the Court notes that the Government did not contest the applicability of Article 5 to the applicant's situation. The applicant was brought to the police station under a threat of force and he was not free to leave the premises without the authorisation of the police officers. The Court considers that there was an element of coercion which, notwithstanding the short duration of the arrest, was indicative of a deprivation of liberty within the meaning of Article 5 § 1 ...

► *Creangă v. Romania* [GC], 29226/03, 23 February 2012

97. The Court notes further that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP [National Anti-Corruption Prosecution Service] ... At the material time, police officers were bound by military discipline and it would have been extremely difficult for them not to carry out the orders of their superiors. While it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition there were other significant factors pointing to the existence of a deprivation of liberty in his case, at least once he had been given verbal notification of the decision to open the investigation at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the need to be assisted by a lawyer.

98. In view of their chronological sequence, these events clearly formed part of a large-scale criminal investigation, requiring multiple investigative measures and hearings, some of which had already been conducted over previous days. That procedure was intended to dismantle a petroleum-trafficking network that involved police officers and gendarmes. The opening of proceedings against the applicant and his colleagues fits into this procedural context, and the need to carry out the various criminal investigation procedures concerning them on the same day tends to indicate that the applicant was indeed obliged to comply.

99. The Court therefore notes that the Government were not able to produce any documents establishing that the applicant had left the NAP headquarters and, furthermore, failed to demonstrate that he could have left the prosecution service premises of his own free will after his initial statement ...

100. To conclude ... the Court considers that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m.

► ***Kotiy v. Ukraine*, 28718/09, 5 March 2015**

44. Meanwhile, it is indisputable that from 1.30 a.m. on 14 November 2008 the applicant was present in the police department in Kyiv and had to answer questions until 4.17 a.m. in connection with the charges against him. The Court takes note of the applicant's allegation that his appearance in the police department was not voluntary and that at that time he had been on the list of wanted persons. In this context it finds it unrealistic to assume that the applicant was free to leave the police department ... In view of the coercive element present during that period of time ..., the Court finds that from 1.30 a.m. on 14 November 2008 the applicant was deprived of his liberty within the meaning of Article 5 § 1 of the Convention.

LEGAL BASIS

Formal compliance

► ***Raninen v. Finland*, 20972/92, 16 December 1997**

46. ... It thus follows, which was undisputed, that the applicant's arrest and detention during his transportation by the military police from the prison to the Pori barracks on 18 June 1992 was contrary to national law ...

Accordingly, in so far as concerns these measures, his deprivation of liberty was not "lawful" under the terms of Article 5 § 1 of the Convention, which provision has therefore been violated ...

► ***Creangă v. Romania* [GC], 29226/03, 23 February 2012**

107. Under Romanian law, there are only two preventive measures entailing a deprivation of liberty: police custody and pre-trial detention. For either of these measures to be ordered there must be reasonable indications or evidence that the prohibited offence has been committed ..., that is, information leading to the

legitimate suspicion that the person who is under criminal investigation could have committed the alleged offence ... However, neither of those measures was applied to the applicant before 10 p.m. on 16 July 2003.

108. The Court is conscious of the constraints arising in a criminal investigation and does not deny the complexity of the proceedings instituted in the instant case, requiring a unified strategy to be implemented by a single prosecutor carrying out a series of measures on the same day, in a large-scale case involving a significant number of people. Likewise, it does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understands that the national authorities must take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge cannot justify recourse to arbitrariness and areas of lawlessness in places where people are deprived of their liberty.

109. Having regard to the foregoing, the Court considers that, at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention. However, the prosecutor decided only at a very late stage to take the second measure, towards 10 p.m.

110. Accordingly, the Court considers that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no basis in domestic law and that there has therefore been a violation of Article 5 § 1 of the Convention.

► ***Öcalan v. Turkey* [GC], 46221/99, 12 May 2005**

90. Irrespective of whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question that only falls to be examined by the Court if the host State is a party to the Convention – the Court requires proof in the form of concordant inferences that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law ... Only then will the burden of proving that the sovereignty of the host State and international law have been complied with shift to the respondent Government ...

98. The applicant has not adduced evidence enabling concordant inferences ... to be drawn that Turkey failed to respect Kenyan sovereignty or to comply with international law in the present case ...

99. Consequently, the applicant's arrest on 15 February 1999 and his detention were in accordance with "a procedure prescribed by law" for the purposes of Article 5 § 1 of the Convention. There has, therefore, been no violation of that provision.

Purpose

► ***Brogan and Others v. United Kingdom*, 11209/84, 29 November 1998**

53. ... The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance

with Article 5 para. 1 (c) ... the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 para. 1 ... does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest ... Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority.

Their arrest and detention must therefore be taken to have been effected for the purpose specified in paragraph 1 (c) ...

► ***Emrullah Karagöz v. Turkey*, 78027/01, 8 November 2005**

59. ...the Court observes that the applicant's transfer to the gendarmerie command after being placed in pre-trial detention escaped effective judicial review. It further considers that handing a remand prisoner over to gendarmes for questioning amounts to circumventing the applicable legislation on the periods that may be spent in police custody. That was what happened in the applicant's case when he was subjected to further questioning a few hours after being placed in pre-trial detention. Furthermore, his detention in the gendarmes' custody was extended until 12 December 2001 for no apparent reason. That in itself must be regarded as a breach of the requirements of lawfulness in Article 5 § 1 (c) of the Convention since all the safeguards that should be provided during questioning, especially access to legal advice, were rendered inoperative.

60. There has therefore been a violation of Article 5 § 1 of the Convention.

► ***Lutsenko v. Ukraine*, 6492/11, 3 July 2012**

63. ... the applicant was arrested within the framework of the second criminal case and was taken to a court on the next day. However, the court did not examine the lawfulness of the applicant's arrest and, according to the Government, which in fact insisted on this point, had not intended to do so. The relevant facts also confirm that the prosecuting authorities took the applicant to the court solely for examination of their application for the applicant's detention in connection with the first criminal case and effectively opposed any examination of the lawfulness of the applicant's arrest during the hearing of 27 December 2010. Such behaviour on the part of the domestic authorities strongly suggests that the purpose of the applicant's arrest was not to bring him before a competent legal authority within the same criminal case, but to ensure his availability for examination of the application for a change of preventive measure to a custodial one in a different set of criminal proceedings.

64. Furthermore, the applicant's arrest does not appear to have been "necessary to prevent him from committing an offence or fleeing after having done so". It is true that the order for the applicant's arrest indicated among the reasons therefor

the prevention of his avoiding participating in the investigation and of his continuing criminal activities, however the authorities failed to explain in what way the applicant, being accused of abuse of office, could continue this type of activity almost a year after he had left the office of Minister of the Interior. Concerning the necessity to ensure the applicant's participation in further investigative actions, the Government submitted that the resumption of the investigation had been necessary to consolidate two criminal cases against the applicant ... They did not claim however that any such actions within the first criminal case had been necessary or had been eventually conducted. As to the risk of fleeing, the applicant was under an obligation not to abscond which he had given to the very same investigator, V., who had arrested him and who did not appear to have any previous complaints concerning the applicant's compliance with the said obligation.

65. The Court therefore concludes that the applicant's arrest was made for another purpose than that indicated in Article 5 § 1 of the Convention and was therefore arbitrary and contrary to this provision. It follows that there has been a violation of Article 5 § 1 of the Convention in this respect.

Arbitrariness

► *Navalnyy and Yashin v. Russia*, 76204/11, 4 December 2014

92. ... The Government contended that the legal ground for the arrest had been Article 27.2 of the Code of Administrative Offences, which had empowered the police to escort individuals, that is, to take them to the police station in order to draw up an administrative offence report.

93. The Court has found above that escorting the applicants to the police station did not appear strictly necessary in the circumstances ... It further notes that Article 27.5 § 4 of the Code of Administrative Offences expressly excluded the time of escorting from the term of the ensuing administrative detention. While the law did not consider the escorting as part of administrative detention, it set no time-limit for the duration of the escorting itself, supposedly because it was meant to be insignificant. By comparison, the duration of the administrative detention should not as a general rule exceed three hours, which is an indication of the period of time the law regards as reasonable and sufficient for drawing up an administrative offence report.

94. The Court ... considers that the applicants' escorting ended at 9.40 p.m. when their convoy reached the first police station, Severnoye Izmaylovo. It is not clear why the reports were not drawn up at that police station, given that the applicants spent three hours there and underwent a personal search, which was recorded in a search report. The Government have not explained why the applicants were sent to two other police stations, without an administrative offence report being drawn up or a detention order being issued at the first or even the second police station.

95. The applicants' "transit" before reaching the Kitay-Gorod police station lasted for nearly six hours, in the absence of any record and without counting as administrative detention. Following the Government's reasoning, it could have continued for even longer without breaching the law. In view of the above, the Court finds that this period constituted unrecorded and unacknowledged detention, which, in the

Court's constant view, is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision ...

96. Lastly, the Court observes that once the administrative offence reports had been drawn up at the Kitay-Gorod police station, the objective of escorting the applicants to the police station had been met. However, instead of being released at 2.30 a.m. on 6 December 2011, the applicants were formally remanded in custody to secure their attendance at the hearing before the Justice of the Peace. The Government argued that the term of the applicants' detention remained within the forty-eight-hour time-limit provided for by Article 27.5 § 3 of the Code of Administrative Offences. However, neither the Government nor any other domestic authorities have provided any justification for the choice of that provisional measure On the face of it, there was no reason to believe that the applicants would abscond or otherwise obstruct the course of justice, and in any event, it fell on the authorities to demonstrate any such risk. In the absence of any explicit reasons against the applicants' release given by the authorities, the Court considers that the overnight detention at the Kitay-Gorod police station was unjustified and arbitrary.

97. Overall, the Court finds that the applicants' arrest and detention on 5 and 6 December 2011 were unlawful and arbitrary. It finds a breach of the applicants' right to liberty on account of their unjustified escorting to the police station, their unrecorded and unacknowledged six-hour-long detention in transit and the lack of reasons for remanding them in custody at the Kitay-Gorod police station.

98. Accordingly, there has been a violation of Article 5 § 1 of the Convention in respect of both applicants.

See also Requirement of reasonable suspicion (Plausible basis), p. 46 immediately below

REQUIREMENT OF REASONABLE SUSPICION

Definite proof not required

► *Murray v. United Kingdom*, 14310/88, 28 October 1994

55. ... The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 ... is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.

Plausible basis

► *Fox, Campbell and Hartley v. United Kingdom*, 12244/86, 30 August 1990

32. ... having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may

have committed the offence. What may be regarded as “reasonable” will however depend upon all the circumstances ...

35. ... The fact that Mr Fox and Ms Campbell both have previous convictions for acts of terrorism connected with the IRA [Irish Republican Army] ..., although it could reinforce a suspicion linking them to the commission of terrorist-type offences, cannot form the sole basis of a suspicion justifying their arrest in 1986, some seven years later.

The fact that all the applicants, during their detention, were questioned about specific terrorist acts, does no more than confirm that the arresting officers had a genuine suspicion that they had been involved in those acts, but it cannot satisfy an objective observer that the applicants may have committed these acts.

The aforementioned elements on their own are insufficient to support the conclusion that there was “reasonable suspicion” ...

► ***Murray v. United Kingdom, 14310/88, 28 October 1994***

51. ... Article 5 para. 1 (c) ... of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 para. 1 (c) ... has been secured. Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence ...

► ***K.-F. v. Germany, 25629/94, 27 November 1997***

58. ... Mrs S., the landlady, had informed the police that Mr and Mrs K.-F. had rented her flat without intending to perform their obligations as tenants and were about to make off without paying what they owed ... After initial inquiries had revealed that Mr and Mrs K.-F.'s address was merely a Post Office box and that Mr K.-F. had previously been under investigation for fraud ..., the police arrested the couple at 9.45 p.m. on 4 July 1991 and took them to the police station so that their identities could be checked ... In a report drawn up at 11.30 p.m. the police stated that they strongly suspected Mr and Mrs K.-F. of rent fraud and that there was a risk that they would abscond.

59. Having regard to those circumstances, the Court can, in principle, follow the reasoning of the Koblenz Court of Appeal, which ... held that the police officers' suspicions of rent fraud and the danger that Mr K.-F. would abscond were justified. Consequently, the applicant was detained on reasonable suspicion of having committed an offence, within the meaning of Article 5 § 1 (c).

► *Stepuleac v. Moldova*, 8207/06, 6 November 2007

70. ... the only ground cited by the prosecuting authority when arresting the applicant and when requesting the court to order his pre-trial detention was that the victim (G.N.) had directly identified him as the perpetrator of a crime ... However, ... the complaint lodged by G.N. did not directly indicate the applicant's name, nor did it imply that all the employees of the applicant's company were involved ... The prosecutor's decision ... to initiate the criminal investigation included the applicant's name ... It is unclear why his name was included in that decision at the very start of the investigation and before further evidence could be obtained. It is to be noted that the applicant was never accused of condoning illegal activities on the premises of his company, which might have explained his arrest as Tantal's director, but of personal participation in blackmail ...

72. ... the domestic court, when examining the request for a detention order ..., established that at least one of the aspects of G.N.'s complaint was abusive ... This should have cast doubt on G.N.'s credibility. The conflict he had with the company's administration ... gives further reasons to doubt his motives. However, rather than verifying this information, which was easily obtainable from the law enforcement authorities, particularly given the large number of prosecutors assigned to the case, the prosecutor arrested the applicant partly on the basis of his alleged kidnapping of G.N. This lends support to the applicant's claim that the investigating authorities did not genuinely verify the facts in order to determine the existence of a reasonable suspicion that he had committed a crime, but rather pursued his arrest, allegedly for private interests. ...

73. In the light of the above, in particular the prosecutor's decision to include the applicant's name in the list of suspects without a statement by the victim or any other evidence pointing to him ..., as well as the prosecutor's failure to make a genuine inquiry into the basic facts, in order to verify whether the complaint was well-founded, the Court concludes that the information in its possession does not "satisfy an objective observer that the person concerned may have committed the offence".

74. There has, accordingly, been a violation of Article 5 § 1 of the Convention in respect of the applicant's first arrest ...

76. ... Had the applicant indeed committed the crime and had he wanted to pressure the victim or witnesses or destroy evidence, he would have had plenty of time to do so before December 2005, and no evidence was submitted to the Court of any such actions on the part of the applicant. There was, therefore, no urgency for an arrest in order to stop an ongoing criminal activity and the 24 investigators assigned to the case could have used any extra time to verify whether the complaints were *prima facie* well-founded. Instead of such verification, the applicant was arrested on the day when the investigation was initiated ...

77. More disturbingly, it follows from the statements of the two alleged victims that one of the complaints was fabricated and the investigating authority did not verify with him whether he had indeed made that complaint, while the other was the result of the direct influence of officer O., the same person who registered the first

complaint against the applicant ... This renders both complaints irrelevant for the purposes of determining the existence of a reasonable suspicion that the applicant had committed a crime, while no other reason for his arrest was cited ...

80. Whether or not the applicant was arrested deliberately or following a failure properly to consider the facts of the case or a bona fide mistake, the Court does not see in the file, as in the case of the first arrest, any evidence to support a reasonable suspicion that the applicant committed a crime.

► ***Kandzhov v. Bulgaria*, 68294/01, 6 November 2008**

60. ... the Court observes that the applicant's actions consisted of the gathering of signatures calling for the resignation of the Minister of Justice and displaying two posters calling him a "top idiot". When examining the criminal charges against the applicant the Supreme Court of Cassation specifically found that these actions had been entirely peaceful, had not obstructed any passers-by and had been hardly likely to provoke others to violence. On this basis, it concluded that they did not amount to the constituent elements of the offence of hooliganism and that in convicting the applicant the Pleven District Court had "failed to give any arguments" but had merely made blanket statements in this respect ... Nor did the orders for the applicant's arrest under section 70(1) of the 1997 Ministry of Internal Affairs Act and for his detention under Article 152a § 3 of the 1974 Code of Criminal Procedure – which were not reviewed by a court – contain anything which may be taken to suggest that the authorities could reasonably believe that the conduct in which he had engaged constituted hooliganism, whose elements were comprehensively laid down in the Supreme Court's binding interpretative decision of 1974 ...

► ***Ipek and Others v. Turkey*, 17019/02, 3 February 2009**

30. The Court notes in this context that the second applicant was arrested in the course of an investigation into an illegal armed organisation of which he was suspected of being a member, and of having gone to the city in order to conduct activities on its behalf. In these circumstances, the suspicion against him may be considered to have reached the level required by Article 5 § 1 (c), as the purpose of the deprivation of liberty was to confirm or dispel the suspicions about his involvement in this illegal organisation ...

31. As regards the other applicants, however, it appears that they were arrested merely because they were at the second applicant's house at the time of the search. Against this background and in the absence of any information or documents demonstrating the contrary, the Court considers that, at the time of their arrest, these applicants were not detained on reasonable suspicion of having committed an offence, or to prevent their committing an offence, within the meaning of Article 5 § 1 (c) of the Convention ... There has accordingly been a violation of this provision in respect of Mr Ipek and Mr Demirel.

► ***Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014**

93. Against this background, the prosecution accused the applicant of essentially the following: that he had arrived in Ismayilli one day after the spontaneous and

disorganised “acts of hooliganism” had already taken place and that, within a period of about two hours (the overall length of his stay in the town), he had managed to seize a significant degree of control over the situation, turn the ongoing disorganised rioting into “organised acts” of disorder, establish himself as a leader of the protestors whom he had not known before and who had already gathered without his involvement, and directly cause all of their subsequent disorderly actions.

96. ... the Court notes that the prosecution’s official documents mentioned no witness statements and no other specific information that had given them reason to suspect the applicant of having committed any of the actions described in those documents and to charge him with the above-mentioned criminal offences. No such statements or other information was presented to the courts deciding on the applicant’s remand in custody. Thus, the Court finds it established that the prosecution’s case file was neither presented to nor reviewed by the domestic courts for the purpose of verifying the existence of a “reasonable suspicion”.

97. ... The vague and general references by both the prosecution and the courts, in their respective documents and decisions, to unspecified “case material”, in the absence of any specific statement, information or concrete complaint cannot be regarded as sufficient to justify the “reasonableness” of the suspicion on which the applicant’s arrest and detention were based ...

98. The Court further notes that, enclosed with their observations, the Government submitted copies of the records of the applicant’s face-to-face confrontations with R.N. and I.M. However, the Government submitted those records without any comment or explanation as to their pertinence to the present complaint. As mentioned above, those records were not presented before the domestic courts, nor were the witnesses’ names and statements otherwise mentioned in the prosecution’s procedural decisions (such as the decision to charge the applicant with criminal offences), the prosecution’s submissions to the domestic courts, the domestic courts’ decisions, or the available transcripts of the court hearings. That fact, in itself, renders the evidence inapplicable in the context of evaluating the reasonableness of the suspicions against the applicant, having regard also to the Government’s failure to provide any factual comment on the role of those statements in the present case.

99. For the above reasons, the Court considers that no specific facts or information giving rise to a suspicion justifying the applicant’s arrest were mentioned or produced during the pre-trial proceedings, and that R.N.’s and I.M.’s statements, which were only subsequently produced before the Court, have not been shown to constitute such facts or information ...

100. ... having regard to the above analysis, the Court finds that the material put before it does not meet the minimum standard set by Article 5 § 1 (c) of the Convention for the reasonableness of a suspicion required for an individual’s arrest and continued detention. Accordingly, it has not been demonstrated in a satisfactory manner that, during the period under the Court’s consideration in the present case, the applicant was deprived of his liberty on a “reasonable suspicion” of having committed a criminal offence.

PREVENTING THE COMMISSION OF AN OFFENCE

► *Shimovolos v. Russia*, 30194/09, 21 June 2011

53. It is significant in this connection that the applicant was not suspected of “having committed an offence”. According to the Government, he was arrested for the purpose of preventing him from committing “offences of an extremist nature” ...

54. It transpires from the domestic judgments that police measures, such as identity checks, questioning and escorting to the police station, were taken against the applicant during his trip to Samara because his name was registered in the Surveillance Database. The only reason for the registration of his name in that database of “potential extremists” was that he was a human rights activist ... The Court reiterates in this connection that Article 5 § 1 (c) does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing a concrete and specific offence ...

55. ... In the Court’s opinion, the Government’s vague reference to “offences of an extremist nature” is not specific enough to satisfy the requirements of Article 5 § 1 (c) ... The domestic documents relating to the applicant’s arrest are no more specific in that respect. It follows from the attendance report that the applicant had been brought to the police station on the basis of information contained in two telexes. The perusal of those telexes reveals that an opposition rally was planned in Samara and that the Interior Department considered it necessary to stop members of certain opposition organisations from taking part in that rally in order to prevent them from committing “unlawful and extremist acts” ... No concrete and specific offences were referred to.

56. The only specific suspicion against the applicant mentioned in the telexes was the suspicion that he might be carrying extremist literature ... However, the Government did not provide any facts or information which could satisfy an objective observer that that suspicion was “reasonable”. The Court notes with concern that the suspicion was apparently based on the mere fact that the applicant was a member of human rights organisations. In its opinion, such membership cannot in any case form a sufficient basis of a suspicion justifying the arrest of an individual. Moreover, that suspicion was dispelled, according to the testimony by the escorting police officer, due to the fact that the applicant did not have any luggage with him ... The Court concludes from the above that the applicant’s arrest could not be “reasonably considered necessary to prevent his committing an offence” within the meaning of Article 5 § 1 (c).

57. It follows that the applicant’s arrest did not have any legitimate purpose under Article 5 § 1 and was accordingly arbitrary ...

► *Lutsenko v. Ukraine*, 6492/11, 3 July 2012

63. ... the applicant was arrested within the framework of the second criminal case and was taken to a court on the next day. However, the court did not examine the

lawfulness of the applicant's arrest and, according to the Government, which in fact insisted on this point, had not intended to do so. The relevant facts also confirm that the prosecuting authorities took the applicant to the court solely for examination of their application for the applicant's detention in connection with the first criminal case and effectively opposed any examination of the lawfulness of the applicant's arrest during the hearing of 27 December 2010. Such behaviour on the part of the domestic authorities strongly suggests that the purpose of the applicant's arrest was not to bring him before a competent legal authority within the same criminal case, but to ensure his availability for examination of the application for a change of preventive measure to a custodial one in a different set of criminal proceedings.

64. Furthermore, the applicant's arrest does not appear to have been "necessary to prevent him from committing an offence or fleeing after having done so". It is true that the order for the applicant's arrest indicated among the reasons therefor the prevention of his avoiding participating in the investigation and of his continuing criminal activities, however the authorities failed to explain in what way the applicant, being accused of abuse of office, could continue this type of activity almost a year after he had left the office of Minister of the Interior. Concerning the necessity to ensure the applicant's participation in further investigative actions, the Government submitted that the resumption of the investigation had been necessary to consolidate two criminal cases against the applicant ... They did not claim however that any such actions within the first criminal case had been necessary or had been eventually conducted. As to the risk of fleeing, the applicant was under an obligation not to abscond which he had given to the very same investigator, V., who had arrested him and who did not appear to have any previous complaints concerning the applicant's compliance with the said obligation.

65. The Court therefore concludes that the applicant's arrest was made for another purpose than that indicated in Article 5 § 1 of the Convention and was therefore arbitrary and contrary to this provision. It follows that there has been a violation of Article 5 § 1 of the Convention in this respect.

CIRCUMSTANCES AND USE OF FORCE

Before family members

► *Murray v. United Kingdom*, 14310/88, 28 October 1994

92. The domestic courts held that Mrs Murray was genuinely and honestly suspected of the commission of a terrorist-linked crime ... The Court accepts that there was in principle a need both for powers of the kind granted by ... the 1978 Act and, in the particular case, to enter and search the home of the Murray family in order to arrest Mrs Murray.

Furthermore, the "conditions of extreme tension" ... under which such arrests in Northern Ireland have to be carried out must be recognised ...

These are legitimate considerations which go to explain and justify the manner in which the entry into and search of the applicants' home were carried out. The Court

does not find that, in relation to any of the applicants, the means employed by the authorities in this regard were disproportionate to the aim pursued.

93. Neither can it be regarded as falling outside the legitimate bounds of the process of investigation of terrorist crime for the competent authorities to record and retain basic personal details concerning the arrested person or even other persons present at the time and place of arrest. None of the personal details taken during the search of the family home or during Mrs Murray's stay at the Army centre would appear to have been irrelevant to the procedures of arrest and interrogation ...

► ***Gutsanovi v. Bulgaria*, 34529/10, 15 October 2013**

134. As regards the psychological effects of the police operation on the applicants, the Court observes that police operations which entail intervention in the home and the arrest of suspects inevitably arouse negative emotions in the persons targeted. However, in the present case, there is concrete, undisputed evidence that Mrs Gutsanova and her two minor daughters were very severely affected by the events. ... The Court also considers that the fact that the police operation took place in the early morning and involved special officers wearing masks, who were seen by Mrs Gutsanova and her two daughters, served to heighten the feelings of fear and anxiety experienced by these three applicants, to the extent that the treatment to which they were subjected exceeded the threshold of severity required for Article 3 of the Convention to apply. The Court therefore considers that these three applicants were subjected to degrading treatment ...

136. The Court reiterates its findings to the effect that the police operation in question was planned and carried out without regard for a number of relevant factors such as the nature of the criminal offences of which Mr Gutsanov was suspected, the fact that he had no history of violence, and the possible presence of his wife and daughters in the family home. All these elements point clearly to the excessive nature of the deployment of special officers and special procedures in order to arrest the first applicant and enable the police to enter his home. The Court considers that, in the light of these circumstances, the manner in which Mr Gutsanov's arrest was carried out – very early in the morning, by several armed and masked officers who forced their way in through the door of the house, and under the frightened gaze of Mr Gutsanov's wife and two young daughters – aroused strong feelings of fear, anguish and powerlessness in the first applicant, capable of humiliating and debasing him in his own eyes and in the eyes of his close relatives. The Court considers that the intensity of these feelings exceeded the threshold of severity required for Article 3 to apply. Accordingly, Mr Gutsanov too was subjected to degrading treatment.

Media coverage

► ***Natsvlshvili and Togonidze v. Georgia*, 9043/05, 29 April 2014**

105. ... In certain situations a virulent media campaign can indeed adversely affect the fairness of a trial and involve the State's responsibility. This may occur in terms of the impartiality of the court under Article 6 § 1, as well as with regard to the presumption of innocence embodied in Article 6 § 2 However, the Court does not

consider that the filming of the first applicant's arrest by journalists from a private television station already amounted to a virulent media campaign aimed at hampering the fairness of the trial, nor is there any specific indication that the interest of the media in the matter was sparked by the prosecutor, the Governor or any other State authority. In the Court's opinion, the media coverage of the present case did not extend beyond what can be considered as merely informing the public about the arrest of the managing director of one of the largest factories in the country.

106. There has accordingly been no violation of Article 6 § 2 of the Convention.

Use of force

Excessive

► *Erdoğan Yağiz v. Turkey*, 27473/02, 6 March 2007

46. The applicant had no record of being a security threat and there is no evidence that he posed a danger to himself or to others or that he had previously committed criminal acts or acts of self-destruction or violence against others. The Court attaches particular importance to the fact that in their observations the Government did not provide any explanation justifying the need for handcuffs.

47. The Court cannot discern any ground for accepting that it was necessary for the applicant to be seen in handcuffs during his arrest and the searches. It therefore considers that in the particular context of the case, exposing him to public view wearing handcuffs was intended to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his moral resistance.

► *Dalan v. Turkey*, 38585/97, 7 June 2005

27. There is no need for the Court to dwell further on this matter ... In any event the number and severity of the injuries recorded on the applicant's person, 12 days after her arrest, appear too serious to correspond to the proportionate use of force by eight police officers in order to arrest three women, who could not have presented them with any particular threat ...

In short, the Court sees no plausible ground capable of acquitting the respondent State of its responsibilities under Article 3, because of the injuries sustained by Mrs Dalan at the hands of the police, regardless of when they were inflicted on her.

► *Nachova and Others v. Bulgaria* [GC], 43577/98, 6 July 2005

105. ... the regulations in place permitted a team of heavily armed officers to be dispatched to arrest the two men in the absence of any prior discussion of the threat, if any, they posed or of clear warnings on the need to minimise any risk to life. In short, the manner in which the operation was planned and controlled betrayed a deplorable disregard for the pre-eminence of the right to life...

106. ... Neither man was armed or represented a danger to the arresting officers or third parties, a fact of which the arresting officers must have been aware on the

basis of the information available to them. In any event, upon encountering the men in the village of Lesura, the officers, or at least Major G., observed that they were unarmed and not showing any signs of threatening behaviour ...

107. Having regard to the above, the Court considers that in the circumstances that obtained in the present case any resort to potentially lethal force was prohibited by Article 2 of the Convention, regardless of any risk that Mr Angelov and Mr Petkov might escape. As stated above, recourse to potentially deadly force cannot be considered as “absolutely necessary” where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.

► ***Wieser v. Austria*, 2293/03, 22 February 2007**

40. ... the Court notes first that the applicant ... was not simply ordered to undress, but was undressed by the police officers while being in a particular helpless situation. Even disregarding the applicant’s further allegation that he was blindfolded during this time which was not established by the domestic courts, the Court finds that this procedure amounted to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason. However, no such argument has been adduced to show that the strip search was necessary and justified for security reasons. The Court notes in this regard that the applicant, who was already handcuffed was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely.

41. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the strip search of the applicant during the police intervention at his home constituted an unjustified treatment of sufficient severity to be characterised as “degrading” within the meaning of Article 3 of the Convention.

► ***Fahriye Çalışkan v. Turkey*, 40516/98, 2 October 2007**

43. In that context the Court is ready to assume that inspector S.Ç. acted to control the applicant, who was allegedly highly agitated at the relevant time. That said, she was a woman alone in a police station, to which she had been brought in connection with a straightforward problem concerning an association. The Court therefore finds it difficult to understand the exact circumstances that might have made her come to blows with an inspector, as there is nothing in the file that indicates any predisposition to violence on her part.

In any event, even filled with resentment on account of having been slapped, an inspector, surrounded by his subordinates, should have shown greater self-control and certainly used other methods than those which left the applicant unable to work for five days. That treatment was debasing and likely to inspire disproportionate feelings of fear and vulnerability, and therefore did not correspond to the necessary use of force ...

44. There has accordingly been a substantive violation of Article 3 of the Convention.

Not excessive

► *Raninen v. Finland*, 20972/92, 16 December 1997

56. ... handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.

► *Scavuzzo-Hager v. Switzerland*, 41773/98, 7 February 2006

61. Even assuming that the struggle between P. and the two police officers, and the neighbour who came to their assistance, had a detrimental effect on P.'s state of health, the Court considers that in order to engage the international responsibility of the respondent State the officers would also have to have been reasonably able to realise that P. was in a state of vulnerability that required a high degree of caution in the use of the "normal" arrest techniques ...

62. In this case, however ... it is clear from the forensic medical report produced by the University of Zürich on 21 January 1997 that it was impossible for the two police officers to have been aware that P.'s vulnerability was such that the slightest impact on his body might lead to fatal complications.

63. That being so, finding no reason to doubt the experts' conclusions, the Court holds that the allegation that P.'s death was caused by the use of force by the police is ill-founded.

► *Portmann v. Switzerland*, 38455/06, 11 October 2011

52. The Court shares the Government's view that that the applicant is a particularly dangerous man against whom the police had to protect themselves properly ... Furthermore, at the scene of his arrest the police found several loaded firearms. At the time of his arrest the applicant behaved in a very aggressive manner and said several times that the police were lucky to have taken him by surprise, otherwise he would have killed them.

53. Realising how dangerous the applicant was, the police deemed it necessary to place a hood over his head and handcuff him in order to prevent him from escaping and endangering himself and the police officers. Like the prosecuting authorities ..., the Court considers that the measures taken were appropriate. It points out that in this case the hood was used both to restrict the arrested man's freedom of action and to preserve the anonymity of the arresting officers and protect them from any subsequent reprisals. He was taken to the police station in Herisau and, after a brief meeting with the investigating judge, escorted to the Trogen police station, where the hood and handcuffs were immediately removed.

54. It is also important in the Court's view that the wearing of the hood was accompanied by the necessary safety measures. According to the Government's observations, which the applicant has not disputed, he did not attempt to resist

wearing the hood, and he confirmed to the police, when asked, that he was able to breathe normally. He was subsequently kept under supervision by a police officer at almost all times, in keeping with the relevant regulations. That being so, it makes no difference in the Court's view whether it was a proper hood or, as the applicant claims, two pillow cases ...

56. In the light of the above, the Court finds that the wearing of the hood, even combined with handcuffs, was limited to about two hours, during which appropriate safety measures were taken, and was not intended to humiliate or debase the applicant. It did not, therefore, attain the level of severity required to fall within the scope of Article 3 of the Convention.

57. That being so, the applicant was not subjected to degrading treatment within the meaning of Article 3 of the Convention and there has been no violation of that provision.

DUTY TO GIVE REASONS

Sufficient information

► *Fox, Campbell and Hartley v. United Kingdom*, 12244/86, 30 August 1990

41. On being taken into custody, Mr Fox, Ms Campbell and Mr Hartley were simply told by the arresting officer that they were being arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists ... This bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2 ...

However, following their arrest all of the applicants were interrogated by the police about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations ... There is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation.

► *Dikme v. Turkey*, 20869/92, 11 July 2000

55. ... the first applicant ... alleged that the officers who had started the interrogation were members of the "anti-Dev-Sol" squad ... and that after the first interrogation session, at about 7 p.m., a member of the secret service had threatened him, saying: "You belong to Devrimci Sol, and if you don't give us the information we need, you'll be leaving here feet first!" ...

56. In the Court's opinion, that statement gave a fairly precise indication of the suspicions concerning the first applicant. Accordingly, and having regard to the illegal nature of the organisation in question and to the reasons he may have had for concealing his identity and fearing the police (his sister had been killed in a clash with the police ...), the Court considers that Mr Dikme should or could already have realised at that stage that he was suspected of being involved in prohibited activities such as those of Dev-Sol ...

► ***H. B. v. Switzerland, 26899/95, 5 April 2001***

48. ... immediately upon his arrest on 12 May 1993 the applicant was informed in writing of the various offences of which he was suspected. In addition ... the applicant was orally informed by the investigating judge of accusations directed against the B. company, and indeed, he had been well aware of the prosecuting authorities' interest in the company. All this information enabled the applicant to file a hand-written complaint with the Court of Appeal of the Canton of Solothurn on the day of his arrest ...

49. Bearing in mind that the applicant, a member of the board and manager of the B. company, had specialised knowledge of the financial situation of the company, the Court considers that upon his arrest the applicant was duly informed of the "essential legal and factual grounds for his arrest, so as to be able, if he [saw] fit, to apply to a court to challenge its lawfulness" ...

► ***Čonka v. Belgium, 51564/99, 5 February 2002***

51. ... on their arrival at the police station, the applicants were served with the decision ordering their arrest. The document handed to them for that purpose stated that their arrest had been ordered pursuant to section 7, first paragraph, point (2), of the Aliens Act, in view of the risk that they might seek to elude deportation ...

52. The Court has already noted that when the applicants were arrested at the police station a Slovak-speaking interpreter was present, notably for the purposes of informing the aliens of the content of the verbal and written communications which they received, in particular, the document ordering their arrest. ..., the information thus furnished to them nonetheless satisfied the requirements of Article 5 § 2 of the Convention. Consequently, there has been no violation of that provision.

Done promptly

► ***Murray v. United Kingdom, 14310/88, 28 October 1994***

76. ... apart from repeating the formal words of arrest required by law, the arresting officer, Corporal D., also told Mrs Murray the section of the 1978 Act under which the arrest was being carried out ... This bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 para. 2 ...

77. ... In the Court's view, it must have been apparent to Mrs Murray that she was being questioned about her possible involvement in the collection of funds for the purchase of arms for the Provisional IRA [Irish Republican Army] by her brothers in the USA. Admittedly, "there was never any probing examination of her collecting money" – to use the words of the trial judge – but, as the national courts noted, this was because of Mrs Murray's declining to answer any questions at all beyond giving her name ... The Court therefore finds that the reasons for her arrest were sufficiently brought to her attention during her interview.

78. Mrs Murray was arrested at her home at 7 a.m. and interviewed at the Army centre between 8.20 a.m. and 9.35 a.m. on the same day ... In the context of the

present case this interval cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 para. 2 ...

► ***Dikme v. Turkey*, 20869/92, 11 July 2000**

56. ... In any event, the intensity and frequency of the interrogations also suggest that at the very first session, which [began several hours after an arrest at 7.30 a.m. and] lasted until or slightly beyond 7 p.m., Mr Dikme could have gained some idea of what he was suspected of ... The constraints of time imposed by the notion of promptness in Article 5 § 2 ... were therefore complied with, especially as the first applicant to some extent contributed to the prolongation of the period in question by concealing his identity.

► ***Saadi v. United Kingdom* [GC], 13229/03, 29 January 2008**

82. The Government pointed to the general statements of intent regarding the Oakington detention regime. They accepted that the forms in use at the time of the applicant's detention were deficient, but contended that the reasons given orally to the applicant's on-site representative (who knew the general reasons) on 5 January 2001 were sufficient to enable the applicant to challenge the lawfulness of his detention under Article 5 § 4 if he wished ...

84. The Chamber found a violation of this provision, on the grounds that the reason for detention was not given sufficiently "promptly". It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention. The first time the applicant was told of the real reason for his detention was through his representative on 5 January 2001 ..., when the applicant had already been in detention for seventy-six hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2 of the Convention, the Chamber found that a delay of seventy-six hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given "promptly".

85. The Grand Chamber agrees with the Chamber's reasoning and conclusion. It follows that there has been a violation of Article 5 § 2 of the Convention.

FIRST APPEARANCE BEFORE A JUDGE

Need for automatic examination of merits of decision

► ***T. W. v. Malta*, 25644/94 [GC], 25 April 1999**

43. In addition to being prompt, the judicial control of the detention must be automatic ... It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court ... It might even defeat the purpose of the safeguard under

Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny ... Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody ... Furthermore, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention ...

Meaning of judge

► *Nikolova v. Bulgaria* [GC], 31195/96, 25 March 1999

49. ... Thus, the “officer” must be independent of the executive and of the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the “officer” may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality are capable of appearing open to doubt ... The “officer” must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified. If it is not so justified, the “officer” must have the power to make a binding order for the detainee’s release ...

50. ... Following her arrest on 24 October 1995 the applicant was brought before an investigator who did not have power to make a binding decision as to her detention and was not procedurally independent from the prosecutor. Moreover, there was no legal obstacle to his acting as a prosecutor at the applicant’s trial ... The investigator could not therefore be regarded as an “officer authorised by law to exercise judicial power” within the meaning of Article 5 § 3 of the Convention. The applicant was not heard by a prosecutor. In any event the prosecutor, who could act subsequently as a party to the criminal proceedings against Mrs Nikolova ..., was not sufficiently independent and impartial for the purposes of Article 5 § 3 ...

► *H. B. v. Switzerland*, 26899/95, 5 April 2001

62. ... the Court considers that, when the investigating judge decided on the applicant’s arrest and detention, it appeared that, had his case been referred to trial before the District Court, the investigating judge ordering his detention on remand would have been “entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority” ...

64. The Court considers, therefore, that there has been a violation of Article 5 § 3 of the Convention on the ground that the applicant was not brought before an “officer authorised by law to exercise judicial power”.

► *Vachev v. Bulgaria*, 42987/98, 8 July 2004

64. The present case does not concern detention pending trial, but house arrest. Nevertheless, the Court finds no material difference with the cases cited above. It has not been disputed by the parties that the applicant’s house arrest constituted deprivation of liberty within the meaning of Article 5 ... Therefore, in accordance with paragraph 3 of that Article, he was entitled to be brought promptly before a

judge or other officer authorised by law to exercise judicial power. The investigator who ordered the applicant's house arrest ... cannot be considered such an officer as he was not sufficiently independent and impartial for the purposes of Article 5 § 3, in view of the practical role that he played in the prosecution. The Court refers to its analysis of the relevant domestic law contained in its Nikolova judgment ...

65. It follows that there has been an infringement of the applicant's right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention.

Period involved

Excessive

► *Brogan and Others v. United Kingdom*, 11209/84, 29 November 1988

59. The obligation expressed in English by the word "promptly" and in French by the word "aussitôt" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ... ("reasonable time"/"délai raisonnable") and even from that in paragraph 4 of Article 5 ... ("speedily"/"à bref délai") ...

62. As indicated above ..., the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden ..., falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 ... The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 ...

► *Koster v. Netherlands*, 12843/87, 28 November 1991

23. The Government explained that the lapse of time in question had occurred because of the weekend, which fell in the intervening period, and the two-yearly major manoeuvres, in which the military members of the court had been participating at the time.

25. ... the Court considers that the manoeuvres in question did not justify any delay in the proceedings: as they took place at periodical intervals and were therefore foreseeable, they in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday.

Accordingly, and even taking into account the demands of military life and justice ..., the applicant's appearance before the judicial authorities did not comply with the requirement of promptness laid down in Article 5 para. 3 ...

► ***Aksoy v. Turkey*, 21987/93, 18 December 1996**

77. In the Brannigan and McBride judgment ... the Court held that the United Kingdom Government had not exceeded their margin of appreciation by derogating from their obligations under Article 5 of the Convention ... to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control ...

78. Although the Court is of the view ... that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture ... Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable ...

82. In its above-mentioned Brannigan and McBride judgment ... the Court was satisfied that there were effective safeguards in operation in Northern Ireland which provided an important measure of protection against arbitrary behaviour and incommunicado detention. For example, the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention, there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor ...

83. In contrast, however, the Court considers that in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

► ***Kandzhov v. Bulgaria*, 68294/01, 6 November 2004**

66. ... the applicant was brought before a judge three days and twenty-three hours after his arrest ... In the circumstances, this does not appear prompt. He was arrested on charges of a minor and non-violent offence. He had already spent twenty-four hours in custody when the police proposed to the prosecutor in charge of the case to request the competent court to place the applicant in pre-trial detention. Exercising his powers ..., the prosecutor ordered that the applicant be detained for a further seventy-two hours, without giving any reasons why he considered it necessary, save for a stereotyped formula saying that there was a risk that he might flee or re-offend. It does not seem that when thus prolonging the applicant's detention the prosecutor took appropriate steps to ensure his immediate appearance before a judge, as mandated by the provision cited above ... Instead, the matter was brought before the Pleven District Court at the last possible moment, when the seventy-two hours were about to expire ... The Court sees no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner ... This was particularly important in view of the dubious legal grounds for his deprivation of liberty.

67. There has therefore been a violation of Article 5 § 3 of the Convention.

► ***Vassis and Others v. France*, 62736/09, 27 June 2013**

55. ... the Court notes that at the time of its interception, the *Junior* also was on the high seas off the coast of West Africa, thousands of kilometres from the French coast. Moreover, there is nothing to suggest that its diversion to France took any longer than necessary, given that the *Junior* is a vessel originally designed for coastal rather than long-distance sailing ...

58. In the present case, the police custody followed on from a period of eighteen days of deprivation of liberty within the meaning of Article 5 of the Convention ... Even though this was a long period of time, the applicants did not actually appear for the first time before a “judge or other officer”, within the autonomous meaning of Article 5 § 3 of the Convention, in this case a judge responsible for civil liberties and detention matters, until after an additional period of some forty-eight hours ...

60. ... the Court has no doubt that the eighteen days required for the applicants’ transfer allowed their arrival in France to be prepared with foresight. In view of the length of that period, without judicial supervision, there was no justification for subsequently placing the applicants in police custody for the initial forty-eight hours; moreover, the specific circumstances of the case meant that the promptness requirement of Article 5 § 3 of the Convention was even stricter than in a situation where the beginning of police custody coincided with the initial deprivation of liberty. Therefore, as soon as the applicants arrived in France they should have been brought, without delay, before a “judge or other officer authorised to exercise judicial power”.

61. In particular, the Court points out that its findings in previous cases that periods of two or three days before the initial appearance before a judge do not breach the promptness requirement are not designed to afford the authorities the opportunity to intensify their investigations and to collect the substantial and consistent evidence required for the applicants to be placed under formal investigation by the investigating judge, for example because they have contested the charges. Consequently, this case-law cannot be interpreted as being in any way intended to grant the national authorities a period of time which they are at liberty to use to complete the prosecution case file: the purpose of Article 5 § 3 of the Convention is to facilitate the detection of any ill-treatment and to minimise any unjustified interference with individual liberty, in order to protect the individual, by means of an automatic initial review, within a strict time-frame leaving little room for flexible interpretation ...

62. As that did not happen in the present case following the applicants’ arrival in France, there has been a violation of Article 5 § 3 of the Convention.

Not excessive

► ***Medvedyev and Others v. France* [GC], 3394/03, 29 March 2010**

131. ... the Court notes that at the time of its interception the *Winner* was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the

French coast, comparable to the distance in the *Rigopoulos* case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions.

132. The Court notes, lastly, that the applicants were placed in police custody at 8.45 a.m. on 26 June 2002 and effectively brought before an investigating judge at the police station in Brest, according to the reports produced by the Government, between 5.05 and 5.45 p.m. in the case of the first judge and at undocumented times in the case of the second judge ..., it being understood that the applicants do not dispute the fact that the meetings with the second judge took place at about the same time. This means that after arriving in France the applicants spent only about eight or nine hours in police custody before they were brought before a judge.

133. That period of eight or nine hours was perfectly compatible with the concept of "brought promptly" enshrined in Article 5 § 3 of the Convention and in the Court's case-law.

Hearing

► *Mamedova v. Russia*, 7064/05, 1 June 2006

81. It is also peculiar that in the decision of 22 February 2005 the Regional Court held that it was not required to hear the parties' opinion concerning the materials submitted by the prosecutor in support of the request for an extension. In this connection the Court recalls that Article 5 § 3 obliges the "officer" to hear himself the accused, to examine all the facts militating for and against pre-trial detention and to set out in the decision on detention the facts upon which that decision is based ... Therefore, the extension of the applicant's detention without hearing her opinion, giving her an opportunity to comment on the materials submitted by the prosecutor and having proper regard to her arguments in favour of the release is incompatible with the guarantees enshrined in Article 5 § 3 of the Convention.

Need for power of release

► *T. W. v. Malta*, 25644/94 [GC], 25 April 1999

48. ... the Court considers that the applicant's appearance before the magistrate on 7 October 1994 was not capable of ensuring compliance with Article 5 § 3 of the Convention since the magistrate had no power to order his release. It follows that there has been a breach of that provision.

► ***McKay v. United Kingdom* [GC], 543/03, 3 October 2006**

31. Article 5 § 3 as part of this framework of guarantees is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked ...

48. The Court recalls that the applicant was arrested on 6 January 2001, at 10 p.m. on suspicion of having carried out a robbery of a petrol station. He was charged at 12.37 p.m. the next day. On 8 January 2001, at 10 a.m., the applicant made his first appearance in the magistrates' court which remanded him in custody. It is not in dispute that the magistrate had the competence to examine the lawfulness of the arrest and detention and whether there were reasonable grounds for suspicion and moreover that he had the power to order release if those requirements were not complied with. That alone provided satisfactory guarantees against abuse of power by the authorities and ensured compliance with the first limb of Article 5 § 3 as being prompt, automatic and taking place before a duly empowered judicial officer.

49. The question of release pending trial was a distinct and separate matter which logically only became relevant after the establishment of the existence of a lawful basis and a Convention ground for detention. It was, in the applicant's case, dealt with some 24 hours later, on 9 January 2001, by the High Court which ordered his release. No element of possible abuse or arbitrariness arises from the fact that it was another tribunal or judge that did so nor from the fact that the examination was dependent on his application. The applicant's lawyer lodged such an application without any hindrance or difficulty ...

51. There has, accordingly, been no violation of Article 5 § 3 of the Convention.

► ***Allen v. United Kingdom*, 18837/06, 30 March 2010**

51. ... the Court rejects the applicant's contention that the Deputy District Judge did not "exercise judicial power;" as his decision on bail was open to appeal. To the contrary, it observes that its case-law to date has emphasised that the power of a judge or judicial officer on initial review under Article 5 § 3 simply must be to release an individual in the event that he finds their detention unlawful or not to be based on any reasonable suspicion that they have committed an offence. The Court further notes that, as was the case in *McKay* ..., the question of the applicant's bail was reconsidered shortly thereafter by a judicial officer who undisputedly did have the power to make a final decision in that respect.

52. There has, accordingly, been no violation of Article 5 § 3 of the Convention.

DUTY TO ACCOUNT FOR CUSTODY

► ***Kurt v. Turkey*, 24276/94, 25 May 1998**

123. ...What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards,

could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

124. ... Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.

125. Against that background, the Court recalls that it has accepted the Commission's finding that Üzeyir Kurt was held by soldiers and village guards on the morning of 25 November 1993. His detention at that time was not logged and there exists no official trace of his subsequent whereabouts or fate. That fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention.

CONDITIONS AND ILL-TREATMENT

► *Tomasi v. France*, 12850/87, 27 August 1992

115. The Court ... finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals ...

116. There has accordingly been a violation of Article 3 ...

► *Elçi and Others v. Turkey*, 23145/93, 13 November 2003

641. The Court finds to be credible and consistent the applicants' testimony about their dire conditions of detention – cold, dark and damp, with inadequate bedding, food and sanitary facilities – as well as the allegations made ... that they were insulted, humiliated, slapped and terrified into signing any document that was put before them. Furthermore, the Court accepts that at least at crucial moments, such as during interrogations and the confrontations with Mr Güven, the applicants were blindfolded.

646. ...the Court finds it established that the applicants ... suffered physical and mental violence at the hands of the gendarmerie during their detention in November and December 1993. Such ill-treatment caused them severe pain and suffering and

was particularly serious and cruel, in violation of Article 3 of the Convention. It must therefore be regarded as constituting torture within the meaning of that Article.

► ***Navalnyy and Yashin v. Russia*, 76204/11, 4 December 2014**

111. The Court reiterates that it has already examined the conditions of detention obtaining in police stations in various Russian regions and found them to be in breach of Article 3 ... It found a violation of Article 3 in a case where an applicant had been kept for twenty-two hours in an administrative-detention police cell without food or drink or unrestricted access to a toilet ... In a different case, it noted that a similar cell designed for short-term administrative detention not exceeding three hours was not suitable for four days' detention because by its design, it lacked the amenities indispensable for prolonged detention. The cell did not have a toilet or a sink. It was solely equipped with a bench, there being no chair or table or any other furniture, and the applicant's food was brought by relatives ...

112. In the present case the Court finds the same deficiencies. Moreover, the applicants' detention in the cell was preceded by a long late-night transfer between police stations without access to food or drinking water. In view of the cumulative effect of the factors analysed above, the Court considers that the conditions in which the applicants were held at the police station diminished their dignity and caused them distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. It follows that the conditions of the applicants' detention amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

OUTSIDE CONTACT

► ***Sadak v. Turkey*, 25142/94, 8 April 2004**

45. ... Nor does the Court rule out the possibility that an excessively lengthy period of police custody in complete isolation and in conditions particularly difficult for the detainee might amount to treatment contrary to Article 3.

46. In the instant case, the Court notes that the applicant was not held in conditions of sensory deprivation and social isolation. It is true that while in police custody he had no contact with the outside world, but he was in contact with the staff of the detention centre and with other individuals held in police custody. Moreover, as he was not questioned at all his detention could be construed as an extended period of waiting before he was brought before a judge. And the wait was not so long as to affect his personality.

47. The Court therefore considers that the applicant's detention was not *per se* so serious as to amount to inhuman or degrading treatment within the meaning of Article 3. Accordingly, there has been no violation of that provision on that count.

Chapter 5

Detention on remand

LEGAL BASIS

► *Jėčius v. Lithuania*, 34578/97, 31 July 2000

62. ... the Court reiterates that a practice of keeping a person in detention without a specific legal basis, but because of a lack of clear rules governing the detainee's situation, with the result that a person may be deprived of his liberty for an unlimited period without judicial authorisation, is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law ...

► *Boicenco v. Moldova*, 41088/05, 11 July 2006

151. The Government invoked several sections of the Code of Criminal Procedure which in their view constituted a legal basis for the applicant's detention after the expiry of his detention warrant of 23 July 2005 ...

152. Having analysed those sections, the Court notes that none of them provides for the detention of the applicant without a detention warrant. Moreover, even assuming that any of the provisions invoked by the Government would have provided for such a detention, this would run contrary to Article 25 of the Constitution, which states in clear terms that detention is possible only on the basis of a warrant and that it cannot be longer than 30 days. This is confirmed by the provisions of section 177 of the Code of Criminal Procedure ... which repeats the provisions of Article 25 of the Constitution in that detention on remand can be applied only on the basis of a court order.

153. It follows from the above that the applicant's detention after the expiry of his detention warrant on 23 July 2005 was not based on a legal provision.

► *Gusinskiy v. Russia*, 70276/01, 19 May 2004

67. The Government accepted that by virtue of the Amnesty Act the investigating officer should have stopped the proceedings against the applicant once he learned that the applicant held the Friendship of the Peoples Order. ... The Court therefore finds that by 13 June 2000 the authorities did know, or could reasonably have been expected to know, that the criminal proceedings against the applicant should be stopped.

68. The Court agrees with the applicant that it would be irrational to interpret the Amnesty Act as permitting detention on remand in respect of persons against whom all criminal proceedings must be stopped. There has, therefore, been a breach of the national law.

69. Accordingly, there has been a violation of Article 5 of the Convention.

► ***Simons v. Belgium (dec.)*, 71407/10, 28 August 2012**

25. That being said, the Court finds that the applicant did not have the possibility of being assisted by a lawyer, neither during her police custody or in the interview, nor during her first examination by the investigating judge ...

31. This case-law clearly expresses the following principle: first, a person “charged with a criminal offence”, within the meaning of Article 6 of the Convention, is entitled to receive legal assistance from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, during questioning by police or by an investigating judge ...

32. ... this is one of the principles of the right to a fair trial ... It is not one of the “general principles” implied by the Convention, which are, by definition, transversal in nature.

The Court further points out that the general principles implied by the Convention to which the Article 5 § 1 case-law refers are the principle of the rule of law ... and, connected to the latter, that of legal certainty ..., the principle of proportionality ... and the principle of protection against arbitrariness (which is, moreover, the very aim of Article 5 ...).

33. Thus, whilst the statutory inability for a person “charged with a criminal offence”, who is deprived of his liberty, to receive legal assistance from the beginning of his detention affects the fairness of the criminal proceedings against him, it cannot be inferred from that sole fact that his detention breaches Article 5 § 1 of the Convention for failure to satisfy the requirement of lawfulness inherent in that provision.

JUSTIFICATION

Duty to consider whether required

► ***Letellier v. France*, 12369/86, 26 June 1991**

35. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release.

► ***McKay v. United Kingdom [GC]*, 543/03, 3 October 2006**

45. In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty.

Burden of proof

► *Moiseyev v. Russia*, 62936/00, 9 October 2008

154. The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, warrants a departure from the rule of respect for individual liberty. Any system of mandatory detention pending trial is incompatible per se with Article 5 § 3 of the Convention, it being incumbent on the domestic authorities to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty ... Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is permissible only in exhaustively enumerated and strictly defined cases ...

Reasonable suspicion required but insufficient

► *Buzadji v. Republic of Moldova* [GC], 23755/07, 5 July 2016

92. As mentioned above ..., the persistence of reasonable suspicion is a condition sine qua non for the validity of the continued detention, but does not suffice to justify the prolongation of the detention after a certain lapse of time. This dictum ... later became better known as one of the more comprehensive “Letellier principles” ... The said principle enabled a distinction to be drawn between a first phase, when the existence of reasonable suspicion is a sufficient ground for detention, and the phase coming after a “certain lapse of time”, where reasonable suspicion alone no longer suffices and other “relevant and sufficient” reasons to detain the suspect are required.

93. Since the applicant did not claim in the proceedings before the Court that there was no reasonable suspicion that he had committed an offence, the Court does not consider it necessary to examine this issue. However, in view of the weaknesses of the additional reasons (other than reasonableness of suspicion) relied on by the domestic courts, the question arises as to the point in time from which such additional reasons were required. An answer to this question would depend on the meaning of the expression “certain lapse of time” ...

96. ... the Court considers that it would be useful to further develop its case-law as to the requirement on national judicial authorities to justify continued detention for the purposes of the second limb of Article 5 § 3 ...

100. The need to further elaborate the case-law appears to stem from the fact that the period during which the persistence of reasonable suspicion may suffice as a ground for continued detention under the second limb is subject to a different and far less precise temporal requirement – “a certain lapse of time” (as developed in the Court’s case-law) – than under the first limb – “promptly” (as provided in the text of the Convention) – and that it is only after that “certain lapse of time” that the detention has to be justified by additional relevant and sufficient reasons. It is true that in some instances the Court has held that “[t]hese two limbs confer distinct rights and

are not on their face logically or temporally linked" ... However, it should be noted that in each context the period will start to run from the time of arrest, and that the judicial authority authorising the detention is required to determine whether there are reasons to justify detention and to order release if there are no such reasons. Thus, in practice, it would often be the case that the application of the guarantees under the second limb would to some extent overlap with those of the first limb, typically in situations where the judicial authority which authorises detention under the first limb at the same time orders detention on remand subject to the guarantees of the second limb. In such situations, the first appearance of the suspect before the judge constitutes the "crossroads" where the two sets of guarantees meet and where the second set succeeds the first. And yet, the question of when the second applies to its full extent, in the sense that further relevant and sufficient reasons additional to reasonable suspicion are required, is left to depend on the rather vague notion of "a certain lapse of time".

101. The Court further notes that, according to the domestic laws of the great majority of the thirty-one High Contracting Parties to the Convention covered by the comparative law survey referred to in paragraph 54 above, the relevant judicial authorities are obliged to give "relevant and sufficient" reasons for continued detention if not immediately then only a few days after the arrest, namely when a judge examines for the first time the necessity of placing the suspect in pre-trial detention. Such an approach, if transposed to Article 5 § 3 of the Convention, would not only simplify and bring more clarity and certainty into the Convention case-law in this area, but would also enhance the protection against detention beyond a reasonable time.

102. In the light of all of the above considerations, the Court finds compelling arguments for "synchronising" the second limb of guarantees with the first one. This implies that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest.

Specific reasoning necessary

► *Mamedova v. Russia*, 7064/05, 1 June 2006

80. The Court further observes that the decisions extending the applicant's detention had no proper regard to her personal situation. In most decisions the domestic courts used the same summary formula and stereotyped wording. The District Court's decisions of 19 July and 2 August 2005 gave no grounds whatsoever for the applicant's continued detention. It only noted that "the applicant should remain in custody". It is even more striking that by that time the applicant had already spent a year in custody, the investigation had completed and the case had been referred for trial.

► *Bykov v. Russia* [GC], 4378/02, 10 March 2009

65. ... the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application

for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reasoning did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from 7 September 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial.

66. As regards the Government's argument that the circumstances of the case and the applicant's personality were self-evident for the purpose of justifying his pre-trial detention, the Court does not consider that this in itself absolved the courts from the obligation to set out reasons for coming to this conclusion, in particular in the decisions taken at later stages. It reiterates that where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention ...

67. The Court therefore finds that the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, eight months and 15 days.

► ***Ignatov v. Ukraine, 40583/15, 15 December 2016***

36. ... the Court notes that, despite the criminal case being at a new procedural stage, with two co-accused, the domestic court gave no reasons for its decision neither did it indicate to which of the co-accused it referred in particular ... That left the applicant in a state of uncertainty as to the grounds for his detention after that date. In this connection, the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 ... In these circumstances, the Court considers that the District Court's decision of 1 October 2013 did not afford the applicant adequate protection from arbitrariness, which is an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1 of the Convention.

37. There has accordingly been a violation of Article 5 § 1 of the Convention.

Seriousness of offence and likely penalty insufficient

► ***Mamedova v. Russia, 7064/05, 1 June 2006***

74. Examining the lawfulness of, and justification for, the applicant's continued detention the district and regional courts persistently relied on the gravity of the charges as the main factor for the assessment of the applicant's potential to abscond, obstruct the course of justice or re-offend. However, the Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment

of the risk of absconding or re-offending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence ... This is particularly true in cases, such as the present one, where the characterisation in law of the facts – and thus the sentence faced by the applicant – was determined by the prosecution without judicial control of the issue whether collected evidence supported a reasonable suspicion that the applicant had committed the imputed offence ...

► ***Kovyzin and Others v. Russia*, 13008/13, 17 September 2015**

84. ... the specific acts imputed to the individual applicants during the investigation included shouting political slogans, breaking through the police cordon, upsetting portable lavatories thus participating in mass disorders (classified as grave offences) and, in two cases, taking part in confrontations with the riot police officers causing no lasting harm (classified as offences of medium gravity). The Court finds that despite the domestic classification, this behaviour was not of a kind usually considered so serious as to justify the pre-trial detention by itself. By way of comparison, the Court has previously given weight to the Russian authorities' reliance on the gravity of certain offences, such as kidnapping compounded with extortion ..., or multiple aggravated gang kidnapping associated with extortion, robbery and possession and trafficking of firearms ..., or aggravated fraud by an organised group ... or an organised aggravated murder ..., or an organised aggravated assault causing injuries of four and one death ...

85. In the present case, the Court is only prepared to accept that if the nature and the gravity of the offences could play any role in the choice of preventive measure, it was only at the very initial stages of the investigation.

Inadmissible reasons

► ***Tymoshenko v. Ukraine*, 49872/11, 30 April 2013**

270. As transpires from the detention order, as well as the prosecutor's application for this measure and its factual context, the main justification for the applicant's detention was her supposed hindering of the proceedings and contemptuous behaviour. This reason is not included in those which would justify deprivation of liberty under Article 5 § 1 (c) of the Convention.

► ***Lutsenko v. Ukraine*, 6492/11, 3 July 2012**

72. The further grounds for the applicant's detention, namely failure to testify and admit his guilt, by their nature run contrary to such important elements of the fair trial concept as freedom from self-incrimination and the presumption of innocence. In the context of choice of whether or not to impose a custodial preventive measure, the advancing of such grounds appears particularly disturbing as they indicate that a person may be punished for relying upon his basic rights to a fair trial. The Court is also concerned with the fact that the domestic courts agreed with such grounds in ordering and upholding the applicant's detention.

► ***Piruzyan v. Armenia*, 33376/07, 26 June 2012**

98. The Court observes at the outset that grounds such as the need to carry out further investigative measures or the fact that the proceedings have not yet been completed do not correspond to any of the acceptable reasons for detaining a person pending trial under Article 5 § 3.

Risk of absconding

► ***W. v. Switzerland*, 14379/88, 26 January 1993**

33. The Court points out that the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention ... In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts ...

In their carefully reasoned decisions the Bernese courts based themselves on specific characteristics of the applicant's situation: after transferring his residence from Switzerland to Monte Carlo, he had frequently visited Germany, England, the United States and the island of Anguilla (where he was supposed to be the owner of a bank); he had thus established numerous close connections with foreign countries. Furthermore, he had stated on several occasions that he wished to go and live in the United States. There were certain indications that he still had considerable funds at his disposal outside his own country and possessed several different passports. As a solitary man who had no need of contacts, he would have had no difficulty in living in concealment outside Switzerland.

The Federal Court ... acknowledged that the danger of absconding decreased as the length of detention increased ... However, it considered that the factors specified by the indictments chamber left no real doubt as to W's intention of absconding and could legitimately suffice to demonstrate that such a danger still existed.

There is no reason for the Court to reach a different conclusion ...

► ***Mamedova v. Russia*, 7064/05, 1 June 2006**

76. The domestic courts gauged the applicant's potential to abscond by reference to the fact that her accomplice had gone into hiding. In the Court's view, the behaviour of a co-accused cannot be a decisive factor for the assessment of the risk of the detainee's absconding. Such assessment should be based on personal circumstances of the detainee. In the present case, the domestic courts did not point to any aspects of the applicant's character or behaviour that would justify their conclusion that she presented a persistent flight risk. The applicant, on the other hand, constantly invoked the facts mitigating the risk of her absconding. However, the domestic courts devoted no attention to discussion of the applicant's arguments that she had no criminal record, had a permanent place of residence and employment in Vladimir,

a stable way of life, two minor children, and that her father had been seriously ill. They did not address the fact that the applicant had had an opportunity to flee after the search of her flat but she had remained at the investigator's disposal. In these circumstances, the Court finds that the existence of the risk of flight was not established ...

► ***Aleksandr Makarov v. Russia, 15217/07, 12 March 2009***

125. In its decision of 5 February 2007 the Sovetskiy District Court for the first time relied on the information provided by the Tomsk Regional FSB Department and concluded that the applicant was planning to abscond, urging his relatives to sell property and buy foreign currency ... In every subsequent detention order the judicial authorities relied heavily on the applicant's potential to abscond, given the information provided by the FSB ...

126. The Court, however, cannot overlook the fact that the information from the FSB officials was not supported by any evidence (copies of sale-purchase contracts, State certificates showing change of ownership, bank records confirming the purchase of currency, and so on). The Court accepts that the extension of the applicant's detention may initially have been warranted for a short period to provide the prosecution authorities with time to verify the information presented by the FSB officials and to adduce evidence in support. However, with the passage of time the mere availability of the information, without any evidence to support its veracity, inevitably became less and less relevant, particularly so when the applicant persistently disputed his ability to abscond, alleging that no property had been sold or foreign currency bought and referring to his age, poor health, lack of a valid passport for travel or medical insurance and the fact that he had no relatives and did not own property outside the Tomsk Region to confirm that there was no danger of his absconding ...

127. ... the domestic authorities were under an obligation to analyse the applicant's personal situation in greater detail and to give specific reasons, supported by evidentiary findings, for holding him in custody ... The Court does not find that the domestic courts executed that obligation in the present case. It is a matter of serious concern for the Court that the domestic authorities applied a selective and inconsistent approach to the assessment of the parties' arguments pertaining to the grounds for the applicant's detention. While deeming the applicant's arguments to be subjective and giving no heed to relevant facts which mitigated the risk of his absconding, the courts accepted the information from the FSB officials uncritically, without questioning its credibility.

128. The Court further reiterates that the judicial authorities also cited the fact that the applicant had several places of residence in the Tomsk Region in support of their finding that he was liable to abscond. In this respect, the Court reiterates that the mere absence of a fixed residence does not give rise to a danger of absconding ... The Court further observes that the authorities did not indicate any other circumstance to suggest that, if released, the applicant would abscond ... The Court therefore finds that the existence of such a risk was not established.

Risk to administration of justice

► *W. v. Switzerland*, 14379/88, 26 January 1993

36. In order to demonstrate that a substantial risk of collusion existed and continued to exist until the beginning of the trial, the indictments chamber referred essentially to the exceptional extent of the case, the extraordinary quantity of documents seized and their intentionally confused state, and the large number of witnesses to be questioned, including witnesses abroad. It based a secondary argument on the personality of the applicant, whose behaviour both before and after his arrest reflected his intention of systematically deleting all evidence of liability, for example by falsifying or destroying accounts. According to the indictments chamber, there were also specific indications justifying the fear that he might abuse his regained liberty by carrying out acts, which would also be facilitated by the thorough entanglement of the sixty-odd companies controlled by him and his influence on their employees, namely eliminating items of evidence which were still hidden but whose probable existence followed from other documents, manufacturing false evidence, or conspiring with witnesses. Finally, the indictments chamber noted the extension in April 1987 of the investigation to offences which had been committed, and had originally been the subject of proceedings, in Germany ...

... the national authorities were entitled to regard the circumstances of the case as justification for using the risk of collusion as a further ground for the detention in issue.

► *I. A. v. France*, 28213/95, 23 September 1998

110. ... The Court finds it hard to understand how such risks [of pressure being brought to bear on witnesses and of evidence being destroyed] could fluctuate in such a way. It accepts nevertheless – as the competent judicial authorities noted – that they were apparent from the applicant's personality and his attitude during the investigation. However, although they thus justified the applicant's detention at the beginning, they necessarily gradually lost their relevance as the few witnesses in the case were interviewed and the investigations proceeded.

It is true that the inquiry conducted after the burglary of 4 May 1993 at Mr I.A.'s home revealed that it had been carried out at his behest with the aim of removing certain documents ... It can easily be understood how an event of that nature could lead the investigating authorities to fear that, if released, the accused might endeavour to conceal other evidence. It appears, however, from the case file that at the stage of the proceedings at which the burglary took place most of the evidence had already been gathered – moreover, on 24 October 1994 the investigating judge ordered the removal of the seals placed on the applicant's house ...

► *Kauczor v. Poland*, 45219/06, 3 February 2009

Furthermore, the Court observes that the risk that the applicant would tamper with the evidence was not sufficiently justified by the authorities when deciding to extend his pre-trial detention. The Court notes that the Government relied on a presumption that the applicant would obstruct the proceedings and tamper with evidence because he had not pleaded guilty to the offences charged. In so far as

the domestic courts appear to have drawn adverse inferences from the fact that the applicant had not pleaded guilty, the Court considers that their reasoning showed a manifest disregard for the principle of the presumption of innocence and cannot, in any circumstances, be relied on as a legitimate ground for deprivation of the applicant's liberty ...

47. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention ...

► ***Aleksandr Makarov v. Russia, 15217/07, 12 March 2009***

129. ... The Court observes that the domestic courts linked the applicant's liability to obstruct justice to his status as the mayor of Tomsk and the fact that a number of witnesses in the criminal case were his former subordinates working for the Tomsk mayor's office. The domestic courts also mentioned the threats that the applicant's relatives and confidants allegedly made against victims and witnesses.

130. ... the Court is mindful that the applicant's employment status was a relevant factor for the domestic courts' findings that there was a risk of tampering with witnesses. At the same time, it does not lose sight of the fact that the applicant was suspended from his position as mayor of Tomsk immediately after his arrest and that his release would not have led to his being reinstated in that position. Therefore, the Court entertains doubts as to the validity of that argument to justify the applicant's continued detention. Furthermore, the Court reiterates that for the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to his official authority. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at falsification or destruction of evidence or manipulation of witnesses ...

131. In this respect, the Court observes that it was not until 3 December 2007 that the Tomsk Regional Court for the first time supported its conclusion of the risk of collusion by making reference to the alleged attempts to tamper with witnesses committed by the applicant's relatives ... the text of the decision ..., apart from a bald reference to the threats which the applicant's relatives and confidants allegedly made against the witnesses, the Regional Court did not mention any specific facts warranting the applicant's detention on that ground.

132. However, more fundamentally, the Court finds it striking that relying on certain information, the domestic court did not provide the applicant with an opportunity to challenge it, for example, by having those witnesses examined ..., or at least by serving him with copies of their complaints or statements. It appears ... that the applicant was not even notified of the nature and content of the submissions lodged by the prosecution authorities to corroborate their assertion of witness manipulation. Moreover, the Court finds it peculiar that being informed of the intimidation, harassment or threats of retaliation against witnesses, the prosecution authorities did not institute criminal proceedings or at least open a preliminary inquiry into those

allegations. The Court observes ... that the domestic authorities did not take any actions against either the applicant or his relatives and confidants, that they were never subject to any form of investigation and were not even questioned about the alleged attempts to manipulate witnesses. The Court is therefore not convinced that the domestic authorities' findings of the applicant's liability to pervert the course of justice had sufficient basis in fact.

133. Furthermore, the Court notes that the pre-trial investigation in respect of the applicant was completed at the end of August 2007 ... He remained in custody for an additional eighteen months during which the proceedings were pending before the trial court. It thus appears that the domestic authorities had sufficient time to take statements from witnesses in a manner which could have excluded any doubt as to their veracity and would have eliminated the necessity to continue the applicant's deprivation of liberty on that ground ... The Court therefore considers that, having failed to act diligently, the national authorities were not entitled to regard the circumstances of the case as justification for using the risk of collusion as a further ground for the applicant's detention.

► ***Lutsenko v. Ukraine*, 6492/11, 3 July 2012**

70. The next ground for the applicant's detention was alleged pressure put on a witness through the applicant's interviews with the media. The Government argued that protection of witnesses had been the most important consideration in deciding on the applicant's detention. The Court notes, however, that neither the domestic authorities nor the Government themselves explained in what way the witnesses had been actually threatened by the applicant's public statements and why the detention could be considered an adequate response to such statements. It appears that this ground was stated by the investigating authorities in the broader context of their dissatisfaction with the applicant's presentation to the media of his opinion concerning the criminal proceedings against him. The Court considers that, being a prominent political figure, the applicant could be expected to express his opinion on this matter and that this would interest both his supporters and opponents.

71. Although freedom of expression is not absolute and may be restricted, any such restriction should be proportionate. In this respect the Court reiterates that the imposition of a prison sentence for a media-related offence will be compatible with 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 cases of hate speech or incitement to violence ... The Court considers that in the circumstances of the instant case there was no justification for the deprivation of the applicant's liberty for exercising his freedom of speech which did not constitute any offence.

► ***Amirov v. Russia*, 51857/13, 27 November 2014**

109. In the decisions extending the detention it was emphasised that the fears of collusion were founded on the specific, fear-spreading and order-challenging nature of the crimes and the circumstances surrounding the criminal offences with which the applicant was charged. Those included the organisation of a terrorist attack on a civilian aircraft and the commissioning of murders of various public officials,

including representatives of the law-enforcement bodies who had investigated criminal activities in Makhachkala. The national courts stressed the organised nature of the crimes, involving eleven apprehended defendants and a number of suspects still on the run. Moreover, they could not disregard the fact that the criminal group itself was comprised of public officials and law-enforcement officers. The authorities considered the risk of pressure being brought to bear on the parties to the proceedings to be real, and in such circumstances insisted on the necessity to keep the applicant detained in order to prevent him from disrupting the criminal proceedings. The Court reiterates that the fear of reprisal, justifiable in the present case, can often be enough for intimidated witnesses to withdraw from the criminal justice process altogether. The Court observes that the domestic courts carefully balanced the safety of the witnesses and victims who had already given statements against the applicant, together with the prospect of other witnesses' willingness to testify, against the applicant's right to liberty ...

110. ... the domestic courts cited specific facts in support of their conclusion that the applicant might interfere with the proceedings, having assessed the evolving circumstances and the changes that affected the applicant's situation in the course of his detention. They also considered the possibility of applying alternative measures, but found them to be inadequate ...

111. The Court believes that the authorities were faced with the difficult task of determining the facts and the degree of responsibility of each of the defendants who had been charged with taking part in the organised criminal acts. In these circumstances, the Court also accepts that the need to obtain voluminous evidence from many sources, coupled with the existence of a general risk flowing from the organised nature of the applicant's alleged criminal activities, constituted relevant and sufficient grounds for extending the applicant's detention for the time necessary to complete the investigation, draw up a bill of indictment and hear evidence from the accused and witnesses in court. The Court does not underestimate the need for the domestic authorities to take statements from witnesses in a manner that excludes any doubt as to their veracity. The Court thus concludes that, in the circumstances of this case, the risk of the applicant interfering with the course of justice actually did exist, and it justified holding him in custody ... The Court concludes that the circumstances of the case as described in the decisions of the domestic courts, including the applicant's personality and the nature of the crimes with which he was charged, reveal that his detention was based on "relevant" and "sufficient" grounds.

Risk of further offences

► *Muller v. France*, 21802/93, 17 March 1997

44. As far as the danger of reoffending is concerned, a reference to a person's antecedents cannot suffice to justify refusing release ...

► *Aleksandr Makarov v. Russia*, 15217/07, 12 March 2009

134. In a number of the detention orders the domestic courts cited the likelihood that the applicant would reoffend as an additional ground justifying his continued

detention. In this connection, the Court observes that the judicial authorities did not mention any specific facts supporting their finding that there existed a risk of the applicant's reoffending. Furthermore, the Court does not share the national authorities' opinion that in a situation when all charges against the applicant, save for one, were brought against him in respect of his actions as the mayor of Tomsk and he was suspended from that position, there was a real danger of the applicant committing new offences.

► ***Nerattini v. Greece*, 43529/07, 18 December 2008**

24. ... the Court notes that the Indictment Division of the Samos Criminal Court stated that the fact that during the search of the applicant's house a significant number of antiquities was found, "demonstrates the perpetrator's propensity to commit further offences relating to antiquities". In the Court's view, it is clear that, according to this statement, the applicant had already committed several thefts of antiquities and it was probable that he would repeat such offences in the future. However the Court points out that, until that time, the applicant had not been formally accused of or tried for such acts. In fact, when he was brought before the Public Prosecutor, on 18 August 2007, the applicant was only charged with having received a packet containing cannabis and the supplementary charges were laid against him several months later.

25. In view of the above, the Court considers that decision no. 49/2007 of the Indictment Division of the Samos Criminal Court reflected the opinion that the applicant was guilty of misappropriation of antiquities, a crime that he was not even formally accused of at that time. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to the presumption of innocence has been breached.

There has accordingly been a violation of Article 6 § 2 of the Convention.

► ***Perica Oreb v. Croatia*, 20824/09, 31 October 2013**

146. ... the presumption of innocence cannot cease to apply while the appeal proceedings are still pending simply because the accused was convicted at first instance. To conclude otherwise would contradict the role of appeal proceedings, where the appellate court is required to re-examine the earlier decision submitted to it as to the facts and the law ...

147. The Court considers, in this connection, that only a formal finding of a previous crime, that is, a final conviction, may be taken as a reason for ordering pre-trial detention on the ground that someone has previously been convicted. To consider the mere fact that there are other, separate and still pending, criminal proceedings against the person concerned as a conviction would unavoidably imply that he or she was guilty of the offences that were the subject of those proceedings. This is exactly what happened in the present case where the national courts repeatedly stated that the applicant had already been convicted of similar offences even though his criminal record clearly indicated that he had not been convicted of any offences. Furthermore, they also considered the fact that parallel criminal proceedings were pending against him as a relevant factor in assessing the risk of his reoffending and

considered that that fact showed a lack of conformity of his lifestyle with the laws, thus implying that he was guilty of the offences that were the subject of those proceedings. They thus repeatedly breached the applicant's right to be presumed innocent in the said separate proceedings pending concurrently ...

148. There has accordingly been a violation of Article 6 § 2 of the Convention.

Threat to public order and protection of detainee

► *I. A. v. France*, 28213/95, 23 September 1998

104. ... The Court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises ... the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition, detention will continue to be legitimate only if public order actually remains threatened; its continuation cannot be used to anticipate a custodial sentence ...

The above conditions have not been satisfied in the present case, since those of the decisions in issue which go some way towards substantiating this ground do no more than refer in an abstract manner to the nature of the crime concerned, the circumstances in which it was committed and, occasionally, the reactions of the victim's family ...

108. The Court accepts that in some cases the safety of a person under investigation requires his continued detention, for a time at least. However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place ...

This ground was ... cited intermittently by the judicial authorities, as if the dangers threatening the applicant regularly disappeared and reappeared.

Moreover, the few decisions which refer to factors that might explain why there was a need to protect the applicant mention the risk of "revenge attacks by the victim's family" or "reprisals" ... or the "fear" expressed by the applicant on account of the "frequently barbaric and unjust [Lebanese] customs" ... In particular, they omit to specify why there was such a need when almost all the victim's family lived in Lebanon.

► *Aleksandr Makarov v. Russia*, 15217/07, 12 March 2009

137. ... Apart from the fact that Russian law does not list the notion of disturbance to public order among permissible grounds for detention of accused persons, the Court notes that the Government relied on the alleged danger to public order from a purely abstract point of view, relying solely on the gravity of the offences allegedly committed by the applicant. They did not provide any evidence or indicate any

instance which could show that the applicant's release could have posed an actual danger to public order.

Automatic exclusion from consideration for release

► *Caballero v. United Kingdom* [GC], 32819/96, 8 February 2000

18. The applicant claimed that the automatic denial of bail pending his trial pursuant to section 25 of the Criminal Justice and Public Order Act 1994 ... constituted a violation of Article 5 § 3 of the Convention ...

20. ... In their memorial to the Court, the Government conceded that there had been a violation of those provisions.

21. The Court accepts the Government's concession that there has been a violation of Article 5 §§ 3 ... of the Convention ...

► *Boicenco v. Moldova*, 41088/05, 11 July 2006

135. ... under section 191 of the Moldovan Criminal Procedure Code no release pending trial is possible for persons charged with intentional offences punishable with more than 10 years' imprisonment ...

138. Accordingly, the Court concludes that there has been a violation Article 5 § 3 of the Convention in that under section 191 of the Code of Criminal Procedure it was not possible for the applicant to obtain release pending trial.

Need to set a time limit

► *Kharchenko v. Ukraine*, 40107/02, 10 February 2011

74. The Court considers that the absence of any precise provisions laying down whether, and under what conditions, detention ordered for a limited period at the investigation stage can properly be extended at the stage of the court proceedings, does not satisfy the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention. It also reiterates that the practice which developed in response to the statutory lacuna whereby a person may be detained for an unlimited and unpredictable time without the detention being based on a specific legal provision or on any judicial decision, is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law ...

75. The Court observes that, although the court upheld the pre-trial detention measure in respect of the applicant on 15 October 2001, it did not set a time-limit for his continued detention and did not give any reasons for its decision ... This left the applicant in a state of uncertainty as to the grounds for his detention after that date. In this connection the Court reiterates that the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 ... In these circumstances, the Court considers that the

District Court decision of 15 October 2001 did not afford the applicant the adequate protection from arbitrariness which is an essential element of the “lawfulness” of detention within the meaning of Article 5 § 1 of the Convention, and that therefore the applicant’s detention after 15 October 2001 was likewise not in accordance with Article 5 § 1 of the Convention.

DUTY TO TAKE ACCOUNT OF DETAINEE’S STATE OF HEALTH

► *Bonnechaux v. Switzerland (rep.)*, 8224/78, 5 December 1979

88. The Commission cannot rule out the possibility that the detention for 35 months of a person aged 74, suffering from diabetes and cardio-vascular disorders might in certain circumstances raise problems in regard to Article 3 ...

The Commission has no information enabling it to criticise the conditions in which the applicant was detained or causing it to doubt that he had access to the medical care his state of health required.

USE OF ALTERNATIVES

Duty to consider

► *Zherebin v. Russia*, 51445/09, March 2016

58. ... In addition to citing the seriousness of the charges as a reason underlying the applicant’s remand in custody, the domestic authorities, in the present case, considered that the applicant might abscond or interfere with the administration of justice owing to a lack of employment or a known place of residence. The Court might accept these grounds as relevant. However, it cannot find them decisive given that the judicial decisions authorising the applicant’s detention remained silent as to why those risks could not have been offset by any other means of ensuring his appearance at trial.

59. The Court further notes in this regard that the domestic courts refused to consider the guarantee statements signed by persons agreeing to vouch for the applicant, doubting their authenticity. They also cited, without any reference to the applicable rules of criminal procedure, the applicant’s failure to submit those documents to the investigator. The Court finds such argument unconvincing. It cannot establish, accordingly, that the authorities gave proper consideration to the possibility of ensuring the applicant’s attendance by the use of other “preventive measures” which are expressly provided for in Russian law to ensure the proper conduct of criminal proceedings, such as release on bail or house arrest.

60. Lastly, the Court points out that the domestic authorities, in refusing to release the applicant, argued that he had failed to furnish evidence to disprove the prosecution’s allegations as to the existence of the risk that he might abscond or interfere with the administration of justice ... In this connection, the Court reiterates that it has repeatedly considered the practice of shifting the burden of proof to the detained person in such matters to be tantamount to overturning the rule of Article 5 of the

Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases ...

62. Having regard to the above, the Court considers that by failing to consider alternative “preventive measures”, relying essentially on the seriousness of the charges, and by shifting the burden of proof to the applicant, the authorities extended his detention on grounds which, although “relevant”, cannot be regarded as “sufficient” to justify its duration ...

63. There has accordingly been a violation of Article 5 § 3 of the Convention.

Bail

► *Letellier v. France*, 12369/86, 26 June 1991

46. When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security ...

The Court notes ... that the indictments divisions did not establish that this was not the case in this instance.

► *Bonnechaux v. Switzerland (rep.)*, 8224/78, 5 December 1979

74. ... As the amount of bail has to be fixed having regard primarily to the suspected person’s assets ..., the latter cannot maintain that his detention has been prolonged by the demand for excessive bail when he has failed to furnish the information essential for the fixing of its amount. In other words, an accused whom the judicial authorities declare themselves prepared to release on bail must faithfully furnish sufficient information, that can be checked if need be, about the amount of his assets, so that the authorities can assess the amount of bail to be fixed ...

► *W. v. Switzerland*, 14379/88, 26 January 1993

33. ...the circumstances of the case and the applicant’s character entitled the relevant courts to decline his offer to provide security of 18 May 1988 (something which he was still refusing to do a short time previously, on 1 February): both the amount (CHF 30,000) and the unknown provenance of the money to be paid meant that it was not a fit guarantee that the applicant would decide not to abscond in order not to forfeit it ...

Finally, the fact that once convicted the applicant returned to prison after each leave cannot retrospectively invalidate the view taken by the courts.

► *Punzelt v. Czech Republic*, 31315/96, 25 April 2000

85. The Court notes that during the relevant period the Czech courts rejected the applicant’s offers to pay securities of up to 15,000,000 Czech korunas (CZK) as they did not consider it a sufficient guarantee for the applicant’s appearance for trial.

On one occasion the City Court expressed its readiness to consider releasing the applicant, in view of his health problems, if he paid a security of CZK 30,000,000. In its decision the City Court pointed out that the applicant had issued two uncovered cheques amounting to the equivalent of CZK 28,400,000, that prior to his arrest he had intended to buy two department stores for CZK 338,856,000 and 236,000,000, and that he had undertaken to pay for them by instalments of CZK 150,000,000.

86. Having considered the particular circumstances of the case, the Court finds that neither the repeated refusal of release on bail nor the eventual imposition of a security of CZK 30,000,000, given the scale of the applicant's financial transactions, infringed the applicant's rights under Article 5 § 3 ...

► ***Iwańczuk v. Poland*, 25196/94, 15 November 2001**

69. The Court notes that the applicant promptly complied with his obligation to provide relevant information as to his assets. It was only the assessment of the actual sum of the bail to be deposited, that the courts kept changing. The main difficulty, however, consisted in determining the form of the bail, i.e. whether it should be deposited in cash, in State bonds or by way of mortgage on the applicant's real property. Regard must be had to the fact that the authorities at a certain point refused that the bail be deposited in the form of mortgage, without questioning the applicant's title to the property concerned. This, in the Court's view, implies that the authorities were reticent to accept the bail, which, in case of the applicant's non-appearance for the trial, would require undertaking certain formalities in order to seize the assets. This in itself, in the Court's opinion, cannot be regarded as sufficient ground on which to maintain for four months the detention on remand which had already been deemed unnecessary by the decision of the competent judicial authority.

70. In view of the fact that the proceedings relating to the amount and the modalities of payment of the bail, lasted as long as four months and fourteen days, whereas the applicant remained in detention throughout this period, after the decision was taken that his further detention was unnecessary, and that no adequate reasons were forwarded by the authorities to justify successive changes of decisions concerning the form in which bail was to be deposited, the Court finds that there has been a violation of Article 5 § 3 of the Convention.

► ***Mangouras v. Spain*, 12050/04, 8 January 2009**

38. The Court notes that the applicant was deprived of his liberty for eighty-three days and that he was released following the deposit of a bank guarantee of EUR 3,000,000 corresponding to the amount of bail demanded ...

39. The Court accepts that the amount of bail fixed was high. It observes, however, that it was paid by the London Steamship Owners' Mutual Insurance Association. The latter were the insurers of the *Prestige's* owner ..., who was also the applicant's employer ...

42. The Court considers that account has to be taken of the particular circumstances of the case, namely the specific nature of the offences committed in the context of a "hierarchy of responsibilities" peculiar to the law of the sea and, in particular, to

offences against the marine environment, which distinguish this case from others in which it has had occasion to examine the length of pre-trial detention. In that regard, the Court takes the view that the seriousness of the natural disaster justified the domestic courts' concern to determine who was responsible and, accordingly, that it was reasonable for them to try to ensure that the applicant would appear for trial by fixing a high level of bail.

44. In view of the foregoing, the Court considers that the domestic authorities provided sufficient reasons for finding that the amount of bail demanded from the applicant was proportionate and took sufficient account of his personal circumstances, and in particular his status as an employee of the ship's owner which, in its turn, was insured against eventualities of this kind ... It takes the view that the amount of bail in the instant case, although high, was not disproportionate in view of the legal interest being protected, the seriousness of the offence and the disastrous consequences, both environmental and economic, stemming from the spillage of the ship's cargo.

► ***Gatt v. Malta*, 28221/08, 27 July 2010**

38. The Court notes that the applicant did not comply with the court order of 6 June 2006 ordering him to pay EUR 23,300 and was consequently imprisoned for two thousand days.

42. The purpose of the court order was to secure payment of an amount due to the authorities by way of a penalty for breaching bail conditions. The Court considers that monetary guarantees are indispensable to ensure respect for the right to liberty when remand in custody is envisaged. It notes however that in 2006 the applicant was indigent and unable to pay the said amount, although he might have been able to do so when he assented to the obligation in 2001. Indeed, it would have been reasonable for the applicant to assume that the proceedings against him would not have lasted over five years. The Court observes that the applicant had been under strict bail conditions ... for nearly five years. Thus, it is plausible to conclude that he had been unable to earn a living during that period. In such circumstances, it was unrealistic to expect that the applicant would be able to comply with the court order.

43. The Court further notes that in the cases examined under the first limb of Article 5 § 1 (b) the duration of the detention amounted to short periods, such as four days ... or one week ... and at maximum six months ... In the present case, the detention for non-compliance with a court order has so far amounted to over four years and is set to last for over five years and six months in total. Moreover, this period was not subject to remission, as would have been the case had the applicant been detained after conviction (Article 5 § 1 (a)). Nor was this period of detention subject to the guarantees of Article 5 § 3, as would have been the case had the applicant been remanded in custody on suspicion of having committed a crime (Article 5 § 1 (c)). In light of the above, the Court considers that a period of detention of more than five years and six months (two thousand days) for failure to comply with a court order to pay EUR 23,300 as a result of a single breach of curfew imposed as a bail condition cannot be considered to strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court and the importance of the right to liberty.

44. In consequence, in so far as it is based on this ground, the applicant's entire period of detention cannot be said to have been in accordance with Article 5 § 1 of the Convention.

45. The Court must nevertheless consider whether the detention was Convention compatible on the basis of the second ground invoked by the Government, namely the second limb of Article 5 § 1 (b) "in order to secure the fulfilment of any obligation prescribed by law" ...

51. In conclusion, the Court considers that in the circumstances of the present case, and especially on account of its duration, the applicant's detention was disproportionate. In particular, the law as applied in the applicant's case failed to strike a balance between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty.

52. Accordingly, the Court finds a violation of Article 5 § 1 of the Convention.

► ***Lavrechov v. Czech Republic, 57404/08, 20 June 2013***

47. ... the Court first notes that the bail of approximately EUR 400,000 is a substantial amount of money. However, the appropriate time for discussing the proportionality of the amount of security for bail is when the bail is set ... not when it is forfeited. In the present case the applicant does not contend that the initial bail was unreasonable, and indeed the Court notes that he was apparently able to provide the security swiftly and without undue hardship.

48. The main issue in the case is whether acquittal should play a role in a decision that bail should be forfeited. In this context it observes that the purpose of the bail is to ensure the proper conduct of criminal proceedings, and in particular to ensure that the accused appears at the hearing ...

49. However, the conduct of the criminal proceedings was significantly hampered by the applicant's non-compliance with the bail conditions. The applicant failed to appear at any of the scheduled hearings, and failed to assist the court in any way, even though he must have been aware that he was in breach of his bail conditions. Hearings had to be cancelled several times, which resulted in the length of the proceedings being considerably extended and the Regional Court being faced with serious difficulties in its attempts to serve the applicant with documents.

50. It must further be noted that the fact that the applicant was acquitted does not in itself mean that his prosecution was illegal or otherwise tainted in the first place ... there may well be cases of reasonable suspicion which at trial do not result in a conviction beyond reasonable doubt. Nevertheless, in these situations the State still has a legitimate interest in the proper conduct of the proceedings and in ensuring that individuals in respect of whom there exists a reasonable suspicion that they have committed a crime do not try to evade justice or undermine the smooth conduct of the proceedings in which their guilt or otherwise is to be assessed.

51. Therefore, the outcome of the proceedings has no direct relevance to the question of forfeiture of the bail. The question is rather whether forfeiture was proportionate given the breach of bail conditions during the proceedings.

52. The Court observes that the bail in the present case was not forfeited because of the impossibility of delivering a single document to the applicant. The High Court concluded that the applicant had been avoiding criminal prosecution by staying out of the country for several years. The Court considers that even though originally the applicant may have had objective reasons for not attending the hearings, this cannot be said of the period after he acquired a new passport.

53. The applicant was given ample opportunity to appear at the trial. The hearings were rescheduled several times. The applicant received his passport, according to his version of the events, in April 2003, and the decision to hold the trial *in absentia* was taken only in December 2005. He had thus had at least two years and eight months to enter into contact with the Regional Court so that it could set a date for a hearing for which he could travel to the Czech Republic. In these circumstances the High Court's finding that the applicant's own behaviour had shown that he had been avoiding his criminal prosecution does not seem unreasonable.

54. In these circumstances – that is, where the applicant must have been aware of the fact that he was in breach of his bail conditions for a substantial period of time – it was incumbent on him to inform the Regional Court clearly and unequivocally of his address in Russia and to remain in regular contact with it in order to counter-balance the difficulties with delivery of official documents to Russia which needed to be considered under the European Convention on Mutual Assistance in Criminal Matters. The applicant failed to do so. The letter from the applicant's lawyer of 8 July 2002 cannot be considered sufficient in these circumstances. The letter only noted where the applicant had his official registered address in Russia, but it did not in any way indicate where he wanted to receive his correspondence. Furthermore, on 2 September 2004 the applicant informed the court that he was unable to attend a hearing because he had health problems and new lawyers, but still failed to give an address for service in Russia.

55. Lastly, the Court adds that the forfeiture, that is the interference in question, was the result of fully adversarial proceedings at which the applicant was able to present his arguments. The domestic courts carefully scrutinised the pertinent issues and reasoned their decisions comprehensively ... The procedural requirements of Article 1 of Protocol No. 1 ... were thus complied with.

56. Having regard to the above considerations, the Court considers that the decision to forfeit the applicant's bail did strike a "fair balance" between the demands of the general interest of the community and the requirements of the applicant's rights in the circumstances of the case.

57. There has accordingly been no violation of Article 1 of Protocol No. 1.

House arrest

► *Mancini v. Italy*, 44955/98, 2 August 2001

17. ... in view of their effects and their manner of implementation, both imprisonment and house arrest amounted to a deprivation of the applicants' liberty for the

purposes of Article 5 § 1 (c) of the Convention. The present case therefore concerns the delay in substituting for detention in prison a more lenient security measure ...

19. ... Although it is true that under certain circumstances transfer from one psychiatric hospital to another may result in a significant improvement in the patient's overall situation, the fact remains that such a transfer in no way alters the type of deprivation of liberty to which an applicant is subjected. The same cannot be said of replacing detention in prison with house arrest because this entails a change in the nature of the place of detention from a public institution to a private home. Unlike house arrest, detention in prison requires integration of the individual into an overall organisation, sharing of activities and resources with other inmates, and strict supervision by the authorities of the main aspects of his day-to-day life.

► ***Vachev v. Bulgaria, 42987/98, 8 July 2004***

64. The present case does not concern detention pending trial, but house arrest. Nevertheless, the Court finds no material difference with the cases cited above. It has not been disputed by the parties that the applicant's house arrest constituted deprivation of liberty within the meaning of Article 5 ... Therefore, in accordance with paragraph 3 of that Article, he was entitled to be brought promptly before a judge or other officer authorised by law to exercise judicial power. The investigator who ordered the applicant's house arrest ... cannot be considered such an officer as he was not sufficiently independent and impartial for the purposes of Article 5 § 3, in view of the practical role that he played in the prosecution. The Court refers to its analysis of the relevant domestic law contained in its *Nikolova* judgment ...

65. It follows that there has been an infringement of the applicant's right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention.

► ***Buzadji v. Republic of Moldova [GC], 23755/07, 5 July 2016***

111. The Government submitted that lesser reasons were required in order to justify house arrest than detention in an ordinary remand facility because the former measure was more lenient than the latter.

112. It is true that in most cases house arrest implies fewer restrictions and a lesser degree of suffering or inconvenience for the detainee than ordinary detention in prison ... Therefore, when faced with a choice between imprisonment in a detention facility and house arrest, as in the present case, most individuals would normally opt for the latter.

113. However, the Court notes that no distinction of regime between different types of detention was made in the *Letellier* principles ... It further reiterates that in *Lavents* ..., where the Court was called upon to examine the relevance and sufficiency of reasons for depriving the applicant of liberty pending trial for a considerable period of time, the respondent Government had unsuccessfully argued that different criteria ought to apply to the assessment of the reasons for the impugned restriction on liberty as the applicant had been detained not only in prison but also been held in house arrest and in hospital. The Court dismissed the argument, stating

that Article 5 did not regulate the conditions of detention, referring to the approach previously adopted in Mancini ... and other cases cited therein. The Court went on to specify that the notions of "degree" and "intensity" in the case-law, as criteria for the applicability of Article 5, referred only to the degree of restrictions to the liberty of movement, not to the differences in comfort or in the internal regime in different places of detention. Thus, the Court proceeded to apply the same criteria for the entire period of deprivation of liberty, irrespective of the place where the applicant was detained.

114. The Court finds no reason to adopt a different approach in the present case. In its view, it would hardly be workable in practice were one to assess the justifications for pre-trial detention according to different criteria depending on differences in the conditions of detention and the level of (dis)comfort experienced by the detainee. Such justifications should, on the contrary, be assessed according to criteria that are practical and effective in maintaining an adequate level of protection under the Article 5 without running a risk of diluting that protection. In short, the Court finds it appropriate to follow the same approach as in Lavents for its examination of the present case.

Compulsory residence order

► *Ciancimino v. Italy (dec.)*, 12541/86, 27 May 1991

2. ...The Commission considers that, having regard to the particularly serious nature of the threat to "ordre public" posed by criminal organisations and the importance of crime prevention in connection with persons suspected of belonging to the mafia, compulsory residence measures can in principle be regarded as necessary in a democratic society in pursuit of the aims mentioned above

... the Commission notes that the applicant's "dangerousness" has been assessed during judicial proceedings which are still pending ... and that in those proceedings the rights of the defence have been fully respected It further notes that in the case under consideration the application of such measures, which are the subject of separate proceedings, is nevertheless also connected with criminal proceedings against the applicant, who faces various charges in three separate criminal trials

That being so, the Commission considers that there was no disproportion between the aim pursued and the measure adopted in the applicant's case. It follows that, when examined from the standpoint of Article 2 of Protocol No 4 to the Convention, the applicant's complaint is manifestly ill-founded ...

► *Fedorov and Fedorova v. Russia*, 31008/02, 13 October 2005

40. The Court finds, however, that the circumstances of the present case are sufficiently different to enable it to distinguish this case from the cases discussed above on the following points.

41. First, in the present case the applicants were the subject of criminal proceedings. The Court notes that it is not in itself questionable that the State may apply various preventive measures restricting the liberty of an accused in order to ensure

the efficient conduct of a criminal prosecution, including a deprivation of liberty. In the Court's view, an obligation not to leave the area of one's residence is a minimal intrusive measure involving a restriction of one's liberty ...

42. Second, the preventive measure was not automatically applied for the whole duration of the criminal proceedings against the applicants ... Accordingly, the obligation not to leave the place of residence was imposed on the first applicant for a period of 5 years, 10 months and 17 days, out of which 4 years, 3 months and 8 days fall within the Court's competence *ratione temporis*. The same measure was applied in respect of the second applicant during approximately 4 years and 6 months, out of which 4 years, 3 months and 8 days fall within the Court's temporal jurisdiction.

43. Third, as follows from the above calculations, the period when the applicants were subjected to the restriction at issue was significantly shorter than the one in *Luordo* and the subsequent cases against Italy.

44. Taking into account the above considerations, the Court finds that in the circumstances of the present case the mere duration of the application of the preventive measure is insufficient for the Court to conclude that it was disproportionate. In order to decide whether a fair balance was struck between the general interest in the proper conduct of the criminal proceedings and the applicants' personal interest in enjoying freedom of movement, by contrast to *Luordo* and the subsequent cases against Italy, the Court must ascertain whether the applicants actually sought to leave the area of their residence and, if so, whether permission to do so was refused.

45. The parties agreed that the first applicant had twice applied for permission to leave the Kargasok district, and that both times the permission had been granted. The applicants contended, however, that they had sought to leave their place of residence on a number of other occasions but permission had been refused ...

46. The Court notes, however, that the applicants did not provide any evidence to show that they had actually applied to domestic authorities for permission to leave their place of residence on other occasions ... In the absence of any evidence that the applicants had filed any other applications to leave the place of their residence and, consequently, that any such applications had been refused, the Court can not reach the conclusion that a fair balance between the demands of the general interest and the applicants' rights was upset. Accordingly, the Court finds that ... the restriction on the applicants' freedom of movement was not disproportionate.

47. In conclusion, there has been no violation of Article 2 of Protocol No. 4 to the Convention.

Travel restrictions

► *Kotiy v. Ukraine*, 28718/09, 5 March 2015

72. ... the selected preventive measure obliged the applicant to reside at a specific address in Ukraine and ignored the possibility that the applicant might continue to live in Germany, where he pursued his professional activities and where he and his family had settled several years before. Even occasional travels abroad were impossible,

since the applicant's international travel passports had been seized. Accordingly, in the specific circumstances of the applicant's case, the written undertaking not to abscond was not a minimally intrusive measure, as maintained by the Government, but in fact amounted to an extensive interference with the applicant's private and family life. The fact that at the time of his arrest the applicant was allegedly temporarily unemployed does not mitigate the interference. As to the Government's contention that the applicant's family could have moved to Ukraine in order to overcome the restriction on the family life imposed by the domestic authorities, the Court considers that the resettlement of the applicant's family, including his children, would not have been a balanced solution, taking into account the other preventive measures available and the interests of the family. Meantime, the domestic authorities failed to make assessment of the other non-custodial preventive measures available in domestic law – such as bail, for example – which could have been less detrimental to the applicant's private and family life.

73. The fact that the applicant did not apply to the investigator asking for permission to leave his registered place of residence or return the passports does not appear to be significant, given that such an application could not be considered to constitute an effective remedy or method of addressing the substance of the applicant's complaint. Moreover, the applicant cannot be reproached for not having raised the matter at the domestic level bearing in mind that he had, for example, challenged the decisions to initiate criminal proceedings against him and that this action, if successful, could eventually have resolved the issue of the impugned measures.

74. Lastly, assessing the necessity of the restrictive measures in the context of their duration, the Court takes note of the applicant's contention that from the moment he gave the written undertaking not to abscond (24 November 2008) until his application to the Court (23 May 2009) he was not called upon by the investigator to take part in any investigatory procedure. This allegation has not been refuted by the Government.

75. In the light of the above considerations, the Court finds that by applying the impugned restrictive measures concerning the applicant, the domestic authorities failed to strike a fair balance between the applicant's right to respect for his private and family life, on the one hand, and the public interest in ensuring the effective investigation of a criminal case on the other.

Surrender of passport

► *Schmid v. Austria* (dec.), 10670/83, 9 July 1985

2. ... The applicant further alleges a breach of Article 2 of Protocol No. 4 to the Convention in that the continuing bail conditions, applied even after the applicant's release from detention ... prevented him from leaving the country and, because they involved denial of his travel papers, also prevented him from moving around within the country ... the Commission considers that the restrictions permitted by para. 3 of Article 2 of Protocol No. 4 must in the present case be read in conjunction with the final sentence of para. 3 of Article 5 of the Convention. The applicant was released pending trial and "guarantees to appear for trial" were imposed. The

Commission considers that there is no reason why those guarantees should be limited to monetary security. It further considers that in the circumstances the bail requirements, insofar as they restricted the applicant's choice of residence and his freedom to move within the country and abroad, were "in accordance with law and ... necessary in a democratic society ... for the prevention of crime ...". They were thus covered by para. 3 of Article 2 of Protocol No. 4.

► ***İletmiş v. Turkey*, 29871/96, 6 December 2005**

42. The Court considers that the confiscation by the administrative authorities of the applicant's passport and their failure to return it to him for a number of years amount to an interference with the applicant's exercise of his right to respect for his private life. Sufficiently close personal ties existed for there to have been a risk that they would be seriously affected by the confiscation measure ... It observes in this connection that the applicant had been living in Germany for seventeen years, had gone there at the age of 22 to study at university and had got married there, that his two children had been born there and that the whole family lived in Germany, where both spouses were employed as social workers ...

45. The Court also accepts that the withdrawal of the passport in 1992, at the time of the applicant's arrest, pursued at least one of the "legitimate aims" set out in Article 8, namely preserving "national security" and/or "the prevention of ... crime".

46. As to whether the measure was "necessary in a democratic society", that is, whether it corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued, the Court notes at the outset that the Convention finds no fault with preventive measures of this type ...

47. The Court considers, however, that the longer the proceedings went on without any progress being made and without any evidence against the applicant being produced, the less compelling the legitimate aim became. Likewise, with the passing of time the applicant's right to freedom of movement, considered here as an aspect of his right to respect for his private life, increasingly outweighed the imperatives of national security and the prevention of crime.

48. On this point the Court observes that, in the fifteen years of proceedings during which the applicant was prohibited from leaving the country, no evidence of any threat to national security or any risk of crime was adduced. That no such threat existed is confirmed by the fact that the Assize Court at no time ordered the applicant not to leave the country. Furthermore, the administrative authorities themselves never gave reasons for the impugned prohibition. The Court fails to see, therefore, how the simple fact that the applicant had been suspected in 1984 of belonging to an illegal organisation, or that the resulting proceedings were still pending, could possibly justify such harsh measures against him over a period of fifteen years in the absence of any concrete evidence that there was a real danger of him committing a crime. The Court also stresses that the applicant had no criminal record and was eventually acquitted of the charges against him, no material proof of his purported membership of the organisations concerned having been found in the course of the preliminary investigations or the trial.

49. Finally, the Court must consider the applicant's personal and family situation when he lived in Germany ... and take into account the extent of the uncertainty and upheaval in his life caused by the indefinite maintenance of the impugned measure.

50. At a time when freedom of movement, particularly across borders, is considered essential to the full development of a person's private life, especially when, like the applicant, the person has family, professional and economic ties in several countries, for a State to deprive a person under its jurisdiction of that freedom for no reason is a serious breach of its obligations.

The fact that "freedom of movement" is guaranteed as such under Article 2 of Protocol no. 4, which Turkey has signed but not ratified, is irrelevant given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols ...

The Court comes to the conclusion that, after a time ..., continuing to prohibit the applicant from leaving the country no longer answered a "pressing social need" and was therefore disproportionate in relation to the aims pursued, legitimate though they were under Article 8 of the Convention.

Accordingly, there has been a violation of Article 8 of the Convention.

Police supervision

► *Raimondo v. Italy*, 12954/87, 22 February 1994

39. ... In view of the threat posed by the Mafia to "democratic society", the measure [special police supervision] was in addition necessary "for the maintenance of ordre public" and "for the prevention of crime". It was in particular proportionate to the aim pursued, up to the moment at which the Catanzaro Court of Appeal decided, on 4 July 1986, to revoke it ...

... Even if it is accepted that this decision, taken in private session, could not acquire legal force until it was filed with the registry, the Court finds it hard to understand why there should have been a delay of nearly five months in drafting the grounds for a decision which was immediately enforceable and concerned a fundamental right, namely the applicant's freedom to come and go as he pleased; the latter was moreover not informed of the revocation for eighteen days.

40. The Court concludes that at least from 2 to 20 December 1986 the interference in issue was neither provided for by law nor necessary. There has accordingly been a violation of Article 2 of Protocol No. 4 ...

Parental supervision

► *Nikolov v. Bulgaria*, 38884/97, 30 January 2003

78. On 16 September 1997 the District Court did not order the applicant's unconditional release but his placement under parental supervision, within the meaning of Article 378 § 1(1) of the Code of Criminal Procedure ...

Under the relevant law, that meant that one of his parents had to make a declaration undertaking to supervise the applicant and secure his appearance before the competent authority. The authorities interpreted the law in the sense that release was only possible after the fulfilment of that condition, an approach which cannot be seen as unreasonable or unforeseeable ...

79. In accordance with Article 5 § 3 *in fine* of the Convention, release pending trial may be conditioned by guarantees. In such cases, continued deprivation of liberty for a certain period of time pending the giving of a recognisance or until the fulfilment of other lawful conditions set out in law or in a judicial decision is undoubtedly a continuation of the initial detention “effected for the purpose of bringing [the accused] before the competent legal authority on ... suspicion of having committed an offence ...” and falls under Article 5 § 1(c) of the Convention ...

81. The Government’s position was that the delay in the applicant’s release following the District Court’s decision of 16 September 1997 had two causes: regular administrative formalities and difficulties in locating the applicant’s mother who had to sign a declaration that she would secure her son’s appearance before the competent authority ...

82. The Court reiterates that administrative formalities connected with release cannot justify a delay of more than several hours ...

83. Further, the Court observes that the Government have not provided any details about the alleged difficulties in contacting the applicant’s mother. It is undisputed that her address was available ... The day on which she was eventually contacted and the day on which she signed the necessary papers have not been indicated. As a result, the Government have not established that the applicant was released immediately upon the fulfilment of the conditions attached to the District Court’s decision.

84. The Court thus finds that in the absence of a strict account of the relevant events, hour by hour, the Government’s position that the entire period of the applicant’s deprivation of liberty between 16 and 23 September 1997 fell under paragraph 1(c) of Article 5 must be rejected.

85. It follows that there has been a violation of Article 5 § 1 as regards the applicant’s deprivation of liberty between 16 and 23 September 1997.

REVIEW OF LAWFULNESS

Availability

► ***R. M. D. v. Switzerland, 19800/92, 26 September 1997***

52. ... it was not disputed that Mr R.M.D. could have made an application for release in each canton. Had he been detained in one canton only, the procedure would undoubtedly have satisfied the requirements of Article 5 § 4 of the Convention. The problem was not that remedies were unavailable in each of the cantons, but that they were ineffective in the applicant’s particular situation. Having been successively transferred from one canton to another, he was unable, owing to the limits of the

cantonal courts' jurisdiction, to obtain a decision on his detention from a court, as he was entitled to do under Article 5 § 4.

53. The explanation for that situation lies in the federal structure of the Swiss Confederation, in which each canton has its own code of criminal procedure ...

54. ... the Court considers that those circumstances cannot justify the applicant's being deprived of his rights under Article 5 § 4. Where, as in this instance, a detained person is continually transferred from one canton to another, it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that Article.

► ***König v. Slovakia*, 39753/98, 20 January 2004**

20. ... the Košice Regional Court convicted the applicant of two offences and sentenced him to a fixed term of imprisonment. However, the Regional Court did not ... rule on the request for release which the applicant had made prior to the delivery of the judgment. In the absence of any decision on that request the applicant continued to be held in detention on remand, technically, by virtue of a decision which had been taken on a different occasion prior to the delivery of the Regional Court's judgment.

21. In these circumstances, it cannot be held that the control required by Article 5 § 4 was incorporated in the Košice Regional Court's judgment from the moment of its delivery on 24 February 1997. Such control took effect only on 2 July 1997 when the Supreme Court dismissed the applicant's appeal and the Regional Court's judgment thus became final ...

► ***Öcalan v. Turkey* [GC], 46221/99, 12 May 2005**

70. As regards the special circumstances in which the applicant found himself while in police custody, the Court sees no reason to disagree with the Chamber's finding that the circumstances of the case made it impossible for the applicant to have effective recourse to the remedy referred to by the Government. In its judgment, the Chamber reasoned as follows ...:

"... Firstly, the conditions in which the applicant was held and notably the fact that he was kept in total isolation prevented him using the remedy personally. He possessed no legal training and had no possibility of consulting a lawyer while in police custody. Yet, as the Court has noted above ..., the proceedings referred to in Article 5 § 4 must be judicial in nature. The applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer.

... Secondly, as regards the suggestion that the lawyers instructed by the applicant or by his close relatives could have challenged his detention without consulting him, the Court observes that the movements of the sole member of the applicant's legal team to possess an authority to represent him were obstructed by the police ... The other lawyers, who had been retained by the applicant's family, found it impossible to contact him while he was in police custody. Moreover, in view of the unusual circumstances of his arrest, the applicant was the principal source of direct information on events in Nairobi that would have been relevant, at that point in the proceedings, for the purposes of challenging the lawfulness of his arrest.

... Lastly, solely with regard to the length of time the applicant was held in police custody, the Court takes into account the seriousness of the charges against him and the fact that the period spent in police custody did not exceed that permitted by the domestic legislation. It considers that, in those circumstances, an application on that issue to a district judge would have had little prospect of success.”

► ***Asenov v. Bulgaria, 42026/98, 15 July 2007***

75. The Court notes that the district court twice refused to hear applications for his release, on the ground that, although he remained in custody, technically he was no longer in detention pending trial but under an obligation to provide the required security.

76. The Court notes that the first of these refusals took place under the procedural regulations applicable at the time, which made no provision at the preliminary investigation stage for detention to be challenged in court when it resulted from failure to provide the required security. With regard to the second application, under the relevant domestic law ... the trial court before which the case was pending was competent to rule on it, but nonetheless refused to do so in the applicant’s case ...

78. In view of the circumstances of the instant case, it is clear that the applicant was deprived of the right to a remedy guaranteed by Article 5 § 4 of the Convention.

Speediness

► ***Letellier v. France, 12369/86, 26 June 1991***

56. The Court has certain doubts about the overall length of the examination of the second application for release, in particular before the indictments divisions called upon to rule after a previous decision had been quashed in the Court of Cassation; it should however be borne in mind that the applicant retained the right to submit a further application at any time. Indeed from 14 February 1986 to 5 August 1987 she lodged six other applications, which were all dealt with in periods of from eight to twenty days ...

57. There has therefore been no violation of Article 5 § 4 (art. 5-4).

► ***Baranowski v. Poland, 28358/95, 28 March 2000***

71. In that regard, the Court observes that the proceedings relating to the first application for release lasted ... approximately five months. The proceedings relating to the second started on 28 March 1994 and ran concurrently, lasting a little more than three months.

72. The Court accepts that the complexity of medical issues involved in an examination of an application for release can be a factor which may be taken into account when assessing compliance with the requirement of “speediness” laid down in Article 5 § 4. It does not mean, however, that the complexity of a medical dossier – even exceptional – absolves the national authorities from their essential obligations under this provision ...

73. In that context, the Court observes that it took the Łódź Regional Court some six weeks to obtain a report from a cardiologist and a further month to obtain evidence from a neurologist and a psychiatrist. Then the court needed yet another month to obtain other – unspecified – evidence ... Those rather lengthy intervals between the respective decisions to take evidence do not appear to be consistent with “special diligence” in the conduct of the proceedings, referred to by the Government in their memorial. The Court is not, therefore, convinced by the Government’s argument that the need to obtain medical evidence can explain the overall length of the proceedings. Accordingly, it finds that these proceedings were not conducted “speedily”, as required by Article 5 § 4.

► ***Mamedova v. Russia*, 7064/05, 1 June 2006**

96. The Court notes that it took the domestic courts thirty-six, twenty-six, thirty-six, and twenty-nine days to examine the applicant’s appeals against the detention orders ... Nothing suggests that the applicant, having lodged the appeals, caused delays in their examination. The Court considers that these four periods cannot be considered compatible with the “speediness” requirement of Article 5 § 4, especially taking into account that their entire duration was attributable to the authorities ...

97. There has therefore been a violation of Article 5 § 4 of the Convention.

Scope of review

► ***Nikolova v. Bulgaria* [GC], 31195/95, 25 March 1999**

61. The Plovdiv Regional Court when examining the applicant’s appeal against her detention on remand apparently followed the case-law of the Supreme Court at that time and thus limited its consideration of the case to a verification of whether the investigator and the prosecutor had charged the applicant with a “serious wilful crime” within the meaning of the Criminal Code and whether her medical condition required release ...

While Article 5 § 4 of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant’s submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the “lawfulness”, in the sense of the Convention, of the deprivation of liberty. The submissions of the applicant in her appeal of 14 November 1995 contained such concrete facts and did not appear implausible or frivolous. By not taking these submissions into account the Regional Court failed to provide the judicial review of the scope and nature required by Article 5 § 4 of the Convention.

► ***Grauslys v. Lithuania*, 36743/97, 10 October 2000**

54. ... the Court observes that the decisions of the domestic courts mentioned by the Government included no reference to the applicant’s numerous appeals about the unlawfulness of his detention ... Even in its decision to release the applicant, the Regional Court refused to examine the applicant’s allegations of breaches of

domestic law and the Convention because of the bar created by Article 372 § 4 of the Code of Criminal Procedure then in force, and did not specify any reasons for the applicant's release ... The release order could thus be interpreted as an acknowledgement that the lawfulness of the applicant's remand was open to question, but it did not constitute an adequate judicial response for the purposes of Article 5 § 4 ...

Periodicity

► *Herczegfalvy v. Austria*, 10533/83, 24 September 1992

75. ... According to the Court's case-law on the scope of paragraphs 1 and 4 of Article 5 ... of the Convention, in order to satisfy the requirements of the Convention such a review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 ..., namely to protect the individual against arbitrariness. The latter condition implies not only that the competent courts must decide "speedily" ... but also that their decisions must follow at reasonable intervals ...

77. In this case the three decisions taken under Article 25 (3) of the Criminal Code were taken at intervals of fifteen months ..., two years ... and nine months ... respectively. The first two decisions cannot be regarded as having been taken at reasonable intervals, especially as the numerous requests for release submitted at that time by Mr Herczegfalvy brought no response ...

78. In short, there was a violation of Article 5 para. 4 ...

► *Egmez v. Cyprus*, 30873/96, 21 December 2000

94. The Court recalls that Article 5 § 4 of the Convention requires a procedure of a judicial character with guarantees appropriate to the kind of deprivation of liberty in question ... It is not excluded that a system of automatic periodic review of the lawfulness of the detention by a court may ensure compliance with the requirements of Article 5 § 4 ...

95. The Court notes that, following the hearing in Larnaka Hospital on 8 October 1995, the lawfulness of the applicant's detention was reviewed on two occasions, automatically on 16 October 1995 and, further to an application for provisional release, on 20 October 1995. The applicant was legally represented on both occasions. It follows that there was no breach of Article 5 § 4 of the Convention.

Access to file

► *Mooren v. Germany* [GC], 11364/03, 9 July 2009

121. The Chamber found that the applicant had not had an opportunity adequately to challenge the findings of the domestic courts in their decisions ordering his detention as required by the principle of "equality of arms". His defence counsel had not been given access to those parts of the case file, submitted by the prosecution and referred to by the courts, on which the suspicion against the applicant had essentially been based. It had not been sufficient to provide the applicant's counsel

with copies of four pages of the voluminous case file containing an overview by the Tax Fraud Office on the amount of the taxes the applicant was suspected of having evaded. Likewise, the authorities' proposal to give the applicant's counsel merely an oral account of the facts and of the evidence in the case file had failed to comply with the requirements of "equality of arms". The fact that the Court of Appeal had later acknowledged that the applicant's procedural rights had been curtailed by the failure to grant his counsel access to the case file and that the domestic authorities had allowed his counsel to inspect the file after his conditional release were incapable of remedying in an effective manner the procedural shortcomings that had occurred in the earlier stages of the proceedings. Therefore, the proceedings for review of the applicant's detention had failed to comply with Article 5 § 4 ...

124. Proceedings conducted under Article 5 § 4 of the Convention before the court examining an appeal against detention must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person ... Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention ...

125. The Grand Chamber, having regard to the Court's case-law, fully endorses the reasoning of the Chamber and finds that the procedure by which the applicant sought to challenge the lawfulness of his pre-trial detention violated the fairness requirements of Article 5 § 4 of the Convention.

► ***Sher and Others v. United Kingdom*, 5201/11, 20 October 2015**

148. ... A key question for a court reviewing the legality of detention is whether a reasonable suspicion exists. It will be for the authorities to present evidence to the court demonstrating grounds for such a reasonable suspicion. This evidence should in principle be disclosed to the applicant to enable him to challenge the grounds relied upon.

149. However, ... terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court. Article 5 § 1 (c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter organised terrorism in discharge of their duty under the Convention to protect the right to life and the right to bodily security of members of the public. Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity ... It follows that Article 5 § 4 cannot require disclosure of such material or preclude the holding of a closed hearing to allow a court to consider confidential material. Pursuant to Article 5 § 4, the authorities must disclose adequate information to enable the applicant to know the nature of the allegations

against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention ...

150. ... The applicants did not argue that the context of their arrests was inadequate to justify the holding of a closed hearing and restrictions on their right to disclosure. The Court is satisfied that the threat of an imminent terrorist attack, identified in the course of Operation Pathway, provided ample justification for the imposition of some restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security.

151. In terms of the applicable legal framework governing proceedings for warrants of further detention, Schedule 8 to the 2000 Act sets out clear and detailed procedural rules. Thus, a detained person must be given notice of an application for a warrant of further detention and details of the grounds upon which further detention is sought. He is entitled to legal representation at the hearing and has the right to make written or oral submissions. The possibility of withholding specified information from the detained person and his lawyer is likewise provided for in Schedule 8 and is subject to the court's authorisation. Schedule 8 also sets out the right of the court to order that a detained person and his lawyer be excluded from any part of a hearing. The grounds for granting a warrant of further detention are listed in Schedule 8 ...

152. The proceedings in the present case, which took place before the City of Westminster Magistrates' Court, were judicial in nature and followed the procedure set out in Schedule 8. An application for the warrants of further detention was made and served on the applicants the day before each of the two hearings ... The majority of each application was disclosed, with only information in section 9 of the application, concerning the further inquiries to be made, being withheld ... That information was provided to the District Judge and the applicants were given reasons for the withholding of the information ...

153. It is true that part of the hearing on 10 April 2009 was closed to enable the District Judge to scrutinise and ask questions about the section 9 material ... However, ..., the procedure in Schedule 8 allowing the court to exclude the applicants and their lawyers from any part of a hearing was conceived in the interests of the detained person, and not in the interests of the police. It enabled the court to conduct a penetrating examination of the grounds relied upon by the police to justify further detention in order to satisfy itself, in the detained person's best interests, that there were reasonable grounds for believing that further detention was necessary. The Court is further satisfied that the District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants ...

155 At the open hearings, the senior police officer making the application explained orally why the application was being made and, at the second hearing, provided details regarding the progress of the investigation and the examination of material seized during the searches ... The applicants were legally represented and their solicitor was able to cross-examine the police officer witness, and did so at the first hearing on 10 April 2009 ...

156. In light of the foregoing, the Court is satisfied that there was no unfairness in the proceedings leading to the grant of the warrants of further detention on 10 and 15 April 2009. In particular, the absence of express legislative provision for the appointment of a special advocate did not render the proceedings incompatible with Article 5 § 4 of the Convention.

157. There has accordingly been no violation of Article 5 § 4 of the Convention.

Non-communication of prosecutor's submissions

► *Ilijkov v. Bulgaria*, 33977/96, 26 July 2001

103. ...A court examining an appeal against detention must provide guarantees of a judicial procedure. Thus, the proceedings must be adversarial and must adequately ensure "equality of arms" between the parties, the prosecutor and the detained ...

104. ... it is evident that the parties to the proceedings before the Supreme Court were not on equal footing. As a matter of domestic law and established practice – still in force – the prosecution authorities had the privilege of addressing the judges with arguments which were not communicated to the applicant. The proceedings were therefore not adversarial.

► *Osváth v. Hungary*, 20723/02, 5 July 2005

18. The Court observes that the applicant's pre-trial detention was repeatedly prolonged without him having been served in advance with copies of the prosecution's motions to that end. The Court considers that even if the applicant was able to appear in person or be represented at the court hearings concerning his detention, this possibility was not sufficient to afford him a proper opportunity to comment on the prosecution's motions. Moreover, the Court notes that the applicant could not appear in person or be represented before the Supreme Court, which decided in camera to prolong the applicant's detention on remand.

In these circumstances, the Court is satisfied that the applicant did not receive the benefit of a procedure that was really adversarial ...

Adequate opportunity to prepare case

► *Samoila and Cionca v. Romania*, 33065/03, 4 March 2008

77. Regarding the timing of the serving of summonses and the possibility of the applicants' lawyers attending the Supreme Court hearings, the Court notes that four of the seven summonses were served on the applicants the day before or on the day of the hearing. In these conditions and taking account of the fact that Oradea is some 600 km from Bucharest, the Court considers that it was virtually impossible for the lawyers to arrive at these hearings in time.

78. Furthermore, the Court observes that, according to the information provided by the Government, the applicants were allowed only one telephone conversation per week and that correspondence passed through the administrative departments

of the prison, which inevitably delayed the distribution of post. Consequently, with regard to the summonses for the hearings of 2 and 3 September and 3 October 2003, for which the applicants were summoned four, eight and two days in advance, respectively, the Court considers that there was little possibility of informing their lawyers of them or of the latter attending them.

79. For that matter, the Court notes that, even when the applicants expressly made known their wish to attend the hearings of the Supreme Court, Prosecutor I. M. opposed this on the grounds that they had to be present at other hearings of the Court of Appeal.

80. Consequently, by not enabling the applicants to participate appropriately in hearings the outcome of which would be decisive for the continuation or end of their detention, the domestic authorities had deprived them of the possibility of challenging in an appropriate manner the grounds put forward by the prosecution for their continued detention.

81. Accordingly, there was a violation of Article 5 § 4 of the Convention.

Presence and assistance of lawyer

► *Wloch v. Poland*, 27785/95, 19 October 2000

129. The Court first observes that, according to the law on criminal procedure as it stood at the relevant time, detention on remand was ordered by decision of a public prosecutor. Against a detention order, an appeal lay to a court. The law did not entitle either the applicant himself or his lawyer to attend the court session held in proceedings instituted following such an appeal. The Court notes, however, that in the instant case, in such proceedings in the Cracow Regional Court on 4 October 1994, that court, apparently by way of exception, allowed the applicant's lawyers to be present before it, although the Government did not indicate the legal basis for this decision. The applicant's representatives were allowed to address the court and afterwards they were ordered to leave the courtroom. Thus, it was open to the prosecutor, who remained, to make in their absence any further submissions in support of the detention order, while neither the applicant nor his lawyers had any opportunity to become acquainted with them, to formulate any objections or to comment thereon ...

131. In these circumstances, the Court is of the view that the proceedings in which the applicant's appeal against the detention order was examined cannot be said to have been compatible with the requirements of Article 5 § 4 of the Convention. While the proceedings appear to have been conducted "speedily" within the meaning of this provision, they did not provide the "fundamental guarantees of procedure applied in matters of deprivation of liberty".

► *Celejewski v. Poland*, 17584/04, 4 May 2006

45. ... The applicant acknowledged that the court issued the detention order having held a session in his presence, as required by the law in force at the material time ...

46. The Court further notes that, in proceedings concerning the prolongation of pre-trial detention, the courts are also under an obligation set out by Article 249 § 5 of the Code of Criminal Procedure to inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand, or an appeal against a decision to impose or to prolong detention on remand is to be considered ... It is open to the lawyer to attend such session. In this connection the Court observes that in the present case there is no evidence that the courts departed from the normal procedure and that the applicant's lawyer was not duly summoned to the court sessions. Moreover, the applicant has not advanced any argument that his defence, while it was assured by a court-appointed lawyer or at any other stage, was inadequate.

In view of the above, the Court is of the opinion that the proceedings in which the prolongation of his detention was examined satisfied the requirements of Article 5 § 4 ...

► ***Fodale v. Italy*, 70148/01, 1 June 2006**

43. ... the Court of Cassation set the appeal by the public prosecutor's office down for a hearing on 15 February 2000. However, no summons to appear was served on the applicant or his counsel. The respondent was thus unable to file written pleadings or to present oral argument at the hearing, in response to the submissions of the public prosecutor's office. By contrast, a representative of that office was able to do so before the Court of Cassation.

44. In these circumstances the Court is unable to find that the requirements of adversarial proceedings and equality of arms were met.

45. There has therefore been a violation of Article 5 § 4 of the Convention.

► ***Castravet v. Moldova*, 23393/05, 13 March 2007**

53. The Court notes that the problem of alleged lack of confidentiality of lawyer-client communications in the CFEC [Centre for Fighting Economic Crime and Corruption] detention centre was a matter of serious concern for the entire community of lawyers in Moldova for a long time and that it had even been the cause of a strike organised by the Moldovan Bar Association ... The Bar's requests to verify the presence of interception devices in the glass partition was rejected by the CFEC administration ..., and that appears to have contributed to the lawyers' suspicion. Such concern and protest by the Bar Association would, in the Court's view, have been sufficient to raise a doubt about confidentiality in the mind of an objective observer.

54. The evidence of Şarban and Modârcă ... is far from proving that surveillance was carried out in the CFEC meeting room. However, against the background of the general concern of the Bar Association, such speculation might be enough to increase the concerns of the objective observer.

55. Accordingly, the Court's conclusion is that the applicant and his lawyer could reasonably have had grounds to believe that their conversation in the CFEC lawyer-client meeting room was not confidential.

56. Moreover, the Court notes that, contrary to the Government's contention to the effect that the applicant and his lawyer could easily exchange documents, the

pictures provided by the Government ... show that this was not the case because of the lack of any aperture in the glass partition. This, in the Court's view, rendered the lawyer's task even more difficult.

57. ... having regard to the further information at its disposal concerning the real impediments created by the glass partition to confidential discussions and exchange of documents between lawyers and their clients detained in the CFECC, the Court is now persuaded that the existence of the glass partition prejudices the rights of the defence.

58. The Government referred to the case of *Kröcher and Möller v. Switzerland* in which the fact that the lawyer and his client were separated by a glass partition was found not to violate the right to confidential communications. The Court notes that the applicants in that case were accused of extremely violent acts and were considered very dangerous. However, in the present case the applicant had no criminal record ... and was prosecuted for a non-violent offence. Moreover, it appears that no consideration was given to the character of the detainees in the CFECC detention centre. The glass partition was a general measure affecting indiscriminately everyone in the remand centre, regardless of their personal circumstances.

59. The security reasons invoked by the Government are not convincing, in the Court's view, since visual supervision of the lawyer-client meetings would be sufficient for such purposes.

60. In the light of the above, the Court considers that the impossibility for the applicant to discuss with his lawyers issues directly relevant to his defence and to challenging his detention on remand, without being separated by a glass partition, affected his right to defence.

61. There has accordingly been a violation of Article 5 § 4 of the Convention.

Presence of accused

► *Grauzinis v. Lithuania*, 37975/97, 10 October 2000

34. The Court considers that, given what was at stake for the applicant, i.e. his liberty, as well as the lapse of time between the various decisions, and the re-assessment of the basis for the remand, the applicant's presence was required throughout the pre-trial remand hearings ... in order to be able to give satisfactory information and instructions to his counsel.

Furthermore, viewed as a whole, these and the subsequent proceedings failed to afford the applicant an effective control of the lawfulness of his detention, as required by Article 5 § 4 of the Convention.

► *Mamedova v. Russia*, 7064/05, 1 June 2006

91. ... Given the importance of the first appeal hearing, the appeal court's reliance on the applicant's character, and her intention to plead release on account of the particular conditions of her detention, her attendance was required to give satisfactory information and instructions to her counsel ...

92. In view of the above, the Court considers that the refusal of the request for leave to appear at the appeal hearing ... deprived the applicant of an effective control of the lawfulness of her detention required by Article 5 § 4 of the Convention.

► ***Allen v. United Kingdom, 18837/06, 30 March 2010***

41. The Court notes that the applicant initially had been granted bail at the hearing before the Deputy District Judge, which she personally attended ... It further notes the submissions made by the applicant's counsel at the outset of the prosecution's appeal hearing that the applicant had expected to be released following the grant of bail and that she had not properly understood the implications of the prosecution's appeal ...

42. The Court considers to be relevant the fact that the Deputy District Judge had the opportunity to see the applicant in person and make his own assessment of her before deciding to grant her bail. This was a factor emphasised by counsel for the applicant when requesting that Judge Globe use his discretion to allow the applicant to attend the hearing of the prosecution's appeal against bail.

43. Against this background, the Court recalls its earlier case-law concerning the question of whether an applicant's attendance is required for the purposes of Article 5 § 4 of the Convention ... In these cases, as pointed out by the respondent Government, the Court identified special circumstances in which an applicant's personal attendance might be required under Article 5 § 4 of the Convention, even though he or she was legally represented. Notably however, the Court finds these cases to be distinguishable, in that they all concerned applicants' appeals against their detention on remand and not, as in the present case, a prosecution appeal against the grant of bail, without which the applicant would have been entitled to be at liberty. Indeed, in *Jankauskas*, cited above, the Court was careful to note that the domestic courts had held hearings in the presence of both the applicant and his lawyer when making orders authorising and extending the term of his detention on remand. What was at issue in that case was whether the applicant had a right to be personally present at his subsequent appeal against the order for his detention.

44. The Court considers of central importance the fact that the relevant domestic law qualifies a prosecution appeal against bail as a re-hearing of the application for bail, thereby entitling the judge hearing the appeal to remand the accused in custody or to grant bail subject to such conditions as he may deem appropriate ... It follows that the applicant should have been afforded the same guarantees at the prosecution's appeal as at first instance. Though the Court is mindful of the inherent logistical difficulties involved in ensuring a detainee's personal attendance at a court hearing, it finds no evidence of any compelling reasons in the present case which might have rendered the applicant's presence undesirable or impracticable. To the contrary, it is accepted that the applicant's representatives had made arrangements for her to be present at the court building on the day of the prosecution appeal hearing, and that no inconvenience would have been caused in allowing her to attend.

45. It is also noteworthy that, according to the applicable domestic law, the prosecution appeal had the effect of immediately staying the applicant's grant of bail at first instance, consequently depriving the applicant of her liberty from the moment

the prosecution announced their intention to appeal against the Deputy District Judge's decision ... Furthermore, as the applicant herself asserts, a lengthy period of pre-trial detention was likely given the gravity of the charges against her ...

46. The Court cannot but stress the importance of what was at stake for the applicant, namely her right to liberty ...

47. For the reasons set out above, and in light of the fundamental importance of the right to liberty in issue, the Court does not find the Government's justification for the refusal in question to be sufficient. For the Court, having regard to the particular circumstances of the applicant's case as described above, fairness required that the applicant's request to be present at the appeal be granted.

48. There has accordingly been a violation of Article 5 § 4 of the Convention.

► ***Idalov v. Russia* [GC], 5826/03, 22 May 2012**

161. ... Although it is not always necessary for the procedure under Article 5 § 4 to be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question ... In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required ... The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty ...

162. ... the Court observes that the applicant was absent from the appeal hearings on 22 January, 16 June, 6 August and 2 October 2003 and 12 February 2004. The hearing on 16 June 2003 took place in the absence of the applicant's representative. Furthermore, there is nothing in the material before the Court to suggest that the appellate court even considered the question whether the applicant had been summoned to the hearing and whether his personal participation was required for the effective review of the lawfulness of his continued detention.

163. The Court further notes that the Government have acknowledged that the authorities' failure to ensure the applicant's participation in the appeal proceedings for the review of the lawfulness of his detention amounted to a violation of Article 5 § 4 of the Convention ...

164. Having regard to its established case-law on the issue and the circumstances of the present case, the Court does not see any reason to hold otherwise. The fact that the applicant was unable to participate in the appeal proceedings on 22 January, 16 June, 6 August and 2 October 2003 and 12 February 2004 amounted to a violation of Article 5 § 4 of the Convention.

Public hearing not required

► ***Reinprecht v. Austria*, 67175/01, 15 November 2005**

39. Moreover, it must be borne in mind that Articles 5 § 4 and 6, despite their connection, pursue different purposes. Article 5 § 4 is aimed at protecting against arbitrary detention by guaranteeing a speedy review of the lawfulness of any detention ... In

cases of pre-trial detention falling within the scope of Article 5 § 1 (c), the review has to establish, *inter alia*, whether there is reasonable suspicion against the detainee. Article 6 deals with the “determination of a criminal charge” and is aimed at guaranteeing that the merits of the case, that is, the question whether or not the accused is guilty of the charges brought against him, receive a “fair and public hearing”.

40. This difference of aims explains why Article 5 § 4 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness.

In addition there is some force in the Government’s argument that the requirement of public hearings could have negative effects on speediness. Hearings on the lawfulness of pre-trial detention will in practice often be held in remand prisons. Either granting the public effective access to attend hearings in prison or transferring detainees to court buildings for the purpose of public hearings may indeed require arrangements which run counter to the requirement of speediness. This is all the more so in a case like the present one, in which repeated reviews at short intervals are required.

41. In conclusion, the Court finds that Article 5 § 4, though requiring a hearing for the review of the lawfulness of pre-trial detention, does not as a general rule require such a hearing to be public. It would not exclude the possibility that a public hearing may be required in particular circumstances. However, no such circumstances were shown to exist in the present case.

Appropriate conduct of hearing

► *Ramishvili and Kokhreidze v. Georgia*, 1704/06, 27 January 2009

129. ... the applicants were placed in a caged dock at the far end of the court room in complete disorder and surrounded by guards. They could hardly communicate with their lawyers, could not properly hear the prosecutor and the judge and could hardly make their submissions audible due to the turmoil in the room. In order to participate in the hearing, the applicants had to stand on a chair in the barred dock, hanging on to the metal side bars, and shout. Communication in the court room was constantly hampered by the unsolicited interruptions of journalists, unabated ringing of mobile telephones, persons vehemently arguing with each other and uttering vulgar curses, etc., and the judge was either unwilling or unable to establish order.

130. ... the applicants’ advocates, when making their defence statements, were dazzled by camera flashes and halogen camera lights. Their statements were hardly audible. By contrast, due to the immediate proximity of the prosecutor’s seat to the judge, the dialogue of questions and answers between them was unaffected and presented no comparable obstacle of audibility ...

131. The Court considers that an oral hearing in such chaotic conditions can hardly be conducive to a sober judicial examination. It cannot accept the Government’s argument that the possibility of written applications could have palliated the above-mentioned turmoil in the court room. It notes that oral hearings should create such conditions that verbal responses and audio-visual exchanges between the parties and the judge in a court room flow in a decent, dynamic and undisturbed manner.

132. The Court reiterates that the applicants' confinement inside the barred dock, which looked like a metal cage, and the presence of "special forces" in the courthouse were detrimental to their powers of concentration, powers which are indispensable for conducting an efficient defence ... such humiliating and unjustifiably stringent measures of restraint during the public hearing, the latter being broadcast throughout the country, tainted the presumption of innocence, the respect for which principle is of paramount importance at every stage of criminal proceedings, including proceedings bearing on the lawfulness of detention pending trial ...

134. ... the personal conduct of the judge presiding over the hearing ... could not be said ... to have been devoid of bias. Thus, the Court cannot escape the observation that the judge was obviously aiding the prosecutor during the hearing, by either directly responding to the questions of the defence instead of the latter or rephrasing these questions in a manner more advantageous to the prosecutor ...

135. As to the requisite "independence", it was undoubtedly tainted by the high number of under-cover government agents and even "special forces" present during the hearing of 2 September 2005. The court cannot be said to have given the appearance of independence when the government agents seemed to be more in control of the situation in the court room than the hearing judge himself and when the latter's deliberation room, which should be private and inviolable, was easily accessed by strangers ...

136. The above considerations are sufficient for the Court to conclude that the judicial review ... lacked the fundamental requisites of a fair hearing. The review was thus held in violation of the applicants' rights under Article 5 § 4 of the Convention.

Power of release required

► *A. and Others v. United Kingdom* [GC], 3455/05, 19 February 2009

202. Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 ... It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty ... The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful.

CONDITIONS

Quality

► *I. I. v. Bulgaria*, 44082/98, 9 June 2005

72. ... the Court notes that the applicant was detained for three months in a cell of six square metres apparently occupied by three to four detainees.

73. The Court further notes that the sanitary conditions in which the applicant was kept were very unsatisfactory. The cell was dark, poorly ventilated and apparently

damp ... The conditions in which the detainees had to relieve themselves in the toilet and attend to their personal hygiene were also unacceptable ...

74. Also, as no possibility for outdoor or out-of-cell activities was provided, the applicant had to spend in the cell – which had no window and was lighted by a single electric bulb – practically all his time, except for two or three short visits per day to the sanitary facilities or the times when he would write a request to the competent authorities, in which case he was allowed to stay in the hallway ...

75. Furthermore, subjecting a detainee to the humiliation of having to relieve himself in a bucket in the presence of his cellmates and of being present while the same bucket was being used by them ... cannot be deemed warranted, except in specific situations where allowing visits to the sanitary facilities would pose a concrete and serious security risk. However, no such risks were invoked by the Government as grounds for the limitation on the daily visits to the toilet by the detainees in the Shoumen Regional Investigation Service during the period in issue.

76. Regarding the impact of the conditions of detention on the applicant's health, the Court notes that his skin disease (psoriasis), which apparently required good hygiene and exposure to sunlight, severely aggravated during his detention and that he apparently even started to develop psoriatic arthritis ... It is true that in mid-March 1998 he was allowed to consult a dermatologist and was thereafter regularly administered injections ..., but the Court is struck by the fact that he was not allowed – without any legitimate reason being put forward – to apply his psoriasis medication as often as he needed ...

79. In conclusion, having regard to the cumulative effects of the unduly stringent regime to which the applicant was subjected, the material conditions in which he has kept and to the specific impact which these conditions and regime had on the applicant's health, the Court considers that the conditions of detention of the applicant amounted to inhuman and degrading treatment contrary to Article 3 of the Convention.

► ***Moiseyev v. Russia*, 62936/00, 9 October 2008**

135. ... the applicant was transported more than one hundred and fifty times in standard-issue prison vans which were sometimes filled beyond their design capacity. Given that he had to stay inside that confined space for several hours, these cramped conditions must have caused him intense physical suffering. His suffering must have been further aggravated by the absence of adequate ventilation and lighting, and unreliable heating. Having regard to the cumulative effect which these conditions of transport must have had on the applicant, the Court finds that the conditions of transport from the remand centre to the courthouse and back amounted to "inhuman" treatment within the meaning of Article 3 of the Convention. It is also relevant to the Court's assessment that the applicant was subjected to such treatment during his trial or at the hearings with regard to applications for an extension of his detention, that is, when he most needed his powers of concentration and mental alertness ...

140. The Court observes that on more than one hundred and fifty days the applicant was detained in the convoy cells located on the premises of the Moscow City Court.

Whereas his detention in these cells was normally limited to several hours before, after and between court hearings, on a dozen occasions he was not summoned to a hearing and spent the entire working day inside the cell.

141. ... The Court ... notes that the convoy cells were destined for detention of a very limited duration. Accordingly, not only were they tiny in surface area – by any account no more than two square metres – but also, by their design, they lacked the amenities indispensable for longer detention. The cell did not have a window and offered no access to natural light or air. Its equipment was limited to a bench, there being no chair, table or any other furniture. It is of a particular concern for the Court that the cell did not have a toilet and that detainees could only relieve themselves on the wardens' orders. Furthermore, there is no evidence of any catering arrangements which would have enabled the detainees to receive sufficient and wholesome food and drink on a regular basis. The Court considers it unacceptable for a person to be detained in conditions in which no provision has been made for meeting his or her basic needs ...

142. The applicant remained in these cramped conditions for several hours a day and occasionally for as long as eight to ten hours. Although his detention in the convoy premises was not continuous, the Court cannot overlook the fact that it alternated with his detention in the remand prison and transport in conditions which it has already found above to have been inhuman and degrading. In these circumstances, the cumulative effect of the applicant's detention in the extremely small cells of the convoy premises at the Moscow City Court without ventilation, food, drink or free access to toilet must have been of such intensity as to induce physical suffering and mental weariness.

143. There has accordingly been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention on the convoy premises of the Moscow City Court.

Segregation from convicted prisoners

► *Peers v. Greece*, 28524/95, 19 April 2001

76. The applicant complained that, despite the fact that he was a remand prisoner, he was subjected to the same regime as convicts. He argued that the failure of the Koridallos Prison authorities to provide for a special regime for remand prisoners amounts to a violation of the presumption of innocence ...

78. The Court recalls that the Convention contains no Article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that Article 6 § 2 has been violated on the grounds adduced by the applicant.

Strict security regime

► *Van der Ven v. Netherlands*, 50901/99, 4 February 2003

54. ... throughout his detention in the EBI, the applicant was subjected to very stringent security measures. The Court further considers that the applicant's social contacts were strictly limited, taking into account the fact that he was prevented from having contact with more than three fellow inmates at a time, that direct contact

with prison staff was limited, and that, apart from once a month in the case of visits from members of his immediate family, he could only meet visitors behind a glass partition. However, ... the Court is unable to find that the applicant was subjected either to sensory isolation or to total social isolation. ...

55. The applicant was placed in the EBI because he was considered extremely likely to attempt to escape from detention facilities with a less strict regime and, if he were to escape, he was deemed to pose an unacceptable risk to society in terms of committing further serious violent crimes ...

58. ... pursuant to the EBI house rules, the applicant was strip-searched prior to and following an "open" visit as well as after visits to the clinic, the dentist's surgery or the hairdresser's. In addition to this, for a period of three and a half years he was also obliged to submit to a strip-search, including an anal inspection, at the time of the weekly cell inspection ... this weekly strip-search was carried out as a matter of routine and was not based on any concrete security need or the applicant's behaviour.

The strip-search as practised in the EBI obliged the applicant to undress in the presence of prison staff and to have his rectum inspected, which required him to adopt embarrassing positions ...

62. The Court considers that in a situation where the applicant was already subjected to a great number of surveillance measures, and in the absence of convincing security needs, the practice of weekly strip-searches that was applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. The applicant himself confirmed that this was indeed the case in a meeting with a psychiatrist, during which he also stated that he would, for instance, forgo visiting the hairdresser's so as not to have to undergo a strip-search ...

63. Accordingly, the Court concludes that the combination of routine strip-searching and the other stringent security measures in the EBI amounted to inhuman or degrading treatment in breach of Article 3 of the Convention.

Interception of communications

► *Labita v. Italy* [GC], 26772/95, 6 April 2000

175. The applicant complained that the Pianosa Prison authorities had censored his correspondence with his family and lawyer...

182. The Court notes that the Italian Constitutional Court, relying on Article 15 of the Constitution, has held that the Minister of Justice had no power to take measures concerning prisoners' correspondence and had therefore acted *ultra vires* under Italian law ... The censorship of the applicant's correspondence during this period was therefore illegal under national law and was not "in accordance with the law" within the meaning of Article 8 of the Convention.

► *Erdem v. Germany*, 38321/97, 5 July 2001

62. The Court notes that in the instant case Article 148 § 2 of the Code of Criminal Procedure operates in a very specific field, namely the prevention of terrorism, its

purpose, according to the case-law of the Federal Court of Justice, being to prevent prisoners suspected of offences under Article 129a of the Criminal Code from continuing to work for the terrorist organisation to which it is alleged they belong and contributing to its survival ...

65. Nonetheless, the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, as the Court has stated above, that rule may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place ...

66. The trial of senior PKK [Partiya Karkerên Kurdistan] figures took place in the special context of the prevention of terrorism in all its forms. Furthermore, it does not appear unreasonable for the German authorities to have sought to ensure maximal security during the trial, bearing in mind that a large Turkish community, many of whose members are of Kurdish origin, lives in Germany.

67. The Court further notes that the provision is worded very precisely, as it specifies the category of persons whose correspondence must be monitored, that is to say prisoners suspected of belonging to a terrorist organisation within the meaning of Article 129a of the Criminal Code. Moreover, there are restrictions on the use of the measure, which operates as an exception to the general rule that privilege attaches to correspondence between prisoners and their lawyers, which act as safeguards: unlike other cases that have come before the Court and in which correspondence was opened by the prison authorities ..., in the instant case the power to monitor correspondence was vested in an independent judge who had to be unconnected with the investigation and was under a duty to keep the information thus obtained confidential. Lastly, the power to monitor correspondence is limited, since prisoners are free to discuss their cases orally with their representatives. While it is true that representatives are precluded from delivering written documents or other objects to prisoners, they may provide them with information contained in written documents.

68. The Court reiterates that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention ...

69. Having regard to the threat posed by terrorism in all its forms ..., the safeguards attached to the monitoring of correspondence in the instant case and the margin of appreciation afforded to the State, the Court holds that the interference in issue was not disproportionate to the legitimate aims pursued.

70. Consequently, there has been no violation of Article 8 of the Convention.

Contact with media

► *Sotiropoulou v. Greece (dec.)*, 40225/02, 18 January 2007

3. Lastly, the applicant complained that the prison authorities punished her with a disciplinary sanction of five days in solitary confinement for having made statements to a journalist during her pre-trial detention claiming that she was innocent

and complaining about the conditions of her incarceration. She relies on Article 10 of the Convention ...

The Court notes from the outset that in the instant case the sanction did not prevent the applicant outright from communicating with third parties during her pre-trial detention, which would have raised a problem in respect of Article 10 ... Instead, while her case was being examined she had the right to communicate by letter or by telephone with a circle of people close to her to whom she could express her feelings about her situation. To communicate with anyone else, including journalists, she needed the prior authorisation of the competent judicial authority. It follows that the penalty concerned was not imposed on the applicant because she communicated with a newspaper and a television channel but because she gave the interview without the requisite prior authorisation.

The Court considers that this condition was justified in the instant case by the seriousness and the particular nature of the deeds of which she was accused, and also because it was the initial stage of the judicial proceedings. In particular, the applicant was accused of being a member of a terrorist group. It was therefore reasonable on the part of the authorities to impose harsher restrictions on her communication rights in order to prevent any contact between her, through third parties, with other presumed members of the "17 November" terrorist group, or to prevent her from giving details of her conditions of detention. This could have interfered with the course of the investigation and jeopardised the safety of the applicant or other detainees ...

In view of the foregoing, the Court finds that the reasons given by the national authorities to justify the interference are "relevant and sufficient" and that the penalty of five days' solitary confinement in her cell imposed on the applicant was in this case "proportionate to the legitimate aims pursued".

Access to family

► *Ploski v. Poland*, 26761/95, 12 November 2002

37. The Court also notes that apparently the charges brought against the applicant did not concern violent crime and that he was released as early as February 1996 ... Therefore, the applicant could not be considered as a prisoner without any prospect of being released from a prison. It is aware of the problems of a financial and logistical nature caused by escorted leaves and the instances of shortage of police and prison officers. However, taking into account the seriousness of what is at stake, namely refusing an individual the right to attend the funerals of his parents, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leaves – could have been found ...

39. The Court concludes that, in the particular circumstances of the present case, and notwithstanding the margin of appreciation left to the respondent State, the refusals of leave to attend the funerals of the applicant's parents, were not "necessary in a democratic society" as they did not correspond to a pressing social need and

were not proportionate to the legitimate aims pursued. There has therefore been a violation of Article 8 of the Convention.

► ***Van der Ven v. Netherlands, 50901/99, 4 February 2003***

65. ... He further complained of the conditions under which visits by members of his family had had to take place: behind a glass partition with no possibility of physical contact save for a handshake once a month in the case of his immediate family...

71. ... In the present case, the security measures were established in order to prevent escapes ... in the EBI, security is concentrated on those occasions when, and places where, the prisoner concerned might obtain or keep objects which could be used in an attempted escape, or might obtain or exchange information relating to such an attempt. Within these constraints, the applicant was able to receive visitors for one hour every week and to have contact, and take part in group activities, with other EBI inmates, albeit in limited numbers.

72. In the circumstances of the present case the Court finds that the restrictions on the applicant's right to respect for his private and family life did not go beyond what was necessary in a democratic society to attain the legitimate aims intended.

Accordingly, there has been no violation of Article 8 of the Convention.

► ***Kucera v. Slovakia, 48666/99, 17 July 2007***

129. ... the Court notes that the applicant was allowed to meet with his wife for the first time on 29 January 1999. The refusal to allow the applicant to meet her during the period of 13 months during which he had been held in custody undoubtedly constituted a serious interference with his right to respect for his private and family life.

130. It is evident that there was a legitimate need to prevent the applicant from hampering the investigation, for example by exchanging information with his co-accused including his wife, in particular during the investigation into the relevant facts. The Court is not persuaded, however, that the interference complained of was indispensable for achieving that aim. In particular, there is no indication that allowing the applicant to meet with his wife under special visiting arrangements including, for example, supervision by an official would have jeopardised the ongoing investigation into the criminal case.

131. It is also questionable whether relevant and sufficient grounds existed for preventing the applicant from meeting his wife for such a long period. In particular, on 6 May 1998 counsel for the applicant and his wife requested that her clients be allowed to meet each other, even if this meant that the investigator had to be present. Reference was made to the suffering caused by the lengthy separation of the applicant from his wife and also to the fact that the investigation into the offences in issue had practically ended. Similarly, in the second half of 1998 the applicant indicated in his requests for release that at that time the investigation into the case exclusively concerned offences which were unrelated to him and his wife.

132. The Court has considered the fact that the applicant attempted, on 19 January 1998, secretly to send a letter to his wife from the prison ... It does not attach particular importance to this incident as it occurred at an early stage of the proceedings and it has not been alleged that the purpose of that letter was to interfere with the investigation.

133. In view of the above, the Court considers that the interference in issue cannot be regarded as having been "necessary in a democratic society".

134. There has therefore been a violation of Article 8 of the Convention on account of prohibition on the applicant meeting with his wife.

► ***Varnas v. Lithuania*, 42615/06, 9 July 2013**

111. Remanding a person in custody may be regarded as placing the individual in a distinct legal situation, which even though it may be imposed involuntarily and generally for a temporary period, is inextricably bound up with the individual's personal circumstances and existence. The Court is therefore satisfied – and it has not been disputed between the parties – that by the fact of being remanded in custody the applicant fell within the notion of "other status" within the meaning of Article 14 of the Convention ...

113. The applicant's complaints under examination concern the legal provisions regulating his visiting rights in remand prison. They thus relate to issues which are of relevance to all persons detained in prisons, as they determine the scope of the restrictions on their private and family life which are inherent in the deprivation of liberty, regardless of the ground on which they are based.

114. The Court therefore considers that, as regards the facts at issue, the applicant can claim to have been in a relevantly similar situation to a convicted person ...

118. Thus, at the relevant time, the duration of visits for a person detained pending trial, such as the applicant, was shorter (two hours) than that which the law allowed in respect of a convicted person (four hours). Above all, a person detained pending trial had no right to conjugal visits at all. Moreover, the frequency of visits and the type of contact (short-term or conjugal visits) to which convicted persons were entitled differed according to the security level of the liberty deprivation facility in which they were being held and according to that of the prisoner ... In contrast, the restrictions on the visiting rights of remand prisoners were applicable in a general manner, regardless of the reasons for their detention and the related security considerations.

119. The Court notes the Government's argument that the grounds for imposing pre-trial detention and thus limiting the suspect's contacts with the outside world serve to guarantee an unhindered investigation ...

120. As to the reasonableness of the justification of difference in treatment between remand detainees and convicted prisoners, the Court acknowledges that the applicant in the instant case had been charged with belonging to a criminal association and to an organised group involved in multiple car thefts. However, it also finds that the security considerations relating to any criminal family links were absent in the

instant case ... Namely, the applicant's wife was neither a witness nor a co-accused in the criminal cases against her husband, which removed the risk of collusion or other forms of obstructing the process of collecting evidence ... Nor has the Court any information to the effect that the applicant's wife was involved in criminal activities. Accordingly, the Court is not persuaded that there was a particular reason to prevent the applicant from having conjugal visits with his wife ... Above all, the Court notes that in justifying the prohibition on the applicant having conjugal visits when placed in pre-trial detention, the Government, like the Lithuanian administrative courts, in essence relied on the legal norms as such, without any reference as to why those prohibitions had been necessary and justified in the applicant's specific situation.

121. Lastly, whilst giving certain weight to the Government's argument that during his pre-trial detention the applicant had not lost contact with his wife in view of the number of short-term visits she paid him in the Lukiškės Remand Prison, the Court cannot lose sight of the fact that especially limited physical contact appears to have been available during those short-term visits, given that the visitor and the inmate were separated by wire netting, except for a 20 cm gap so that the visitor could pass food to the inmate. The Court also considers that such limited physical interaction was further compounded by the fact that the detainee and the visitor were under the constant observation of a guard ... As to the lack of direct contact with visitors, the Court observes that in a previous case it held that a person detained pending trial who had been physically separated from his visitors throughout his detention for three and a half years was, in the absence of any demonstrated need such as security considerations, not justified as regards the effective enjoyment of the right to one's private and family life ... The Court therefore considers that the particularly long period of the applicant's pre-trial detention (two years at the moment when the applicant had first asked for a conjugal visit) reduced his family life to a degree that could not be justified by the inherent limitations involved in detention. In this context the Court also notes that the Lukiškės Remand Prison authorities' refusal to grant the applicant a conjugal visit had been based not only on theoretical security considerations, but equally on the lack of appropriate facilities ..., a reason which cannot withstand the Court's scrutiny ... It therefore finds that by having restricted the applicant from receiving conjugal visits when detained on remand the authorities failed to provide a reasonable and objective justification for the difference in treatment and thus acted in a discriminatory manner.

122. There has therefore been a violation of Article 14 in conjunction with Article 8 of the Convention.

Supervision of person at risk

► *Tanribilir v. Turkey*, 21422/93, 16 November 2000

77. The Court considers that the *gendarmes* cannot be criticised for not having taken any special measures, such as posting a round-the-clock guard outside the applicant's cell or confiscating his clothes.

78. It is true that according to the perfectly consistent statements made by the *gendarmes* to the national authorities they had regularly checked on the holding

cells, but there had been no permanent guard there ... But the same *gendarmes* told the Commission delegates that on the night in question a corporal was supposed to have been on permanent guard duty outside the holding cells ...

79. However, the Court observes that there is no evidence in the file that the *gendarmes* could reasonably have foreseen that A.T. was going to commit suicide and that they should have assigned a guard to supervise his cell round the clock.

80. For the above reasons the Court holds that there has been no violation of Article 2 of the Convention in this respect.

Protection from fellow detainees

► *Paul and Audrey Edwards v. United Kingdom*, 46477/99, 14 March 2002

60. The Court is satisfied that information was available which identified Richard Linford as suffering from a mental illness with a record of violence which was serious enough to merit proposals for compulsory detention and that this, in combination with his bizarre and violent behaviour on and following arrest, demonstrated that he was a real and serious risk to others and, in the circumstances of this case, to Christopher Edwards, when placed in his cell.

61. As regards the measures which they might reasonably have been expected to take to avoid that risk, the Court observes that the information concerning Richard Linford's medical history and perceived dangerousness ought to have been brought to the attention of the prison authorities, and in particular those responsible for deciding whether to place him in the health care centre or in ordinary location with other prisoners. It was not. ...

62. ... it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision. The defects in the information provided to the prison admissions staff were combined in this case with the brief and cursory nature of the examination carried out by a screening health worker who was found by the inquiry to be inadequately trained and acting in the absence of a doctor to whom recourse could be had in case of difficulty or doubt.

63. ... while the Court deplores the fact that the cell's call button, which should have been a safeguard, was defective, it considers that on the information available to the authorities, Richard Linford should not have been placed in Christopher Edwards's cell in the first place.

Medical care

► *Dzieciak v. Poland*, 77766/01, 9 December 2008

101. ... the quality and promptness of the medical care provided to the applicant during his four-year pre-trial detention put his health and life in danger. In particular, the lack of cooperation and coordination between the various state authorities,

the failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment and constituted a violation of the State's obligation to protect the lives of persons in custody.

There has accordingly been a violation of Article 2 of the Convention on account of the Polish authorities' failure to protect the applicant's life.

► ***Aleksanyan v. Russia, 46468/06, 22 December 2008***

156. ... as from the end of October 2007, at the very least, the applicant's medical condition required his transfer to a hospital specialised in the treatment of Aids. The prison hospital was not an appropriate institution for these purposes.

157. ... the Court observes that it does not detect any serious practical obstacles for the immediate transfer of the applicant to a specialised medical institution. Thus, the Moscow AIDS Centre ... was located in the same city, and it was prepared to accept the applicant for in-patient treatment. It appears that the applicant was able to assume most of the expenses related to the treatment. Furthermore, in view of the applicant's state of health and his previous conduct, the Court considers that the security risks he might have presented at that time, if any, were negligible compared to the health risks he faced ... In any event, the security arrangements made by the prison authorities in Hospital no. 60 did not appear very complicated.

158. ... the Court considers that the national authorities failed to take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention, at least until his transfer to an external haematological hospital on 8 February 2008. This undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment. There has therefore been a violation of Article 3 of the Convention.

► ***Kaprykowski v. Poland, 23052/05, 3 February 2009***

71. ... the applicant had at least three serious medical conditions which required regular medical care, namely epilepsy, encephalopathy and dementia. He suffered from frequent epileptic seizures, sometimes as often as several times a day ...

72. ... Throughout his incarceration several doctors stressed that he should receive specialised psychiatric and neurological treatment and should be under constant medical supervision ... Already in 2001 the medical experts appointed by the Białystok District Court were of the opinion that the penitentiary system could no longer offer the applicant the necessary treatment and they recommended that he should undergo brain surgery ... On 9 May 2007 when the applicant was being released from Czarne Prison hospital, the doctors clearly recommended that he should be placed under 24-hour medical supervision ... In the light of the above the Court is convinced that the applicant was in need of constant medical supervision, in the absence of which he faced major health risks.

73. ... it must be noted that the applicant had frequent epileptic seizures and, when he was detained in the general wing of Poznań Remand Centre, he could count only on the immediate assistance of his fellow inmates and, possibly, on being only later examined by an in-house doctor who did not specialise in neurology. In addition, due to his personality disorder and dementia, the applicant could not act autonomously in making decisions or in undertaking more demanding daily routines. That must have given rise to considerable anxiety on his part and must have placed him in a position of inferiority *vis-à-vis* other prisoners.

74. The fact that from 24 June until 12 July 2005 the applicant was in the Poznań Remand Centre hospital does not affect this finding, since the establishment did not specialise in treating neurological disorders and since the period of the applicant's hospitalisation was anyway very short.

Moreover, placing the applicant, from 9 May until 30 November 2007, in an ordinary cell of a general wing of Poznań Remand Centre, without providing him with a 24-hour medical supervision, was clearly in contradiction to the recommendations of the doctors who had treated the applicant in the Czarne Prison hospital in the preceding months. The fact that during that time the applicant was attended eighteen times by the remand centre's medical staff has no bearing since the medical care provided to him was of a general character, none of the doctors being a neurologist.

Finally, the Court is struck by the Government's argument that the conditions of the applicant's detention were adequate, because he was sharing his cell with other inmates who knew how to react in the event of his medical emergency. The Court wishes to stress its disapproval of a situation in which the staff of a remand centre feels relieved of its duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or, if necessary, with first aid.

75. Lastly, the Court must also be mindful of three important factors comprising the background of the case.

Firstly, the time when the applicant could rely solely on the prison health care system amounted to more than four years ... the Court is concerned about the fact that the applicant was detained most of the time in ordinary detention facilities or, at best, in an internal disease ward of a prison hospital. He was detained in the specialised neurological hospital of Gdańsk Remand Centre on only two occasions.

Secondly, the applicant was often transported long distances and transferred about eighteen times between different detention facilities ... such a frequent change of environment must have produced unnecessary negative effects on the applicant who was, at the relevant time, a person of a fragile mental state.

Thirdly, ... for a considerable time the applicant was taking certain non-generic drugs which had been prescribed by the neurology specialists of the Gdańsk Remand Centre hospital and that in June 2005 his treatment was changed to generic drugs upon the decision of the doctors practising in the Poznań Remand Centre hospital, who were not neurologists. The Court also notes that when in October 2005 the applicant was finally transferred to the neurology ward of the Gdańsk Remand Centre hospital, he immediately resumed taking previously prescribed medicines.

The Court reiterates that the Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population generally ... Nevertheless, it takes note of the applicant's submission ... that the change to generic drugs resulted in an increase in the number of his daily seizures and made their effects more severe ... and as such contributed to the applicant's increased feeling of anguish and physical suffering.

76. In the Court's opinion the lack of adequate medical treatment in Poznań Remand Centre and the placing of the applicant in a position of dependency and inferiority *vis-à-vis* his healthy cellmates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty.

77. In conclusion, the Court considers that the applicant's continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, amounting to a violation of Article 3 of the Convention.

Right to vote

► *Labita v. Italy* [GC], 26772/95, 6 April 2000

202. The Court observes that persons who are subject to special police supervision are automatically struck off the electoral register as they forfeit their civil rights because they represent "a danger to society" or, as in the instant case, are suspected of belonging to the Mafia ... The Government pointed to the risk that persons "suspected of belonging to the Mafia" might exercise their right of vote in favour of other members of the Mafia.

203. The Court has no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim. It observes, however, that although the special police supervision measure against the applicant was in the instant case imposed during the course of the trial, it was not applied until the trial was over, once the applicant had been acquitted on the ground that "he had not committed the offence". The Court does not accept the view expressed by the Government that the serious evidence of the applicant's guilt was not rebutted during the trial. That affirmation is in contradiction with the tenor of the judgments of the Trapani District Court ... and the Palermo Court of Appeal ... When his name was removed from the electoral register, therefore, there was no concrete evidence on which a "suspicion" that the applicant belonged to the Mafia could be based ...

In the circumstances, the Court cannot regard the measure in question as proportionate.

Ill-treatment by guards

► *Satik and Others v. Turkey*, 31866/96, 10 October 2000

56. ... the applicants complain that they were subjected to a severe and unjustified beating by State agents. In the Government's submission, the applicants sustained their injuries as a result of a fall which they had provoked by their own protest action.

57. ... The Government have not submitted any elements which would serve to rebut a presumption that the applicants were deliberately beaten as alleged when engaged in a protest action. In particular, it has not been suggested by the Government that the intervention of the gendarme officers was considered necessary to quell a riot or a planned attack on the internal security of Buca Prison ...

61. In the absence of a plausible explanation on the part of the authorities, the Court is led to find that the applicants were beaten and injured by State agents as alleged. The treatment to which they were subjected amounts to a violation of Article 3 of the Convention.

LENGTH

Need to monitor

► ***Mamedova v. Russia, 7064/05, 1 June 2006***

82. Finally, the Court observes that at no point in the proceedings did the domestic authorities consider whether the length of the applicant's detention had exceeded a "reasonable time". Such an analysis should have been particularly prominent in the domestic decisions after the applicant had spent many months in custody, however the reasonable-time test has never been applied.

Defining the period

► ***N. v. Federal Republic of Germany (dec.), 9132/80, 16 December 1982***

11. ... When determining the period to be considered under Article 5 (3) of the Convention, regard must be had not only to the time after the applicant's arrest on 28 July 1977, but also to the fact that the applicant had been detained on remand in connection with the same criminal proceedings already at an earlier time ... By the time of the pronouncement of the judgment of first instance on 13 January 1978 the applicant's detention on remand had thus effectively lasted 11 months. The Commission considers that this is the final date to be taken into account for the purposes of Article 5 (3) of the Convention ...

12. ... After this date, the applicant continued to be considered as a remand prisoner under the domestic law, but for the purposes of the Convention his detention comes under Article 5(1) (a) which authorises the lawful detention of a person after conviction by a competent court ...

► ***Zandbergs v. Latvia, 71092/01, 20 December 2011***

63. ... the Court notes that no provision of the Code of Criminal Procedure applicable at the material time provided for the inclusion of the time served abroad in the pre-trial detention or custody in the overall length of detention on remand. On the contrary, the new paragraph 3 of Article 23-5 of this code, added on 9 December 1999 – that is to say before the applicant's extradition to Latvia – expressly excluded

such possibility. The Court further considers that, in principle, neither Article 5 § 3 nor any other provision of the Convention creates a general obligation for a State party to take into account the length of a pre-trial detention suffered in a third State.

Not unreasonable

► *W. v. Switzerland*, 14379/88, 26 January 1993

42. ... the Federal Court ... never regarded the time spent by the applicant in prison as excessive. It considered that the applicant was primarily responsible for the slow pace of the investigation: there had been great difficulties in reconstructing the financial situation of his companies, as a result of the state of their accounts. It stated that things had become even more difficult when he decided to refuse to make any statement, thereby delaying the progress of the case ...

... the Court ... notes that the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care ... it finds no period during which the investigators did not carry out their inquiries with the necessary promptness, nor was there any delay caused by possible shortage of personnel or equipment. Consequently, it appears that the length of the detention in issue was essentially attributable to the exceptional complexity of the case and the conduct of the applicant. To be sure, he was not obliged to co-operate with the authorities, but he must bear the consequences which his attitude may have caused for the progress of the investigation.

► *Contrada v. Italy*, 27143/95, 24 August 1998

67. ... with the exception of the analysis of the data relating to Mr Contrada's mobile telephones, which could and should have been carried out earlier, and the excessive workload referred to by the trial court on 31 March 1995 ..., the Court sees no particular reason to criticise the relevant national authorities' conduct of the case, especially as, when the maximum periods of detention pending trial were extended, the trial court offered to increase the rate of the hearings, but the defence declined ...

Furthermore, although investigative measures such as the hearing of witnesses and confrontations are quite unexceptional in criminal cases, it should not be forgotten that trials of presumed members of the Mafia, or, as in the present case, of persons suspected of supporting that organisation from within State institutions, are particularly sensitive and complicated. With its rigid hierarchical structure and very strict rules and its substantial power of intimidation based on the rule of silence and the difficulty in identifying its followers, the Mafia represents a sort of criminal opposition force capable of influencing public life directly or indirectly and of infiltrating the institutions. It is for that reason – to enable the "organisation" to be undermined through information supplied by former "members" – that detailed inquiries are necessary.

68. In the light of the foregoing, the Court considers that the authorities who dealt with the case could reasonably base the detention in issue on relevant and sufficient grounds and that they conducted the proceedings without delay. There has therefore been no violation of Article 5 § 3.

► ***Chraidi v. Germany*, 65655/01, 26 October 2006**

45. ... the Court finds that the competent national court acted with the necessary special diligence in conducting the proceedings in the applicant's case.

46. The Court has found in previous cases that detention on remand exceeding five years constituted a violation of Article 5 § 3 of the Convention ...

47. The present case involved a particularly complex investigation and trial concerning serious offences of international terrorism which caused the death of three victims and serious suffering to more than one hundred. Following his extradition from Lebanon in 1996, the sole reason for the applicant's presence in Germany was to stand trial for these offences.

49. In these exceptional circumstances, the Court concludes that the length of the applicant's detention [5 years and nearly 6 months] can still be regarded as reasonable. There has accordingly been no violation of Article 5 § 3 of the Convention.

Unreasonable

► ***Muller v. France*, 21802/93, 17 March 1997**

48. ... Whilst the joinder of the various sets of proceedings was certainly necessary for the proper administration of justice, the successive changes of judge – the first a year after the investigation had begun, the other two after it had been under way for two years – contributed to slowing down the investigation; that fact was moreover recognised by the domestic courts ... The judicial authorities did not act with all due expedition, although the applicant had admitted the offences once and for all as soon as the investigation had begun ... and did not thereafter make any application that might have slowed its progress. The period spent by Mr Muller in detention pending trial therefore exceeded the "reasonable time" laid down in Article 5 para. 3 ...

► ***Labita v. Italy* [GC], 26772/95, 6 April 2000**

163. The Court observes that the grounds stated in the relevant decisions were reasonable, at least initially, though very general, too. The judicial authorities referred to the prisoners as a whole and made no more than an abstract mention of the nature of the offence. They did not point to any factor capable of showing that the risks relied on actually existed and failed to establish that the applicant, who had no record and whose role in the mafia-type organisation concerned was said to be minor (the prosecutor called for a three-year sentence in his case), posed a danger. No account was taken of the fact that the accusations against the applicant were based on evidence which, with time, had become weaker rather than stronger.

164. The Court accordingly considers that the grounds stated in the impugned decisions were not sufficient to justify the applicant's being kept in detention for two years and seven months.

165. In short, the detention in issue infringed Article 5 § 3 of the Convention.

► ***Punzelt v. Czech Republic*, 31315/96, 25 April 2000**

78. As regards the conduct of the proceedings by the national authorities, the Court notes, in particular, that more than eight months elapsed between the filing of the indictment and the hearing before the City Court on 28 June 1994. This period does not appear, as such, to be excessive as during this time the City Court had to deal with several requests for further evidence to be taken which the applicant made, notwithstanding that at the end of the investigation he had expressly stated that he had no other proposals in this respect.

79. However, the City Court subsequently adjourned three other hearings to enable further evidence to be taken. As a result, it delivered its first judgment after a delay of another six months.

80. Subsequently the Court of Cassation quashed the judgment of 10 January 1995 on the ground that the City Court had not established or considered all the relevant facts of the case, that it had applied the law erroneously and that its judgment was unclear. Despite the Supreme Court's intervention to accelerate the proceedings, the City Court did not deliver its second judgment until 16 January 1996, that is to say ten months after its first judgment had been quashed.

81. In these circumstances, the Court finds that "special diligence" was not displayed in the conduct of the proceedings.

82. Accordingly, there has been a violation of Article 5 § 3 of the Convention as a result of the length of the applicant's detention on remand.

Deduction from sentence

► ***P. L. v. France*, 21503/93, 2 April 1997**

27. The Court ... further notes that the pardon granted in the decree of 27 January 1997 gave the applicant what he was seeking from the French authorities. His imprisonment will be one year and eighteen days shorter, just as if his first period of detention on remand had been deducted from his sentence ... That being so, the circumstances described above may be regarded as an "arrangement or other fact of a kind to provide a solution of the matter" within the meaning of Rule 49 para. 2. Moreover, there is no reason of public policy why the case should not be struck out of the list (Rule 49 paras. 2 and 4). The case should therefore be struck out of the list.

► ***Labita v. Italy* [GC], 26772/95, 6 April 2000**

143. ... even though the Palermo Court of Appeal ... acceded to the applicant's claim for compensation for unjust detention, it based its decision on Article 314 § 1 of the Code of Criminal Procedure, which affords a right to reparation to "anyone who has been acquitted in a judgment that has become final" ... The detention is deemed to be "unjust" as a result of the acquittal, and an award under Article 314 § 1 does not amount to a finding that the detention did not satisfy the requirements of Article 5 of the Convention. While it is true that the length of the applicant's detention pending trial was taken into account in calculating the amount of reparation,

there is no acknowledgment in the judgment concerned, either express or implied, that it had been excessive.

144. In conclusion, the Court considers that despite the payment of a sum as reparation for the time he spent in detention pending trial, the applicant can still claim to be a “victim” within the meaning of Article 34 of the Convention of a violation of Article 5 § 3 ...

► ***Chraidi v. Germany*, 65655/01, 26 October 2006**

25. ... although the Convention forms an integral part of the law of the Federal Republic of Germany ... and there was accordingly nothing to prevent the Regional Court from holding, if appropriate, that the length of the applicant’s detention on remand had been in breach of the Convention, either expressly or in substance, the latter court merely conceded that the impugned detention had lasted an “unusually long” time ... Furthermore, the Court is not satisfied that the applicant was afforded adequate redress for the alleged violation because the Regional Court failed to specify to what extent the applicant’s sentence had been reduced on account of the length of his detention on remand ...

26. The Court therefore considers that the Regional Court’s statement concerning the unusual length of the applicant’s detention did not deprive the latter of his status of victim within the meaning of Article 34 of the Convention ...

► ***Gagliano Giorgi v. Italy*, 23563/07, 6 March 2012**

57. ... the Court notes that, because of the duration of the proceedings in question, on 11 June 1998 the Court of Appeal declared the charge of bribery to be time-barred. This evidently led to a reduction in the applicant’s sentence because, of the two offences with which he was charged, that was the one that carried the harsher penalty, even though the material before the Court does not indicate the exact extent of that reduction or clarify whether there was ultimately any connection between the reduction and the violation of the “reasonable time” requirement. The Court further observes that the applicant decided not to waive the time bar, which he was entitled to do under Italian law ... In those circumstances, the Court considers that the reduction of his sentence at least compensated for or significantly reduced the damage normally entailed by the excessive length of criminal proceedings.

Release on termination

► ***Giulia Manzoni v. Italy*, 19218/91, 1 July 1997**

23. Mrs Manzoni maintained that she had been unlawfully detained for seven hours between the end of the trial in the Rome District Court (11.45 a.m.) and her release from prison (6.45 p.m.).

24. The Government, pointing out that the applicant had no longer been regarded as being in detention after 11.45 a.m., argued that the period of time in issue had been quite normal seeing that she had been taken to the prison (roughly an hour’s drive from the court) at about 1.30 p.m. and that the staff there had served the record

of the hearing on her (at 3.10 p.m.), informed the police that she was about to be released and waited for confirmation that there were no objections, returned her personal effects to her, dealt with accounts and at 6.30 p.m. had taken a note of her address for notification purposes. All those measures had necessarily taken some time.

25. ... the Court ... merely notes that Mrs Manzoni was taken to Rebibbia Prison more than an hour and a half after the end of her trial and that the record of the hearing was served on her shortly after her arrival there; that procedure must be regarded as a first step towards complying with the Rome District Court's judgment. Admittedly, the administrative formalities mentioned by the Government could have been carried out more swiftly, but that is not a ground for finding that there has been a breach of the Convention; some delay in carrying out a decision to release a detainee is often inevitable, although it must be kept to a minimum.

In conclusion, there has been no violation of Article 5 para. 1 (c) ...

► ***Değerli and Others v. Turkey*, 18242/02, 5 February 2008**

22. In the instant case the Court notes that the order to release the applicants, issued on 3 July 2001, was transmitted at 5.50 p.m. the same day to the establishment where the applicants were being held. Yet they were not released until the following day, after a delay of between eighteen hours and fifty minutes and twenty-three hours and thirty-five minutes. The Court considers that in the absence of a strict, hour-by-hour account of the actions and formalities carried out by the prison authorities, the Government's claim that there was no delay in the applicants' release cannot be accepted ...

25. It also considers that the number of detainees to be released cannot justify the delays observed. In order to guarantee the right to liberty of the people under their jurisdiction, the contracting States must take the necessary measures to enable prison staff to execute release orders without delay, even when a large number of detainees are being released.

26. In the light of the foregoing, the Court finds that the applicants' continued detention in the hours following the issue of the order to release them contravened the requirements of Article 5 of the Convention as it was not based on one of the aims authorised by the first paragraph of that Article.

► ***Ladent v. Poland*, 11036/03, 18 March 2008**

82. ... the Kraków-Śródmieście District Court ordered the applicant's release on 10 January 2003. However, the Międzyrzecz Detention Centre refused to execute that order on the basis of a facsimile copy of the order sent by the court and requested service of the original documents. On 10 January 2003 the District Court ordered the relevant documents to be sent by courier service. The Government have not specified when the documents were received by the detention centre. The applicant was released on 13 January 2003, which is three days after the District Court had ordered his release.

83. The Court must scrutinise complaints of delays in the release of detainees with particular vigilance ... In its view, the administrative formalities related to the applicant's release could and should have been carried out more swiftly. In this regard, it observes that the paramount importance of the right to liberty imposes on the authorities a duty to remove organisational shortcomings attributable to the State which may occasion unjustified deprivation of liberty ... the Court considers that the administrative formalities related to the applicant's release were not kept to a minimum as required by the relevant case-law.

84. There has accordingly been a violation of Article 5 § 1 of the Convention on that account.

Chapter 6

Gathering evidence

IDENTIFYING THE SUSPECT

► *Laska and Lika v. Albania*, 12315/04, 20 April 2010

64. The Court observes that the applicants were found guilty essentially on the strength of eyewitnesses' submissions obtained during the identification parade. It notes that the eyewitnesses' evidence resulting from the identification was the key evidence supporting the prosecution's case against the applicants ...

66. In the first place, the applicants and B.L. were required to stand in the line-up wearing white and blue balaclavas, similar in colour to those worn by the authors of the crime. The other two persons in the line-up wore black balaclavas, in stark contrast to the white and blue balaclavas worn by the applicants and B.L., who were accused of committing the offence. The change of position of the persons in the line-up did not result in any different outcome for the applicants, as they were consistently required to wear the same colour (white and blue) balaclavas ... The Court finds that the identification parade was tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime.

67. Moreover, the identification parade was held in the absence of the applicants' lawyers. It does not transpire from the case file that the applicants waived of their own free will, either expressly or tacitly, the entitlement to legal assistance at the time of the identification parade ...

68. The Court notes in this connection that even though the District Court accepted that there had been irregularities at the investigation stage, in convicting the applicants it relied on the positive identification of the applicants made by eyewitnesses at the identification parade. However, neither the assistance provided subsequently by a lawyer nor the adversarial nature of ensuing proceedings could cure the defects which had occurred during the criminal investigation ...

69. There was no independent oversight of the fairness of the procedure or opportunity to protest against the blatant irregularities. The Court finds that the manifest disregard of the rights of the defence at this stage irretrievably prejudiced the fairness of the subsequent criminal trial.

70. Finally, the Court notes that it has not been explained why the applicants' requests to have the balaclavas used during the identification parade produced before the court were refused ...

71. The Court considers that in the circumstances of the applicants' case, fairness demanded that they be enabled to argue that the balaclavas they were required to wear at the identification parade, which constituted the decisive evidence for the applicants' conviction, were entirely different from those worn by the robbers. However, they were denied an opportunity at the trial to redress the irregularities which occurred at the identification parade. In this connection, the Government did not invoke any public interest grounds for withholding such evidence, and no such grounds are apparent from the domestic proceedings.

72. In conclusion, having regard to the above findings, the Court concludes that the proceedings in question did not satisfy the requirements of a fair trial. There has accordingly been a violation of Article 6 § 1 ...

SEARCH AND SEIZURE

Search

► ***Funke v. France*, 10828/84, 25 February 1993**

56. ... The Court ... recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse ...

57. This was not so in the instant case. At the material time ... the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government ... appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.

► ***L. M. v. Italy*, 60033/00, 8 February 2005**

32. The Court ... notes that the domestic law provides specifically for the validation of the records of searches, thereby enabling the public prosecutor's office to determine whether the police acted lawfully. The total, unjustified absence of such validation shows that the relevant authorities failed to ensure that the search at issue was conducted in compliance with the statutory procedures.

33. It follows that subsequent to the search the statutory procedures were not followed and that there has therefore been a violation of Article 8 of the Convention.

► ***Roemen and Schmit v. Luxembourg*, 51772/99, 25 February 2003**

47. ... The measures were intended to establish the identities of the Registration and State-Property Department officials who had worked on the file concerning the imposition of a fiscal fine on the minister ... in other words, the journalist's source ...

56. ... measures other than searches of the applicant's home and workplace (for instance, the questioning of Registration and State-Property Department officials) might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions. The Government have entirely failed to show that the domestic authorities would not have been able to ascertain whether, in the first instance, there had been a breach of professional confidence and, subsequently, any handling of information thereby obtained without searching the applicant's home and workplace ...

60. It therefore finds that the impugned measures must be regarded as disproportionate and that they violated the first applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention ...

► ***Buck v. Germany*, 41604/98, 28 April 2005**

47. ... the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence in respect of which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law ... In addition to that ... all that was at stake was the conviction of a person who had no previous record of contraventions of road traffic rules.

48. Furthermore, the Court notes that, even though the contravention in question had been committed with a car belonging to the company owned by the applicant, the proceedings in the course of which the search and seizure had been executed had not been directed against the applicant himself, but against his son, that is, a third party.

51. Finally ... the Court observes that the attendant publicity of the search of the applicant's business and residential premises in a town of some 10,000 inhabitants was likely to have an adverse effect on his personal reputation and that of the company owned and managed by him. In this connection, it is to be recalled that the applicant himself was not suspected of any contravention or crime.

52. ... Having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued.

► ***Keegan v. United Kingdom*, 28867/03, 18 July 2006**

32. ... the police obtained a warrant from a Justice of the Peace, giving information under oath that they had reason to believe the proceeds of a robbery were at the address which had been used by one of the suspected robbers. No doubt was cast, in the domestic proceedings or before the Court, on the genuineness of the belief of the officers who obtained the warrant or those who executed it. If this belief had been correct, the Court does not doubt that the entry would have been found to have been justified.

33. However, the applicants had been living at the address for about six months and they had no connection whatsoever with any suspect or offence. As the County Court Judge noted, it is difficult to conceive that enquiries were not made by the police to verify who lived at the address the suspected robber had been known to give and that if such enquiries had been properly made (via the local authority or utility companies), they would not have revealed the change in occupation. The loss of the police notes renders it impossible to deduce whether it was a failure to make the proper enquiries or a failure to transmit or properly record the information obtained that led to the mistake that was made. In any event, as found by the domestic courts, although the police did not act with malice and indeed with the best of intentions, there was no reasonable basis for their action in breaking down the applicants' door early one morning while they were in bed. Put in Convention terms, there might have been relevant reasons but, as in the circumstances they were based on a misconception which could, and should, have been avoided with proper precautions, they cannot be regarded as sufficient ...

34. The fact that the police did not act maliciously is not decisive under the Convention, which aims to protect against abuse of power, however motivated or caused ... The Court cannot agree that limiting actions for damages to cases of malice is necessary to protect the police in their vital function of investigating crime. The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being ... In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively carried out, the resulting police action, which caused the applicants considerable fear and alarm, cannot be regarded as proportionate.

35. As argued by the applicants, this finding does not imply that any search which proves to be unsuccessful would fail the proportionality test, only that a failure to take reasonable and available precautions may do so.

36. The Court accordingly concludes that the balance has not been properly struck ... and that there has been a violation of Article 8 of the Convention.

► *Imakayeva v. Russia*, 7615/02, 9 November 2006

187. The Court notes that no search warrant was produced to the applicant during the search and that no details were given of what was being sought. Furthermore, it appears that no such warrant was drawn up at all, either before or after the search, assuming that the security forces acted in a situation which required urgency. The Government were unable to submit any details about the reasons for the search, to refer to any record of a legitimisation of it or to indicate the procedural significance of this action. The Government could not give any details about the items seized at the Imakayevs' house because they had allegedly been destroyed. It thus appears that no record or description of these items was made. The receipt drawn up by a military officer who had failed to indicate his real name or rank or even the state body which he represented, and which referred to "a bag of documents and a box of floppy discs" ..., appears to be the only existing paper in relation to the search.

188. The Government's reference to the Suppression of Terrorism Act cannot replace an individual authorisation of a search, delimiting its object and scope, and drawn up in accordance with the relevant legal provisions either beforehand or afterwards. The provisions of this Act are not to be construed so as to create an exemption to any kind of limitations of personal rights for an indefinite period of time and without clear boundaries to the security forces' actions. The application of these provisions in the present case is even more doubtful, given the Government's failure to indicate, either to the applicant or to this Court, what kind of counter-terrorist operation took place on 2 June 2002 in Novye Atagi, which agency conducted it, its purpose, etc. Moreover, the Court remarks that for over two years after the event various state authorities denied that such an operation had taken place at all. The Court is again struck by this lack of accountability or any acceptance of direct responsibility by the officials involved in the events in the present case.

189. The Court thus finds that the search and seizure measures ... were implemented without any authorisation or safeguards. In these circumstances, the Court concludes that the interference in question was not "in accordance with the law" and that there has been a violation of Article 8 of the Convention.

► ***Smirnov v. Russia, 71362/01, 7 June 2007***

46. ... the applicant himself was not charged with, or suspected of, any criminal offence or unlawful activities. On the other hand, the applicant submitted documents showing that he had represented, at different times, four persons in criminal case no. 7806, in connection with which the search had been ordered. In these circumstances, it is of particular concern for the Court that, when the search of the applicant's flat was ordered, no provision for safeguarding the privileged materials protected by professional secrecy was made.

47. The search order was drafted in extremely broad terms, referring indiscriminately to "any objects and documents that [were] of interest for the investigation of criminal case [no. 7806]", without any limitation. The order did not contain any information about the ongoing investigation, the purpose of the search or the reasons why it was believed that the search at the applicant's flat would enable evidence of any offence to be obtained ... Only after the police had penetrated into the applicant's flat was he invited to hand over "documents relating to the public company T. and the federal industrial group R.". However, neither the order nor the oral statements by the police indicated why documents concerning business matters of two private companies – in which the applicant did not hold any position – should have been found on the applicant's premises ... The *ex post factum* judicial review did nothing to fill the lacunae in the deficient justification of the search order. The Oktyabrskiy Court confined its finding that the order had been justified, to a reference to four named documents and other unidentified materials, without describing the contents of any of them ... The court did not give any indication as to the relevance of the materials it referred to and, moreover, two out of the four documents appeared after the search had been carried out. The Court finds that the domestic authorities failed in their duty to give "relevant and sufficient" reasons for issuing the search warrant.

48. As regards the manner in which the search was conducted, the Court further observes that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were “of interest” for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant’s personal notebook, the central unit of his computer and other materials, including his client’s authority form issued in unrelated civil proceedings and a draft memorandum in another case. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege ... Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. ...

49. ... There has therefore been a violation of Article 8 of the Convention.

► ***Peev v. Bulgaria*, 64209/01, 26 July 2007**

37. ... in the past it has found that searches carried out in business premises and the offices of persons exercising liberal professions amount to interferences with the right to respect for both the private lives and the homes of the persons concerned ... The issue in the present case is whether the search in the applicant’s office, which was located on the premises of a public authority, also amounted to such interference.

39. ... the situation obtaining in the present case should ... be assessed under the “reasonable expectation of privacy” test. In the Court’s opinion, the applicant did have such an expectation, if not in respect of the entirety of his office, at least in respect of his desk and his filing cabinets. This is shown by the great number of personal belongings that he kept there ... Moreover, such an arrangement is implicit in habitual employer–employee relations and there is nothing in the particular circumstances of the case – such as a regulation or stated policy of the applicant’s employer discouraging employees from storing personal papers and effects in their desks or filing cabinets – to suggest that the applicant’s expectation was unwarranted or unreasonable. The fact that he was employed by a public authority and that his office was located on government premises does not of itself alter this conclusion, especially considering that the applicant was not a prosecutor, but a criminology expert employed by the Prosecutor’s Office ... Therefore, a search which extended to the applicant’s desk and filing cabinets must be regarded as an interference with his private life ...

44. ... the Government did not seek to argue that any provisions had existed at the relevant time, either in general domestic law or in the governing instruments of the Prosecutor’s Office, regulating the circumstances in which that office could, in its capacity as employer or otherwise, carry out searches in the offices of its employees outside the context of a criminal investigation. The interference was therefore not “in accordance with the law”, as required by Article 8 § 2.

► ***André and Another v. France, 18603/03, 24 July 2008***

42. Accordingly, although domestic law may make provision for searches of the practices of lawyers, it is essential that such searches are accompanied by particular safeguards. Likewise, the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence ..., or in connection with efforts to combat certain practices ... On that account, however, it is vital to provide a strict framework for such measures, since lawyers occupy a vital position in the administration of justice and can, by virtue of their role as intermediary between litigants and the courts, be described as officers of the law.

43. In the instant case, the Court notes that the search was accompanied by special procedural safeguards, since it was carried out in the presence of the chairman of the Bar Association of which the applicants were members...

44. On the other hand, besides the fact that the judge who had authorised the search was not present, the presence of the chairman of the Bar Association and his specific objections were insufficient to prevent the actual inspection of all the documents at the practice, or their seizure. As regards in particular the seizure of the first applicant's handwritten notes, the Court notes that it is not disputed that these were the lawyer's personal documents and subject to professional secrecy, as maintained by the chairman of the Bar Association.

45. Furthermore, the Court notes that the search warrant was drawn up in broad terms, the decision being limited to ordering the searches and seizures required to disclose evidence of misconduct at certain places at which documents and data carriers relating to the suspected fraud might be found, in particular at the applicants' place of business. Accordingly, the inspectors and police officers were given extensive powers.

46. Lastly, and most importantly, the Court notes that the purpose of the search at issue was to discover at the premises of the applicants, purely in their capacity as the lawyers of the company suspected of fraud, documents which could establish the existence of such fraud on the company's part and to use such documents in evidence against it. At no time were the applicants accused or suspected of having committed an offence or being involved in any fraud committed by their client.

47. The Court therefore notes that in the present case, in the context of a tax inspection into the affairs of a company that was the applicants' client, the authorities targeted the applicants solely because of the difficulties encountered both in carrying out the necessary tax inspections and in finding "accounting, legal and corporate documents" confirming the suspicion that the client company was involved in fraud.

48. In the light of the foregoing, the Court finds that, in the circumstances of the case, the search and seizures carried out at the applicants' premises were disproportionate to the aim pursued.

49. There has therefore been a violation of Article 8 of the Convention.

► ***Sher and Others v. United Kingdom*, 5201/11, 20 October 2015**

173. The warrant in the present case was issued by a District Judge in the Magistrates' Court ... The police officer making the application confirmed that he had reasonable grounds for believing that the material at the addresses identified was likely to be of substantial value to a terrorism investigation and the judge agreed ... The applicants did not suggest that there were no reasonable grounds for granting the warrant.

174. It is true that the search warrant was couched in relatively broad terms. While limiting the search and seizure of files to specific addresses, it authorised in a general and unlimited manner the search and seizure of correspondence, books, electronic equipment, financial documents and numerous other items. However, the specificity of the list of items susceptible to seizure in a search conducted by law enforcement officers will vary from case to case depending on the nature of the allegations in question. Cases such as the present one, which involve allegations of a planned large-scale terrorist attack, pose particular challenges, since, while there may be sufficient evidence to give rise to a reasonable suspicion that an attack is under preparation, an absence of specific information about the intended nature of the attack or its targets make precise identification of items sought during a search impossible. Further, the complexity of such cases may justify a search based on terms that are wider than would otherwise be permissible. Multiple suspects and use of coded language, as in the present case, compound the difficulty faced by the police in seeking to identify in advance of the search the specific nature of the items and documents sought. Finally, the urgency of the situation cannot be ignored. To impose under Article 8 the requirement that a search warrant identify in detail the precise nature of the items sought and to be seized could seriously jeopardise the effectiveness of an investigation where numerous lives might be at stake. In cases of this nature, the police must be permitted some flexibility to assess, on the basis of what is encountered during the search, which items might be linked to terrorist activities and to seize them for further examination. While searches of electronic devices raise particularly sensitive issues, and arguably require specific safeguards to protect against excessive interference with personal data, such searches were not the subject of the applicants' complaints or the domestic proceedings in this case and, in consequence, no evidence has been led by the parties as to the presence or otherwise of such safeguards in English law.

175. Finally, it is of some relevance in the present case that the applicants had a remedy in respect of the seized items in the form of an *ex post facto* judicial review claim or a claim for damages ... It is noteworthy that they did not seek to challenge the seizure of any specific item during the search, nor did they point to any item which they contend was seized or searched for unjustifiably by reference to the nature of the investigation.

176. For these reasons, the Court concludes that the search warrants ... cannot be regarded as having been excessively wide. The national authorities were therefore entitled to consider that the resultant "interference" with the applicants' right to respect for their private lives and homes was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

► ***Sakit Zahidov v. Azerbaijan*, 51164/07, 12 November 2015**

52. ... the Court will examine firstly the quality of the physical evidence, including whether the circumstances in which it was obtained casts doubt on its reliability or accuracy ...

53. As regards the first question, the Court observes at the outset that it is undisputed by the parties that the search of the applicant was not carried out immediately following his arrest at 7 p.m. on 23 June 2006. It took place at 7.20 p.m. on 23 June 2006 at the NDMIA [Narcotics Department of the Ministry of Internal Affairs], nowhere near his place of arrest. In this connection, the Court notes that it has already found in a case against Azerbaijan that the police's failure to conduct a search immediately following an arrest without good reason raises legitimate concerns about the possible "planting" of evidence ... The Court considers that these findings are also relevant to the present case. In fact, the time lapse of around twenty minutes between the arrest and search raises legitimate concerns about the possible "planting" of the evidence, because the applicant was completely under the control of the police during that time. Moreover, there is nothing to suggest that there were any special circumstances rendering it impossible to carry out a search immediately after the applicant's arrest. The Court further observes that the domestic courts failed to examine a copy of the video-recording of the search despite the applicant's explicit request in this regard ... Furthermore, the Government also failed to provide a copy to the Court when specifically requested to do so.

54. The Court also cannot overlook the fact that the applicant's arrest was not immediately documented by the police. In particular, although it is undisputed by the parties that he was arrested by the police at 7 p.m. on 23 June 2006, an official record of the arrest was not drawn up until 10.55 p.m. on 23 June 2006 ... Moreover, it appears that the applicant was not represented by a lawyer during his arrest and the search at the NDMIA.

55. Having regard to the above, the Court considers that the quality of the physical evidence on which the domestic courts' guilty verdict was based is questionable because the manner in which it was obtained casts doubt on its reliability.

Seizure

► ***Panteleyenko v. Ukraine*, 11901/02, 29 June 2006**

51. ... instead of selecting the evidence necessary for the investigation, they seized all documents from the office and certain personal items belonging to the applicant which were clearly unrelated to the criminal case ...

53. In these circumstances, the Court concludes that the interference in question has not been shown to be "in accordance with the law" and that there has accordingly been a violation of Article 8 on this ground.

► ***M. N. and Others v. San Marino*, 28005/12, 7 July 2015**

77. The Court firstly notes the wide extent of the *exequatur* order of the *Commissario*, which also affected the applicant, an individual not subject to the ongoing investigation

in relation to which the letters rogatory were made, and in respect of whom no clear suspicions had been advanced ... The Court notes that albeit decided by a judicial authority, the Government admitted that the *Commissario* had limited powers in making the order. Indeed, the *Commissario* could not, or in any event, had failed to make any assessment as to the need for such a wide ranging order, or its impact on the multiple third parties, including the applicant, who was extraneous to the criminal proceedings.

78. The Court must further assess whether an “effective control” was available to the applicant to challenge the measure to which he had been subjected ... and therefore whether subsequent to the implementation of that order the applicant had available any means for reviewing it, in his regard ...

79. The Court notes that the applicant, like other persons in his position, only became officially aware of the *exequatur* decision and its implementation following a notification which was ordered on 26 April 2010 ... and which was served on him only on 24 January 2011, that is, more than a year after the measure was ordered. Subsequently, the applicant instituted proceedings challenging the *exequatur* decision. These proceedings were not however examined on the merits, the domestic courts having considered that the applicant had no standing to impugn the measure as he was not an “interested person”.

80. The Court observes that there is no immediate reason why the term “interested persons” in Article 30.3 of Law no. 104/2009 should be interpreted as referring solely to persons affected by the order such as the persons charged and the owners or possessors of the banking and fiduciary institutes/establishments but not to the applicant, who was also affected by the measure. However, the Court would recall that it is not its task to substitute itself for the domestic jurisdictions ... The Court notes that the Government supported the interpretation of the domestic courts. It follows that it is not disputed that the procedure attempted by the applicant was not in fact available to him. It is also noted that the applicant’s claims as to the constitutional legitimacy of such a finding were also rejected for lack of standing. The Court reiterates that the institution of proceedings does not, in itself, satisfy all the access to court requirements of Article 6 § 1 ..., it follows from this that, contrary to what was submitted by the Government, the mere fact that the applicant instituted those proceedings, which were then rejected for lack of standing, does not in itself satisfy the requirement of effective control under Article 8 ...

82. The Court further observes that no other procedure appears to have been available to the applicant ...

83. Finally, the Court underlines that in the circumstances of the present case, the applicant, who was not an accused person in the original criminal procedure, was at a significant disadvantage in the protection of his rights compared to an accused person, or the possessor of the banking or fiduciary institute, subject to the *exequatur* decision (and who were entitled to challenge it), with the result that the applicant did not enjoy the effective protection of national law. Thus, the Court finds that, despite the wide extent of the measure which had been applied extensively and across to all banking and fiduciary institutes in San Marino, the applicant did not have available to him the “effective control” to which citizens are entitled under the

rule of law and which would have been capable of restricting the interference in question to what was “necessary in a democratic society” ...

85. There has accordingly been a violation of Article 8 of the Convention and the Government’s objection as to non-exhaustion of domestic remedies is dismissed.

Use of force

► *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

77. ... it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale ... The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences ...

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant’s health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

Destruction of property

► *Selçuk and Asker v. Turkey*, 23184/94, 24 April 1998

77. ... It recalls that Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village of İslamköy all their lives ... Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk’s protests were ignored, and no assistance was provided to them afterwards.

78. Bearing in mind in particular the manner in which the applicants' homes were destroyed ...and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 ...

86. ... There can be no doubt that these acts, in addition to giving rise to violations of Article 3, constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.

87. It follows that the Court finds violations of Article 8 of the Convention and Article 1 of Protocol No. 1.

BODY EXAMINATION INCLUDING AUTOPSY

► *X. v. Netherlands (dec.)*, 8239/78, 4 December 1978

The Commission thinks it reasonable that the authorities, in pursuance of their task, should be able to take certain measures affecting the person whom they suspect of an offence. It points out that Article 5, paragraph 1.c of the Convention even permits detention on remand in such cases. Therefore, *a fortiori*, it will tolerate minor interferences such as a bloodtest ...

The Commission notes that various guarantees are provided against arbitrary or improper use of the bloodtest ... a bloodtest may only be ordered by the Public Prosecutor, his deputy or another police official authorised to do so. The enabling decree accompanying this legislation also stipulates that the bloodtest may only be performed by an approved doctor, who may ... refuse to carry out the test for exceptional reasons of a medical character ...

The Commission therefore considers that Netherlands legislation on this point is inspired by the desire and need to protect society and, more particularly, road safety and the health of other people. Thus, while compulsory bloodtesting may be seen as constituting a violation of private life within the meaning of Article 8, paragraph 1, it may also be seen as necessary for protection of the rights of others, within the meaning of paragraph 2 of the same article.

► *Akpınar and Altun v. Turkey*, 56760/00, 27 February 2007

76. ... it is undisputed that the ears of Seyit Külekçi and Doğan Altun had been cut off, in whole or in part, by the time their bodies were returned to the applicants.

78. ... the mutilation of the bodies occurred while they were in the hands of the State security forces.

81. ...the Court is led to conclude that the ears of Seyit Külekçi and Doğan Altun were cut off after their deaths.

82. Nevertheless, the Court has never applied Article 3 of the Convention in the context of disrespect for a dead body. The present Chamber concurs with this approach, finding that the human quality is extinguished on death and, therefore,

the prohibition on ill-treatment is no longer applicable to corpses, like those of Seyit Külekçi and Doğan Altun, despite the cruelty of the acts concerned.

83. It follows that there has been no violation of Article 3 on this account.

84. As to the second limb of the applicants' complaint, the Court previously held ... that ... a father who was presented with the mutilated body of his son ... could claim to be a victim ... of a violation of Article 3 ... the Court concluded that the anguish caused to that applicant in such circumstances amounted to degrading treatment, contrary to Article 3.

85. The Court observes, in the present case, that the applicants were indeed presented with the mutilated bodies of Seyit Külekçi and Doğan Altun.

86. ... the Court confirms that the applicants, who are the sister and father of the deceased, can claim to be victims within the meaning of Article 34 of the Convention. Furthermore, the Court has no doubt that the suffering caused to them as a result of this mutilation amounted to degrading treatment contrary to Article 3 of the Convention.

87. It follows that there has been a violation of Article 3 of the Convention in respect of the applicants themselves.

PSYCHIATRIC EXAMINATION

► ***Botka and Paya v. Austria (dec.)*, 15882/89, 29 March 1993**

3. ... The Commission observes that the expert S. prepared the opinion on the first applicant's mental health in the course of criminal proceedings against Mr. R., suspected of having defrauded the first applicant as well as his brother. The charges against Mr. R. raised, *inter alia*, the question of the first applicant's mental health.

The Commission notes that the preparation of the opinion in question did not necessitate any particular examination of the first applicant by Dr. S. In particular, when, following the appointment of Dr. S. as expert in October 1988, the first applicant refused an examination, no further steps, such as coercive measures, were taken ... Furthermore, Dr. S. accompanied the Investigating Judge on the occasion of the first applicant's questioning as witness on 1 February 1989, when the first applicant did not object, but voluntarily answered also the questions put by the expert. Moreover, the expert, in his opinion of April 1989, did not establish any negative findings on the first applicant's capacity to enter into legal transactions.

In these particular circumstances, the Commission finds that the appointment of the expert S. to prepare an expert opinion on questions of the first applicant's mental health does not show any lack of respect for the first applicant's right to respect for his private life under Article 8 para. 1 ... of the Convention.

► ***Worwa v. Poland*, 26624/95, 27 November 2003**

82. The Court emphasises that ordering a psychiatric report in order to determine the mental state of a person charged with an offence remains a necessary measure and one which protects individuals capable of committing offences without being in full possession of their mental faculties. However, the State authorities are required to

make sure such a measure does not upset the fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice.

83. ... the Court finds that that balance was not preserved. The judicial authorities within the territorial jurisdiction of a single court repeatedly and at short intervals summoned the applicant to undergo psychiatric examinations, and in addition she was sent home on several occasions after travelling to the specified place having been told that no appointment had been made for the day indicated on the summons ...

84. ... the Court, notwithstanding the large number of disputes in which the applicant was involved, considers that the judicial authorities failed to act with due diligence. The interference with the applicant's exercise of her right to respect for her private life was therefore unjustified.

INVESTIGATION OF CRIME SCENE WITH DIRECT ASSISTANCE OF SUSPECT

► *Demiray v. Turkey*, 27308/95, 21 November 2000

46. ... the Court notes that the authorities were certainly in a position to evaluate the risks inherent in visiting the alleged site of the arms cache in question, if only because of the sensitivity of the situation in south-east Turkey. According to the sketch map provided by the Government, Ahmet Demiray was 1 m away from the arms cache at the time of the explosion, whereas two of the gendarmes accompanying him were 30 m. away and the third one 50 m away, forming an isosceles triangle with the arms cache at the centre ... In the absence of an explanation by the Government of the reasons for proceeding in that way, which inevitably gives rise to serious doubts, and of any indication of other measures taken to protect Ahmet Demiray, the Court can only conclude that the relevant authorities failed to take measures which, judged reasonably, might have been expected to safeguard against the risk incurred by the applicant's husband.

47. The Court therefore considers that the State's responsibility for the death is engaged. Accordingly, there has been a violation of Article 2 of the Convention in that regard.

INTERCEPTION OF COMMUNICATIONS

► *Lüdi v. Switzerland*, 12433/86, 15 June 1992

39. There is no doubt that the telephone interception was an interference with Mr Lüdi's private life and correspondence.

Such an interference is not in breach of the Convention if it complies with the requirements of paragraph 2 of Article 8 ... The measure in question was based on Articles 171b and 171c of the Berne Code of Criminal Procedure, which apply ...even to the preliminary stage of an investigation, where there is good reason to believe that criminal offences are about to be committed. Moreover, it was aimed at the "prevention of crime", and the Court has no doubt whatever as to its necessity in a democratic society.

► ***Kopp v. Switzerland*, 23224/94, 25 March 1998**

73. However, the Court discerns a contradiction between the clear text of legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law has established the principle, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.

74. Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence.

75. In short, Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter. Consequently, Mr Kopp, as a lawyer, did not enjoy the minimum degree of protection required by the rule of law in a democratic society. There has therefore been a breach of Article 8.

► ***Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015**

302. The Court concludes that Russian legal provisions governing interceptions of communications do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications. In particular, the circumstances in which public authorities are empowered to resort to secret surveillance measures are not defined with sufficient clarity. Provisions on discontinuation of secret surveillance measures do not provide sufficient guarantees against arbitrary interference. The domestic law permits automatic storage of clearly irrelevant data and is not sufficiently clear as to the circumstances in which the intercept material will be stored and destroyed after the end of a trial. The authorisation procedures are not capable of ensuring that secret surveillance measures are ordered only when "necessary in a democratic society". The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions.

303. It is significant that the shortcomings in the legal framework as identified above appear to have an impact on the actual operation of the system of secret surveillance which exists in Russia. The Court is not convinced by the Government's assertion that all interceptions in Russia are performed lawfully on the basis of a proper judicial authorisation. The examples submitted by the applicant in the domestic proceedings

... and in the proceedings before the Court ... indicate the existence of arbitrary and abusive surveillance practices, which appear to be due to the inadequate safeguards provided by law ...

304. In view of the shortcomings identified above, the Court finds that Russian law does not meet the “quality of law” requirement and is incapable of keeping the “interference” to what is “necessary in a democratic society”.

305. There has accordingly been a violation of Article 8 of the Convention.

AUDIO AND VIDEO SURVEILLANCE

► *P. G. and J. H. v. United Kingdom, 44787/98, 25 September 2001*

34. The applicants complained that covert listening devices were used by the police to monitor and record their conversations at a flat ... and that listening devices were used while they were at the police station to obtain voice samples.

38. As there was no domestic law regulating the use of covert listening devices at the relevant time ..., the interference in this case was not “in accordance with the law” as required by Article 8 § 2 of the Convention, and there has therefore been a violation of Article 8 ...

59. The Court’s case-law has, on numerous occasions, found that the covert taping of telephone conversations falls within the scope of Article 8 in both aspects of the right guaranteed, namely, respect for private life and correspondence. While it is generally the case that the recordings were made for the purpose of using the content of the conversations in some way, the Court is not persuaded that recordings taken for use as voice samples can be regarded as falling outside the scope of the protection afforded by Article 8. A permanent record has nonetheless been made of the person’s voice and it is subject to a process of analysis directly relevant to identifying that person in the context of other personal data. Though it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants.

60. The Court concludes therefore that the recording of the applicants’ voices when being charged and when in their police cell discloses an interference with their right to respect for private life within the meaning of Article 8 § 1 of the Convention.

62. ... It considers that no material difference arises where the recording device is operated, without the knowledge or consent of the individual concerned, on police premises. The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation.

► *Perry v. United Kingdom, 63737/00, 17 July 2003*

47. ... The judge found shortcomings as regarded police compliance with paragraphs D.2.11, D.2.15 and D.2.16 of the Code of Practice [regarding the taking and

use of video footage for identification], which concerned, significantly, their failure to ask the applicant for his consent to the video, to inform him of its creation and use in an identification parade, and of his own rights in that respect (namely, to give him an opportunity to view the video, object to its contents and to inform him of the right for his solicitor to be present when witnesses saw the videotape). In light of these findings by domestic courts, the Court cannot but conclude that the measure as carried out in the applicant's case did not comply with the requirements of domestic law.

► ***Van Vondel v. Netherlands*, 38258/03, 25 October 2007**

41. ... the applicant complained of a violation of his right to privacy in that a number of his (telephone) conversation with Mr R. had been recorded by the latter with recording devices made available by the National Police Internal Investigation Department to Mr R. who had also been given suggestions by the National Police Internal Investigation Department about the substance of the conversations to be held with the applicant ...

53. Although the Court understands the practical difficulties for an individual who is or who fears to be disbelieved by investigation authorities to substantiate an account given to such authorities and that – for that reason – such a person may need technical assistance from these authorities, it cannot accept that the provision of that kind of assistance by the authorities is not governed by rules aimed at providing legal guarantees against arbitrary acts. It is therefore of the opinion that, in respect of the interference complained of, the applicant was deprived of the minimum degree of protection to which he was entitled under the rule of law in a democratic society.

54. In the light of the foregoing, the Court finds that the interference in issue was not “in accordance with law”. This finding suffices for the Court to hold that there has been a violation of Article 8 of the Convention.

► ***Bykov v. Russia* [GC], 4378/02, 10 March 2009**

78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, “the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence” ...

79. In the Court's opinion, these principles apply equally to the use of a radio-transmitting device, which, in terms of the nature and degree of the intrusion involved, is virtually identical to telephone tapping.

80. ... the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific safeguards were provided for. Given the absence of specific

regulations providing safeguards, the Court is not satisfied that, as claimed by the Government, the possibility for the applicant to bring court proceedings seeking to declare the “operative experiment” unlawful and to request the exclusion of its results as unlawfully obtained evidence met the above requirements.

81. It follows that in the absence of specific and detailed regulations, the use of this surveillance technique as part of an “operative experiment” was not accompanied by adequate safeguards against various possible abuses. Accordingly, its use was open to arbitrariness and was inconsistent with the requirement of lawfulness.

82. The Court concludes that the interference with the applicant’s right to respect for private life was not “in accordance with the law”, as required by Article 8 § 2 of the Convention.

GPS SURVEILLANCE

► *Uzun v. Germany*, 35623/05, 2 September 2010

77. The applicant’s surveillance via GPS, ordered by the Federal Public Prosecutor General in order to investigate into several counts of attempted murder for which a terrorist movement had claimed responsibility and to prevent further bomb attacks, served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims.

78. ... In examining whether, in the light of the case as a whole, the measure taken was proportionate to the legitimate aims pursued, the Court notes that the applicant’s surveillance via GPS was not ordered from the outset. The investigation authorities had first attempted to determine whether the applicant was involved in the bomb attacks at issue by measures which interfered less with his right to respect for his private life. They had notably tried to determine the applicant’s whereabouts by installing transmitters in S’s car, the use of which (other than with the GPS) necessitated the knowledge of where approximately the person to be located could be found. However, the applicant and his accomplice had detected and destroyed the transmitters and had also successfully evaded their visual surveillance by State agents on many occasions. Therefore, it is clear that other methods of investigation, which were less intrusive than the applicant’s surveillance by GPS, had proved to be less effective.

79. The Court further observes that ... the applicant’s surveillance by GPS was added to a multitude of further previously ordered, partly overlapping measures of observation. These comprised the applicant’s visual surveillance ... It further included the video surveillance of the entry of the house he lived in and the interception of the telephones in that house and in a telephone box situated nearby by both of the said authorities separately. Moreover, the North Rhine-Westphalia Department for the Protection of the Constitution intercepted his postal communications at the relevant time.

80. The Court considers that in these circumstances, the applicant’s surveillance via GPS had led to a quite extensive observation of his conduct by two different State authorities. In particular, the fact that the applicant had been subjected to

the same surveillance measures by different authorities had led to a more serious interference with his private life, in that the number of persons to whom information on his conduct had become known had been increased. Against this background, the interference by the applicant's additional surveillance via GPS thus necessitated more compelling reasons if it was to be justified. However, the GPS surveillance was carried out for a relatively short period of time (some three months), and, as with his visual surveillance by State agents, affected him essentially only at weekends and when he was travelling in S's car. Therefore, he cannot be said to have been subjected to total and comprehensive surveillance. Moreover, the investigation for which the surveillance was put in place concerned very serious crimes, namely several attempted murders of politicians and civil servants by bomb attacks. As shown above, the investigation into these offences and notably the prevention of further similar acts by the use of less intrusive methods of surveillance had previously not proved successful. Therefore, the Court considers that the applicant's surveillance via GPS, as carried out in the circumstances of the present case, was proportionate to the legitimate aims pursued and thus "necessary in a democratic society" within the meaning of Article 8 § 2.

UNDERCOVER AGENTS

► **Lüdi v. Switzerland, 12433/86, 15 June 1992**

40. ... in the present case the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life within the meaning of Article 8 ... Toni's actions took place within the context of a deal relating to 5 kg of cocaine. The cantonal authorities, who had been warned by the German police, selected a sworn officer to infiltrate what they thought was a large network of traffickers intending to dispose of that quantity of drugs in Switzerland. The aim of the operation was to arrest the dealers when the drugs were handed over. Toni thereupon contacted the applicant, who said that he was prepared to sell him 2 kg of cocaine, worth 200,000 Swiss francs ... Mr Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him.

► **Ramanauskas v. Lithuania [GC], 74420/01, 5 February 2008**

63. ... The national authorities cannot be exempted from their responsibility for the actions of police officers by simply arguing that, although carrying out police duties, the officers were acting "in a private capacity". It is particularly important that the authorities should assume responsibility as the initial phase of the operation ... took place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the use of the model and exempting AZ from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results.

64. Moreover, no satisfactory explanation has been provided as to what reasons or personal motives could have led AZ to approach the applicant on his own initiative

without bringing the matter to the attention of his superiors, or why he was not prosecuted for his acts during this preliminary phase ...

65. It follows that the Lithuanian authorities' responsibility was engaged under the Convention for the actions of AZ and VS prior to the authorisation of the model ...

67. To ascertain whether or not AZ and VS confined themselves to "investigating criminal activity in an essentially passive manner", the Court must have regard to the following considerations. Firstly, there is no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. Secondly, as is shown by the recordings of telephone calls, all the meetings between the applicant and AZ took place on the latter's initiative ... through the contact established on the initiative of AZ and VS, the applicant seems to have been subjected to blatant prompting on their part to perform criminal acts, although there was no objective evidence – other than rumours – to suggest that he had been intending to engage in such activity.

68. These considerations are sufficient for the Court to conclude that the actions of the individuals in question went beyond the mere passive investigation of existing criminal activity.

► ***Miliniene v. Lithuania*, 74355/01, 24 June 2008**

37. ... There was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. However, the initiative in the case was taken by SŠ, a private individual, who, when he understood that the applicant would require a bribe to reach a favourable outcome in his case, complained to the police. Thereafter the police approached the Deputy Prosecutor General who authorised and followed the further investigation within the legal framework of a criminal conduct simulation model, affording immunity from prosecution to SŠ in exchange for securing evidence against the suspected offender.

38. To the extent that SŠ had police backing to offer the applicant considerable financial inducements and was given technical equipment to record their conversations, it is clear that the police influenced the course of events. However, the Court does not find that police role to have been abusive, given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society. Nor does it find that the police role was the determinative factor. The determinative factor was the conduct of SŠ and the applicant. To this extent, the Court accepts that, on balance, the police may be said to have "joined" the criminal activity rather than to have initiated it. Their actions thus remained within the bounds of undercover work rather than that of *agents provocateurs* in possible breach of Article 6 § 1 of the Convention ...

► ***Veselov and Others v. Russia*, 23200/10, 2 October 2012**

126. The Court has found above that the applicants' criminal conviction for drug offences was based primarily on the results of the police-controlled test purchases. In none of these cases did the police consider other investigative steps to verify the suspicion that the applicants were drug dealers. With such a strong emphasis on the

results of the covert operations and their importance for the outcome of the criminal proceedings, it was incumbent on the domestic authorities to ensure that the manner in which the test purchases were ordered and conducted excluded the possibility of abuse of power, in particular of entrapment. However, the Court found that the accountability of the police for their officers' and informants' conduct could not be established, largely because of a systemic failure, namely the absence of a clear and foreseeable procedure for authorising test purchases. It reiterated its case-law to the effect that the authorisation of a test purchase by a simple administrative decision of the same body as the one which conducts the operation, without any independent supervision, with no need to justify the operation and virtually no formalities to follow, is in principle inadequate ... Having compared this system with practices adopted in other Member States, the Court found that in most other countries the conduct of a test purchase and similar covert operations is subject to a number of procedural restrictions ... In Russia, by contrast, the operational-search bodies of the State are entrusted with an intrusive investigative technique which apparently affords no structural safeguards against abuse.

127. In the circumstances of the present cases, it was precisely the deficient procedure for authorising the test purchase that exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them. The domestic courts, for their part, failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants vis-à-vis the applicants.

128. In the light of the foregoing the Court considers that the criminal proceedings against all three applicants were incompatible with the notion of a fair trial. There has accordingly been a violation of Article 6 of the Convention.

► ***Volkov and Adamskiy v. Russia*, 7614/09, 26 March 2015**

40. ... the Court observes that similarly to the applicant in the case of *Kuzmickaja* Mr Volkov and Mr Adamskiy were engaged in lawful business activity. They publicly advertised their computer-repair services, providing their respective telephone numbers. They thereby solicited customers in need of computer repairs and offered their technical expertise to the general public.

41. Meanwhile, the police received incriminating information against the applicants and, as such, came under an obligation to verify a criminal complaint. They called the applicants on their respective numbers and asked them to install some computer programmes. The applicants did not complain to the domestic courts that the police officers had specifically asked for unlicensed software or that they had exerted any pressure on the applicants at the time of the call or tried to pressure them into committing illegal acts. Moreover, from the records of the conversation between the applicants and the police officers in the course of the computer repairs it is clear that the applicants brought unlicensed software for installation on their own initiative, without unlawful incitement by the undercover agents ...

42. The Court therefore considers that the undercover police officers' requests appeared to be regular orders of the kind usually placed by customers in response to online or newspaper advertisements for services. The actions of the police did

not go beyond the ordinary conduct which is normally expected of clients in the course of lawful commercial activity. It was up to the applicants to respond to such requests in a lawful manner and to install licensed software.

43. However, Mr Volkov admitted in court that after the order had been placed he had bought compact discs with counterfeit software on them for installation. Mr Adamskiy acknowledged that soon after the call he had downloaded counterfeit copies of the required programmes from the Internet. The applicants both promptly found unlicensed software and installed it on V's and M's computers the next day. Neither of the applicants indicated in the domestic proceedings that V and M had specifically asked them to install unlicensed software. Mr Adamskiy also claimed that he had acted unlawfully because he had been in need of money at the time. However, nothing in the case materials suggests that the police were aware of Mr Adamskiy's financial situation and that they used it to incite him to commit a crime. Moreover, in the course of the computer repairs both applicants openly informed the undercover agents that the software had been counterfeit and that it would have been much more expensive to install licensed software ...

44. Accordingly, it follows that the present case is distinguishable from other Russian cases on entrapment because it was the applicants' own deliberate conduct and not the actions of the police that became the determinative factor in the commission of their offences. Mr Volkov and Mr Adamskiy appear to have shown pre-existing criminal intent and have committed the criminal offences without active intervention on the part of police.

45. Therefore, under these circumstances, the Court sees no reason to depart from the finding on an *agent provocateur* complaint which it made in the case of *Kuzmickaja* ... The police's conduct in the present case does not appear to have been unlawful or arbitrary given their obligation to verify criminal complaints, whereas the applicants chose of their own free will to act illegally.

OBLIGATION TO GIVE INFORMATION

► *Funke v. France*, 10828/84, 25 February 1993

44. The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law ... cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 ..., to remain silent and not to contribute to incriminating himself.

► *Z. v. Finland*, 22009/93, 25 February 1997

102. ... The object was exclusively to ascertain from her medical advisers when X had become aware of or had reason to suspect his HIV infection. Their evidence had the possibility of being at the material time decisive for the question whether X was

guilty of sexual offences only or in addition of the more serious offence of attempted manslaughter in relation to two offences committed prior to 19 March 1992, when the positive results of the HIV test had become available ...

103. ... under the relevant Finnish law, the applicant's medical advisers could be ordered to give evidence concerning her without her informed consent only in very limited circumstances, namely in connection with the investigation and the bringing of charges for serious criminal offences for which a sentence of at least six years' imprisonment was prescribed ... Since they had refused to give evidence to the police, the latter had to obtain authorisation from a judicial body – the City Court – to hear them as witnesses ... The questioning took place in camera before the City Court, which had ordered in advance that its file, including transcripts of witness statements, be kept confidential ... All those involved in the proceedings were under a duty to treat the information as confidential. Breach of their duty in this respect could lead to civil and/or criminal liability under Finnish law ...

The interference with the applicant's private and family life which the contested orders entailed was thus subjected to important limitations and was accompanied by effective and adequate safeguards against abuse ...

105. ... the Court finds that the various orders requiring the applicant's medical advisers to give evidence were supported by relevant and sufficient reasons which corresponded to an overriding requirement in the interest of the legitimate aims pursued. It is also satisfied that there was a reasonable relationship of proportionality between those measures and aims. Accordingly, there has been no violation of Article 8 ...

► ***Serves v. France, 20225/92, 20 October 1997***

47. ... It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction.

It appears, however, from the interview records, which the applicant signed, that he refused at the outset to take the oath. Yet the oath is a solemn act whereby the person concerned undertakes before the investigating judge to tell, in the terms of Article 103 of the Code of Criminal Procedure, "the whole truth and nothing but the truth". Whilst a witness's obligation to take the oath and the penalties imposed for failure to do so involve a degree of coercion, the latter is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence.

In other words, the fines imposed on Mr Serves did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose.

► ***Tirado Ortiz and Lozano Martin v. Spain (dec.), 43486/98, 22 June 1999***

2. ... The Court considers, however, that the Spanish legal provisions in this domain were inspired by the concern and need to protect society and, more particularly, to

ensure road safety and protect the health of others. Thus, while compulsory testing of alcohol levels may be regarded as amounting to a violation of the applicants' private life within the meaning of Article 8 § 1 of the Convention, it may also be seen as necessary for the prevention of criminal offences and the protection of the rights and freedoms of others. It follows that this part of the application must be rejected as being manifestly ill-founded ...

► ***P. G. and J. H. v. United Kingdom, 44787/98, 25 September 2001***

42. It is not in dispute that the obtaining by the police of information relating to the numbers called on the telephone in B's flat interfered with the private lives or correspondence (in the sense of telephone communications) of the applicants who made use of the telephone in the flat or were telephoned from the flat. The Court notes, however, that metering, which does not per se offend against Article 8 if, for example, done by the telephone company for billing purposes, is by its very nature to be distinguished from the interception of communications which may be undesirable and illegitimate in a democratic society unless justified ...

45. Both parties agreed that the obtaining of the billing information was based on statutory authority, in particular, section 45 of the Telecommunications Act 1984 and section 28(3) of the Data Protection Act 1984. The first requirement therefore poses no difficulty. The applicants argued that the second requirement was not fulfilled in their case, as there were insufficient safeguards in place concerning the use, storage and destruction of the records.

46. The Court observes that the quality of law criterion in this context refers essentially to considerations of foreseeability and lack of arbitrariness ... What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question. In this case, the information obtained concerned the telephone numbers called from B's flat between two specific dates. It did not include any information about the contents of those calls, or who made or received them. The data obtained, and the use that could be made of them, were therefore strictly limited.

47. While it does not appear that there are any specific statutory provisions (as opposed to internal policy guidelines) governing storage and destruction of such information, the Court is not persuaded that the lack of such detailed formal regulation raises any risk of arbitrariness or misuse. Nor is it apparent that there was any lack of foreseeability. Disclosure to the police was permitted under the relevant statutory framework where necessary for the purposes of the detection and prevention of crime, and the material was used at the applicants' trial on criminal charges to corroborate other evidence relevant to the timing of telephone calls. It is not apparent that the applicants did not have an adequate indication as to the circumstances in, and conditions on, which the public authorities were empowered to resort to such a measure.

48. The Court concludes that the measure in question was "in accordance with the law" ...

50. The information was obtained and used in the context of an investigation into, and trial of, a suspected conspiracy to commit armed robberies. No issues of proportionality have been identified. The measure was accordingly justified under Article 8 § 2 as “necessary in a democratic society” for the purposes identified above.

► ***Weh v. Austria*, 38544/97, 8 April 2004**

54. There is nothing to show that the applicant was “substantially affected” so as to consider him being “charged” with the offence of speeding within the autonomous meaning of Article 6 § 1 ... It was merely in his capacity as the registered car owner that he was required to give information. Moreover, he was only required to state a simple fact – namely who had been the driver of his car – which is not in itself incriminating.

55. In addition, although this is not a decisive element in itself, the Court notes that the applicant did not refuse to give information, but exonerated himself in that he informed the authorities that a third person had been driving at the relevant time. He was punished under section 103 § 2 of the Motor Vehicles Act only on account of the fact that he had given inaccurate information as he had failed to indicate the person’s complete address. Neither in the domestic proceedings nor before the Court did he ever allege that he had been the driver of the car at the time of the offence.

56. The Court ... considers that, in the present case, the link between the applicant’s obligation under section 130 § 2 of the Motor Vehicles Act to disclose the driver of his car and possible criminal proceedings for speeding against him remains remote and hypothetical. However, without a sufficiently concrete link with these criminal proceedings the use of compulsory powers (i.e. the imposition of a fine) to obtain information does not raise an issue with regard to the applicant’s right to remain silent and the privilege against self-incrimination.

► ***O’Halloran and Francis v. United Kingdom* [GC], 15809/02, 29 June 2007**

57. ... the compulsion was imposed in the context of section 172 of the Road Traffic Act, which imposes a specific duty on the registered keeper of a vehicle to give information about the driver of the vehicle in certain circumstances. ... Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion.

58. A further aspect of the compulsion applied in the present cases is the limited nature of the inquiry which the police were authorised to undertake. Section 172 (2) (a) applies only where the driver of the vehicle is alleged to have committed a relevant offence, and authorises the police to require information only “as to the identity of the driver” ... Further ... section 172 does not sanction prolonged questioning about facts alleged to give rise to criminal offences, and the penalty for declining to answer is “moderate and non-custodial”.

59. ... In cases where the coercive measures of section 172 of the 1988 Act are applied, the Court notes that by section 172(4), no offence is committed under section 172(2)(a) if the keeper of the vehicle shows that he did not know and could not with reasonable diligence have known who the driver of the vehicle was. The offence is thus not one of strict liability, and the risk of unreliable admissions is negligible.

60. As to the use to which the statements were put, Mr O'Halloran's statement that he was the driver of his car was admissible as evidence of that fact by virtue of section 12(1) of the Road Traffic Offenders Act 1988 ..., and he was duly convicted of speeding ... It remained for the prosecution to prove the offence beyond reasonable doubt in ordinary proceedings, including protection against the use of unreliable evidence and evidence obtained by oppression or other improper means (but not including a challenge to the admissibility of the statement under section 172), and the defendant could give evidence and call witnesses if he wished. Again ... the identity of the driver is only one element in the offence of speeding, and there is no question of a conviction arising in the underlying proceedings in respect solely of the information obtained as a result of section 172(2)(a).

61. As Mr Francis refused to make a statement, it could not be used in the underlying proceedings, and indeed the underlying proceedings were never pursued. The question of the use of the statements in criminal proceedings did not arise, as his refusal to make a statement was not used as evidence: it constituted the offence itself ...

62. Having regard to all the circumstances of the case, including the special nature of the regulatory regime at issue and the limited nature of the information sought by a notice under section 172 of the Road Traffic Act 1988, the Court considers that the essence of the applicants' right to remain silent and their privilege against self-incrimination has not been destroyed.

► ***Voskuil v. Netherlands*, 64752/01, 22 November 2007**

66. ... the applicant was required to identify his source for two reasons: ... secondly, to secure a fair trial for the accused.

67. The Court sees no need on this occasion to consider whether under any conditions a Contracting Party's duty to provide a fair trial may justify compelling a journalist to disclose his source. Whatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant, the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant ... That being so, this reason given for the interference complained of lacks relevance.

► ***Sanoma Uitgevers B.V. v. the Netherlands* [GC], 38224/03, 14 September 2010**

88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference

with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake ...

90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body ...

91. The Court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the Court's view, that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.

92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources ... In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk ...

93. In the Netherlands, since the entry into force of Article 96a of the Code of Criminal Procedure this decision is entrusted to the public prosecutor rather than to an independent judge. Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.

► ***Brusco v. France*, 1466/07, 14 October 2010**

46. In the instant case, the Court notes that when the applicant was made to swear "to tell the truth, the whole truth and nothing but the truth", as required by Article 153 of the Code of Criminal Procedure, before being questioned by a police officer, he had been in police custody ...

47. ... The Court observes, however, that the applicant's arrest and placement in custody took place in the context of a preliminary investigation by the investigating judge against E.L. and J.P.G., both of whom were suspected of involvement in the

attack on B.M. ... The argument that the applicant was questioned as a mere witness was purely formalistic and, therefore unconvincing since the judicial authorities and the police had reason to suspect that he had been involved in the offence ...

49. Lastly, in the Court's view, the applicant's arrest and placement in police custody could have had serious repercussions on his situation ... Moreover, it was precisely after he was taken into police custody on the basis of evidence that made him a suspect that he had been placed under investigation and remanded in custody.

50. In these circumstances, the Court finds that when the applicant was taken into police custody and required to swear "to tell the truth, the whole truth and nothing but the truth", "criminal charges" had been brought against him and he should therefore have had the right not to incriminate himself and to remain silent, as guaranteed by Article 6 §§ 1 and 3 of the Convention ...

54. The Court also observes that there is no indication in either the case file or the witness statements that the applicant had been informed at the start of the interview that he had the right to remain silent, not to answer any questions or to answer only those questions he wished to answer. It further notes that the applicant received the assistance of a lawyer only after 20 hours in police custody, a time period provided for by Article 63-4 of the Code of Criminal Procedure ... The lawyer had therefore been unable to inform him of his right to remain silent and not to incriminate himself before his first interview or to assist him in making this statement and those that followed, as required under Article 6 of the Convention.

55. It follows that ..., in the instant case, there was a violation of the applicant's right not to incriminate himself and to remain silent, as guaranteed by Article 6 §§ 1 and 3 of the Convention.

PRIVACY OBLIGATIONS WITH RESPECT TO EVIDENCE GATHERED

► *Z. v. Finland*, 22009/93, 25 February 1997

112. The Court is not persuaded that, by prescribing a period of ten years, the domestic courts attached sufficient weight to the applicant's interests. It must be remembered that, as a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for her private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years is not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 ...

► *Panteleyenko v. Ukraine*, 11901/02, 29 June 2006

57. ... the domestic court requested and obtained from a psychiatric hospital confidential information regarding the applicant's mental state and relevant medical

treatment. This information was subsequently disclosed by the judge to the parties and other persons present in the courtroom at a public hearing.

58. The Court finds that those details undeniably amounted to data relating to the applicant's "private life" and that the impugned measure led to the widening of the range of persons acquainted with the details in issue. The measures taken by the court therefore constituted an interference with the applicant's rights guaranteed under Article 8 of the Convention ...

61. It is to be noted that the Court of Appeal, having reviewed the case, came to the conclusion that the first instance judge's treatment of the applicant's personal information had not complied with the special regime concerning collection, retention, use and dissemination afforded to psychiatric data ... Moreover, the Court notes that the details in issue being incapable of affecting the outcome of the litigation (i.e. the establishment of whether the alleged statement was made and the assessment whether it was libellous; compare and contrast, *Z v. Finland* ...), the Novozavodsky Court's request for information was redundant, as the information was not "important for an inquiry, pre-trial investigation or trial", and was thus unlawful for the purposes of Article 6 of the Psychiatric Medical Assistance Act 2000.

62. The Court finds for the reasons given above that there has been a breach of Article 8 of the Convention in this respect.

RETENTION OF EVIDENCE AFTER COMPLETION OF INVESTIGATION/PROSECUTION

► *S. and Marper v. United Kingdom* [GC], 30562/04, 4 December 2008

113. ... the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter ...

118. ... The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed ...; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances ...

121. ... The Court ... reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data ...

122. ... It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed ...

124. ... the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society ... the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime ...

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

LIABILITY FOR LOSS OR DAMAGE TO ITEMS SEIZED

► *Tendam v. Spain*, 25720/05, 13 July 2010

51. It is true that Article 1 of Protocol No. 1 does not enshrine the right of an acquitted person to obtain redress for all harm resulting from the seizure of his/her possessions during the investigation of a criminal case ... Nonetheless, when the investigating or prosecuting authorities seize possessions, they should take the reasonable measures necessary to look after them, in particular by making an inventory of them and their state at the time of seizure and at the time of return to the acquitted owner. Moreover, domestic legislation should make provision for proceedings to be taken against the State to obtain redress for losses resulting from failure to keep such possessions in a reasonably good state ... Those proceedings need, furthermore, to be effective in order to enable the acquitted owner to defend his or her case.

52. In this case, the Court observes that the applicant brought a case against the State for damage of the seized possessions recovered after his acquittal and the

disappearance of some that were not returned, under Section 292 of the LOPJ on the abnormal functioning of the administration of justice ... Moreover, contracting States have a duty to lay down the conditions for compensation for losses resulting from seizure ...

54. In the circumstances of the instant case, the Court finds that the burden of proof regarding the missing or damaged items rested with the judicial authorities, which were responsible for looking after them throughout the duration of the seizure, and not with the applicant, who was acquitted more than seven years after the items were seized. Since, following the applicant's acquittal, the judicial authorities provided no justification for the disappearance of and damage to the seized items, they are liable for any losses resulting from the seizure.

55. The Court notes that the domestic courts that examined the claim did not take into account the liability incurred by the judicial authorities or afford the applicant an opportunity to obtain redress for the damage sustained as a result of failure to maintain the items seized.

56. The Court finds that, by refusing his claim for compensation, they caused the applicant to bear a disproportionate and excessive burden.

57. Accordingly, there was a violation of Article 1 of Protocol No. 1.

Chapter 7

Interrogation

RIGHT TO ASSISTANCE OF A LAWYER

► *John Murray v. United Kingdom, 18731/91, 8 February 1996*

66. ... under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.

Under such conditions the concept of fairness enshrined in Article 6 ... requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 ...

68. It is true, as pointed out by the Government, that when the applicant was able to consult with his solicitor he was advised to continue to remain silent and that during the trial the applicant chose not to give evidence or call witnesses on his behalf. However, it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period. As matters stand, the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence. The Court's conclusion as to the drawing of inferences does not alter that ...

70. There has therefore been a breach of Article 6 para. 1 in conjunction with paragraph 3 (c) ... of the Convention as regards the applicant's denial of access to a lawyer during the first 48 hours of his police detention.

► ***Salduz v. Turkey* [GC], 36391/02, 27 November 2008**

54. ... the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial ... At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused ... Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination ... In this connection, the Court also notes the recommendations of the CPT ..., in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” ... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

► ***Panovits v. Cyprus*, 4268/04, 11 December 2008**

73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant’s right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant’s defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant’s right to receive legal representation prior to his interrogation in an explicit and unequivocal manner.

► ***Yaremenko v. Ukraine*, 32092/02, 12 June 2008**

86. The Court notes that ... the applicant’s conviction for the 1998 crime was based mainly on his confession, which was obtained by the investigators in the absence of

a lawyer and which the applicant retracted the very next day and then from March 2001 on.

87. The Court further notes with concern the circumstances under which the initial questioning of the applicant about the 1998 crime took place ... One of the grounds for obligatory representation is the seriousness of the crime of which a person is suspected, and hence the possibility of life imprisonment as a punishment. In the present case the law-enforcement authorities, investigating the violent death of a person, initiated criminal proceedings for infliction of grievous bodily harm causing death rather than for murder. The former was a less serious crime and therefore did not require the obligatory legal representation of a suspect. Immediately after the confession was obtained, the crime was reclassified as, and the applicant was charged with, murder.

88. The Court is struck by the fact that, as a result of the procedure adopted by the authorities, the applicant did not benefit from the requirement of obligatory representation and was placed in a situation in which, as he maintained, he was coerced into waiving his right to counsel and incriminating himself. It may be recalled that the applicant had a lawyer in the existing criminal proceedings, yet waived his right to be represented during his questioning for another offence. These circumstances give rise to strong suspicion as to the existence of an ulterior purpose in the initial classification of the offence. The fact that the applicant made confessions without a lawyer being present and retracted them immediately in the lawyer's presence demonstrates the vulnerability of his position and the real need for appropriate legal assistance, which he was effectively denied on 1 February 2001 owing to the way in which the police investigator exercised his discretionary power concerning the classification of the investigated crime.

89. As to the removal of lawyer O. Kh. on 2 February 2001, the Government's argument that this was done solely at the applicant's request seems scarcely credible, since this was not mentioned in the removal decision itself, and in the replies of the prosecutors it was referred to as an additional ground for the lawyer's removal.

90. The Court notes that the fact that two other lawyers who represented the applicant saw him only once each, during questioning, and never before the questioning took place seems to indicate the notional nature of their services. It considers that the manner of and reasoning for the lawyer's removal from the case, as well as the alleged lack of legal grounds for it, raise serious questions as to the fairness of the proceedings in their entirety. The Court also notes that the lawyer was allowed back onto the case in June 2001 without any indication that the alleged grounds for his removal had ceased to exist.

91. There has therefore been a violation of Article 6 § 3 (c) of the Convention.

► ***Tarasov v. Ukraine*, 17416/03, 31 October 2013**

94. ... the applicant waived his right to be legally represented at the initial stages of the investigation. Those waivers, however, were given by the applicant in circumstances which raise serious doubts as to the applicant's free will in making those waivers. Apart from the applicant's allegation that he had been forced to sign those

waivers ..., the Court also takes into account the applicant's allegations of ill-treatment and the failure of the State authorities to give a plausible explanation of the applicant's injuries incurred in detention, which the Court has found sufficient to establish the Convention responsibility of the Government under Article 3. Therefore, the Court concludes that the applicant's waivers of the right to legal representation at the initial stages of the investigation were not established in an unequivocal manner, as required by Article 6 § 3 (c) of the Convention.

95. Furthermore, the Court notes that after being questioned by the police without legal assistance the applicant confessed to a number of crimes and for almost three months at the beginning of investigation he had not had a lawyer, although important investigative steps had been taken during that period. However, as the Court has previously stressed on many occasions, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure, without restriction, the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention. Therefore, the applicant's defence rights were prejudiced at the very outset of the proceedings and the domestic courts did not react to this procedural flaw in an appropriate manner.

It follows that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the applicant's right to legal representation.

► **Turbylev v. Russia, 4722/09, 6 October 2015**

94. The Court observes that irrespective of whether the applicant confessed before or after his arrest was formally recorded ..., it follows from the facts of the case, which are not disputed by the Government, and in particular from the police officers' statements, that at the time of his confession the applicant was being held in police custody for the sole reason that he was suspected of having participated in the robbery, that suspicion being based on information reported to the police by Ms R. ... The police officers were therefore obliged to provide him with the rights of a suspect, access to a lawyer being one such right ... This would also correspond to the domestic criminal procedural-law requirement that the right of access to a lawyer arises from the moment of actual arrest ..., which accords with the Constitutional Court's interpretation of the right to legal assistance as arising from the moment of actual restriction of one's constitutional rights, in particular the right to liberty and security, and not from the moment of the formal recognition of one's status as a suspect or one's detention ...

95. The absence of a domestic-law requirement of access to a lawyer for a statement of surrender and confession was used as leeway to circumvent the applicant's right as a *de facto* suspect to legal assistance and to admit his statement of surrender and confession, obtained without legal assistance, in evidence to establish his guilt. This has irretrievably prejudiced the rights of the defence. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings and

the possibility of challenging the admissibility of the evidence at issue at the trial and on appeal could remedy the defects which had occurred during police custody.

96. Even assuming that the applicant had been informed of the constitutional right not to incriminate himself before making his confession statement, as was found by the domestic courts, he cannot be said to have validly waived his privilege against self-incrimination in view of the Court's finding that he had given his confession statement as a result of his inhuman and degrading treatment by the police. In any event, no reliance can be placed on the mere fact that the applicant had been reminded of his right to remain silent and signed the relevant record ..., especially because the record cited Article 51 of the Constitution without explaining its meaning. Furthermore, since the lack of access to a lawyer in the present case resulted from the systemic application of legal provisions, as interpreted by the domestic courts, and the applicant was not informed of the right to legal assistance before signing the statement of his surrender and confession, the question of the waiver of the right to legal assistance is not pertinent.

97. The Court concludes that the domestic courts' use in evidence of the statement of the applicant's surrender and confession obtained as a result of his ill-treatment in violation of Article 3 and in the absence of access to a lawyer has rendered the applicant's trial unfair.

98. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention ...

► ***Ibrahim and Others v. United Kingdom* [GC],
50541/08, 13 September 2016**

276. The Government argued that the compelling reasons for delaying legal advice arose from the potential for loss of life on a large scale, the urgent need to obtain information on planned attacks and the severe practical constraints under which the police were operating. The Court ... is in no doubt that such a need existed at the time when the safety interviews of the first three applicants were conducted ... When the first three applicants and Mr Osman detonated their devices on 21 July, again on three underground trains and a bus, it was inevitable that the police would conclude that the United Kingdom had become the target of a wave of terrorist attacks ... The failure of the bombs to explode meant that the perpetrators of the attack were still at liberty and free to detonate other bombs, possibly successfully. ... The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. The Court finds that the Government have convincingly demonstrated in the case of the first three applicants the existence of an urgent need to avert serious adverse consequences for the life and physical integrity of the public.

277. However, ... the existence of exceptional circumstances which satisfy the substantive requirement of compelling reasons does not automatically provide adequate justification for limiting suspects' access to legal advice. Other factors which must be taken into account include whether there was a basis for the restriction in domestic law, whether the restriction was based on an individual assessment of the particular circumstances of the case and whether the restriction was temporary in nature. In the

first three applicants' case, there was a clear framework in place, set out in legislation, regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance for operational decision-making ... The legislation provided that restrictions on legal assistance had to end as soon as the circumstances justifying them ceased to exist ... Restrictions were further subject to a strict upper time-limit of forty-eight hours ... An individual decision to limit each of the applicants' right to legal advice was taken by a senior police officer based on the specific facts of their cases, and the reasons for the decision were recorded. It is clear from the reasons given that the authorisation was made in accordance with the legislative framework and that the applicants' procedural rights were taken into account ... The decision to restrict legal advice was subsequently reviewed by the trial judge and by the Court of Appeal ...

279. In conclusion, the Court is satisfied that the Government have convincingly demonstrated that there were compelling reasons for the temporary restrictions on the first three applicants' right to legal advice ...

298. As with the first three applicants, the Government relied on the exceptional circumstances prevailing in July 2005 as constituting compelling reasons to justify the restriction of the fourth applicant's access to a lawyer ... The question is whether these exceptional circumstances were sufficient to constitute compelling reasons in the fourth applicant's case for continuing with his interview without cautioning him or informing him of his right to legal advice.

299. ... The possibility of denying a suspect the procedural rights guaranteed by the code by declining to change his formal status when such a change had become appropriate was not set out in domestic law. There were, therefore, no legal provisions guiding operational decision-making by clarifying how any discretion was to be exercised or requiring regard to be had to an individual's Article 6 rights. It is also noteworthy that there was the possibility under the legal framework in place to delay access to legal advice for suspects who had been formally cautioned ... This legal framework was applied to the first three applicants and could equally have been applied in the fourth applicant's case if the senior police officer had been of the view that an urgent police interview without prior access to legal advice was necessary. Such a decision would have been recorded in writing. By contrast, the decision not to arrest the fourth applicant but to continue to question him as a witness was not recorded and the specific reasons for it, including any evidence that his procedural rights were, in fact, taken into account, could not therefore be subject to *ex post facto* review by the domestic courts or by this Court.

300. In the light of the above, the Court finds that the Government have not convincingly demonstrated, on the basis of contemporaneous evidence, the existence of compelling reasons in the fourth applicant's case, taking account of the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.

► ***Dvorski v. Croatia* [GC], 25703/11, 20 October 2015**

93. ... while the applicant had formally chosen the lawyer M.R. to represent him during police questioning, that choice was not an informed one because the applicant had no knowledge that another lawyer, hired by his parents, had come to the police station to see him, presumably with a view to representing him ...

94. The Court notes that the only reason cited by the Government for not allowing G.M. access to the applicant was the fact that G.M., in the Government's view, did not have a proper power of attorney to represent him. At the same time, the Government did not dispute that the applicant was not informed at the relevant time that G.M. had been trying to see him at the police station.

95. The Court notes, however, that G.M. alleged before the national authorities that he had in fact been provided with a written power of attorney by the applicant's parents on 14 March 2007. It would appear that these allegations have never been convincingly refuted in the domestic proceedings. Moreover, a written power of attorney was included in the case file compiled by the investigating judge on 15 March 2007, when the applicant was brought before him by the police.

96. The relevant domestic law is clear on the fact that a defence lawyer may be hired by a suspect himself or by his relatives, including his parents ... In accordance with paragraph 6 of Article 62, a suspect may orally authorise a lawyer to act on his behalf during the proceedings. The purpose of Article 62, paragraph 4, of the Code of Criminal Procedure, which provides that a defence lawyer may be hired by the accused's close relatives but that the accused may expressly refuse the lawyer chosen, cannot be achieved unless the accused is informed that his or her close relatives have hired a lawyer for him or her. This, in any case, obliged the police to at least inform the applicant that G.M. had come to the police station and that he had been authorised by his parents to represent him. However, the police omitted to inform the applicant of this and also refused G.M. access to him.

97. That omission and refusal could hardly be explained by the fact that the applicant had later signed a power of attorney authorising M.R. to be present during his questioning by the police. As already mentioned, he had done so while being at all times unaware of the lawyer G.M.'s attempts to assist him after being instructed by his parents.

98. Nor do the documents in the criminal case file reveal any justification for the omissions and actions of the police that resulted in the applicant being denied the opportunity to choose whether he wished to be assisted by G.M. during questioning. Moreover, according to a written record of the applicant's oral evidence given to the investigating judge on 15 March 2007, the day after his arrest, the applicant stated that his chosen lawyer was G.M. and that the police officers had denied him access to G.M. He also said that he had not hired M.R. as his lawyer ...

99. In these circumstances, the Court is not convinced that the impugned restriction, resulting from the conduct of the police, of the applicant's opportunity to designate G.M. to represent him from the initial phase of police questioning was supported by relevant and sufficient reasons ...

102. As the Court has already observed, the applicant had no knowledge that G.M., hired by his parents, had come to the police station to see him. The Court also notes that the applicant challenged what he characterised as the “imposition” of the lawyer M.R. on him during police questioning, first of all during his initial examination by an investigating judge and subsequently throughout the entire proceedings. In these circumstances, it cannot be maintained that by signing the power of attorney and providing a statement to the police, the applicant unequivocally waived, either tacitly or explicitly, any right that he had under Article 6 of the Convention to be represented by a lawyer of his own informed choice.

AVAILABILITY OF AN INTERPRETER

► *Baytar v. Turkey*, 45440/04, 14 October 2014

49. The Court further reiterates that paragraph 3 (e) of Article 6 guarantees the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings ...

50. Furthermore, like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right ...

51. ... it is not in dispute that the applicant’s level of knowledge of Turkish rendered necessary the assistance of an interpreter. Both the District Court and the trial court decided that she needed an interpreter ...

52. The Court further notes that, while the applicant enjoyed the assistance of an interpreter when she was examined by the judge responsible for deciding whether she should be remanded in custody, this had not been the case during her questioning by the gendarmes, when she had stated that she had found the impugned document in the prison waiting room, thus admitting that a document had indeed been found in her possession.

53. The Court has already had occasion to emphasise the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained at this stage may be decisive for the subsequent proceedings ... It should be pointed out that an individual held in police custody enjoys a certain number of rights, such as the right to remain silent or to be assisted by a lawyer. The decision to exercise or waive such rights can only be taken if the individual concerned clearly understands the charges, so that he or she can consider what is at stake in the proceedings and assess the advisability of such a waiver.

54. The Court takes the view that, as the applicant was not able to have the questions put to her translated and was not made aware as precisely as possible of the charges against her, she was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. Accordingly, it is questionable whether the choices made by the applicant without the assistance of an interpreter were totally informed.

55. The Court finds that this initial defect thus had repercussions for other rights which, while distinct from the right alleged to have been breached, were closely related thereto and undermined the fairness of the proceedings as a whole.

56. While it is true that the applicant enjoyed the assistance of an interpreter when she was brought before a judge following her police custody, the Court is of the opinion that this fact was not such as to cure the defect which had vitiated the proceedings at their initial stage.

ACCESS TO THE CASE FILE

► *A. T. v. Luxembourg*, 30460/13, 9 April 2015

79. ... The Court reiterates that restrictions on access to the case file at the stages of instituting criminal proceedings, inquiry and investigation may be justified by, among other things, the necessity to preserve the secrecy of the data possessed by the authorities and to protect the rights of the other persons ... In the instant case, given the justifications set out in domestic case-law, the Court considers it reasonable that the domestic authorities justify the lack of access to the case file with reasons of protecting the interests of justice. In addition, before charges are pressed, the person interrogated is at liberty to organise his defence (including the right to remain silent, to consult the case file after the first interrogation by the investigating judge, and to choose his defence strategy throughout the criminal proceedings). A proper balance is thus ensured by the guarantee on access to the case file, from the end of the first interrogation, before the investigating authorities and throughout the substantive proceedings ...

81. The Court considers that Article 6 of the Convention cannot be interpreted as guaranteeing unlimited access to the criminal case file before the first interrogation by the investigating judge where the domestic authorities have sufficient reasons relating to the protection of the interests of justice not to impede the effectiveness of the investigations ...

83. Having regard to the foregoing observations, the Court holds that the lawyer's assistance during the interrogation on 18 December 2009 was not ineffective owing to the lack of access to the case file before that interrogation.

84. Therefore, there was no violation of Article 6 of the Convention under this head.

RIGHT TO REMAIN SILENT

► *Heaney and McGuinness v. Ireland*, 34720/97, 21 December 2000

53. ... when the section 52 requests were made during those interviews, they were then effectively informed that, if they did not account for their movements at particular times, they risked six months' imprisonment.

55. Accordingly, the Court finds that the "degree of compulsion" imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act

in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.

58. The Court ... finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention.

59. It concludes, therefore, that there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6 § 1 of the Convention.

Moreover, given the close link, in this context, between those rights guaranteed by Article 6 § 1 of the Convention and the presumption of innocence guaranteed by Article 6 § 2 ..., the Court also concludes that there has been a violation of the latter provision.

► ***Van Vondel v. Netherlands (dec.)*, 38258/03, 23 March 2006**

1. ... The right not to incriminate oneself is primarily concerned with respect for the will of an accused person to remain silent in the context of criminal proceedings and with the use made of compulsorily obtained information in criminal prosecutions. However, not every measure taken with a view to encouraging individuals to give the authorities information must be regarded as improper compulsion. It does not per se prohibit the use of compulsory powers to require persons to provide information about, for instance, their financial assets even though a penalty may be attached to a failure to do so ... or, in the context of the present case, compulsory powers to require persons to provide information to a parliamentary commission of inquiry, as it would be difficult to envisage such a commission functioning effectively without such powers.

... the applicant was charged with and convicted of having committed perjury before the PEC. In other words, he lied or perjured himself through giving untruthful information to the PEC. This was not an example of forced self-incrimination before the PEC relating to an offence which he had previously committed; it was the offence itself. It may be that the applicant lied in order to prevent revealing conduct which, in his perception, might possibly be criminal and lead to prosecution. However, the right to silence and not to incriminate oneself cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation. Thus, the present case is not one concerned with the use of compulsorily obtained information in subsequent criminal proceedings. Consequently, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incrimination or that there has been any unfairness contrary to Article 6 § 1 of the Convention in respect of the criminal proceedings brought against the applicant.

► ***Yaremenko v. Ukraine*, 32092/02, 12 June 2008**

78. Notwithstanding the Government's arguments that the applicant's right to silence was protected in domestic law, the Court notes that the applicant's lawyer was dismissed from the case by the investigator after having advised his client to

remain silent and not to testify against himself. This reason was clearly indicated in the investigator's decision. It was also repeated twice in the prosecutors' replies to the lawyer O. Kh.'s complaints. In one of those replies ... it was also noted that the lawyer had breached professional ethics by advising his client to claim his innocence and to retract part of his previous confession.

79. Moreover, the Court finds it remarkable that the applicant and Mr S, over two years later, gave very detailed testimonies which according to investigator contained no discrepancies or inconsistencies. This degree of consistency between the testimonies of the applicant and his co-accused raise suspicions that their accounts had been carefully coordinated. The domestic courts however considered such detailed testimonies as undeniable proof of their veracity and made them the basis for the applicant's conviction for the 1998 crime despite the fact that his testimony had been given in the absence of a lawyer, had been retracted immediately after the applicant was granted access to the lawyer of his choice, and had not been supported by other materials. In those circumstances, there are serious reasons to suggest that the statement signed by the applicant was obtained in defiance of the applicant's will.

80. In light of the above considerations and taking into account that there was no adequate investigation into the allegations by the applicant that the statement had been obtained by illicit means ..., the Court finds its use at trial impinged on his right to silence and privilege against self-incrimination.

81. Accordingly, in this respect there has been a violation of Article 6 § 1 of the Convention.

► ***Schmid-Laffer v. Switzerland*, 41269/08, 16 June 2015**

39. ... The Court finds that the police interview of 1 August 2001 may have undermined the fairness of the subsequent proceedings against the applicant ... The Court infers that, in the circumstances of the instant case, the police should have informed the applicant of her rights to remain silent and not to incriminate herself during the police interview ... However, the Court entirely shares the opinion of the domestic authorities that that interview was of little importance among the other evidence ... It finds that the Federal Court demonstrated in detail and convincingly that the applicant's conviction was based in particular on the statements of M.S., which were found credible by the domestic authorities. Those statements were corroborated by the statements of a number of other persons ... In other words, the conviction was not decided on the sole basis of the information obtained during the interview of 1 August 2001 ... Moreover, the applicant, who was duly represented by a lawyer before the domestic courts and before the Court, fails to state exactly which statements made at that point were subsequently relied upon by the Swiss courts in convicting her. It should also be noted that, according to the record of the interview ..., the applicant did not incriminate herself on that occasion and that she remained at liberty.

40. In view of the foregoing, the Court concludes that the proceedings, viewed as a whole, were not unfair. Accordingly, there was no violation of Article 6 § 1.

See also the cases under Right to assistance of a lawyer, p. 163 above

Torture

► ***Selmouni v. France* [GC], 25803/94, 28 July 1999**

102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report of 7 December 1991 ... that the marks of the violence Mr Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe ... Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning ...

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

► ***Elçi and Others v. Turkey*, 23145/93, 13 November 2003**

640. The Court notes the consistency of the allegations made by the applicants that Tahir Elçi, Niyazi Çem, Meral Daniş Beştaş and Hüsniye Ölmez were insulted, assaulted, stripped naked and hosed down with freezing cold water ...

646. In the light of the circumstances of the case as a whole, the Court finds it established that the applicants ... suffered physical and mental violence at the hands of the gendarmerie during their detention in November and December 1993. Such ill-treatment caused them severe pain and suffering and was particularly serious and cruel, in violation of Article 3 of the Convention. It must therefore be regarded as constituting torture within the meaning of that Article.

► ***Menesheva v. Russia*, 59261/00, 9 March 2006**

48. The applicant submitted that on 13 February 1999 she was arrested in a manner contrary to Article 3 of the Convention. She furthermore alleged that she had

been beaten up upon arrival at the police station by the officers who questioned her and then again on the same day by the police officers when she refused to let them search her flat. She alleged that she had sustained injuries, such as bruises and abrasions, and that she felt intimidated due to such treatment. She also alleged that she had received no medical assistance thereafter ...

59. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical and moral resistance. In any event, the Court reiterates that, in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 ...

60. ... The sequence of events also demonstrates that the pain and suffering was inflicted on her intentionally, in particular with the view of extracting from her information concerning L ...

61. To assess the severity of the "pain or suffering" inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim ... The Court observes that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral impact.

62. In these circumstances, the Court concludes that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

► ***Mammadov (Jalaloglu) v. Azerbaijan, 34445/04,***
11 January 2007

69. Having regard to the nature of the ill-treatment (beating of the soles of the applicant's feet), the Court considers that it could only have been intentionally inflicted because a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant ... The Court considers that this treatment was of such a serious and cruel nature that it can be characterised as torture.

70. In conclusion, the Court finds that there has been a violation of Article 3 of the Convention in this regard.

Inhuman and degrading treatment

► ***Ribitsch v. Austria, 18896/91, 4 December 1995***

29. The applicant asserted that the injuries he had on his release from police custody, particularly the bruises on the inside and outside of his right arm ... had only one cause, namely the ill-treatment inflicted by the police officers who questioned

him, who, after grossly insulting him, had assaulted him repeatedly in order to induce him to make a confession ...

38. The Court ... reiterates that the requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals ...

39. ... the injuries suffered by Mr Ribitsch show that he underwent ill-treatment which amounted to both inhuman and degrading treatment.

► ***Jager v. Netherlands (dec.)*, 39195/98, 14 March 2000**

3. ... The Court notes that ... the applicant was subjected to the "*Zaanse verhoormethode*" on 14 and 15 January 1995. After having noted the characteristic features of this interrogation technique and the manner in which it was used in the applicant's case, the Court considers that it is a sophisticated method from a psychological point of view and therefore objectionable in the context of a criminal investigation in that it is apparently aimed at attaining, by seeking to create an atmosphere of intimacy between the suspect and the interrogators through mental stimulation, an optimal level of communication as a result of which the interrogated person is incited, on the basis of a perceived relation of trust, to confide in the interrogators in order to seek relief from a mentally burdensome memory.

The Court does not find it established that the use of this method has resulted in mental pain and suffering for the applicant to such an extent that it amounts to inhuman treatment within the meaning of Article 3 of the Convention. The Court therefore cannot find that this interrogation method, as such, or the manner in which it has been applied in the present case attains the minimum level of severity required under Article 3 of the Convention.

► ***Gäffgen v. Germany [GC]*, 22978/05, 1 June 2010**

94. ... it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective officer E. on the instructions of the deputy chief of the Frankfurt am Main police, D., ... with intolerable pain if he refused to disclose J's whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision ... Furthermore, it is clear both from D's note for the police file ... and from the Regional Court's finding in the criminal proceedings against D. ... that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent ...

102. In so far as the duration of the impugned conduct is concerned, the Court notes that the interrogation under threat of ill-treatment lasted for approximately ten minutes.

103. As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J's whereabouts, confessed under threat as to where he had hidden the body. Thereafter, he continued to elaborate in detail on J's

death throughout the investigation proceedings. The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering. The applicant, however, did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result.

104. The Court further observes that the threat was not a spontaneous act but was premeditated and calculated in a deliberate and intentional manner.

105. As regards the purpose of the threats, the Court is satisfied that the applicant was intentionally subjected to such treatment in order to extract information on J's whereabouts.

106. The Court further notes that the threats of deliberate and imminent ill-treatment were made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability. It is clear that D. and E. acted in the performance of their duties as State agents and that they intended, if necessary, to carry out that threat under medical supervision and by a specially trained officer. Moreover, D's order to threaten the applicant was not a spontaneous decision, since he had given such an order on a number of earlier occasions and had become increasingly impatient at the non-compliance of his subordinates with his directions. The threat took place in an atmosphere of heightened tension and emotions in circumstances where the police officers were under intense pressure, believing that J's life was in considerable danger.

107. In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law ..., the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities ...

108. Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law ... a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture ...

131. The Court refers to its above finding ... that while being interrogated by the police on 1 October 2002 the applicant was threatened with torture in order to make him disclose J's whereabouts and that this method of interrogation constituted inhuman treatment as prohibited by Article 3.

► ***Bouyid v. Belgium* [GC], 23380/09, 28 September 2015**

102. ... it appears from the case file that each slap was an impulsive act in response to an attitude perceived as disrespectful, which is certainly insufficient to establish such necessity. The Court consequently finds that the applicants' dignity was undermined and that there has therefore been a violation of Article 3 of the Convention.

103. In any event, the Court emphasises that a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity ...

105. The Court reiterates that it may well suffice that the victim is humiliated in his own eyes for there to be degrading treatment within the meaning of Article 3 of the Convention ... Indeed, it does not doubt that even one unpremeditated slap devoid of any serious or long-term effect on the person receiving it may be perceived as humiliating by that person.

106. That is particularly true when the slap is inflicted by law-enforcement officers on persons under their control, because it highlights the superiority and inferiority which by definition characterise the relationship between the former and the latter in such circumstances. The fact that the victims know that such an act is unlawful, constituting a breach of moral and professional ethics by those officers and – as the Chamber rightly emphasised in its judgment – also being unacceptable, may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness ...

107. Moreover, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the applicants' case – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty to protect them ... In inflicting the humiliation of being slapped by one of their officers they are flouting this duty.

108. The fact that the slap may have been administered thoughtlessly by an officer who was exasperated by the victim's disrespectful or provocative conduct is irrelevant here ... As the Court has previously pointed out, even under the most difficult circumstances, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned ...

109. Lastly, the Court notes, as a secondary consideration, that the first applicant was born on 22 August 1986 and was thus 17 years old on 8 December 2003. He was therefore a minor at the material time. Ill-treatment is liable to have a greater impact – especially in psychological terms – on a minor ... The need to take account of the vulnerability of minors has also been clearly affirmed at the international level ...

110. The Court emphasises that it is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age (European Code of Police Ethics, § 44; ...). Police behaviour towards minors may be incompatible with the requirements of Article 3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors.

111. In conclusion, the slap administered to each of the applicants by the police officers while they were under their control in the Saint-Josse-ten-Noode police station did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and thus diminished their dignity.

112. Given that the applicants referred only to minor bodily injuries and did not demonstrate that they had undergone serious physical or mental suffering, the treatment in question cannot be described as inhuman or, *a fortiori*, torture. The Court therefore finds that the present case involved degrading treatment.

113. Accordingly, there has been a violation of the substantive head of Article 3 in respect of each of the applicants.

Chapter 8

Charging, plea bargaining and discontinuance of proceedings

CHARGING

Notification

► *Padin Gestoso v. Spain (dec.)*, 39519/98, 8 December 1998

1. ... the question which arises is whether the applicant may be considered to have been informed promptly and in detail of the nature and cause of the charge against him, as required by Article 6 § 3 (a) of the Convention ... the Court has held that a charge means not only official notification of an allegation that a person has committed a criminal offence but also any measure substantially affecting the situation of the suspect ...

... the Court notes that, by a decision of 27 November 1989 central investigating judge no. 5 declared the complaint lodged by the public prosecutor's office admissible and ordered a number of investigative measures. However, contrary to Article 118 of the Code of Criminal Procedure, the investigating judge did not inform the applicant that the complaint concerning him had been ruled admissible. In the applicant's submission, the first information he received about the criminal proceedings against him was when he was served with the decision of 11 June 1990 whereby the investigating judge ordered the persons charged, including the applicant, to be detained pending trial, decided that the proceedings would be kept secret for one month and appointed a lawyer under the legal aid scheme to act for the accused while they were in solitary confinement, a situation which went on until 6 August 1990, when the solitary confinement was rescinded.

... the Court notes that until the decision of 11 June 1990 to charge the applicant and detain him pending trial his situation was not directly affected by the investigations conducted by the investigating judge. It is therefore from that decision on that the applicant must be considered to have been charged. Yet the applicant has not at any time alleged that he did not receive in good time notification of the charges preferred against him by the decision of 11 June 1990. That being so, the Court considers that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 § 3 of the Convention.

► **Brozicek v. Italy, 10964/84, 19 December 1989**

41. In the Court's opinion, it is necessary to proceed on the basis of the following facts. The applicant was not of Italian origin and did not reside in Italy. He informed the relevant Italian judicial authorities in an unequivocal manner that because of his lack of knowledge of Italian he had difficulty in understanding the contents of their communication. He asked them to send it to him either in his mother tongue or in one of the official languages of the United Nations.

On receipt of this request, the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6 § 3 (a) ..., unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him.

No such evidence appears from the documents in the file or the statements of the witnesses heard on 23 April 1989 ... On this point there has therefore been a violation of Article 6 § 3 (a) ...

42. On the other hand, the Court considers the allegation that the judicial notification of 23 February 1976 did not identify "in detail ... the nature and cause of the accusation" to be unfounded. This communication was intended to inform Mr Brozicek of the institution of proceedings against him; it sufficiently listed the offences of which he was accused, stated the place and the date thereof, referred to the relevant Articles of the Criminal Code and mentioned the name of the victim.

See also DEFENCE (Notification of charge), p. 293 below

Appropriateness

► **Myumyun v. Bulgaria, 67258/13, 3 November 2015**

75. It is not necessary for the Court to consider whether the officers' act was properly characterised under the Bulgarian Criminal Code as minor bodily harm under Article 131 § 1 (2) read in conjunction with Article 130 § 2 ... However, it is competent to examine whether the way in which Bulgarian law was applied in this case gave rise to results at odds with the requirements of Article 3 of the Convention. In the event, the officers were given fines amounting to two and a half monthly salaries in the case of Mr N.K. and just below three and a half monthly salaries in the cases of Mr I.K. and Mr T.A. ... in the light of its rulings in similar cases ..., the Court finds that these penalties were manifestly disproportionate to the seriousness of the officers' act. They did not appropriately reflect the gravity of acts of torture and could not be regarded as having the necessary dissuasive effect on State agents who feel they can abuse the rights of those under their control with impunity.

76. In the applicant's view, this could have been avoided if the prosecuting authorities had brought charges against the officers under Articles 282 § 1 or 287 of the Bulgarian Criminal Code. The Court is, for its part, not persuaded that this course of action was plainly open to these authorities ... It is true that in a more recent case it criticised the Bulgarian prosecuting authorities for failing to consider whether to bring charges under Article 287 in a clear case of ill-treatment of a suspect in the course of custodial interrogation which had led to confessions later used in the trial against him ...

77. For the Court, the origin of the problem lay more in the fact that none of the criminal offences relied on in the present case – bodily harm, abuse of office and coercion of a confession or a statement ... – appears capable of squarely addressing the full range of issues thrown up by the act of torture to which the applicant fell victim ...

78. Either way, the Bulgarian legal system did not adequately respond to the act of torture to which the applicant fell victim. There has therefore been a breach of Article 3 of the Convention.

PLEA BARGAINING

► *Natsvlisvili and Togonidze v. Georgia*, 9043/05, 29 April 2014

90. ... There cannot be anything improper in the process of charge or sentence bargaining in itself ... In this connection the Court subscribes to the idea that plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.

91. The Court considers that where the effect of plea bargaining is that a criminal charge against the accused is determined through an abridged form of judicial examination, this amounts, in substance, to the waiver of a number of procedural rights. This cannot be a problem in itself, since neither the letter nor the spirit of Article 6 prevents a person from waiving these safeguards of his or her own free will ... The Court observes in this connection that as early as 1987 the Committee of Ministers of the Council of Europe called upon the member States to take measures aimed at the simplification of ordinary judicial procedures by resorting, for instance, to abridged, summary trials ... However, it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest ...

92. The Court thus observes that by striking a bargain with the prosecuting authority over the sentence and pleading no contest as regards the charges, the first applicant waived his right to have the criminal case against him examined on the merits. However, by analogy with the above-mentioned principles concerning the validity of such waivers, the Court considers that the first applicant's decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.

93. In this connection, the Court notes, firstly, that it was the first applicant himself who asked the prosecuting authority to arrange a plea bargain. In other words, the initiative emanated from him personally and, as the case file discloses, could not be said to have been imposed by the prosecution; the first applicant unequivocally

expressed his willingness to repair the damage caused to the State ... He was granted access to the criminal case materials as early as 1 August 2004 ... The Court also observes that the first applicant was duly represented by two qualified lawyers of his choosing ... One of them met with the first applicant at the very beginning of the criminal proceedings, and represented him during the first investigative interview of 17 March 2004 ... The two lawyers ensured that the first applicant received advice throughout the plea-bargaining negotiations with the prosecution, and one of them also represented him during the judicial examination of the agreement. Of further importance is the fact that the judge of the Kutaisi City Court, who was called upon to examine the lawfulness of the plea bargain during the hearing of 10 September 2004, enquired of the first applicant and his lawyer as to whether he had been subjected to any kind of undue pressure during the negotiations with the prosecutor. The Court notes that the first applicant explicitly confirmed on several occasions, both before the prosecuting authority and the judge, that he had fully understood the content of the agreement, had had his procedural rights and the legal consequences of the agreement explained to him, and that his decision to accept it was not the result of any duress or false promises ...

94. The Court also notes that a written record of the agreement reached between the prosecutor and the first applicant was drawn up. The document was then signed by the prosecutor and by both the first applicant and his lawyer, and submitted to the Kutaisi City Court for consideration. The Court finds this factor to be important, as it made it possible to have the exact terms of the agreement, as well as of the preceding negotiations, set out for judicial review in a clear and incontrovertible manner.

95. As a further guarantee of the adequacy of the judicial review of the fairness of the plea bargain, the Court attaches significance to the fact that the Kutaisi City Court was not, according to applicable domestic law, bound by the agreement reached between the first applicant and the prosecutor. On the contrary, the City Court was entitled to reject that agreement depending upon its own assessment of the fairness of the terms contained in it and the process by which it had been entered into. Not only did the court have the power to assess the appropriateness of the sentence recommended by the prosecutor in relation to the offences charged, it had the power to reduce it ... The Court is further mindful of the fact that the Kutaisi City Court enquired, for the purposes of effective judicial review of the prosecuting authority's role in plea bargaining, whether the accusations against the first applicant were well founded and supported by prima facie evidence ... The fact that the City Court examined and approved the plea bargain during a public hearing, in compliance with the requirement contained in Article 679-3 § 1 of the CCP, additionally contributed, in the Court's view, to the overall quality of the judicial review in question.

DISCONTINUANCE

See also COMPENSATION AND COSTS (Acquittal/discontinuance), p. 480 JUDGMENT (Discontinuance), p. 395, and RIGHTS OF VICTIMS (Discontinuance and acquittal as a determination of a civil right), p. 362 below

Assurance of non-prosecution

► *Mustafa (Abu Hamza) v. United Kingdom (dec.)*, 31411/07, 18 January 2011

34. It is not normally for the Court to determine the appropriateness of a decision to prosecute ... However, an issue may arise under Article 6 where a legitimate expectation is created by the actions of the authorities and a defendant acts upon that legitimate expectation to his detriment ... Consequently, the Court would not exclude the possibility that, if a defendant were given an assurance by the prosecuting authorities that he would not be prosecuted for certain offences and the authorities subsequently reneged on that assurance, the subsequent criminal proceedings would be unfair.

35. That is not, however, the situation which obtained in the applicant's case. The notes of the applicant's meetings with the Security Service raise questions as to why officials of the Service thought fit to give the applicant warnings as to his conduct and why they felt able to advise on whether that conduct amounted to incitement. However, it must have been clear to the applicant that the Security Service officials were not qualified to provide that advice. It must also have been clear that they were not in a position to provide assurances as to whether or not he would be prosecuted: the decision to prosecute him was not one for the Security Service to make ... It is unclear to the Court, as it was to the Court of Appeal, why in 1999 the police did not attach the significance to the cassettes and encyclopaedia that they did in 2004. However, as the Court of Appeal observed, this could not have been taken as an assurance, still less one that the applicant relied on. Equally, the Secretary of State's decisions to deprive the applicant of his citizenship and to accede to his extradition could not have been seen as assurances of non-prosecution. As the trial judge found, there was no reason why revocation of citizenship and prosecution could not be done simultaneously, nor was there anything unlawful in prosecuting someone who was subject to an extradition request.

The Court therefore agrees with the trial judge and the Court of Appeal that nothing that had been done by the authorities could be treated as an assurance that the applicant would not be prosecuted. Furthermore, had the trial judge reached a different conclusion as to whether such an assurance had been given, the case-law set out at paragraphs 26 and 27 above makes clear that it would have been open to him to grant a stay of proceedings. That case-law is entirely compatible with Article 6. No issue arises under Article 6 in respect of this ground.

III-health not a reason

► *Krakolinig v. Austria (dec.)*, 33992/07, 10 May 2012

26. ... the Court considers that the Austrian authorities cannot be held exclusively responsible for the length of the proceedings. There is no indication that the domestic authorities contributed to the length of the proceedings. The Eisenstadt Regional

Court, in particular, tried repeatedly to hold trial hearings and, moreover, had the applicant's fitness to stand trial examined by medical experts at regular intervals.

27. As regards the conduct of the applicant, the Court considers that even though the applicant cannot be considered responsible for the repeated postponement of the trial and the stays of the proceedings as the reason for this, his state of health, was outside of his control, it was without doubt the objective reason for the resulting length of the proceedings. The delays cannot, for this reason, be attributed to the domestic courts, and a breach of the reasonable time requirement under Article 6 can only be found when such delays are attributable to the domestic courts. The Court further observes that Article 6 does not give a right to have criminal proceedings terminated on account of the accused's state of health. This principle is all the more valid when there is, like in the present case, an indication that the person concerned was not entirely prevented by his state of health from attending court proceedings as such.

No right to be prosecuted

► *R. v. United Kingdom (dec.)*, 33506/05, 4 January 2007

As to the termination of criminal proceedings, there is no right under Article 6 of the Convention to a particular outcome or, therefore, to a formal conviction or acquittal following the laying of criminal charges ...

► *Kart v. Turkey [GC]*, 8917/05, 3 December 2009

59. The applicant alleged that the accusations against him were likely to harm his reputation and his career as a lawyer and an MP. Similarly, the suspension of the proceedings against him and the resulting uncertainty were likely to discredit him in the public eye. The press regularly published a list of MPs in respect of whom requests had been made to lift their immunity, and his name was on that list alongside the names of people he alleged were guilty of corruption.

60. The applicant further submitted that his right of access to a court had been impaired by the majority group in the National Assembly. He argued that the right to a fair trial implied the effective possibility of having one's case heard by a court. In the instant case, however, if that possibility existed, it was purely hypothetical and it had not been open to him in practice. Since his election his case had been pending without any final decision being reached, depriving him of his right to a trial within a reasonable time. The fact that the proceedings had been pending since his election, and would have been so for nine years by the time he ceased to be an MP, had compromised his reputation and his political career ...

92. ... having established the legitimacy of parliamentary inviolability, the Court cannot arrive at any conclusion concerning its compatibility with the Convention without considering the circumstances of the case. It must first assess the proportionality of the measure in relation to the applicant's rights under Article 6 of the Convention ...

98. ... the scope of the protection thus afforded cannot be deemed to be excessive in itself. Parliamentary inviolability in Turkey is relative; not only is it limited in time to the duration of the MP's term but it is also subject to an exception, in that it may be lifted. It also applies only to criminal matters, which means that Turkish MPs are not protected against civil actions. Nor does it apply in certain cases of *flagrante delicto* or specific crimes against the regime or the State ... Furthermore, while the scope of parliamentary inviolability in Turkey is more broadly defined, it does not seem to be at odds with the solutions adopted in most European parliamentary systems ...

104. ... the Court cannot ignore the fact that the applicant has had criminal accusations hanging over him for over six years, and the situation could remain the same until he ceases to be an MP. There is therefore no denying that the uncertainty inherent in any criminal proceedings has been accentuated in this case by the impugned parliamentary procedure, as the delays it has caused have resulted in equivalent delays in the criminal proceedings.

105. However, while the Chamber found that such a delay was prejudicial to the applicant ..., the Grand Chamber is unable to ignore the special nature of the applicant's status and the specificity of the impugned procedure. The Grand Chamber considers that the connection between the MP's parliamentary immunity and his status is a fundamental aspect of the matter at issue.

106. It should be noted here that the criminal proceedings at the origin of the applicant's complaint were brought against him before he stood for election to Parliament. As a lawyer he could not have been unaware of the consequences his election would have on the proceedings in question. In standing for election, then standing for a second term, he was aware that his special status would delay the outcome of the criminal proceedings against him. He also knew that because of his status he would not be able to waive his inviolability or have it lifted merely at his request ...

108. ... the Court considers it important when assessing any prejudice suffered by the applicant to bear in mind that the impugned delay is the time taken by the parliamentary procedure for examining requests for the lifting of immunity and not the time taken to complete criminal proceedings as such. In the instant case there is no reason to consider that the applicant will not be able to have a fair trial when he ceases to be an MP. The parliamentary procedure does not appear to adversely affect that possibility in any way, particularly as it has no effect on the presumption of innocence to which all accused persons are entitled. Sight should not be lost here of the fact that the decisions taken by parliamentary bodies in this connection serve no penal or repressive purpose but are aimed in principle – as the lifting of immunity is generally refused – at protecting MPs rather than harming them.

109. ... not only is the obstruction to criminal proceedings as a result of parliamentary inviolability only temporary, but in principle Parliament does not intervene at all in the course of justice as such. In this case, when examining the applicant's request to lift his immunity Parliament seems only to have considered whether inviolability, as a temporary obstacle to judicial action, should be lifted immediately or whether it was preferable to wait until the end of the applicant's term in Parliament. The effect was thus merely to suspend the course of justice, without influencing it or taking part in it.

110. As to the applicant's allegations that the proceedings against him had tarnished his reputation, the Court points out that it is in the very nature of this form of prejudice to manifest itself as soon as an official accusation is lodged. In this case, however, there is no doubt in the Court's mind that the applicant's honour and reputation were protected by respect for the principle of the presumption of innocence.

111. In the light of the above, the Court considers that while the delay inherent in the parliamentary procedure did affect the applicant's right to have his case heard by a court, in delaying the proceedings it did not, in the instant case, impair the very essence of that right. As it is limited in time and covered by special rules concerning, *inter alia*, the suspension of the running of time for the purposes of limitation, the impugned immunity merely constitutes a temporary procedural obstacle to the criminal proceedings, by no means depriving the applicant of the possibility of having his case tried on the merits.

112. With regard to the requirements of the rule of law, however, the type of immunity associated with the applicant's status as an MP is valid only because of the legitimacy of the aims pursued, namely, to preserve the integrity of Parliament and protect the opposition. The Court acknowledges that the applicant's inability in this case to waive his inviolability falls within the scope of the legitimate aims thus defined ... In that sense it accepts that individual renunciation by the applicant is no substitute for a decision of the National Assembly.

113. Lastly, as the right to obtain a judgment in respect of criminal accusations is not absolute, in particular when there is no fundamental irreversible detrimental effect on the parties, the Court considers that in the circumstances of the instant case the failure to lift the applicant's parliamentary immunity did not impair his right to a court to a degree disproportionate to the legitimate aim pursued.

114. Consequently, ... there has been no violation of Article 6 § 1 of the Convention.

Reasons for discontinuance suggesting guilt

► *Virabyan v. Armenia*, 40094/05, 2 October 2012

188. The Court notes that the criminal proceedings against the applicant were terminated at the pre-trial stage by the prosecutor's decision of 30 August 2004 on the ground prescribed by former Article 37 § 2(2) of the CCP [Code of Criminal Procedure], which allowed termination of proceedings if, in the prosecutor's opinion, the accused had redeemed the committed act through suffering and other privations which he had suffered in connection with the committed act. The prosecutor's decision was upheld by the domestic courts.

189. Having regard to the prosecutor's decision of 30 August 2004, the Court notes that this decision was couched in terms which left no doubt as to the prosecutor's view that the applicant had committed an offence. In particular, the prosecutor first recapitulated the circumstances of the case as contained in the charge against the applicant and in a manner suggesting it to be established that police officer H.M. had acted in self-defence, while the applicant had intentionally inflicted injuries on him. The prosecutor went on to conclude that it was inexpedient to prosecute the

applicant because he had also suffered as a result of the committed act. In doing so, the prosecutor specifically used the words “during the commission of the offence [the applicant had] also suffered damage” and “by suffering privations [the applicant had] atoned for his guilt” ...

190. Both the Court of Appeal and the Court of Cassation upheld this decision and in substance did not disagree with it. Moreover, in doing so, both courts found it to be established that the applicant’s claim that he had acted in self-defence was unfounded. It should be mentioned that the proceedings before the courts did not determine the question of the applicant’s criminal responsibility but the question of whether it was necessary to terminate the case on the grounds provided by the prosecutor. Thus, it cannot be said that these proceedings resulted or were intended to result in the applicant being “proved guilty according to law”.

191. Lastly, the Court observes that the ground for termination of criminal proceedings envisaged by former Article 37 § 2(2) of the CCP in itself presupposed that the commission of an imputed act was an undisputed fact.

192. In view of the foregoing, the Court considers that the reasons for termination of the criminal case against the applicant given by the prosecutor and upheld by the courts with reliance on Article 37 § 2(2) of the CCP were in violation of the presumption of innocence.

► **Mikolajová v. Slovakia, 4479/03, 18 January 2011**

6. On 30 June 2000 the applicant’s husband filed a complaint with the police alleging that the applicant had beaten and wounded him on 25 June 2000.

7. On 3 July 2000 the police department in Košice issued a decision by which it dropped the case on the ground that the applicant’s husband did not agree to criminal proceedings being brought against her. The decision stated that although the police “investigation” had established that the applicant had committed a criminal offence, criminal prosecution was barred as the victim, the applicant’s husband, had not given his consent as required under Article 163 of the Criminal Procedure Code. The applicant was not notified of this decision, nor is there any evidence in the case file that she was questioned or otherwise made aware of her husband’s complaint.

8. On 28 January 2002 a health insurance company wrote to the applicant asking her to reimburse the costs of her husband’s medical treatment. According to the letter, the applicant’s husband had been treated in a hospital on 25 June 2000 as a result of injuries which the applicant had inflicted on him. Reference was made, *inter alia*, to the decision issued by the police department in Košice on 3 July 2000.

9. In a letter dated 3 July 2002 the insurance company explained the position to the applicant in reply to her request. A copy of the police decision of 3 July 2000 was enclosed with the letter which was delivered to the applicant’s lawyer on 15 July 2002. The relevant part of the decision of 3 July 2000 read as follows:

“The investigation showed that [the applicant’s] action met the constituent elements of the offence of causing injury to health pursuant to Article 221(1) of the Criminal Code in that she had deliberately inflicted an injury on another person.” ...

59. For the purposes of the instant case the Court is prepared to accept that the disclosure of the police decision of 3 July 2000 to the insurance company had a legal basis and was therefore in accordance with the law, as asserted by the director of the police department in reply to the applicant's complaint ... On the other hand, the Court considers that it is not required to decide whether the disclosure of the police decision pursued a legitimate aim. In its view, this matter is closely related to compliance with the "necessity" test. According to that test, a breach of Article 8 will be found if, in the particular circumstances of a case, an impugned measure fails to strike a fair balance between the competing public and private interests at issue. The requirement of proportionality demands that a respondent Government show relevant and sufficient reasons for the interference. While it is for the national authorities to make the initial assessment in all these respects, and a margin of appreciation must be left to the competent national authorities in this assessment, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention ...

60. In this connection, the Court considers that the police decision was couched in terms which pointed to an expression of fact and not mere suspicion and amounted to an obvious indication that the police department considered the applicant to be guilty. This, it finds, is evident in the actual words employed in the impugned decision ..., namely that:

"The investigation showed that [the applicant's] action met the constituent elements of the offence of causing injury to health pursuant to Article 221 § 1 of the Criminal Code in that she had deliberately inflicted an injury on another person."

61. Of particular concern to the Court is the fact that the applicant had not been charged with a criminal offence but was nevertheless placed on record as a criminal offender. The Court has already had occasion to point to the risk of stigmatisation of individuals stemming from such practices and the threat which they represent to the principle of the presumption of innocence ... For the Court, the damage which may be caused to the reputation of the individual concerned through the communication of inaccurate or misleading information cannot be ignored either. The Court would also observe with concern that the authorities have not indicated whether the police decision remains valid indefinitely, such as to constitute, with each communication to a third party, assuming such to be in pursuit of a legitimate aim, a continuing threat to the applicant's right to reputation.

62. In examining whether the domestic authorities have complied with the above-mentioned fair balance requirement, the Court must have regard to the safeguards in place in order to avoid arbitrariness in decision-making and to secure the rights of the individual against abuse. In the instant case, the Court cannot but note the lack of any available recourse through which the applicant could obtain a subsequent retraction or clarification of the terms of the police decision ...

63. Having regard to the above considerations, the Court finds that the domestic authorities failed to strike a fair balance between the applicant's Article 8 rights and any interests relied on by the Government to justify the terms of the police decision and its disclosure to a third party. There has accordingly been a breach of Article 8 of the Convention.

Effect of discontinuance

► *Antoine v. United Kingdom (dec.)*, 62960/00, 13 May 2003

It follows however from the Court's reasoning above that the criminal proceedings against the applicant were for practical purposes terminated on 18 March 1997 when he was found unfit to stand trial. While it remains theoretically possible that at some later date the Secretary of State may decide that the applicant has become fit to plead, it cannot be considered that the charge nonetheless remains pending. The Secretary of State may never in fact re-institute proceedings against the applicant. If he does, the question of whether the applicant is tried within a reasonable time will depend on an examination of the period between the first concrete step taken to institute another trial which can be regarded as substantially affecting the applicant's position and the conclusion of those proceedings. There is accordingly no problem of delay arising in the determination of the criminal charge in the present circumstances.

► *Withey v. United Kingdom (dec.)*, 59493/00, 26 August 2003

As to whether the present proceedings can be considered to have ended by a court order leaving charges on the file, the Court recalls that the Commission found that such an order ended criminal proceedings for the purposes of Article 6 § 1 where the prosecution had undertaken not to proceed with the charges or where it was the settled practice of the prosecution authorities not to do so ... However, in the first case, the prosecution had undertaken not to proceed with the charges in the future and the latter two cases concerned the more common situation where an accused had been convicted of one offence and it was not intended to pursue the remaining charges which were left on the file unless the conviction was overturned on appeal. Neither situation presented in the instant case.

Turning therefore to the Crown Court order of 19 January 1993 leaving the charges on the file, the Court notes, on the one hand, that there remained a theoretical possibility of the prosecution proceeding on the charges against the applicant in the future. Further, in the light of the trial judge's comments of 19 January 1993, enabling a prosecution to be brought on the charges in the future could be seen as his reason for making the order he did. Consistently, on that date there was no prosecution undertaking that the charges would not be proceeded with.

On the other hand, according to domestic law and practice, the prosecuting authorities would have had to apply to the Crown Court to resurrect the proceedings and a hearing would have been held during which that court would have been obliged to consider that application according to certain criteria including the fairness of re-opening the case and whether an excessive period had passed since the charges had been ordered to lie on the file. The applicant would have been entitled to be represented at any such hearing and would have been able to make submissions as to why the charges should not be pursued. Thereafter, the Crown Court would have had to decide whether or not to allow the prosecution to resurrect the charges against the applicant. Importantly, it is only in exceptional circumstances that a

charge ordered to lie on the file is later pursued and, indeed, the applicant did not refer to one such case in his application.

It is true that the trial judge effectively chose on 19 January 1993 not to enter a verdict of “not guilty” according to section 17 of the 1967 Act but rather to leave the charges to lie on the file and he accompanied this with an express warning that the charges would be resurrected if there was any “repetition of the alleged events contained on the indictment”. However, as a matter of domestic law, any indications so given by the trial judge’s order on 19 January 1993 concerning his view as to a possible future renewal of prosecution on the relevant charges were not determinative of that question: the matter was one for the Crown Court to determine at a future date on the basis of a specific application to it and according to both parties’ submissions and the requirements of fairness. Accordingly, in assessing whether the applicant was “substantively affected” by the proceedings after 19 January 1993, the Court does not consider that the applicant can rely on the course chosen or the comments of the trial judge.

In all of the above these circumstances, the Court considers that the order leaving the charges on the file could be considered to have ended the criminal proceedings against the applicant for the purposes of Article 6, even if there was no undertaking by the prosecution on 19 January 1993 not to pursue the charges later so that there remained a theoretical possibility of their later resurrection. The applicant’s submission that he nevertheless suffered psychological stress after 19 January 1993 cannot mean that he could be reasonably or objectively considered to have been “substantially affected” by those charges when there was no indication after that date from any relevant public authority that the charges would be again resurrected and pursued against him. Any separate issue under Article 6 that a public authority (social services) took action (restricting his contact with his children) in the light of the charges on the file concerning indecent assault of children, is, in any event unsubstantiated: he has not provided any evidence that any action taken by the local authority in respect of his children resulted from the fact that the relevant criminal charges were lying on the file.

Consequently, the Court considers that, for the purposes of Article 6 of the Convention, the criminal proceedings were brought to an end by the order of 19 January 1993.

► ***Stoianova and Nedelcu v. Romania, 77517/01, 4 August 2005***

18. The applicants alleged that the length of the proceedings instituted against them on 14 April 1993 had breached the “reasonable time” requirement ...

19. The Government did not dispute that submission and left the matter to the Court’s discretion. Relying on the Court’s case-law, they maintained, however, that the period to be taken into consideration had begun to run on 12 May 1999, when the proceedings were resumed against the applicants, and had therefore lasted approximately six years.

20. The Court notes that the criminal proceedings against the applicants comprised two separate phases. The first began on 14 April 1993, when they were arrested and remanded in custody, and ended on 11 November 1997 when the prosecutor N.O.

made an order discontinuing the proceedings. The second phase began on 12 May 1999, when the prosecution ordered the proceedings to be reopened, and ended on 21 April 2005 when the prosecution ordered the proceedings to be discontinued.

21. The Court cannot accept the Government's contention that the first phase should not be taken into account for the purposes of Article 6 § 1. It considers that the order discontinuing the proceedings made by the prosecutor N.O. on 11 November 1997 cannot be regarded as having terminated the proceedings against the applicants because it was not a final decision ... It has to be said in that connection that, under Article 270 of the Code of Criminal Procedure, the prosecution had the power to set aside an order discontinuing the proceedings and reopen a criminal investigation without being bound by any time-limit.

There was not merely a theoretical possibility that the prosecution would pursue the charge (contrast *Withy v. the United Kingdom* (dec.) ...): it was open to the prosecution to reopen the criminal investigation without having to seek leave from any domestic court that would have been obliged to consider the application according to certain criteria, including the fairness of reopening the case and whether an excessive period had passed since the decision discontinuing the investigation (contrast *Withy*, cited above). In that connection the Court cannot disregard the fact that prosecutors in Romania, acting as members of the Procurator-General's Department, did not satisfy the requirement of independence from the executive ...

Furthermore, the criminal proceedings were ordered to be reopened on the ground that the initial investigation had been incomplete ... The applicants were not responsible for those shortcomings on the part of the authorities and should not therefore be put at a disadvantage as a result of them.

Lastly, the Government have not in any way shown that resurrecting a charge that had been dropped by an order of the prosecutor was an exceptional step ...

► ***R. v. United Kingdom* (dec.), 33506/05, 4 January 2007**

... the Court observes that the police decided not to prosecute, and the applicant was so informed; instead they issued a warning to the applicant in respect of the offences which he had admitted committing. The question arises in this case whether the criminal charge thereby was dropped or was in fact determined.

The Court will have regard, in this context, to the three guiding criteria as to whether there has been a determination of a criminal charge: the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable ... It notes, as to the first, that according to domestic law, a warning is not a criminal conviction. As to the second, the purpose of the warning is, largely, preventative and does not pursue the aims of retribution and deterrence. Lastly, no fine or restriction of liberty is imposed. The applicant in this case was required to sign on a register and was referred to the youth offending team for possible intervention, measures which the Court finds preventative in nature (see also *Antoine v. United Kingdom* ..., the lack of criminal conviction or any punitive sanction being the most decisive elements in the proceedings following a finding of unfitness to plead). The Court finds therefore that the warning applied to the applicant did not

involve the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. Nor did it involve any public official declaration of guilt of criminal offence which could offend Article 6 § 2.

Turning, lastly, to the civil head, the Court notes that it is not apparent from the papers submitted that the applicant raised, or pursued, this aspect of his complaint through the various instances of domestic proceedings. In any event, even assuming exhaustion of domestic remedies, it finds no indication that the warning applied to the applicant determined any of his civil rights or obligations within the meaning of Article 6 § 1 of the Convention.

Renewal of proceedings

► *Tejedor García v. Spain*, 25420/94, 16 December 1997

29. The applicant complained that the proceedings against him had been unfair because the domestic courts had granted the public prosecutor's application for an order setting aside the decision that no further action be taken some two months after the expiry of the three-day time-limit contained in Article 789 § 5, no. 4...

32. ... Although the date appearing on the public prosecutor's application to have the decision set aside was marked as 13 September 1990, the national courts did not consider that fact to be relevant to the issue concerning the date of receipt of the file and held that that date could not be determined for certain, there being nothing to show when the decision had been sent to the public prosecutor or when he had actually received it ...

As is clear from the above, the courts were thus called upon to interpret Article 789 § 5, no. 4, ... in circumstances where the date of receipt could not be established as a matter of certainty.

33. In the Court's view, the interpretation to be given to Article 789 § 5, no. 4, in such circumstances is a matter for the domestic courts. Granting the public prosecutor's application almost two months after the decision not to prosecute meant that the matter had not become final under Spanish law. In these circumstances, the interpretation of the national courts cannot be described as either arbitrary or unreasonable, or of such a nature as to taint the fairness of the proceedings. Nor can it be said that any issue arises concerning the equality of arms in this case.

34. There has, accordingly, been no violation of Article 6 § 1 of the Convention

► *Smirnova and Smirnova v. Russia (dec.)*, 46133/99, 3 October 2002

3. The second applicant complains under Article 6 § 2 of the Convention and Article 4 of Protocol No. 7 that the re-initiation of the proceedings after their discontinuance violated her right to be presumed innocent and not to be tried or punished twice ...

The Government claim that the public prosecutor complied with the laws of criminal procedure when on 20 March 2000 he again instituted criminal proceedings against the second applicant. Insofar as the proceedings instituted by the Tverskoy District

Court on 21 March 1997 had been terminated, this had been so on account of the ruling of the Constitutional Court.

The second applicant replies that the renewed institution of criminal proceedings cannot be regarded as lawful because the same charges against her had been dropped before.

The Court considers, first, that the presumption of innocence guaranteed by Article 6 § 2 of the Convention requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused ...

The Court, however, finds no indication that the trial court started from the presumption that the second applicant had committed the offences of which she had been charged. Thus, there is no appearance of a violation of Article 6 § 2 of the Convention.

As to Article 4 of Protocol No. 7, the Court recalls that the aim of this Convention provision is to prohibit the repetition of criminal proceedings that have been concluded by a final decision ...

The final decision in the applicants' case was given on 9 April 2002 by the Moscow City Court which discharged the applicants from serving their sentence under the statute of limitations. No further proceedings on the same subject have taken place. The discontinuance of criminal proceedings by a public prosecutor did not amount to either conviction or an acquittal, and therefore Article 4 of Protocol No. 7 finds no application to the second applicant's situation either.

A remedy for length of proceedings

► *Sprotte v. Germany (dec.)*, 72438/01, 17 November 2005

The Government conceded that the overall length of the proceedings violated the applicant's rights to a hearing within a reasonable time ...

... the Court reiterates that the mitigation of a sentence on the ground of the excessive length of proceedings does not in principle deprive the individual concerned of his status as a victim within the meaning of Article 34 of the Convention. However, this general rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and measurable manner or by discontinuing the prosecution ...

The Court notes in the first place that the Federal Constitutional Court, ... expressly established that the length of the criminal proceedings against the applicant was unreasonable and that his conviction violated his right to a fair criminal trial as guaranteed by the Basic Law. It ordered that the proceedings had to be discontinued without a criminal conviction. When reaching this decision, the Federal Constitutional Court thoroughly examined the applicant's complaint and expressly acknowledged the negative effects which the criminal proceedings had upon the applicant's health and the other hardships the applicant had been exposed to, such as having been

deprived of his driving licence for more than seventeen months and the institution of disciplinary proceedings against him. It follows that the domestic courts have fully acknowledged the failure to observe the reasonable time requirement.

Secondly, it has to be examined whether the applicant was afforded adequate redress for the violation. In this respect the Court notes that the Potsdam District Court ... discontinued the proceedings. It further ordered that the court fees had to be borne by the Treasury and that the applicant had to be reimbursed half of the necessary expenses incurred by the proceedings. While the District Court did not give any further reasons for its decision, it becomes clear from the context that it complied with the Federal Constitutional Court's orders. It follows that the proceedings have been discontinued on account of their excessive length. Under these circumstances, the Court is satisfied that the applicant was afforded adequate redress for the overall length of the proceedings, including the period of time between the decision of the Federal Constitutional Court ... and the decision of the Potsdam District Court ...

The applicant cannot, therefore, complain to be a victim of a violation of his right to a hearing within a reasonable time, as guaranteed under Article 6 § 1.

Chapter 9

The trial court

TERMINOLOGY

► ***Didier v. France (dec.)*, 58188/00, 27 August 2002**

On 27 January 1999 the Financial Markets Board [FMB], exercising its disciplinary powers, decided to suspend the applicant's trading licence for six months and fined him 5,000,000 French francs.

On 30 April 1999 the applicant brought an action in the Conseil d'Etat, seeking to have the decision in issue quashed and its execution stayed.

On 3 December 1999 the Conseil d'Etat dismissed the applicant's action.

3. ... The Court takes the view that, in the light of the principles established in its case-law and its autonomous interpretation of the term "tribunal" in Article 6 § 1 of the Convention, the FMB has to be regarded as a "tribunal" for the purposes of those provisions, irrespective of its classification in domestic law ... It further observes that a "tribunal" within the meaning of Article 6 is also one within the meaning of Article 2 of Protocol No. 7 ... The Court lastly notes that when reviewing decisions by the FMB, the Conseil d'Etat is competent to deal with all aspects of the case, so that in that respect it too is a "judicial body that has full jurisdiction", and thus a "tribunal" ... That being so, the Court considers that the applicant was afforded the right of appeal in a criminal matter, in accordance with the first paragraph of Article 2 of Protocol No. 7.

ESTABLISHED BY LAW

► ***Ilaşcu and Others v. Moldova and Russia [GC]*, 48787/99, 8 July 2004**

460. As is well established in the Court's case-law, the word "tribunal" used in the French text of Article 5 (court) and other Articles of the Convention, in particular Article 6 (tribunal), refers in the first place to a body "established by law" satisfying a number of conditions which include independence, particularly vis-à-vis the executive, impartiality, the duration of its members' terms of office and guarantees of a judicial procedure ...

In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal "established by law" provided that it forms part of a judicial system operating on a "constitutional and legal basis" reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees ...

► ***Posokhov v. Russia*, 63486/00, 4 March 2003**

43. However, apart from the apparent failure to observe the requirements of the Lay Judges Act regarding the drawing of random lots and two weeks' service per year, the Court is particularly struck by the fact that the Neklinovskiy District Authority – the body responsible for the appointment of lay judges – has confirmed that it had no list of lay judges appointed before 4 February 2000. The authority thus failed to present any legal grounds for the participation of Ms Streblyanskaya and Ms Khovyakova in the administration of justice on the day of the applicant's trial, bearing in mind that the list adopted on 4 February 2000 only took effect on 15 June 2000 after its approval by the Rostov Regional Legislature.

These circumstances, cumulatively, do not permit the Court to conclude that the Neklinovskiy District Court which heard the applicant's case on 22 May 2000 could be regarded as a "tribunal established by law".

► ***Accardi and Others v. Italy (dec.)*, 30598/02, 20 January 2005**

2. ... As the Court of Cassation rightly pointed out in its judgment of 22 February 2002, the questioning of X and Y was conducted by the investigating judge. The fact that, making use of his right to oversee the performance of the investigative measures, he decided to proceed through the intermediary of a psychologist in order to put certain questions to the children, does nothing to alter that conclusion. As to the fact that the investigating judge left the room while Y was being questioned, the minutes of the hearing of 16 October 1998 show that the move was designed to calm the child and that, in any event, the judge continued to follow the progress of the questioning from behind a two-way mirror.

In the light of the above circumstances, the Court cannot conclude that the Florence investigating judge was not a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention.

► ***Coëme v. Belgium*, 32492/96, 22 June 2000**

107. The Court reiterates that organisation of the judicial system and jurisdiction in criminal cases cannot be left to the discretion of the judicial authorities, and notes that it was Article 103 of the Constitution which, until the 1998 reform ..., required government ministers, exceptionally, to be tried by the Court of Cassation. However, there was no provision extending the Court of Cassation's jurisdiction to defendants other than ministers for offences connected with those for which ministers were standing trial ...

Admittedly, as the Government submitted, application of the rules on connection, laid down in Belgium by Articles 226 and 227 of the Code of Criminal Investigation, was foreseeable in the light of the teachings of legal theory and case-law, and in particular of the Court of Cassation's judgment of 12 July 1865, even though the latter concerned a duel and pointed out that "a duel is an indivisible complex offence" and that "the indivisibility of the procedure is a necessary consequence of the indivisibility of the offence" ... In the present case these indications cannot justify the conclusion that the rule on connection was "established by law", especially since the

Court of Cassation, the supreme Belgian judicial authority, itself decided, not having referred the question to the Administrative Jurisdiction and Procedure Court, that summoning persons who had never held ministerial office to stand trial before it was the result of applying Article 103 of the Constitution rather than the provisions of the Code of Criminal Investigation or the Judicial Code ...

108. Since the connection rule was not established by law, the Court considers that the Court of Cassation was not a tribunal “established by law” within the meaning of Article 6 to try these other four applicants.

INDEPENDENCE

► *Sutter v. Switzerland* (dec.), 8209/78, 1 March 1979

2. ... These judges are appointed by the Federal Council, i.e. the Government, for 3 years. This nomination procedure could not itself affect the tribunal’s dependence. Actually, a judge’s independence does not necessarily imply that he should be appointed for life ... or that he should be irremovable in law ..., i.e. that he cannot be given other duties without his consent. But it is essential that he should enjoy a certain stability, if only for a specific period, and that he should not be subject to any authority in the performance of his duties as a judge. There is nothing to indicate that judges appointed in this way can be dismissed from office. Furthermore, even if as servicemen they are subject to the authority of their hierarchical superiors in their respective units, when they sit as judges, these officers and soldiers are not answerable to anyone about the way in which they administer justice. Their independence is guaranteed in general terms by Article 183ter of the Act of 12 April 1907 on the military organisation of the Confederation, and is further protected by the secrecy of deliberations.

► *Salov v. Ukraine*, 65518/01, 6 September 2005

80. The Court reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence ...

82. In the present case it appears difficult to dissociate the question of impartiality from that of independence, as the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations ...

86. Taking into account the aforementioned considerations as to the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case, the Court finds that the applicant’s doubts as to the

impartiality of the judge of the Kuybyshevsky District Court of Donetsk may be said to have been objectively justified.

► ***Whitfield and Others v. United Kingdom*, 46387/99, 12 April 2005**

45. The Court observes that persons answerable to the Home Office (whether as prison officer, governor or controller in the applicants' prisons) drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants' guilt or innocence together with their sentences. It cannot therefore be said that there was any structural independence between those with the prosecuting and adjudicating roles and the Government did not suggest that there was.

46. Accordingly, the Court considers it evident that the misgivings of Messrs Whitfield, Pewter and Gaskin about the independence and impartiality of their adjudications were objectively justified and, further, that their adjudications were consequently unfair ...

► ***Fruni v. Slovakia*, 8014/07, 21 June 2011**

143. ... the legal basis for the Special Court is not in doubt in the present case. Furthermore, the Court considers that what is at the heart of the present case is not the personal independence of the judges of the Special Court trying the applicant but rather the independence of their status, in particular with regard to the requirement for security vetting clearance which was issued and could be withdrawn by the NSA.

144. The Court observes that the judges of the Special Court and of the Special Division of the Supreme Court were career judges whose term of office was not limited in time, and thus had equal status to that of any other judge in Slovakia.

145. Nevertheless, the Special Court judges could be recalled if they ceased to meet the security vetting criteria. In that context the Court reiterates that, in general, the irremovability of judges by the executive during their term of office must be considered a corollary of their independence and thus included in the guarantees of Article 6 § 1 of the Convention ...

146. However, in assessing this issue the Court finds it appropriate to have regard not only to the legal provisions concerning the composition of the court but also how these provisions are interpreted and how they actually operate in practice. In so doing the Court must look at the realities of the situation ...

147. The Court observes that there is no indication of any specific instance of withdrawal of a security vetting certificate from a Special Court judge. Had there been such an instance, the judge in question could have challenged the withdrawal before a special parliamentary committee and, ultimately, before the Supreme Court and the Constitutional Court.

148. As to its judicial functioning, the Court observes that the Special Court was subject to the supervisory jurisdiction of the Special Division of the Supreme Court upon appeal and that they were both subject to supervision by the Constitutional

Court in the event of a constitutional complaint, as in other criminal cases. All these remedies and the entire procedure were subject to standard procedural rules with no special provisions or limitations.

149. Against this procedural background, the Court has found no grounds for the applicant to have legitimate misgivings as to the “independence” of the Special Court which tried him and the Special Division of the Supreme Court which determined his appeal.

These bodies were accordingly compatible with the requirement of “independence” within the meaning of Article 6 § 1 of the Convention.

► ***Henryk Urban and Ryszard Urban v. Poland*, 23614/08,
30 November 2010**

47. Assessors were appointed by the Minister of Justice provided that they met a number of specific conditions stipulated in the 2001 Act ... The Minister could confer on an assessor the authority to exercise judicial power in a district court, subject to approval by the board of judges of a regional court and for a period not exceeding four years ... Under section 134 § 5 of the 2001 Act the Minister could remove an assessor, including those who were vested with judicial powers. However, the Minister had no unfettered discretion as to removal since he had to secure the approval of the board of judges of a regional court.

48. The Constitutional Court considered the status of assessors in its leading judgment of 24 October 2007. It held that section 135 § 1 of the 2001 Act, providing that the Minister of Justice could confer the exercise of judicial powers on assessors, fell short of constitutional requirements because assessors did not enjoy the necessary guarantees of independence, notably vis-à-vis the Minister. The Court notes that in its analysis of the question of the independence of assessors the Constitutional Court referred to the Strasbourg case-law and observed that Article 45 of the Constitution was modelled on Article 6 § 1 of the Convention ...

49. The Court reiterates that appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role ... It notes that the principal reason for the Constitutional Court’s finding was related to the Minister’s power to remove an assessor who exercised judicial powers, and the lack of adequate substantive and procedural safeguards against the discretionary exercise of that power ... The 2001 Act did not specify what factual grounds could serve as the basis for removal of an assessor and provided for the decision on removal to be taken by the Minister and not by a court. The lack of the requisite guarantees prompted the Constitutional Court to note that the removal of an assessor based on the content of his rulings was not excluded.

50. Furthermore, the Constitutional Court found, contrary to what was asserted by the Government, that the requirement to secure the approval of the board of judges was not a sufficient safeguard. The Government’s statistics indicating that the Minister of Justice never exercised the power to remove an assessor do not, in the Court’s view, invalidate the reasons for the finding of unconstitutionality. In addition, the Constitutional Court was critical of the fact that the 2001 Act did not contain

sufficient guarantees as regards the assessors' term of office. The regulation did not specify a minimum period for which an assessor was employed and for which he was vested with judicial powers ...

52. The Court underlines that the Constitutional Court set aside the regulatory framework governing the institution of assessors as laid down in the 2001 Act. It further stresses that the Constitutional Court did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence ... The Constitutional Court, referring to international standards, pointed to the variety of possible solutions for allowing adjudication by persons other than judges. In this connection, the Court notes that its task in the present case is not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors or other similar officers which exist in certain Member States of the Council of Europe, but to examine the manner in which Poland regulated the status of assessors.

53. Having regard to the foregoing, the Court considers that the assessor B.R.-G. lacked the independence required by Article 6 § 1 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister ... It is not necessary to consider other aspects of the status of assessors since their removability by the executive is sufficient to vitiate the independence of the Lesko District Court which was composed of the assessor B.R.-G.

► ***Maktouf and Damjanović v. Bosnia and Herzegovina* [GC],
2312/08, 18 July 2013**

44. The first applicant, Mr Maktouf, complained that he had not been afforded a fair hearing by an independent tribunal ..., notably because two of its members had been appointed by the Office of the High Representative for a renewable period of two years ...

48. The Court notes from the outset that the establishment of war crimes chambers within the State Court consisting of international and national judges was an initiative of international institutions ...

50. ... the Court notes that the independence of the national member of the adjudicating tribunal was not challenged. As to its international members, there is no reason to doubt their independence of the political organs of Bosnia and Herzegovina and the parties to the case. Their appointment was indeed motivated by a desire, *inter alia*, to reinforce the appearance of independence of the State Court's war crimes chambers (in view of remaining ethnic bias and animosity in the population at large in the post-war period) and to restore public confidence in the domestic judicial system.

51. Although they were appointed by the High Representative, the Court finds no reason to question that the international members of the State Court were independent of that institution. Their appointments were made on the basis of a recommendation from the highest judicial figures in Bosnia and Herzegovina ... Like

the national members whose independence was undisputed, once appointed, the judges in question had to make a solemn declaration before the High Judicial and Prosecutorial Council of Bosnia and Herzegovina and were required to perform their judicial duties in accordance with national law and to respect the rules of professional conduct established by the State Court. All of the requirements for judicial service as set forth in the State Court Act 2000 applied to them by analogy ... The fact that the judges in question had been seconded from amongst professional judges in their respective countries represented an additional guarantee against outside pressure. Admittedly, their term of office was relatively short, but this is understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

52. Against this background, the Court sees no reason for calling into question the finding of the Constitutional Court of Bosnia and Herzegovina in this case that the State Court was independent within the meaning of Article 6 § 1 of the Convention ...

IMPARTIALITY

See also APPEAL (Impartiality), p. 417 below

Prior activities

► ***Nortier v. Netherlands*, 13924/88, 24 August 1993**

33. The Court recalls that what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified ...

The mere fact that Juvenile Judge Meulenbroek also made pre-trial decisions, including decisions relating to detention on remand, cannot be taken as in itself justifying fears as to his impartiality; what matters is the scope and nature of these decisions.

34. Apart from his decisions relating to the applicant's detention on remand, Juvenile Judge Meulenbroek made no other pre-trial decisions than the one allowing the application made by the prosecution for a psychiatric examination of the applicant, which was not contested by the latter. He made no other use of his powers as investigating judge.

35. As for his decisions on the applicant's detention on remand, they could justify fears as to the judge's impartiality only under special circumstances ... There was nothing of that nature in the present case. ... the questions which Juvenile Judge Meulenbroek had to answer when taking these decisions were not the same as those which were decisive for his final judgment. In finding that there were "serious indications" against the applicant his task was only to ascertain summarily that the prosecution had *prima facie* grounds for the charge against the applicant ... The charge had, moreover, been admitted by the applicant and had already at that stage been supported by further evidence ...

37. Under these circumstances the applicant's fear that Juvenile Judge Meulenbroek lacked impartiality cannot be regarded as objectively justified.

► ***Tierce and Others v. San Marino*, 24954/94, 25 July 2000**

79. ... the Court notes that for more than two years the *Commissario della Legge* conducted very thorough investigations in respect of the first applicant; the measures taken included questioning the accused, the complainant and certain witnesses on several occasions, ordering expert reports, questioning the expert and making two orders for preventive attachment of the first applicant's property. The *Commissario della Legge* therefore made very extensive use of his powers as an investigating judge.

He subsequently committed the first applicant for trial and, after examining the parties on one occasion during a trial that lasted approximately three months, convicted him.

80. Accordingly, the Court considers that the applicant's misgivings as to the *Commissario della Legge's* impartiality may be regarded as justified from an objective standpoint. In addition, the Court fails to see how the participation of State Counsel – irrespective of whether he was appointed lawfully – or the aspects of the trial to which the Government referred might be sufficient to dispel any suspicion of bias on the part of the *Commissario della Legge*.

81. The Court would also point out ..., that the instant case differs from the *Padovani* case cited by the Government in that the proceedings brought against Mr Tierce were not concerned with an offence discovered while it was being committed and were not based on statements made by the accused himself; his conviction, which occurred after two criminal complaints had been lodged against him, was based on the findings of the investigations conducted by the *Commissario della Legge*, who refused to accept the first applicant's defence.

► ***Ekeberg and Others v. Norway*, 11106/04, 31 July 2007**

34. A first issue is whether the High Court's impartiality was open to doubt on account of Judge G.'s participation, as one of the three professional judges sitting in the proceedings, due to her prior involvement in a decision ... to reject an appeal by the fourth applicant against a decision of 10 June 2002 by the City Court to prolong his detention ...

38. ... on the basis of Article 172 of the Code of Criminal procedure, requiring that there was a particularly confirmed suspicion that he had committed the offence of which he was charged. According to relevant national case-law, a conviction at first instance was normally a sufficient reason for considering that this condition had been fulfilled, but the issue was nevertheless one that the High Court had to assess for itself. Thus, it must be assumed that the High Court carried out an assessment of its own as to whether there was a qualified suspicion with respect to the fourth applicant ...

40. In the light of the above, the Court finds that the fourth applicant had a legitimate reason to suspect that Judge G. might have had preconceived ideas as to his innocence or guilt before the opening of the High Court trial ...

41. As to Judge G.'s subsequent participation in the trial, the Court notes that ... the present case was heard by a High Court sitting with a jury. It was not Judge G., but

the presiding judge of the High Court, who at the close of the oral hearing instructed the jury before it held its deliberations and gave its verdict on the questions of guilt. The professional judges did not deliberate until after the verdict. There is nothing to indicate that Judge G. had any influence on the jury's votes on the questions put to it regarding the fourth applicant's guilt.

42. However, if, as here, the jury's verdict is that the indicted person is guilty, but the professional judges find that there is insufficient evidence for finding the person guilty, the latter may decide that the case shall be tried anew by other judges ... In this respect the professional judges, including Judge G., had a role to play in the fourth applicant's conviction. Without their endorsement of the jury's verdict, he could not have been convicted by the High Court in the proceedings concerned. Even though, in practice, the professional judges would only exceptionally use their powers to set the jury's verdict aside, their role in the decision on conviction cannot be ignored. The Court finds that the difference between the issue that Judge G. had to settle when applying Article 172 of the Code of Criminal Procedure and the one she had to assess when endorsing the jury's verdict became tenuous.

43. In addition, along with the other two professional judges and four of the jurors, Judge G. took part in sentencing.

44. Against this background, the Court finds that the fourth applicant had legitimate grounds for fearing that, by virtue of Judge G.'s participation in the trial against him, the High Court lacked the requisite impartiality vis-à-vis him. The fact that neither the fourth applicant nor his counsel at any time objected to Judge G.'s participation in the High Court trial should not, in the circumstances of the case, reduce the protection that follows from the requirement of objective impartiality of judges ...

45. As to the second issue, relating to W.'s participation as a juror in the appeal trial, the Court notes that the trial was opened on 24 February 2003 and that on 21 March 2003 the jury deliberated and gave its verdict. After the first four days of the trial ... the High Court was informed of her witness statement to the police of 10 July 1997. After this was read out in court and counsel for the defence made their comments, the High Court's President ordered her to withdraw from further participation in the case. Thus, her presence on the jury bench was limited to, and terminated after, a relatively early phase of the trial.

46. Moreover, the prosecution had not deemed her statement of 10 July 1997 to be of any importance to the case and neither side had called her as a witness in the case ... The Supreme Court considered that the explanations given by the High Court President and W. to the police for the purposes of its own review of the impartiality issue did not give any reason to assume that she had imparted information to other jurors about her prior knowledge of the case or had in any way influenced the jury before she was discharged on 28 February 2003. According to the jury foreperson, the situation that had arisen after W. had withdrawn had been discussed by the jury members internally who had agreed that her participation during the first few days had not had any effect on the jury's verdict.

47. Thus it cannot be said that juror W. was involved either directly or indirectly in determining the criminal charges against the applicants when three weeks later the jury deliberated and gave its verdict ...

48. It should further be noted that the jury's impartiality was ensured by a number of safeguards ... The rules in the Administration of Court Act governing the impartiality of judges also applied to jurors ... Not only had the presiding judge at the opening of the trial discussed with the jury the impartiality requirement applicable to jurors. Also, the jury had been reminded of the importance of this requirement when the High Court promptly ordered juror W. to withdraw from the case on the ground of disqualification ... While neither side in the trial had relied on W's statement to the police of 10 July 1997, the presiding judge would regularly remind the jury to rely only on statements presented in court and not to discuss the case with third parties ...

49. In light of the above, the Court finds that the nature, timing and short duration of juror W's involvement in the proceedings concerned were not capable of causing the applicants to have legitimate doubts as to the impartiality of the jury. The High Court was therefore not obliged to discharge the jury and order a rehearing before a differently composed jury for the purposes of the requirement of impartial tribunal in Article 6 § 1 of the Convention ...

► ***Rudnichenko v. Ukraine*, 2775/07, 11 July 2013**

116. ... the Court notes that Judge R., who convicted the applicant as a single-judge formation, had earlier examined the merits of the case of the applicant's co-defendant, B., in the framework of which she had expressed her view on the involvement and roles of both B. and the applicant, having held, in particular, that they had acted in conspiracy and that it had been the applicant's initiative to steal, together with B., equipment from cars ... Both aforementioned cases concerned the same event and implied the evaluation of the same evidence.

117. Moreover, as the applicant pointed out, Judge R. had herself admitted this as a ground for her self-recusal application, which, however, had been dismissed with a formalistic wording that the withdrawal of this judge was not called for under the applicable legal provisions ...

118. The Court therefore accepts that this situation could raise objectively justified doubts in the applicant's mind concerning the impartiality of that judge ... Indeed, the very fact that the applicant was tried by the judge who herself raised doubts on her impartiality in his case undermined appearances of a fair trial.

119. The Court finds this sufficient to conclude that the tribunal which convicted the applicant could not be regarded as impartial.

► ***Marguš v. Croatia* [GC], 4455/10, 27 May 2014**

85. The mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his impartiality ...

86. No ground for legitimate suspicion of a lack of impartiality can be discerned in the fact that the same judge participates in adopting a decision at first instance and then in fresh proceedings when that decision is quashed and the case is returned to the same judge for re-consideration. It cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside a judicial decision is bound to send the case back to a differently composed panel ...

87. In the present case the first decision was not set aside and the case remitted for retrial following an ordinary appeal; instead, a fresh indictment was brought against the applicant on some of the same charges. However, the Court considers that the principles set out in paragraph 85 are equally valid with regard to the situation which arose in the applicant's case. The mere fact that judge M.K. participated both in the criminal proceedings conducted before the Osijek County Court under case number K-4/97 and in the criminal proceedings conducted against the applicant before the same court under case number K-33/06 should not in itself be seen as incompatible with the requirement of impartiality under Article 6 of the Convention. What is more, in the present case judge M.K. did not adopt a judgment in the first set of proceedings finding the applicant guilty or innocent and no evidence relevant for the determination of these issues was ever assessed ... Judge M.K. was solely concerned with ascertaining whether the conditions for the application of the General Amnesty Act obtained in the applicant's case.

88. The Court considers that in these circumstances there were no ascertainable facts which could give rise to any justified doubt as to M.K.'s impartiality, nor did the applicant have any legitimate reason to fear this.

Personal bias

► *Demicoli v. Malta*, 13057/87, 27 August 1991

40. In the circumstances of the present case the House of Representatives undoubtedly exercised a judicial function in determining the applicant's guilt. ...

41. The two Members of the House whose behaviour in Parliament was criticised in the impugned article and who raised the breach of privilege in the House participated throughout in the proceedings against the accused, including the finding of guilt and (except for one of them who had meanwhile died) the sentencing.

Already for this reason, the impartiality of the adjudicating body in these proceedings would appear to be open to doubt and the applicant's fears in this connection were justified ...

► *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005

130. ... The Court will accordingly examine a number of aspects of the judges' conduct capable of raising an issue under the subjective test.

Firstly, the judges, in their decision sentencing the applicant, acknowledged that they had been "deeply insulted" "as persons" by the applicant ..., in the Court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal involvement on their part ...

Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements ...

Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response". In the judges' opinion, "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned" ...

Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court ... they [then] gave the applicant the choice either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. He was, therefore, in fact asked to mitigate "the damage he had caused by his behaviour" rather than defend himself ...

131. Although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.

132. This conclusion is reinforced by the speed with which the proceedings were carried out and the brevity of the exchanges between the judges and Mr Kyprianou.

► ***Lindon, Otchakovsky-Laurens and July v. France* [GC],
21279/02, 22 October 2007**

76. ... the personal impartiality of a judge must be presumed until there is proof to the contrary ... The third applicant argued in this connection that the reasoning in the judgment of the Paris Court of Appeal of 21 March 2001 to the effect that "[t]he authors of the [petition] had [had] no other aim than that of showing their support for Mathieu Lindon by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks" had shown that the two judges in question had felt overtly and personally targeted by the offending article.

The Court does not share that view. In its opinion, this was simply one of the factors that the Court of Appeal took into account in assessing whether the applicant had acted in good faith, without in fact drawing any conclusion from it. In reality, the third applicant was not convicted because he had published a text that challenged the first two applicants' conviction for defamation, or because he had thus shown support for the petitioners' "defiance", or because he had criticised the judges in question, but because he had, without a proper preliminary investigation, disseminated a text containing "particularly serious allegations" and offensive remarks. Moreover, the Court is unable to find, in the grounds of the judgment of 21 March 2001, the slightest indication that those judges might have felt personally targeted by the offending article.

There is thus no evidence to suggest that the two judges in question were influenced by personal prejudice when they passed judgment.

Absence of prosecutor

► *Krivoshapkin v. Russia, 42224/02, 27 January 2011*

43. In the case of Ozerov the Court found a violation of Article 6 § 1 on account of the prosecutor's absence from the entire trial. It observed that the trial court had changed the body of evidence which had then been put as a basis for the applicant's conviction. In particular, the trial court had taken new incriminating evidence of its own motion and had removed certain evidence submitted by the prosecutor's office. The Court concluded that by examining the case in such manner and convicting the applicant, the trial court had confused the roles of prosecutor and judge and had accordingly given the grounds for legitimate doubts as to its impartiality ...

44. In the present case, the prosecutor also did not appear during the entire proceedings before the first-instance court. The applicant objected to the trial being opened and concluded in the prosecutor's absence, but to no avail. The court read out the bill of indictment and proceeded to examine the evidence submitted by the prosecution. It questioned the defendants and witnesses who attended the hearing. Furthermore, it refused the applicant's request to summon and hear witnesses on his behalf, in particular the persons who had been present at the procedure when the victims had identified him on the photograph. Whilst the applicant pleaded not guilty, the trial court found his guilt established on the basis of the evidence examined in this manner. In these circumstances, the Court cannot but accept that the trial court did not preserve the guarantees of the adversary nature of the criminal proceedings ... and confused the functions of prosecutor and judge: it took up the prosecution case, tried the issues, determined the applicant's guilt and imposed the sanction. Accordingly, the Court finds that the applicant's doubts as to the impartiality of the trial court may be said to have been objectively justified.

Prejudicial appearances

► *Pullar v. United Kingdom, 22399/93, 10 June 1996*

37. It is recalled that Mr Pullar's misgivings as to the impartiality of the tribunal were based on the fact that one member of the jury, Mr Forsyth, was employed by the firm in which the prosecution witness, Mr McLaren, was a partner. Understandably, this type of connection might give rise to some anxiety on the part of an accused ...

39. ... Mr Forsyth, a junior employee within Mr McLaren's firm, had not worked on the project which formed the background to the accusations against Mr Pullar and had been given notice of redundancy three days before the start of the trial ... On these facts, it is by no means clear that an objective observer would conclude that Mr Forsyth would have been more inclined to believe Mr McLaren rather than the witnesses for the defence.

40. In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population. It must also be recalled that the sheriff gave the jury directions to the effect that they should dispassionately assess the credibility of all the witnesses before them ...and that all of the jurors took an oath to a similar effect.

41. Against this background, Mr Pullar's misgivings about the impartiality of the tribunal which tried him cannot be regarded as being objectively justified.

► ***Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005**

127. The present case relates to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench ...

128. The Court therefore finds that, on the facts of the case and considering the functional defect which it has identified, the impartiality of the Assize Court was capable of appearing open to doubt. The applicant's fears in this respect can thus be considered to have been objectively justified ...

► ***Peter Armstrong v. United Kingdom*, 65282/09, 9 December 2014**

39. ... the personal impartiality of a jury member is presumed until there is proof to the contrary. The Court observes that there is no evidence of actual partiality on the part of either the retired or the serving police officer during the trial and it will accordingly examine whether there were sufficient guarantees to exclude any objectively justified doubts as to their impartiality.

40. As in *Hanif and Khan* ..., there were a number of safeguards present in the applicant's case. First, the police officers were two of twelve jurors, selected at random from the local population. The applicant's allegations that the jury composition was manipulated in his case are wholly unsubstantiated and must be rejected. Second, before commencing service, the jurors were required to swear an oath or to make a solemn affirmation that they would faithfully try the case and give a true verdict according to the evidence. Third, they would have been advised, in accordance with the standard jury guidance, to bring any concerns to the attention of the trial judge and not to discuss the case with anyone outside the jury. Fourth, in line with normal practice, they would have received directions from the trial judge as to how to approach the case and the evidence presented.

41. Both of the jurors in question drew to the attention of the trial judge at an early stage in the trial proceedings the fact that they were, or had been, police officers. In the case of the serving police officer, he also indicated that he recognised a police officer sitting in the courtroom. The trial judge promptly invited submissions from counsel and appropriate investigations were made. A list of questions was put to the serving police officer juror in order to identify the nature and extent of his knowledge of the officer in the courtroom and the police officer witnesses in the case. The applicant was fully involved in these proceedings and was informed of the proposed questions before they were put ...

42. Of some importance is the position of defence counsel throughout the proceedings. In respect of the retired police officer juror, counsel made it clear that he would advise the applicant that the presence of a police officer juror, even a serving one, did not raise concerns provided that the officer juror had no knowledge of the case, the parties or the police officer involved in it ... He was given the opportunity to investigate the retired police officer's connections with the case and following adjournment did not challenge the continued presence of the juror ... As regards the serving police officer juror, defence counsel addressed the judge and was given the opportunity to clarify the exact nature of the information he required as to the juror's connection with the case and the officer in the courtroom ... He was informed of the list of questions then drawn up and did not seek to modify or add to them ... Following the juror's questioning, defence counsel confirmed that he was "quite happy that the juror may continue to serve" ... It is clear from the transparent inquiries into the two police officer jurors that the defence had every opportunity to object to the continued presence of the men on the jury but chose not to do so.

43. Of further relevance is the nature of the connection between the jurors and other participants at trial. There was no suggestion at any stage that the retired police officer was acquainted with any other person involved in the trial proceedings or in the courtroom ... The serving police officer recognised a man sitting in the courtroom, but did not know why he was present and was wholly unaware of his involvement as the officer in the case ... He was shown a list of the police officer witnesses and confirmed that he knew none of them ... This is not a case where a police officer who was personally acquainted with a police officer witness giving relevant evidence was a member of the jury (compare and contrast *Hanif and Khan* ...).

44. Finally, it is noteworthy that the applicant's defence did not depend to any significant extent – if at all – upon a challenge to the evidence of the police officer witnesses in his case ... Indeed, this was confirmed by his own counsel ... He admitted that he had killed the victim and the only question for the jury was whether he had acted in self-defence ... In these circumstances, and despite the applicant's claim to the contrary ..., it cannot be said that there was an important conflict or a clear dispute regarding police evidence in the case (compare and contrast *Hanif and Khan* ...).

45. Having regard to all of the above considerations, the safeguards present at the applicant's trial were sufficient to ensure the impartiality of the jury which tried the applicant's case.

► *Kristiansen v. Norway*, 1176/10, 17 December 2015

6. ... the Sarpsborg City Court (*tingrett*) convicted the applicant *inter alia* on a charge of attempted rape committed against Ms A during the night of 9 March 2008 in a car parked near a petrol station ...

52. ... the Court observes that J had had prior knowledge of Ms A and had uttered that she “had formed a picture [*bilde*] of the victim from many years ago where she at the time had experienced her as a quiet and calm person” ... The minority of the Supreme Court agreed with the majority’s view that previous contacts between the victim and J could not, on their own, disqualify the latter ... It had involved sporadic contacts, not a personal knowledge, and the contacts had dated several years back in time ...

53. More problematic is the fact that J depicted Ms A as being “a quiet and calm person”. This was not, as it appears from her own words, merely a superficial impression but was “a picture” that she had “formed” on the basis of her “experience” of Ms A “at the time” ... It has not been suggested that J’s statement could be understood to mean that that “picture” had changed into something negative after having heard oral evidence from the applicant and Ms A. On the contrary, it is common ground between the parties that J’s characterisation of A conveyed nothing negative, although the views differ as to its contents and significance for the assessment of the question of impartiality ...

56. The Court does not find it necessary to determine the exact meaning to be given to J’s statement, which was somewhat vague and imprecise, but it agrees with the minority that the timing should be taken into account.

57. What matters in particular is that (unlike in *Pullar* ...) she uttered a value judgment ... reflecting a preconceived view on Ms A personal character. Although the contents of her statement and its significance for the question of impartiality were open to different assessments, it clearly was not ... It could reasonably be understood as having some sort of positive connotations in regard to Ms A, susceptible of having a bearing on J’s evaluation and/or influencing that of other members of the jury to the defendant’s disadvantage. This possibility was reinforced by the fact that J had expressed her value judgment at a time when it could be perceived as a comment or reaction to the oral evidence given by Ms A, on the one hand, and by the applicant, on the other hand. It is further significant that whether the High Court would rely on his version or on her version of the impugned event was decisive for the question of guilt.

58. In these circumstances, the Court considers that the applicant had a legitimate reason to fear that J might have had preconceived ideas capable of having a bearing on his innocence or guilt.

59. It is moreover relevant that not only did counsel for the defence request that J be disqualified on grounds of lack of impartiality, but also A’s assistant advocate supported the motion and the public prosecutor expressed understanding for the motion, albeit without taking a stance ... In the Court’s view, whilst none of these objections and comments was by itself decisive, when considered together they did provide a strong indication of the importance of appearances in the present case.

60. However, despite the contents and timing of J's affirmation and her prior knowledge of Ms A and the objections or other comments to J's participation by the legal representatives on all sides, the High Court decided not to discharge her (compare *Ekeberg and Others*, ...). As a result she continued to sit in the case without the matter being reverted to again, first as a member of the jury. There is no information, and it has not been argued, that the presiding judge sought to redirect the jury, for instance by impressing on the jurors to rely on evidence presented in court alone and that they must not allow any other factor to influence their decision (compare *Ekeberg and Others* ...). Thereafter, following the jury's affirmative answer to the rape charge (and other charges), J took part in the formation, composed of professional judges and jurors (drawn by lots), which determined the question of sentencing.

61. Having regard to the cumulative effect of the factors mentioned above – the content of the statement, its timing, the decisions not to discharge J or to redirect the jurors – there were justifiable grounds on which to doubt the High Court's impartiality, which shortcoming could not have been alleviated by any of the general safeguards pointed to by the Government.

► ***Mitrov v. "the former Yugoslav Republic of Macedonia"*,
45959/09, 2 June 2016**

49. ... the fear of a lack of impartiality on the part of the judges of the trial court which adjudicated the applicant's case lay in the fact that the mother of the eighteen-year old girl who had died in the traffic accident (Judge M.A.) had been a judge in the trial court and the president of its criminal section. Furthermore, the Court notes that Judge M.A. had victim status ... in the impugned criminal proceedings, and the trial court had also allowed her compensation claim against the applicant's insurance company.

50. Under the subjective test, the Court reiterates that the personal impartiality of a judge must be presumed until there is proof to the contrary ... no evidence has been produced as regards the personal bias on the part of the trial court judges who adjudicated the applicant's case.

51. The case must therefore be examined from the perspective of the objective impartiality test ...

53. The Court observes that at the relevant time there were only four judges, including Judge M.A., in the criminal section of the trial court ... They were all full-time judges ... They all had similar functions, although Judge M.A. had particular responsibilities as president of the criminal section ... It cannot therefore be excluded that personal links had come to exist between the judges in the criminal section of the trial court.

54. In the Court's view, the nature of these personal links is of importance when determining whether the applicant's fears were objectively justified ... In this connection, the Court will firstly assess the nature of the personal link between Judge M.A. and Judge C.K., who presided over the adjudicating panel of the trial court. The Court observes in this respect that Judge M.A. and Judge C.K. had been working together for at least two and a half years ... It has not been argued that they were

particularly close, or that their relationship went beyond a professional relationship as colleagues ... However, in this respect the Court considers relevant the fact that Judge C.K. had been working as a clerk with Judge M.A.

55. Most importantly, the Court notes the particular circumstances of the present case, and gives significant weight to what was at stake for Judge M.A. in the impugned proceedings, namely that they concerned a family tragedy in which she had lost her eighteen-year old daughter. As already noted ..., Judge M.A., along with other members of her family, had victim status in the proceedings and lodged a compensation claim against the applicant's insurance company, which was subsequently decided on the merits by the same panel of judges that determined the applicant's guilt ... In these circumstances, the Court considers that the fact that Judge C.K., who was Judge M.A.'s colleague, was presiding over the panel which decided the applicant's guilt in respect of Judge M.A.'s daughter's death in such a tragic accident, prompted objectively justified doubts as to her impartiality. The Court notes in this respect that similar considerations apply in respect of all the judges in the trial court. In this connection it observes that the domestic law did provide for the possibility of transferring a case to another competent court ..., a practice which according to the applicant, and not refuted by the Government, had been applied in similar circumstances ... In the Court's view this is sufficient to conclude that ... the applicant's fears as to the impartiality of the trial court could have been considered objectively justified.

56. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention ...

Conduct in court

► *C. G. v. United Kingdom*, 43373/98, 19 December 2001

41. The Court observes in the first place that, although the evidence of S. and of the applicant herself in which the interventions [by the judge] occurred was doubtless the most important oral evidence given in the trial, it made up only a part of the trial proceedings which occupied three days. Further, while certain of these interventions of the trial judge were found by the Court of Appeal to be without justification, others were found to be justified. While the Court accepts the assessment of the Court of Appeal that the applicant's counsel found himself incommoded and disconcerted by these interruptions, ... the applicant's counsel was never prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness. In addition, the Court attaches importance to the fact that the applicant's counsel was able to address the jury in a final speech which lasted for 45 minutes without interruption, apart from a brief intervention which was found to be justified, and that the substance of the applicant's defence was reiterated in the trial judge's summing-up, albeit in a very abbreviated form.

42. In these circumstances, the Court does not find that the judicial interventions in the present case, although excessive and undesirable, rendered the trial proceedings as a whole unfair.

► ***Sofri and Others v. Italy (dec.)*, 37235/97, 27 May 2003**

The applicants alleged that the conduct of Mr Della Torre, the President of the Milan Assize Court of Appeal, at the deliberations that preceded the judgment of 11 November 1995, was such as to call his impartiality into question. In that regard, they referred to the statements which the jurors X, Y and Z had made after the operative provisions had been announced ...

The Government observed that the relevant authorities had decided not to take any further action on Mr Sofri's complaints, as they considered that he had not produced any evidence to show that Mr Della Torre had abused his authority or had sought to prejudice the accused. Furthermore, during discussions in private, each member of the assize court had the right and duty to state the reasons forming the basis of his personal conviction and to distance himself from opinions expressed by other judges and jurors. That did not prevent jurors from voting as they wished.

The Court notes that the Brescia investigating judge accorded little credibility to X's and Y's evidence and considered that their spontaneity was open to doubt. In reaching that conclusion, he relied on logical and precise arguments, such as discrepancies in the accounts of the two witnesses, the fact that their evidence was contradicted by the statements of other jurors and Mr De Ruggiero, their failure to express their disagreement with the verdict and their decision to turn in the first instance to the press. There is no evidence to suggest that that assessment was arbitrary.

Consequently, the Court finds that it has not been established that Mr Della Torre exerted illegitimate pressure on the members of the jury or conducted himself in a manner that could create objectively justified doubts as to his impartiality.

Statements outside court

► ***Lavents v. Latvia*, 58442/00, 28 November 2002**

119. ... The Court observes that in statements published on 4 and 5 November 1999 in *Lauku avize* and *Respublika* ..., Ms Šteinerte criticised the attitude of the defence in the court proceedings. She also made predictions about the outcome of the case: she said she did not yet know whether "the verdict would convict or partially acquit", but excluded the possibility of complete acquittal. Furthermore, in statements published in *Kommersant Baltic* ..., she expressed her surprise that the applicant persisted in pleading not guilty to all the charges and called on him to prove his innocence. In the Court's opinion, those statements were not simply "a negative assessment of the case" of the applicant but amounted to the adoption of a definite position as to the outcome of the trial, with a distinct preference for a guilty verdict against the applicant. The Court finds that, whatever led Ms Šteinerte to make those statements, they can in no way be found compatible with the requirements of Article 6 § 1 of the Convention. The applicant therefore had every reason to fear that the judge in question lacked impartiality ...

127. ... The Court finds that such statements, too, amount to an acknowledgement of the applicant's guilt. Moreover, the Court can only express its surprise that during this last interview Ms Šteinerte suggested that accused persons should prove to the court that they were not guilty. In view of its general nature, such a remark

is at variance with the very principle of the presumption of innocence, one of the fundamental principles governing a democratic State.

Impact of press coverage

► *Papon v. France (dec.)*, 54210/00, 15 November 2001

6. ... The Court notes that the applicant's trial had its roots in events (the appraisal of the French authorities' conduct under the Vichy regime) which had long been a matter of intense controversy, and that it could not be expected that the trial itself would be conducted in a dispassionate atmosphere. In the Court's opinion, however, the applicant has not shown that a media campaign was waged against him of such virulence as to sway or be likely to sway the jurors' opinion and the outcome of the Assize Court's deliberations.

On the contrary, the very length of those deliberations, which took nineteen hours, and the verdict reached by the Assize Court would suggest that the jurors voted in accordance with their convictions and consciences and the requirement of being satisfied beyond reasonable doubt which they had sworn to discharge. The Court also considers that it must take account of the fact that the applicant was acquitted of the most serious charge against him, namely aiding and abetting murder ...

Furthermore, the Court observes that the applicant also gave television interviews himself, for example in December 1996 after the judgment committing him for trial at the Assize Court ..., and that as early as 1993 his lawyer published the expert historical report set aside by the Court of Cassation in 1987.

► *Craxi v. Italy*, 34896/97, 5 December 2002

103. In the Court's view, it is inevitable in a democratic society that the press should sometimes make harsh comments on a sensitive case such as the present one, which calls into question the morality of high-ranking public officials and the relations between the political and business worlds.

104. The Court further notes that the courts that dealt with the applicant's case were composed exclusively of professional judges, who, unlike members of a jury, have experience and training that enable them to set aside any suggestion external to the case. Moreover, the applicant was convicted following adversarial proceedings during which he had been able to submit to the competent courts the arguments he considered useful to his case ... There is nothing in the case file to suggest that, in their interpretation of domestic law or assessment of the arguments of the parties and the prosecution evidence, the judges had been influenced by statements made in the press ...

Influence of others

► *Papon v. France (dec.)*, 54210/00, 15 November 2001

6. ... It reiterates that neither the behaviour of the civil parties nor the tactics or strategy they used to try to sway the impending decision could have engaged the

responsibility of the State unless it was established that the latter had not taken the requisite measures to remedy a situation that was likely to undermine the authority and impartiality of the courts. The Court notes that ... the public prosecutor brought disciplinary proceedings against the lawyer who had made the revelation. The fact that he did not consider it necessary to press charges under Article 434-16 of the Criminal Code does not appear to the Court to be a decisive factor since the applicant could have set the prosecution in motion himself, and indeed subsequently did so by lodging a complaint together with a civil-party application on 5 March 1998.

► ***Farhi v. France*, 17070/05, 16 January 2007**

27. The Court notes that ... the applicant's counsel applied for formal note to be taken of what he alleged was unlawful communication between the prosecutor and certain members of the jury ...

28. ... the President and the other judges heard counsel for the applicant and for the civil party, the advocate-general, and then the accused. However, the Government have not stated how that hearing might have helped to determine the content of the communication or to identify the jurors concerned. It was the duty of the domestic court to use all the means in its power to dispel any doubts as to the reality and nature of the alleged events.

29. The Court considers, in particular, that only a hearing of the jurors would have been likely to shed any light on the nature of the remarks exchanged and the influence they might have had, if any, on their opinions.

EQUALITY OF ARMS

► ***Corcuff v. France*, 16290/04, 4 October 2007**

30. The applicant considers that the presence of the principal public prosecutor in the proceedings against him at the information meeting for jurors placed him at a disadvantage incompatible with the principle of equality of arms ...

32. The Court considers that no directions were given to the jurors by the lawyers present at the information meeting concerned ... Indeed, the neutrality of the proceedings was ensured by the President of the Assize Court who conducted the meeting. His role is to oversee the nature of the information exchanged and, in particular, to make sure that no comments are made about the case, the personality of the accused or his possible guilt. Essentially technical in nature, the purpose of the meeting was simply to inform the jurors of the form taken by proceedings before the Assize Court. The Court stresses the benefits of this exercise for the jurors, who are not legal professionals but ordinary citizens often unfamiliar with the intricacies of court proceedings. The meetings could certainly be held without a representative of the prosecutor's office being present. However, the Court considers that the presence at these meetings of a member of the prosecutor's office, just like that of a lawyer, is actually useful in so far as they will be taking part in the proceedings and are therefore in the best position to answer any questions the jurors may have about their respective roles. Also, the fact that these information meetings are attended by all the jurors sitting in the cases to be examined in the course of the Assize Court

session makes it difficult to designate a member of the prosecution who will not be involved in any of the different cases examined in the course of the session. Similarly, the presence of all the lawyers due to plead in the different cases would only complicate a practice aimed solely at presenting the procedure and addressing general questions, and certainly not the specific circumstances of the different cases or the personalities of the accused. That being so, the compromise solution adopted by the Assize Court, of inviting only one representative of the defence lawyers to attend, appears satisfactory. The Court accordingly observes that the presence at the information meetings of one representative of the prosecution and one member of the Bar strikes a fair balance in terms of the information given to jurors. As to the complaint about the privilege allegedly enjoyed by the representative of the prosecution in the form of his right to challenge a juror, there is no evidence that the meeting, aimed at providing procedural information, gives him an opportunity to form any opinion about the jurors' personalities, especially considering that at the time when the meeting is held the representative of the prosecution does not know which of the jurors present will actually be called, or in which cases they will sit. Here again, therefore, it does not appear that the right to challenge a juror gave the prosecution any real advantage over the applicant in the instant case.

33. All these considerations suffice for the Court to find that there has been no breach of the principle of equality of arms in the instant case ...

MILITARY COURTS

Trial of civilians

► *Ergin v. Turkey (no. 6)*, 47533/99, 4 May 2006

47. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.

54. ... the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified ...

Trial of service personnel

► *Findlay v. United Kingdom*, 22107/93, 25 February 1997

75. ... It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including

the president, were directly or ultimately under his command ... Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial ...

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified ...

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer". Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit ... This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 para. 1 ...

► ***Cooper v. United Kingdom [GC], 48843/99, 16 December 2003***

117. The judge advocate is a legally qualified civilian appointed to the staff of the Judge Advocate General (also a civilian) by the Lord Chancellor and from there to each court-martial by the Judge Advocate General. The independence of air-force judge advocates is not questioned by the applicant, and the Court considers that there is no ground to do so ...

The judge advocate is responsible for the fair and lawful conduct of the court-martial and his rulings on the course of the evidence and on all questions of law are binding and must be given in open court. The judge advocate has no vote on verdict and does not therefore retire with the other court-martial members to deliberate on verdict. However, he sums up the evidence and delivers further directions to the other members of the court-martial beforehand, and he can refuse to accept a verdict if he considers it "contrary to law", in which case he gives the president and ordinary members further directions in open court, following which those members retire again to consider verdict. The judge advocate retires with the other members in order to provide advice, deliberate and vote on sentence ...

In such circumstances, the Court finds that the presence in a court-martial of a civilian with such qualifications and with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings ...

STATE SECURITY AND STATE OF EMERGENCY COURTS

► ***Arap Yalgin and Others v. Turkey, 33370/96, 25 September 2001***

46 The Court considers in this connection that where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such

a situation seriously affects the confidence which the courts must inspire in a democratic society ... In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces ...

47. In the light of the foregoing, the Court considers that the applicants – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect ...

48. In conclusion, the applicants' fears as to the Martial Law Court's lack of independence and impartiality can be regarded as objectively justified.

CHANGE IN COMPOSITION

► *Barberà, Messegué and Jabardo v. Spain*, 10590/83, 6 December 1988

71. On the very day of the hearing, Mr de la Concha, the presiding judge of the first section of the Criminal Division of the Audiencia Nacional, had to leave because his brother-in-law had been taken ill; and one of the other judges mentioned in the order of 27 October 1981 ... Mr Infante, was also unable to sit as he was no longer a member of the relevant section of the court. They were replaced by Mr Pérez Lemaur, the presiding judge of the third section, and by Mr Bermúdez de la Fuente, a member of the first section ...

72. Neither the applicants nor their lawyers were given notice of these changes, particularly the change of presiding judge ... Mr Pérez Lemaur, together with Mr Barnuevo and Mr Bermúdez de la Fuente, had admittedly taken a purely procedural decision on 18 December 1981 ..., but the defence lawyers could not infer from that that he would also be sitting on the trial court, bearing in mind in particular the preparatory meeting which they had had with Mr de la Concha on the previous day ... They were therefore taken by surprise. They could legitimately fear that the new presiding judge was unfamiliar with an unquestionably complex case, in which the investigation file – which was of crucial importance for the final result – ran to 1,600 pages. This is so even though Mr Barnuevo, the reporting judge ..., remained in his post throughout the entire proceedings: Mr Pérez Lemaur had not taken part in the preparatory meeting on 11 January 1982; the case in fact proceeded without a full hearing of the evidence; the deliberations were due to take place immediately after the hearing, or at the latest on the following day ...; and the Audiencia Nacional had to give its decision – and did in fact do so – within three days ...

► *Moiseyev v. Russia*, 62936/00, 9 October 2008

176. The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The

assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties etc., which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, the Court must be satisfied that such (re)assignment was compatible with Article 6 § 1, and, in particular, with its requirements of objective independence and impartiality ...

179. ...in the applicant's case there were eleven replacements of the judges on the bench. Four presiding judges dealt successively with the case. Each replacement of the presiding judge was followed by the replacement of both lay judges. In addition, on one occasion the substitute lay judge was called upon to step into the proceedings, and on another a new lay judge had to be designated to replace one who had withdrawn from the case. The proceedings had to be started anew each time a new member joined the formation.

180. The Government did not explain how this inordinate number of changes in the bench ... could be reconciled with the rule of immutability of the court composition, the fundamental importance of which they themselves emphasised. It is a matter of utmost concern for the Court that not only were replacements particularly frequent in the applicant's case but that the reasons for such replacements were only made known on two occasions ...

182. The Court further observes that, as with the distribution of incoming cases among judges, the power to reassign a pending criminal case to another presiding judge was habitually exercised by the President of a court ... the law did not determine with any degree of precision the circumstances in which such reassignment could occur. The lack of foreseeability ... had the effect of giving the President of the Moscow City Court unfettered discretion in the matter of replacement and reassignment of judges in the applicant's criminal case. In this connection the Court emphasises that no procedural safeguards against the arbitrary exercise of the discretion were incorporated ... Thus, it did not require that the parties be informed of the reasons for the reassignment of the case or given an opportunity to comment on the matter ... Furthermore, the replacement of a member of the bench was not set out in any procedural decision amenable to judicial review by a higher court. The Court considers that the absence of any procedural safeguards in the text of the law rendered the members of the bench vulnerable to outside pressure.

184. Having regard to the above considerations, the Court finds that in the applicant's case the Russian criminal law failed to provide the guarantees that would have been sufficient to exclude any objective doubt as to the absence of inappropriate pressure on judges in the performance of their judicial duties ... In these circumstances, the applicant's doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in his criminal case, which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards.

► *Stanford v. United Kingdom*, 16757/90, 23 February 1994

29. The applicant further maintained that the Government bore responsibility for the poor acoustics of the courtroom. While this is undoubtedly a matter which could give rise to an issue under Article 6 ... of the Convention, the expert reports which were carried out both before and after the applicant's complaint indicated that, apart from a minimal loss of sound due to the glass screen, the acoustic levels in the courtroom were satisfactory ...

30. Finally it must be recalled that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in the witness statements. Moreover a reading of the transcript of the trial reveals that he was ably defended by his counsel and that the trial judge's summing up to the jury fairly and thoroughly reflected the evidence presented to the court.

31. In addition, the Court of Appeal, which had been seised of the matter ... could not reasonably have been expected in the circumstances to correct an alleged short-coming in the trial proceedings which had not been raised before the trial judge ...

32. In light of the above the Court concludes that there had been no failure by the United Kingdom to ensure that the applicant received a fair trial.

► *Yaroslav Belousov v. Russia*, 2653/13, 4 October 2016

122. In the context of courtroom security arrangements, the Court has stressed that the means chosen for ensuring courtroom order and security must not involve measures of restraint which by virtue of their level of severity or by their very nature would bring them within the scope of Article 3 of the Convention, as there can be no justification for torture or inhuman or degrading treatment or punishment ... It found, in particular, that confinement in a metal cage was contrary to Article 3 of the Convention, having regard to its objectively degrading nature ...

124. The Court considers that glass cabins do not have the harsh appearance of metal cages, the very exposure in which to the public eye is capable of undermining the defendants' image and of arousing in them feelings of humiliation, helplessness, fear, anguish and inferiority. It also notes that glass installations are used in courtrooms in other member States ..., although their designs vary from glass cubicles to glass partitions, and in the majority of the States their use is reserved for high-security hearings.

125. The Court agrees with the Government that, generally speaking, the placement of defendants behind glass partitions or in glass cabins does not in itself involve an element of humiliation sufficient to reach the minimum level of severity, as is the case with metal cages. This level may be attained, however, if the circumstances of their confinement, taken as a whole, would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention ... The Court will therefore scrutinise the overall circumstances of the applicants' confinement

in the glass cabins to determine whether the conditions there reached, on the whole, the minimum level of severity required to characterise his treatment as degrading within the meaning of Article 3 of the Convention.

126. As regards the hearing room no. 338, the Court observes that ten defendants were held in a glass cabin measuring 5.4 square metres, a setting that left virtually no space between them. They had to endure the court hearing in these conditions for several hours three days a week for a period of about two months. Furthermore, the applicants' trial was a high-profile case closely followed by national and international mass media, so the applicants were permanently exposed to the public at large in this cramped setting. These elements are sufficient for the Court to conclude that the conditions in hearing room no. 338 of Moscow City Court amounted to degrading treatment in breach of Article 3 of the Convention.

127. As regards their subsequent detention in hearing room no. 635, the Court observes that the two-cabin arrangement allowed the applicant at least 1.2 square metres of personal space, thus avoiding the inconvenience and humiliation of extreme overcrowding. The Court has insufficient evidence that ventilation, heating or cooling of the glass cabins in hearing room no. 635 were inadequate. As regards the alleged hindrance these installations caused to the applicants' participation in the proceedings and their communication with legal counsel, they may be considered as elements contributing to the defendants' anxiety and distress, but taken alone they are not sufficient to pass the threshold of Article 3 of the Convention. The Court therefore concludes that the conditions in hearing room no. 635 of Moscow City Court did not attain the minimum level of severity prohibited by Article 3 of the Convention ...

147. The Court has found above that in hearing room no. 338 of the Moscow City Court the applicant was confined in an overcrowded glass cabin, and found a violation of Article 3 of the Convention on that account ... The Court would find it difficult to reconcile the degrading treatment of the defendant during the judicial proceedings with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, above all in the accused ... It follows that for the first two months of the trial the court hearings in the applicant's case were conducted in breach of Article 6 of the Convention.

148. In hearing room no. 635, however, the overcrowding problem was resolved, but the alleged impediments to the defendants' participation in the proceedings and to their legal assistance remained ...

151. In the present case, the applicant and his co-defendants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, this arrangement made it impossible for the applicant to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards. It is also of relevance that the cabin was not equipped to enable the applicant to handle documents or take notes.

152. The Court considers that it is incumbent on the domestic courts to choose the most appropriate security arrangement for a given case, taking into account the interests of administration of justice, the appearance of the proceedings as fair, and the presumption of innocence; they must at the same time secure the rights of the accused to participate effectively in the proceedings and to receive practical and effective legal assistance. In the present case, the use of the security installation was not warranted by any specific security risks or courtroom order issues but was a matter of routine. As follows from the parties' submissions, the trial court had no discretion to order the defendants' placement outside the cabin, although it could change the courtroom for another one, with more cabins. The trial court did not seem to recognise the impact of these courtroom arrangements on the applicant's defence rights, and did not take any measures to compensate for these limitations. Such circumstances prevailed for the whole duration of the first-instance hearing, which lasted for over eight months, including seven months in hearing room no. 635, and could not but adversely affect the fairness of the proceedings as a whole.

153. It follows that during the first-instance hearing the applicant's rights to participate effectively in the proceedings and to receive practical and effective legal assistance had been restricted, and these restrictions had been neither necessary nor proportionate. The Court concludes that the criminal proceedings against the applicant were conducted in violation of Article 6 §§ 1 and 3 (b) and (c) of the Convention.

Chapter 10

Public hearing

CONTENT

► *Riepan v. Austria*, 35115/97, 14 November 2000

29. ... The Court considers that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.

30. ... the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison ... This list was distributed to the media and was available to the general public at the Regional Court's registry and information desk. However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison, with a clear indication of the access conditions.

Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning in a room which, although not too small to accommodate an audience, does not appear to have been equipped as a regular courtroom.

31. In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing of 29 January 1996 did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention ...

► *Hummatov v. Azerbaijan*, 9852/03, 29 November 2007

149. In sum, the Court finds that the Court of Appeal failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Gobustan Prison had on its public character. Consequently, the trial did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention.

150. Moreover, such lack of publicity was not justified for any of the reasons set out in the second sentence of Article 6 § 1. The Court notes that, in the Court of Appeal's interim decisions of 23 April and 13 May 2002, no reasons were offered for holding the trial in a location other than the regular courtroom of the Court of Appeal. The mere fact that, at the time of the examination of his appeal, the applicant was already a prisoner serving a life sentence does not, in itself, automatically imply the necessity of relocation of the appellate proceedings from a normal courtroom to the place of the applicant's imprisonment. The Court reiterates that security problems are a common feature of many criminal proceedings, but cases in which security concerns justify excluding the public from a trial are nevertheless rare (see *Riepan*,⁹ ...). In the present case, it was not shown that there were any such security concerns. Moreover, even if there were any, the Court of Appeal apparently did not consider them serious enough either to mention them in its interim decisions of 23 April and 13 May 2003 or to necessitate a formal decision under Article 392.1.6 of the Code of Criminal Procedure excluding the public. In such circumstances, the Court finds no justification for the lack of publicity at the Court of Appeal hearings.

RESTRICTIONS INCLUDING WAIVER

► *Ernst and Others v. Belgium*, 33400/96, 15 July 2003

67. ... In Belgium, investigation procedures are confidential. The purpose of such confidentiality is to safeguard two major interests: first, respect for the moral integrity and the private life of persons presumed innocent and, second, efficient conduct of the investigation. Accordingly, when a court decides an issue as an investigative tribunal, the hearing is held in private and the decision is not delivered in public ... the applicants do not appear to have requested a public hearing or to have expressed reservations concerning the fact that the hearings would be held in private.

68. The Court finds that the confidentiality of investigation procedures can be justified on grounds relating to the protection of the private lives of the parties to the case and to the interests of justice within the meaning of the second sentence of Article 6 § 1. It further notes that, if, following a complete investigation, the applicants' case had been referred to a court of appeal sitting as a trial court, the defendants and the applicants, as civil parties to the case, would have had the right to full publicity of the proceedings. It reiterates in this regard that, while Article 6 may play a role before a case is referred for trial, how it is applied during the investigation depends upon the specific features of the procedure and the circumstances of the case ...

9. The preceding case.

All in all, the Court finds that the fact that the hearing of the admissibility of the applicants' application to join the proceedings as civil parties was held in private did not infringe the requirements of Article 6 § 1 of the Convention as regards the publicity requirements.

► ***Craxi v. Italy (No. 2)*, 25337/94, 17 July 2003**

57. ... the reading out at the hearing of 29 September 1995 and the disclosure of the content of the telephone interceptions to the press amounted to an interference with the exercise of a right secured to the applicant in paragraph 1 of Article 8 of the Convention ...

60. The Court notes that the applicant criticised, in particular, the fact that after the hearing of 29 September 1995, the press published the content of certain conversations intercepted on his telephone line in Hammamet.

66. The Court observes that ... some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant ...

67. In the opinion of the Court, their publication by the press did not correspond to a pressing social need. Therefore, the interference with the applicant's rights under Article 8 § 1 of the Convention was not proportionate to the legitimate aims which could have been pursued and was consequently not "necessary in a democratic society" within the meaning of the second paragraph of this provision ...

► ***Hermi v. Italy [GC]*, 18114/02, 18 October 2006**

78. However, the Court observes that the fact that the hearings were not held in public was the result of the adoption of the summary procedure, a simplified procedure which the applicant himself had requested of his own volition. The summary procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence ... On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular with reference to the public nature of the hearings and the possibility of requesting the admission of evidence not contained in the file held by the Public Prosecutor's Office.

79. The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived ...

80. In that connection the Court reiterates that it has accepted that other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load, must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent

to the trial at first instance ... Introduction of the summary procedure by the Italian legislature seems to have been expressly aimed at simplifying and thus expediting criminal proceedings ...

81. In the light of the above considerations, the fact that the hearings at first and second instance were conducted in private, and hence without members of the public being present, cannot be regarded as being in breach of the Convention.

► ***M. v. France (dec.)*, 10147/82, 4 October 1984**

The applicant complains *inter alia* that in the Assize Court the presiding judge, exercising his discretionary powers, allowed documents from the case file to be shown on closed-circuit television in the courtroom. He complains that as well as being contrary to the principle of oral proceedings this infringed his right to have his case heard in the manner required by Article 6 para. 1 of the Convention ... The Court of cassation judgment of 21 April 1982 makes clear that the Assize Court used the procedure to show a map and photographs of the scene of the crime simultaneously to the jury, the bench, the advocate-general, the parties claiming damages and their counsel, and the accused and their counsel.

Although the applicant objects to a procedure which made the case file public and so may have swayed the public gallery and the jury, the Commission, from the information at its disposal, cannot see how that procedure could have harmed the orderliness, and thus the fairness, of the trial, particularly as the documents were in the case file and the defence was bound to have known of them.

► ***Pichugin v. Russia*, 38623/03, 23 October 2012**

187. The Court observes that in the applicant's criminal case the Moscow City Court ordered a trial *in camera*, referring to the fact that materials containing state secrets would be discussed during the trial ... The Court reiterates in this connection that the mere presence of classified information in a case file does not automatically imply a need to close a trial to the public, without balancing openness with national security concerns. It may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest and limit secrecy to the extent necessary to preserve such an interest ...

188. There is no evidence to suggest that these conditions were satisfied in the present case. The Moscow City Court did not elaborate on the reasons for holding the trial *in camera*. It did not indicate which documents in the case file were considered to contain State secrets or how they were related to the nature and character of the charges against the applicant. Nor did the Moscow City Court respond to the applicant's request to hold the trial publicly subject to clearing the courtroom for a single or, if need be, a number of secret sessions to read out classified documents ... Indeed, it follows from the applicant's submissions, not contested by the Government, that only about sixty documents out of more than seven thousand in the case file were classified as secret. The Court cannot but find that in such a situation the decision of the Moscow City

Court to close the entire trial to the public was not justified. Finally, the decision to hold the trial in camera appears particularly striking in the light of the fact that none of the classified documents was eventually examined by the trial court ...

189. The Court further looks at the Government's other arguments to the effect that the exclusion of the public was necessary to ensure the safety of the participants in the proceedings and the impartiality of the trial. It notes, however, that the domestic courts, while making the decision to hold the trial in camera and dealing with the applicant's complaints in this connection, did not mention any risks to the safety of the participants in the trial or to the impartiality of the judicial proceedings as a justification for not allowing the public to attend. The Court is therefore not convinced that security concerns or any legitimate concerns for impartiality served as a basis for the decision to exclude the public from the trial.

190. In view of the above, the Court finds that dispensing with a public hearing was not justified in the circumstances of the present case.

ANNOUNCEMENT OF JUDGMENT

► *Sutter v. Switzerland*, 8209/78, 22 February 1984

31. In accordance with section 197 of the 1889 Act, the judgment delivered on 21 October 1977 by the Military Court of Cassation was served on the parties but not pronounced in open court ...

34. ... anyone who can establish an interest may consult or obtain a copy of the full text of judgments of the Military Court of Cassation; besides, its most important judgments, like that in the Sutter case, are subsequently published in an official collection. Its jurisprudence is therefore to a certain extent open to public scrutiny.

Having regard to the issues dealt with by the Military Court of Cassation in the instant case and to its decision – which made the judgment of the Divisional Court final and changed nothing in respect of its consequences for Mr. Sutter –, a literal interpretation of the terms of Article 6 para. 1 ..., concerning pronouncement of the judgment, seems to be too rigid and not necessary for achieving the aims of Article 6 ...

The Court thus concurs with the Government and the majority of the Commission in concluding that the Convention did not require the reading out aloud of the judgment delivered at the final stage of the proceedings.

► *Campbell and Fell v. United Kingdom*, 7819/77, 28 June 1984

89. ...the applicant complained of the fact that the Board of Visitors had not pronounced publicly its decision in his case ...

91. The Court has said in other cases that it does not feel bound to adopt a literal interpretation of the words "pronounced publicly": in each case the form of publication given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 para. 1 ... in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial ...

92. However, in the present case it does not appear that any steps were taken to make public the Board of Visitors' decision. There has accordingly been a violation of Article 6 para. 1 ... on this point.

► ***Lamanna v. Austria*, 28923/95, 10 July 2001**

33. ... the Salzburg Regional Court's decision of 10 October 1994 – although taken after a public hearing of the applicant's compensation claim – was not delivered publicly as it was dependent on his acquittal becoming final. Instead, it was served in writing on 4 November 1994. The decision by the Linz Court of Appeal of 1 February 1995, which contained a summary of the Regional Court's decision, confirmed its application of section 2 § 1 (b) of the 1969 Act and rendered its decision final, was initially also delivered in writing and was not rendered public by any other means. However, following the Supreme Court's judgment of 9 November 2000, it was delivered publicly on 9 February 2001.

34. Having regard to the compensation proceedings as a whole as well as to their specific features, the Court finds that the purpose of Article 6 § 1, namely subjecting court decisions to public scrutiny, thus enabling the public to study the manner in which the courts generally approach compensation claims for detention on remand, was achieved in the present case by the public delivery of the appellate court's judgment.

Accordingly, there has been no violation of Article 6 § 1 of the Convention.

See also JUDGMENT (Conviction), p. 383 below

REPORTING RESTRICTIONS

► ***Z. v. Finland*, 22009/93, 25 February 1997**

113. Finally, the Court must examine whether there were sufficient reasons to justify the disclosure of the applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press ...

Under the relevant Finnish law, the Court of Appeal had the discretion, firstly, to omit mentioning any names in the judgment permitting the identification of the applicant and, secondly, to keep the full reasoning confidential for a certain period and instead publish an abridged version of the reasoning, the operative part and an indication of the law which it had applied ...

Irrespective of whether the applicant had expressly requested the Court of Appeal to omit disclosing her identity and medical condition, that court was informed by X's lawyer about her wishes that the confidentiality order be extended beyond ten years ... It evidently followed from this that she would be opposed to the disclosure of the information in question to the public.

In these circumstances ... the Court does not find that the impugned publication was supported by any cogent reasons. Accordingly, the publication of the information concerned gave rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8 ...

► ***Worm v. Austria, 22714/93, 29 August 1997***

52. The Court of Appeal's judgment was not directed to restricting the applicant's right to inform the public in an objective manner about the development of Mr Androsch's trial. Its criticism went essentially to the unfavourable assessment the applicant had made of the former minister's replies at trial, an element of evidence for the purposes of section 23 of the Media Act ...

54. Having regard to the State's margin of appreciation, it was also in principle for the appellate court to evaluate the likelihood that at least the lay judges would read the article as it was to ascertain the applicant's criminal intent in publishing it ... the fact that domestic law as interpreted by the Vienna Court of Appeal did not require an actual result of influence on the particular proceedings to be proved ... does not detract from the justification for the interference on the ground of protecting the authority of the judiciary ...

57. Given the amount of the fine and the fact that the publishing firm was ordered to be jointly and severally liable for payment of it ..., the sanction imposed cannot be regarded as disproportionate to the legitimate aim pursued.

58. The Court accordingly finds that the national courts were entitled to consider that the applicant's conviction and sentence were "necessary in a democratic society" for maintaining both the authority and the impartiality of the judiciary within the meaning of Article 10 § 2 of the Convention.

► ***News Verlags GmH & CoKG v. Austria, 31457/96, 11 January 2000***

59. It is true ... that the injunctions did not in any way restrict the applicant company's right to publish comments on the criminal proceedings against B. However, they restricted the applicant company's choice as to the presentation of its reports, while it was undisputed that other media were free to continue to publish B's picture throughout the criminal proceedings against him. Having regard to these circumstances and to the domestic courts' finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B's rights, the Court finds that the absolute prohibition on the publication of B's picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence. Thus, there is no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued.

60. It follows from these considerations that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society".

► ***Dabrowski v. Poland, 18235/02, 19 December 2006***

33. ... In three articles the applicant reported on criminal proceedings pending against a local politician and about the subsequent judgment of the Ostróda District Court. The Court considers that the content and the tone of the articles were on the whole fairly balanced ...

34. The Court further agrees that some of the applicant's statements were value judgments on a matter of public interest which cannot be said to have been devoid of any factual basis. Moreover, the applicant's statements were not a gratuitous personal attack on a politician. It also cannot be said that the purpose of the statements in question was to offend or to humiliate the criticised person.

35. ... the domestic courts ... failed to have regard to the fact that the applicant, as a journalist, had a duty to impart information and ideas on political questions and on other matters of public interest and in so doing to have possible recourse to a degree of exaggeration. The Court next notes that neither the first-instance nor the appellate courts took into account the fact that Mr Lubaczewski, being a politician, should have shown a greater degree of tolerance in the face of criticism. In sum, the Court is of the opinion that the reasons adduced by the domestic courts cannot be regarded as relevant and sufficient to justify the interference at issue.

36. ... while the penalty imposed on the applicant was relatively light ... and although the proceedings against him were conditionally discontinued, nevertheless the domestic courts found that the applicant had committed a criminal offence of defamation. In consequence, the applicant had a criminal record. Moreover, it remained open to the courts to resume the proceedings at any time during the period of his probation should any of the circumstances defined by law so justify ...

37. Furthermore, while the penalty did not prevent the applicant from expressing himself, his conviction nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. Such a conviction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog ...

Having regard to the above considerations, the applicant's conviction was disproportionate to the legitimate aim pursued, having regard in particular to the interest of a democratic society in ensuring and maintaining the freedom of the press.

► ***Pinto Coelho v. Portugal (No. 2)*, 48718/11, 22 March 2016**

25. The applicant alleges that her criminal conviction for the unauthorised use of a recording of a court hearing violated her right to freedom of expression ...

49. However, the Court emphasises that at the time when the report in issue was broadcast the domestic case had already been judged ... The Court accordingly finds ... that the Government have not established how, in the circumstances, the divulgence of audio recordings could have had a detrimental effect on the proper administration of justice.

50. When examining the need for such interference in a democratic society in order to "protect the reputation or the rights of others", the Court may have to verify whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, the freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 ... In this regard the

Court notes that the court hearing in the instant case was public, and that none of the individuals concerned complained of any alleged interference with their right to speak. In so far as the Government have alleged that the unauthorised broadcasting of the audio recordings could constitute a violation of the right of others to speak, the Court notes that the individuals concerned had a right of appeal in Portuguese law against such interference but did not use it. Yet it was for them, first and foremost, to defend that right. The Court further notes that the voices of the participants in the hearing were altered to prevent the identification of the speakers. It considers moreover that Article 10 § 2 of the Convention makes no provision for any restrictions to freedom of expression based on the right to speak, which does not enjoy the same protection as the right to protect one's reputation. So the second legitimate aim relied on by the Government necessarily loses strength in the circumstances of the instant case. In addition, the Court fails to see why the right to speak should prevent the dissemination of audio excerpts of the hearing when, as in this case, the hearing was a public one. It accordingly finds that the Government have failed to sufficiently justify the penalty imposed on the applicant for having broadcast recordings of the hearing, and that the courts have not justified the interference with the applicant's right to freedom of expression in the light of paragraph 2 of Article 10 of the Convention.

Secrecy of deliberations

► *Seckerson and Times Newspapers Limited v. United Kingdom* (dec.), 32844/10, 24 January 2012

43. For the Court, rules imposing requirements of confidentiality as regards judicial deliberations play an important role in maintaining the authority and impartiality of the judiciary, by promoting free and frank discussion by those who are required to decide the issues which arise. In the case of judges, such rules also contribute to the guarantee of judicial independence, a core requirement of all Contracting States' legal systems, by ensuring that each member of the bench may decide a case in full confidence that his or her vote will not be made public, except in so far as dissenting opinions are possible in the legal system concerned.

44. As to lay jurors, who are often obliged by law to undertake jury service as part of their civic duties, it is essential that they be free to air their views and opinions on all aspects of the case and the evidence before them, without censoring themselves for fear of their general views or specific comments being disclosed to, and criticised in, the press. In this regard the Court recalls that in its judgment in the case of *Gregory v. the United Kingdom* ..., it acknowledged that the rule governing the secrecy of jury deliberations was a crucial and legitimate feature of English trial law which served to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they had heard. It considers that the nature of this imperative is such that an absolute rule cannot be viewed as being unreasonable or disproportionate, given that any qualification or exception would necessarily lead to an element of doubt which could undermine the very objective which the legislation seeks to secure.

Chapter 11

Proof and evidence

BURDEN OF PROOF

Suspect benefits from reasonable doubt

► ***Capeau v. Belgium*, 42914/98, 13 January 2005**

25. ... The Court would observe in that connection that, in criminal cases, the whole matter of the taking of evidence must be looked at in the light of Article 6 § 2 and requires, *inter alia*, that the burden of proof be on the prosecution ... Consequently, the reasoning of the Unwarranted Pre-trial Detention Appeals Board was incompatible with respect for the presumption of innocence.

► ***Karaman v. Germany*, 17103/10, 27 February 2014**

66. ... the Frankfurt am Main Regional Court had to assess, among other things, the extent to which G. had, as he claimed himself, decided alone on the use of the donated funds without having consulted any contact persons in Turkey, or, as stated by the witnesses and co-accused, how far G. had been integrated into a criminal organisation's hierarchy which had its leaders in Turkey. In order to decide that question the court had to establish who had made the plans to misuse the donations and, on this basis, who had given which instructions to whom. The Court acknowledges that in this context the court inevitably had to mention the concrete role played, and even the intentions harboured, by all the persons behind the scenes in Turkey, including the applicant ...

69. It is true that the court used the full name of the applicant in the written version of the judgment sent to the accused, while it used initials in the version of the judgment published on the Internet on 25 November 2008. The Court does not consider, however, that the use of initials in the official version was necessary in order to avoid any wrong conclusions. It is more important to note that, by referring to the applicant throughout the judgment as "separately prosecuted", the court underlined the fact that it was not called upon to determine the applicant's guilt but, in line with the provisions of domestic law on criminal procedure, was only concerned with assessing the criminal responsibility of those accused within the scope of the proceedings in issue. The legal assessment in part III of the judgment alludes to the "persons behind the scenes" and does not contain any statement that might be understood as an assessment of the applicant's guilt.

70. The Court observes, lastly, that in the introductory comments to the judgment's Internet publication as well as in the Federal Constitutional Court's decision of 3 September 2009 dismissing the applicant's constitutional complaint, it was emphasised that it would be contrary to the principle of the presumption of innocence to attribute any guilt to the applicant and that an assessment of his possible involvement in the crime had to be left to the main proceedings to be conducted against him. The Court is thus satisfied that the courts avoided, as far as possible – in the context of a judgment involving several co-suspects not all of whom were present – giving the impression that they were prejudging the applicant's guilt. There is nothing in the judgment of the Frankfurt am Main Regional Court that makes it impossible for the applicant to have a fair trial in the cases in which he is involved.

71. In view of the above considerations, the Court concludes that the impugned statements in the reasoning of the Frankfurt am Main Regional Court's judgment of 17 September 2008 did not breach the principle of the presumption of innocence.

► ***Navalnyy and Ofitserov v. Russia*, 46632/13, 23 February 2016**

103. ... the criminal charges against the applicants were based on the same facts as those against X, and the three individuals were accused of conspiring to steal the same assets. It is therefore undeniable that any facts established in the proceedings against X and any legal findings made therein would have been directly relevant to the applicants' case. In such circumstances, it was essential for safeguards to be in place to ensure that the procedural steps and decisions taken in the proceedings against X would not undermine the fairness of the hearing in the subsequent proceedings against the applicants. This was particularly so, given that the applicants were legally precluded from any form of participation in the disjoined proceedings as they had not been granted any status which would have allowed them to challenge the decisions and findings made therein.

104. The Court has previously highlighted the first and most obvious guarantee to be secured when co-accused are tried in separate sets of proceedings, notably the courts' obligation to refrain from any statements that may have a prejudicial effect on the pending proceedings, even if they are not binding (see *Karaman*¹⁰ ...). If the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as a serious obstacle for disjoining the cases. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated.

105. The second requirement for the conduct of concurrent proceedings is that the quality of *res judicata* would not be attached to facts admitted in a case to which the individuals were not party. The state of the evidence admitted in one case must remain purely relative and its effect strictly limited to that particular set of proceedings. In other words, in the present case no finding of fact made in the proceedings

10. See the preceding case, *Karaman*, p. 235.

against X could have been admitted in the applicants' case without full and proper examination at the applicants' trial. Moreover, the procedure followed by the court in X's case had been accelerated, and the establishment of facts had been a result of plea-bargaining, not the judicial examination of evidence. Consequently, the facts relied on in that case had been legally assumed rather than proven. As such, they could not have been transposed to another set of criminal proceedings without their admissibility and credibility being scrutinised and validated in those other proceedings, in an adversarial manner, like all other evidence.

106. These two basic requirements have not been complied with in the present case. The Court accepts the applicants' argument that the Leninskiy District Court of Kirov had worded its judgment of 24 December 2012 as regards X so that no doubt could remain either about their identities or involvement in the crime of which X had been convicted. Although the said District Court, as the Government rightly pointed out, could not find the applicants guilty in those proceedings, it expressed its findings of fact and opinion about their participation in the offence in such terms which could not be defined as anything but prejudicial.

107. Turning to the question of *res judicata*, the Court takes cognisance of the Government's argument that the courts adjudicating the applicants' criminal case had not been bound by the judgment in X's case. It notes, however, that Article 90 of the Code of Criminal Procedure, as worded at the material time, expressly afforded the force of *res judicata* to judgments even if issued in accelerated proceedings ... Moreover, by stating that "Circumstances established in a judgment ... shall be accepted by a court ... without additional verification", it set forth the rule whereby not only a finding of guilt of an accused but also findings of fact would formally have potential prejudicial effect. Even though in accordance with Article 90, a judgment cannot predetermine the guilt of those who have not participated in the criminal case under consideration, the fact that the circumstances established in the judgment against X had the force of *res judicata* in effect contravened that prohibition.

108. The Government argued that in the applicants' case the trial court had been obliged to examine all evidence and witnesses and to base its assessment exclusively on the material and testimony presented at the hearing. Even so, the Court considers that in the circumstances, the courts acting in concurrent proceedings had an obvious incentive to remain concordant, because any conflicting findings made in related cases could undermine the validity of both judgments issued by the same court. The Court considers that in the present case, the risk of issuing contradictory judgments was a factor that discouraged the judges from finding out the truth and diminished their capacity to administer justice, thus causing irreparable damage to the court's independence, impartiality and, more generally, its ability to ensure a fair hearing. In view of the foregoing, the Court finds that the judgment of 24 December 2012 had a prejudicial effect on the criminal proceedings against the applicants, and reference to that judgment in the applicants' sentence, even without express reliance on it, accentuated that effect.

109. In the same vein, the Court considers that the separation of the cases, particularly X's conviction with the use of plea-bargaining and accelerated proceedings, compromised his competence as a witness in the applicants' case. As noted above,

his conviction was based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it was not required that that account be verified or corroborated by other evidence. Standing later as a witness, X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of events. Everything above confirms the applicants' argument that the procedure in which evidence had been obtained from X and used in their trial had been suggestive of manipulation incompatible with the notion of a fair hearing.

Presumptions and shifting burden

► *Pham Hoang v. France*, 13191/87, 25 September 1992

34. ... Mr Pham Hoang ... could try to demonstrate that he had "acted from necessity or as a result of unavoidable mistake" ... The presumption of his responsibility was not an irrebuttable one ...

35. Furthermore, in its judgment ... the Court of Appeal did not cite in the reasons for its decision any of the impugned provisions of the Customs Code when it ruled on the accused's guilt, even if it in substance took Articles 399 and 409 as its basis for holding that he had had "an interest in customs evasion" and that he was guilty of an attempted customs offence ... The court set out the circumstances of the applicant's arrest and took account of a cumulation of facts ...

36. It therefore appears that the Court of Appeal duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and did not apply them in a manner incompatible with Article 6 paras. 1 and 2 ... of the Convention ...

► *John Murray v. United Kingdom*, 18731/91, 8 February 1996

54. In the Court's view, having regard to the weight of the evidence against the applicant ... the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. ... the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of the specific safeguards mentioned above, it constitutes, as described by the Commission, "a formalised system which aims at allowing common-sense implications to play an open role in the assessment of evidence".

Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.

56. ... Immediately after arrest the applicant was warned in accordance with the provisions of the Order but chose to remain silent. The Court ... observes that there is no indication that the applicant failed to understand the significance of the warning given to him by the police prior to seeing his solicitor. Under these circumstances the fact that during the first 48 hours of his detention the applicant had been refused access to a lawyer does not detract from the above conclusion that the drawing of inferences was not unfair or unreasonable ...

Nevertheless, the issue of denial of access to a solicitor has implications for the rights of the defence which call for a separate examination ...¹¹

► ***Telfner v. Austria*, 33501/96, 20 March 2001**

18. ... both the District Court and the Regional Court relied in essence on a report of the local police station that the applicant was the main user of the car and had not been home on the night of the accident. However, the Court cannot find that these elements of evidence, which were moreover not corroborated by evidence taken at the trial in an adversarial manner, constituted a case against the applicant which would have called for an explanation from his part. In this context, the Court notes, in particular, that the victim of the accident had not been able to identify the driver, nor even to say whether the driver had been male or female, and that the Regional Court, after supplementing the proceedings, found that the car in question was also used by the applicant's sister. In requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the courts shifted the burden of proof from the prosecution to the defence.

19. In addition, the Court notes that both the District Court and the Regional Court speculated about the possibility of the applicant having been under the influence of alcohol which was, as they admitted themselves, not supported by any evidence. Although such speculation was not directly relevant to establishing the elements of the offence with which the applicant had been charged, it contributes to the impression that the courts had a preconceived view of the applicant's guilt.

20. In conclusion, the Court finds that there has been a violation of Article 6 § 2 of the Convention.

► ***Falk v. Netherlands (dec.)*, 66273/01, 19 October 2004**

In assessing whether ... this principle of proportionality was observed, the Court understands that the impugned liability rule [applied to the registered car owner] was introduced in order to secure effective road safety by ensuring that traffic offences, detected by technical or other means and committed by a driver whose identity could not be established at the material time, would not go unpunished

11. See also this case under INTERROGATION (Right to assistance of a lawyer), p. 163 above.

whilst having due regard to the need to ensure that the prosecution and punishment of such offences would not entail an unacceptable burden on the domestic judicial authorities. It further notes that ... the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Act and/or claim that at the material time the police had a realistic opportunity of stopping the car and establishing the identity of the driver.

... the Court cannot find that Article 5 of the Act – which obliges a registered car owner to assume the responsibility for his or her decision to allow another person to use his or her car – is incompatible with Article 6 § 2 of the Convention. The Court is therefore of the opinion that the domestic authorities, in imposing the fine at issue on the applicant, did not fail to respect the presumption of innocence.

► ***Radio France v. France, 53984/00, 30 March 2004***

24. ... Therefore, as the Government submitted, a publishing director has a valid defence if he can establish the good faith of the person who made the offending remarks or prove that their content was not fixed before being broadcast; moreover, the applicants raised such arguments in the domestic courts.

That being the case, and having regard to the importance of what was at stake – effectively preventing defamatory or insulting allegations and imputations being disseminated through the media by requiring publishing directors to exercise prior supervision – the Court considers that the presumption of responsibility established by section 93-3 of the 1982 Act remains within the requisite “reasonable limits”. Noting in addition that the domestic courts examined with the greatest attention the applicants’ arguments relating to the third applicant’s good faith and their defence that the content of the offending statement had not been fixed in advance, the Court concludes that in the present case they did not apply section 93-3 of the 1982 Act in a way which infringed the presumption of innocence.

► ***O’Donnell v. United Kingdom, 16667/10, 7 April 2015***

52. The Court is called upon to consider whether the drawing of inferences against the applicant under section 4 of the Criminal Evidence (Northern Ireland) Order 1988 rendered his trial unfair within the meaning of Article 6 § 1 of the Convention ...

54. ... the Court cannot but agree with the Government that the circumstantial evidence against the applicant was strong. On the night in question, the applicant had been heard encouraging his co-accused to “just kill” the deceased and that they had later asked the deceased to come out and fight with them ... The deceased was last seen alive with the applicant and his co-accused making their way to a park area beside the Blackwater River where the body was found on a pathway along the banks of the river the following morning. He had been beaten and had suffered a number of knife wounds ... A police search of the applicant’s home found a knife with blood on it inside a plastic bag and clothes that were heavily stained with blood. One of the items of the bloody clothing had the applicant’s name tag on it ... The Court considers that this was a situation which clearly called for an explanation from the applicant and that logically his conviction could not have been based solely or mainly on his refusal to testify.

55. As noted by the Court of Appeal, in reaching his decision on whether the applicant's mental condition made it undesirable for him to be called to give evidence, the trial judge took into consideration competing medical evidence which he referred to in his ruling on this point ... The trial judge preferred the evidence of Dr Kennedy, whose opinion was that the applicant could give evidence with certain safeguards in place which the trial judge considered that he himself could ensure ... Moreover, the Court observes that the trial judge allowed Dr Davies to give evidence to the jury as to the applicant's intellectual capacity and the effects that this might have on his ability to give evidence on his own behalf ... The Court sees no reason to depart from the conclusions of the Court of Appeal, which found that there was nothing unreasonable about the manner in which the trial judge preferred the evidence of one expert over that of another ...

56. ... the Court also observes that the trial judge used clear terms in directing the jury ... The trial judge set out the expert evidence presented at trial regarding the applicant's intellectual disability, his limited capacity to understand English, as well as his limited capacity to provide a coherent account of his actions. The judge also explained that, regardless of whether or not the accused chose to testify, the prosecution retained the burden of proof beyond a reasonable doubt. Furthermore, the judge instructed the jury that they could only draw adverse inferences from the applicant's silence if they were satisfied beyond a reasonable doubt that the evidence relied upon by the applicant to justify his silence presented no adequate explanation for his absence from the witness box ...

57. Therefore, ... the Court considers that the trial judge gave appropriate weight in his direction to the explanation from the expert as to the applicant's decision not to testify ... It was thereafter the function of the jury to decide whether or not to draw an adverse inference from the applicant's silence.

58. Taking all the circumstances of the case into account, including the weight of the circumstantial evidence against the applicant calling for an explanation, the competing medical evidence and trial judge's clear and detailed direction to the jury, the Court finds that there has been no violation of Article 6 §1 regarding the adverse inference instruction in this case.

Prohibition on self-incrimination

► *Saunders v. United Kingdom, 19187/91, 17 December 1996*

74. ... The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.

75. ... the various procedural safeguards to which reference has been made by the respondent Government ... cannot provide a defence in the present case since they did not operate to prevent the use of the statements in the subsequent criminal proceedings.

76. Accordingly, there has been an infringement ... of the right not to incriminate oneself.

► ***Shannon v. United Kingdom, 6563/03, 4 October 2005***

34. The Court recalls that in previous cases it has expressly found that there is no requirement that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings before the right not to incriminate oneself applies ...

35. It is thus open to the applicant to complain of an interference with his right not to incriminate himself, even though no self-incriminating evidence (or reliance on a failure to provide information) was used in other, substantive criminal proceedings.

36. ... the Court recalls that not all coercive measures give rise to the conclusion of an unjustified interference with the right not to incriminate oneself. In *Saunders*, for example, the Court listed types of material which exists independently of the will of a suspect and which fall outside the scope of the right (matters such as documents acquired pursuant to a warrant, breath, blood, DNA and urine samples ...). In other cases, where no proceedings (other than the "coercive" proceedings) were pending or anticipated, the Court found no violation of the right not to incriminate oneself ...

37. The Government saw justification for the proceedings against the applicant for failing to attend the interview on 26 June 1998 in the importance of the tracing the proceeds of crime under the 1996 Order, and they noted the procedural protection available, namely the limitation on the use of any evidence obtained.

38. The Court recalls that in *Heaney and McGuinness* ... it found that the security context of the relevant provision in that case ... could not justify a provision which "extinguishes the very essence of the ... right to silence and ... right not to incriminate [oneself]". If the requirement to attend an interview had been put on a person in respect of whom there was no suspicion and no intention to bring proceedings, the use of the coercive powers under the 1996 Order might well have been compatible with the right not to incriminate oneself, in the same way as a statutory requirement to give information on public health grounds ... The applicant, however, was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged. The security context – the special problems of investigating crime in Northern Ireland – cannot justify the application of the 1996 Order in the present case any more than could that in *Heaney and McGuinness*.

39. As to the procedural protection available to the applicant if he had attended the interview and if he had subsequently wished to prevent the use of information given in criminal proceedings, the Court first notes that it would have been open to the

investigators to forward information to the police. Even though, as the Government say, the two investigations were being run separately, once the information had been passed to the police who were working on the criminal proceedings against the applicant, they would have converged, at least as far as the applicant was concerned.

40. Secondly, the Court notes that information obtained from the applicant at interview could have been used at a subsequent criminal trial if he had relied on evidence inconsistent with it. Such use would have deprived the applicant of the right to determine what evidence he wished to put before the trial court, and could have amounted to “resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused” ... It is true ... that the applicant might not have been tried, and that even if he had, it would have been open to the trial judge to exclude the information obtained at interview. Both of those points, however, depend on the evidence actually being used in subsequent proceedings, whereas it is clear from the case-law referred to above that there is no need for proceedings even to be brought for the right not to incriminate oneself to be at issue.

41. The Court concludes that the requirement for the applicant to attend an interview with financial investigators and to be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself. There has therefore been a violation of Article 6 § 1 of the Convention.

► ***Jalloh v. Germany* [GC], 54810/00, 11 July 2006**

113. In the Court’s view, the evidence in issue in the present case, namely, drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, ... the administration of emetics was used to retrieve real evidence in defiance of the applicant’s will. Conversely, the bodily material listed in *Saunders* concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant’s active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant’s health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant’s case is in striking

contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences ...

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that ... the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to

exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

WITNESSES

Meaning

► *Rudnichenko v. Ukraine*, 2775/07, 11 July 2013

102. The term "witness" ... has an "autonomous" meaning in the Convention system. Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply ...

Anonymity

► *Doorson v. Netherlands*, 20524/92, 26 March 1996

71. ... Although, as the applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them ... Furthermore, the statements made by the witnesses concerned to the investigating judge show that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened ...

In sum, there was sufficient reason for maintaining the anonymity of Y.15 and Y.16 ...

► *Krasniki v. Czech Republic*, 51277/99, 28 February 2006

81. The Court notes that the investigating officer apparently took into account the nature of the environment of drug dealers who, as the Government said, frequently use threats or actual violence against drug addicts and other persons who testify against them. They could thus fear reprisals at the hands of drug dealers and risk personal injury. However, it cannot be established from the records taken during the witnesses' interviews of 11 July 1997 or from the reports of the trial ... how the investigating officer and the trial judge assessed the reasonableness of the personal fear of the witnesses, vis-à-vis the applicant, either when they were questioned by police or when "Jan Novotný" was examined at the trial.

82. Neither did the Regional Court carry out such an examination into the seriousness and substantiation of the reasons for granting anonymity to the witnesses when it approved the judgment of the District Court which had decided to use the statements of the anonymous witnesses in evidence against the applicant ... In this respect, referring to the grounds of the complaint against a breach of law lodged by the Minister of Justice in the applicant's favour ..., the Court is not convinced by the Government's contradictory argument.

83. In the light of these circumstances, the Court is not satisfied that the interest of the witnesses in remaining anonymous could justify limiting the rights of the applicant to such an extent ...

Cross-examination

► *Padin Gestoso v. Spain (dec.)*, 39519/98, 8 December 1998

3. The applicant further complained that his lawyers made a number of unsuccessful requests for the appearance of P, the co-accused turned informer, so that they had to wait for the opening of the trial, four years after the commencement of the proceedings, to be able to cross-examine him. He relied on Article 6 § 3 (d) of the Convention ...

The Court reiterates that it is for the national courts to decide whether it is advisable to call a witness ... Moreover, all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. In other words, the provisions of paragraphs 3 (d) and 1 of Article 6 require as a general rule that the defendant be given an adequate and proper opportunity to challenge and question a witness against him ... In the present case the Court notes that the applicant had the opportunity to examine P. at the public hearing in the Audiencia Nacional and to contradict his depositions during the proceedings. That being so, the Court considers that, on the circumstances of the case, the fact that the applicant was not able to examine P. at an earlier stage in the proceedings did not infringe his defence rights or deprive him of a fair trial.

► *Pichugin v. Russia*, 38623/03, 23 October 2012

201. The Court notes that Mr K. was called and appeared as a witness at the applicant's trial. He gave evidence and was subjected to cross-examination. However, not having been warned about criminal liability for refusing to testify, although such warning was obligatory under domestic law ..., he refused to answer some questions of the defence relating to the circumstances in which the imputed offences had been committed ...

202. The Court considers that as a result of the refusal by a prosecution witness to answer questions put by the defendant, the essence of his right to challenge and question that witness may be undermined ...

203. There are a number of reasons why a witness may refuse to reply to questions put by the defendant, such as fear for his safety ..., the painfulness for the victim of retelling the details of a sexual abuse ... or the right not to incriminate oneself

... Under Russian law the only valid reason for exempting a witness from his duty to testify is his reliance on the privilege against self-incrimination ... however, no reasons were advanced by Mr K. for his refusal to answer the questions. In particular, he did not invoke his privilege against self-incrimination, but simply stated that he did not wish to reply to the questions.

204. The Court finds peculiar the reaction of the presiding judge to such an unmotivated refusal by a witness to reply to questions. Being the ultimate guardian of the fairness of the proceedings, she was required under domestic law to take all necessary measures to ensure observance of the principles of adversarial proceedings and equality of arms ... However, when asked by counsel for the applicant to remind Mr K. of his statutory duty to answer questions and his possible criminal liability for refusing to do so, the presiding judge replied that Mr K. was entitled not to answer ... She did not give any explanation as to why Mr K. could be exempted from his duty to answer questions, as established by Article 56 of the CCrP [Code of Criminal Procedure] ... Nor did she refer to any legal provision authorising such an exemption.

205. In such circumstances, the Court cannot but find that as a result of the gratuitous permission given by the presiding judge to Mr K. not to answer certain questions of the defence relating to the circumstances in which the imputed offences had been committed, the applicant's right to challenge and question that witness, guaranteed by Articles 6 § 1 and 6 § 3 (d), was significantly restricted.

206. The applicant's situation was further aggravated by the fact that he was not permitted to question Mr K. about certain factors that might have undermined his credibility ...

209. The Court considers that, given the importance of the evidence given by Mr K., it was essential that his credibility should be open to testing by cross-examination.

210. The Court observes that the presiding judge dismissed all questions concerning Mr K.'s criminal record, the reasons for not giving testimony inculcating the applicant during his first questionings in 1999 and his motivation for starting to give such evidence in 2003, as well as concerning possible pressure on him from the prosecuting authorities ... It notes that it was the jury's task to determine what weight, if any, should be attached to Mr K.'s statement against the applicant. In order to perform that task they needed to be aware of all relevant circumstances affecting the statement's accuracy and credibility, including any incentive Mr K. might have had to misrepresent the facts. It was therefore important for the defence to discuss the above issues in the presence of the jury in order to test Mr K.'s reliability and credibility. The Court is concerned about the presiding judge's statement that counsel for the applicant "were not allowed to cast doubts on witness statements" ... and that the jury "[did not] need not know [Mr K.'s] motivation for giving testimony [against the applicant]" ...

211. Having regard to the fact that the applicant was not allowed to question Mr K. about the factors that might undermine the credibility of his testimony, which was decisive evidence against the applicant, the Court finds that the applicant's defence rights were significantly restricted.

212. The Court concludes that as a result of Mr K's refusal, supported by the presiding judge, to reply to certain questions about the circumstances in which the imputed offences had been committed, and the prohibition, imposed by the presiding judge, against questioning Mr K. about certain factors that might undermine his credibility, the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention. In these circumstances, the applicant cannot be said to have received a fair trial.

► ***Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015**

(a) The general principles

100. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision ... it will therefore consider the applicant's complaint under both provisions taken together ...

101. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings ... In making this assessment the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted ... and, where necessary, to the rights of witnesses ...

102. The principles to be applied in cases where a prosecution witness did not attend the trial and statements previously made by him were admitted as evidence have been summarised and refined in the judgment ... in *Al-Khawaja and Tahery* ...

103. The Court reiterated in that judgment that Article 6 § 3 (d) enshrined the principle that, before an accused could be convicted, all evidence against him normally had to be produced in his presence at a public hearing with a view to adversarial argument ...

104. ... Even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions ...

105. However, the use as evidence of statements obtained at the stage of a police inquiry and judicial investigation is not in itself inconsistent with Article 6 §§ 1 and 3 (d), provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness is making his statements or at a later stage of the proceedings ...

106. In its judgment in *Al-Khawaja and Tahery* the Court concluded that the admission as evidence of the statement of a witness who had been absent from the trial and whose pre-trial statement was the sole or decisive evidence against the defendant did not automatically result in a breach of Article 6 § 1. It reasoned that applying

the so-called “sole or decisive rule” (under which a trial was unfair if a conviction was based solely or to a decisive extent on evidence provided by a witness whom the accused had been unable to question at any stage of the proceedings ...) in an inflexible manner would run counter to the traditional way in which the Court approached the right to a fair hearing under Article 6 § 1, namely to examine whether the proceedings as a whole had been fair. However, the admission of such evidence, because of the inherent risks for the fairness of the trial, constituted a very important factor to balance in the scales ...

107. According to the principles developed in the *Al-Khawaja and Tahery* judgment, it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence ... The Court must examine

(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness’s untested statements as evidence ...;

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant’s conviction ...; and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair ...

108. As regards the applicability of the above principles ..., the Court reiterates that, while it is important for it to have regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials, ultimately it must apply the same standard of review under Article 6 §§ 1 and 3 (d) irrespective of the legal system from which a case emanates ...

109. ... When examining cases, the Court is of course mindful of the differences between the legal systems of the Contracting Parties to the Convention when it comes to matters such as the admission of evidence of an absent witness and the corresponding need for safeguards to ensure the fairness of the proceedings. It will have due regard in the instant case to such differences when examining, in particular, whether there were sufficient counterbalancing factors to compensate for the handicaps caused to the defence as a result of the admission of the untested witness evidence ...

(b) The relationship between the three steps of the *Al-Khawaja* test

110. ... It is clear that each of the three steps of the test must be examined if – as in the *Al-Khawaja and Tahery* judgment – the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant’s conviction) are answered in the affirmative ... The Court is, however, called upon to clarify whether all three steps of the test must likewise be examined in cases in

which either the question in step one or that in step two is answered in the negative, as well as the order in which the steps are to be examined.

(i) Whether the lack of a good reason for a witness's non-attendance entails, by itself, a breach of Article 6 §§ 1 and 3 (d)

...

112. The Court observes that the requirement to provide a justification for not calling a witness has been developed in its caselaw in connection with the question whether the defendant's conviction was solely or to a decisive extent based on evidence provided by an absent witness ... It further reiterates that the rationale underlying its judgment in *Al-Khawaja and Tahery*, in which it departed from the so-called "sole or decisive rule", was to abandon an indiscriminate rule and to have regard, in the traditional way, to the fairness of the proceedings as a whole ... However, it would amount to the creation of a new indiscriminate rule if a trial were considered to be unfair for lack of a good reason for a witness's non-attendance alone, even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case.

113. ... The Grand Chamber ... considers that the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial. This being said, the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d).

(ii) Whether sufficient counterbalancing factors are still necessary if the untested witness evidence was neither sole nor decisive

...

115. As regards the question whether it is necessary to review the existence of sufficient counterbalancing factors even in cases in which the importance of an absent witness's evidence did not attain the threshold of sole or decisive evidence grounding the applicant's conviction, the Court reiterates that it has generally considered it necessary to carry out an examination of the overall fairness of the proceedings. This has traditionally included an examination of both the significance of the untested evidence for the case against the accused and of the counterbalancing measures taken by the judicial authorities to compensate for the handicaps under which the defence laboured ...

116. Given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or the decisive basis for the applicant's conviction. It must also do so in those cases where, following its assessment of the domestic courts' evaluation of the weight of the evidence ..., it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight

of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.

(iii) As to the order of the three steps of the *Al-Khawaja* test

117. The Court observes that in *Al-Khawaja and Tahery*, the requirement that there be a good reason for the non-attendance of the witness (first step), and for the consequent admission of the evidence of the absent witness, was considered as a preliminary question which had to be examined before any consideration was given as to whether that evidence was sole or decisive (second step ...). "Preliminary", in that context, may be understood in a temporal sense: the trial court must first decide whether there is good reason for the absence of the witness and whether, as a consequence, the evidence of the absent witness may be admitted. Only once that witness evidence is admitted can the trial court assess, at the close of the trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness and, in particular, whether the evidence of the absent witness is the sole or decisive basis for convicting the defendant. It will then depend on the weight of the evidence given by the absent witness how much weight the counterbalancing factors (third step) will have to carry in order to ensure the overall fairness of the trial.

118. Against that background, it will, as a rule, be pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment ... However, all three steps of the test are interrelated and, taken together, serve to establish whether the criminal proceedings at issue have, as a whole, been fair. It may therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings (... that is, the question whether the evidence of the absent witness was sole or decisive, was examined before the first step, that is, the question whether there was a good reason for the witness's absence).

(c) Principles relating to each of the three steps of the *Al-Khawaja* test

(i) Whether there was a good reason for the non-attendance of a witness at the trial

119. Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. If there was a good reason for the witness's non-attendance in that sense, it follows that there was a good reason, or justification, for the trial court to admit the untested statements of the absent witness as evidence. There are a number of reasons why a witness may not attend trial, such as absence owing to death or fear ..., absence on health grounds ... or the witness's unreachability.

120. In cases concerning a witness's absence owing to unreachability, the Court requires the trial court to have made all reasonable efforts to secure the witness's attendance ... The fact that the domestic courts were unable to locate the witness concerned or the fact that a witness was absent from the country in which the

proceedings were conducted was found not to be sufficient in itself to satisfy the requirements of Article 6 § 3 (d), which require the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him ... Such measures form part of the diligence which the Contracting States have to exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner ... Otherwise, the witness's absence is imputable to the domestic authorities ...

121. It is not for the Court to compile a list of specific measures which the domestic courts must have taken in order to have made all reasonable efforts to secure the attendance of a witness whom they finally considered to be unreachable ... However, it is clear that they must have actively searched for the witness with the help of the domestic authorities including the police ... and must, as a rule, have resorted to international legal assistance where a witness resided abroad and such mechanisms were available ...

122. The need for all reasonable efforts on the part of the authorities to secure the witness's attendance at the trial further implies careful scrutiny by the domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness ...

(ii) Whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction

123. As regards the question whether the evidence of the absent witness whose statements were admitted in evidence was the sole or decisive basis for the defendant's conviction (second step of the *Al-Khawaja* test), the Court reiterates that "sole" evidence is to be understood as the only evidence against the accused ... "Decisive" evidence should be narrowly interpreted as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive ...

124. As it is not for the Court to act as a court of fourth instance ..., its starting point for deciding whether an applicant's conviction was based solely or to a decisive extent on the depositions of an absent witness is the judgments of the domestic courts ... The Court must review the domestic courts' evaluation in the light of the meaning it has given to "sole" and "decisive" evidence and ascertain for itself whether the domestic courts' evaluation of the weight of the evidence was unacceptable or arbitrary ... It must further make its own assessment of the weight of the evidence given by an absent witness if the domestic courts did not indicate their position on that issue or if their position is not clear ...

(iii) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

125. As to the question whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of untested witness evidence at the trial (third step of the *Al-Khawaja*

test), the Court reiterates that these counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence ...

126. The fact that the domestic courts approached the untested evidence of an absent witness with caution has been considered by the Court to be an important safeguard ... The courts must have shown that they were aware that the statements of the absent witness carried less weight ... The Court has taken into account, in that context, whether the domestic courts provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available ... It likewise has regard to any directions given to a jury by the trial judge as to the approach to be taken to absent witnesses' evidence ...

127. An additional safeguard in that context may be to show, at the trial hearing, 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 ...

128. A further considerable safeguard is the availability at the trial of corroborative evidence supporting the untested witness statement ... Such evidence may comprise, *inter alia*, 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 ..., or expert opinions on a victim's injuries or credibility ... The Court has further considered as an important factor supporting an absent witness's statement the fact that there were 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. This holds even more true if the latter witness gave evidence at the trial and that witness's reliability was tested by cross-examination ...

129. Moreover, in cases in which a witness is absent and cannot be questioned at the trial, a significant safeguard is 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 ...

130. Another important safeguard countering the handicaps under which the defence labours as a result of the admission of untested witness evidence at the trial is to have given the applicant or defence counsel an opportunity to question the witness during the investigation stage ... The Court has found in that context that where the investigating authorities had already taken the view at the investigation stage that a witness would not be heard at the trial, it was essential to give the defence an opportunity to have questions put to the victim during the preliminary investigation ... Such pre-trial hearings are indeed often set up in order to pre-empt any risk that a crucial witness might not be available to give testimony at the trial ...

131. The defendant must further be afforded the opportunity to give his 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 ... Where the identity of the witness is known to the defence, the latter is able to identify and investigate any motives the witness may have for lying, and can therefore contest

effectively the witness's credibility, albeit to a lesser extent than in a direct confrontation ...

2. Application of these principles to the present case

(a) Whether there was a good reason for the non-attendance of witnesses O. and P. at the trial

...

137. The Regional Court, having critically reviewed the reasons given by each witness for refusing to testify at the trial in Germany, as set out in medical certificates submitted by them, and having, as shown above, considered these reasons insufficient to justify their non-attendance, contacted the witnesses individually, offering them different options in order to testify at the trial, which the witnesses declined.

138. The Regional Court then had recourse to international legal assistance and requested that the witnesses be summoned to appear before a Latvian court in order for the presiding judge of the Regional Court to examine them via a video link and to enable the defence to cross-examine them. However, the hearing was cancelled by the Latvian court, which accepted the witnesses' refusal to testify on the basis of the medical certificates they had submitted. The Regional Court, having again critically reviewed the reasons given for the witnesses' inability to attend the trial, as mentioned above, then even suggested to the Latvian court that it have the witnesses' state of health examined by a public medical officer or that it compel the witnesses to attend the hearing, a suggestion which received no response ...

139. In view of these elements the Grand Chamber, sharing the Chamber's conclusion in this regard, finds that the Regional Court made all reasonable efforts within the existing legal framework ... to secure the attendance of witnesses O. and P. It did not have any other reasonable means within its jurisdiction, on the territory of Germany, to secure the attendance at the trial of O. and P., Latvian nationals residing in their home country. The Court considers, in particular, that there is nothing to indicate that the trial court would have been likely to obtain a hearing of the witnesses, within a reasonable time, following bilateral negotiations with the Republic of Latvia at political level, as proposed by the applicant. In line with the principle *impossibilium nulla est obligatio*, the witnesses' absence was thus not imputable to the domestic court.

140. Accordingly, there was a good reason, from the trial court's perspective, for the non-attendance of witnesses O. and P. at the trial and, as a result, for admitting the statements they had made to the police and the investigating judge at the pre-trial stage as evidence.

(b) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

...

143. In making its own assessment of the weight of the witness evidence in the light of the domestic courts' findings, the Court must have regard to the strength of the

additional incriminating evidence available ... It observes that the Regional Court had before it, in particular, the following further evidence concerning the offence: the hearsay statements made by the witnesses' neighbour E. and their friend L. at the trial concerning the account O. and P. had given them of the events of 3 February 2007; the applicant's own admission in the course of the trial that he had been in O. and P.'s apartment at the relevant time, and had jumped from the balcony to follow P.; the geographical data and recordings of two mobile telephone conversations between one of the co-accused and the applicant at the time of the offence, which revealed that the applicant had been present in an apartment at the scene of the crime and had jumped from the balcony to chase one of the escaping inhabitants; the GPS data revealing that the car of one of the co-accused had been parked near the witnesses' apartment at the relevant time; and, finally, the evidence relating to the offence committed in Kassel on 14 October 2006 by the applicant and an accomplice.

144. The Court, having regard to these elements of evidence, cannot but note that O. and P. were the only eyewitnesses to the offence in question. The other evidence available to the courts was either just hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion as such. In view of these elements, the Court considers that the evidence of the absent witnesses was "decisive", that is, determinative of the applicant's conviction.

(c) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

145. The Court must further determine, in a third step, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the decisive evidence of the absent witnesses. As shown above ..., the following elements are relevant in this context: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial.

(i) The trial court's approach to the untested evidence

146. As regards the domestic courts' treatment of the evidence of the absent witnesses O. and P., the Court observes that the Regional Court approached that evidence with caution. It expressly noted in its judgment that it had been obliged to exercise particular diligence in assessing the witnesses' credibility, as neither the defence nor the court had been able to question and observe the demeanour of the witnesses at the trial.

147. The Court observes in that context that the Regional Court was unable to watch, at the trial, a video recording of the witness hearing before the investigating judge, no such recording having been made. It notes that trial courts in different legal systems have recourse to that possibility ... which allows them, as well as the defence and the prosecution, to observe a witness's demeanour under questioning and to form a clearer impression of the witness's credibility.

148. The Regional Court, in its thoroughly reasoned judgment, made it clear that it was aware of the reduced evidentiary value of the untested witness statements. It compared the content of the repeated statements made by both O. and P. at the investigation stage and found that the witnesses had given detailed and coherent descriptions of the circumstances of the offence. The trial court considered that minor contradictions in the witnesses' statements could be explained by their concern not to disclose their professional activities to the authorities. It further observed that the witnesses' inability to identify the applicant showed that they had not testified with a view to incriminating him.

149. The Court further observes that the Regional Court, in assessing the witnesses' credibility, also addressed different aspects of their conduct in relation to their statements. It took into account the fact that the witnesses had not reported the offence to the police immediately and that they had failed to attend the trial without an adequate excuse. It considered that there were explanations for that conduct – namely the witnesses' fear of encountering problems with the police or of acts of revenge by the perpetrators, and their unease about having to recall and be questioned about the offence – which did not affect their credibility.

150. In view of the foregoing, the Court considers that the Regional Court examined the credibility of the absent witnesses and the reliability of their statements in a careful manner. It notes in that context that its task of reviewing the trial court's approach to the untested evidence is facilitated by the fact that the Regional Court, as is usual in a continental-law system, gave reasons for its assessment of the evidence before it.

(ii) Availability and strength of further incriminating evidence

151. The Court further observes that the Regional Court, as shown above ..., had before it some additional incriminating hearsay and circumstantial evidence supporting the witness statements made by O. and P.

(iii) Procedural measures aimed at compensating for the lack of opportunity to directly cross-examine the witnesses at the trial

152. The Court observes that the applicant had the opportunity to give his own version of the events on 3 February 2007 – an opportunity of which he availed himself – and to cast doubt on the credibility of the witnesses, whose identity had been known to him, also by cross-examining the other witnesses giving hearsay evidence at his trial.

153. The Court notes, however, that the applicant did not have the possibility to put questions to witnesses O. and P. indirectly, for instance in writing. Moreover, neither the applicant himself nor his lawyer was given the opportunity at the investigation stage to question those witnesses.

154. The Court observes in that context that the parties disagreed as to whether or not the refusal to appoint defence counsel for the applicant and to permit counsel to take part in the witnesses' hearing before the investigating judge had complied with domestic law. The Court considers that it is not necessary for the purposes of the present proceedings for it to take a final stance on that question. It reiterates that in examining compliance with Article 6 of the Convention, it is not its function

to determine whether the domestic courts acted in accordance with domestic law ..., but to evaluate the overall fairness of the trial in the particular circumstances of the case, including the way in which the evidence was obtained ...

155. The Court considers that ... it is sufficient for it to note that, under the provisions of German law, the prosecution authorities could have appointed a lawyer for the applicant ... That lawyer would have had a right to be present at the witness hearing before the investigating judge and, as a rule, would have had to be notified thereof ... However, these procedural safeguards, which existed in the Code of Criminal Procedure and were reinforced by their interpretation by the Federal Court of Justice ..., were not used in the applicant's case.

156. The Court would stress that, while Article 6 § 3 (d) of the Convention concerns the cross-examination of prosecution witnesses at the trial itself, the way in which the prosecution witnesses' questioning at the investigation stage was conducted attains considerable importance for, and is likely to prejudice, the fairness of the trial itself where key witnesses cannot be heard by the trial court and the evidence as obtained at the investigation stage is therefore introduced directly into the trial ...

157. In such circumstances, it is vital for the determination of the fairness of the trial as a whole to ascertain whether the authorities, at the time of the witness hearing at the investigation stage, proceeded on the assumption that the witness would not be heard at the trial. Where the investigating authorities took the reasonable view that the witness concerned would not be examined at the hearing of the trial court, it is essential for the defence to have been given an opportunity to put questions to the witness at the investigation stage ...

158. The Court notes in this regard that the applicant challenged the Regional Court's finding that the witnesses' absence at the trial had not been foreseeable. It agrees with the applicant that the witnesses were heard by the investigating judge because, in view of the witnesses' imminent return to Latvia, the prosecution authorities considered that there was a danger of their evidence being lost. This is shown by the reasoning of the prosecution's own request to the investigating judge to hear O. and P. speedily in order to obtain a true statement which could be used at the subsequent trial ... The Court observes in that context that under Article 251 § 1 of the Code of Criminal Procedure, the written records of a witness's previous examination by an investigating judge may be read out at the trial under less strict conditions than the records of a witness examination by the police ...

159. The Court observes that ... the authorities were aware that witnesses O. and P. had not pressed charges against the perpetrators immediately for fear of problems with the police and acts of revenge by the perpetrators, that they had been staying in Germany only temporarily while their families remained in Latvia and that they had explained that they wished to return to their home country as soon as possible. In these circumstances, the prosecution authorities' assessment that it might not be possible to hear evidence from those witnesses at a subsequent trial against the applicant in Germany indeed appears convincing.

160. Despite this, the prosecution authorities did not give the applicant an opportunity – which he could have been given under the provisions of domestic law – to

have witnesses O. and P. questioned at the investigation stage by a lawyer appointed to represent him. By proceeding in that manner, they took the foreseeable risk, which subsequently materialised, that neither the accused nor his counsel would be able to question O. and P. at any stage of the proceedings ...

(iv) Assessment of the trial's overall fairness

161. In assessing the overall fairness of the trial the Court will have regard to the available counterbalancing factors, viewed in their entirety in the light of its finding to the effect that the evidence given by O. and P. was “decisive” for the applicant’s conviction ...

162. The Court observes that the trial court had before it some additional incriminating evidence regarding the offence of which the applicant was found guilty. However, the Court notes that hardly any procedural measures were taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial. In the Court’s view, affording the defendant the opportunity to have a key prosecution witness questioned at least during the pre-trial stage and via his counsel constitutes an important procedural safeguard securing the accused’s defence rights, the absence of which weighs heavily in the balance in the examination of the overall fairness of the proceedings under Article 6 §§ 1 and 3 (d).

163. It is true that the trial court assessed the credibility of the absent witnesses and the reliability of their statements in a careful manner, thus attempting to compensate for the lack of cross-examination of the witnesses, and that the applicant had the opportunity to give his own version of the events in Göttingen. However, in view of the importance of the statements of the only eyewitnesses to the offence of which he was convicted, the counterbalancing measures taken were insufficient to permit a fair and proper assessment of the reliability of the untested evidence.

164. The Court considers that, in these circumstances, the absence of an opportunity for the applicant to examine or have examined witnesses O. and P. at any stage of the proceedings rendered the trial as a whole unfair.

165. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

See also PROOF AND EVIDENCE, Burden of proof (Suspect benefits from reasonable doubt), p. 235 above

Waiver of cross-examination

► *Al-Khawaja and Tahery v. United Kingdom [GC], 26766/05, 15 December 2011*

123. When a witness’s fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant. To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and

witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way. Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3 (d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval.

... The Court does not underestimate the difficulties which may arise in determining whether, in a particular case, a defendant or his associates have been responsible for threatening or directly inducing fear in a witness. However, the *Tahery* case shows that, with the benefit of an effective inquiry, such difficulties are not insuperable.

► **A. S. v. Finland, 40156/07, 28 September 2010**

70. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest ...

71. The Court reiterates that before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6 it must be shown that he could reasonably have foreseen what the consequences of his conduct would be ...

72. As the Court has observed above, the trial courts readily acknowledged that the proceedings were flawed in that the applicant had not been afforded an opportunity to put questions to A. It further observes that the applicant did not ask, explicitly, that the video recording be omitted from the evidence. In the District Court, after a discussion with the possibility of adversarial argument, the applicant eventually consented to the viewing of the video recording. While he later explained before the Court of Appeal that he had been left with no other choice than to do so, as the lower court had allowed the use of Dr S.'s testimony concerning A.'s account, he ultimately left the question of admissibility of the evidence, in its totality, to the discretion of the appellate court ...

73. The Court finds no reason to believe that the applicant, assisted by counsel throughout the court proceedings, did not understand that by consenting to the viewing of A.'s video-taped account he also allowed the trial courts to make a full assessment of that piece of evidence, in the context of the evidence produced to the courts in its totality. The applicant thus took an advised decision in favour of the courts' free assessment of evidence, even though it was not in his power to limit the courts' findings to only those observations which were favourable to his defence. As it turned out, the trial courts came to different conclusions based on that same evidence.

74. Having said that, the Court finds, however, that merely by consenting to the viewing of the video-recording in the above-described manner the applicant cannot be understood as having waived of his own free will, either expressly or tacitly, his

right to put questions to A. On the contrary, the applicant consistently argued that the proceedings were flawed in that he had not been afforded an opportunity to do so, and he requested the courts to take that into account in assessing the admissibility of evidence. As it was clear that A. could not be heard again, the applicant chose to invoke the video-recording on his behalf in a situation where the remaining evidence produced to the courts was of an indirect nature. The Court cannot conclude that the applicant had, in those circumstances, unequivocally waived his entitlement to the guarantees of a fair trial.

Credibility

► *Cornelis v. Netherlands (dec.)*, 994/03, 25 May 2004

... the public prosecution service concluded an arrangement with Mr Z. and statements obtained from him were used in evidence against the applicant. The Court observes that, from the outset, the applicant and the domestic courts were aware of this arrangement and extensively questioned Mr Z. in order to test his reliability and credibility. Moreover, the domestic courts showed that they were well aware of the dangers, difficulties and pitfalls surrounding arrangements with criminal witnesses. In the judgments handed down in the applicant's case, all aspects of the agreements were extensively and carefully scrutinised, with due attention being paid to the numerous objections raised by the defence.

The Court concludes therefore that it cannot be said that the applicant's conviction was based on evidence in respect of which he was not, or not sufficiently, able to exercise his defence rights under Article 6 § 1 of the Convention.

► *Hauschildt v. Denmark (dec.)*, 10486/83, 9 October 1986

3. ... d. ... With regard to this complaint the Commission recalls that when a witness was heard in the Court of Appeal, his statement in the City Court was first read out and the witness was thereafter asked whether he could stand by his statement. Then followed a further hearing of the witness during which the defence counsel, the prosecutor and the judges could put supplementary questions in order to clarify the situation. The Commission considers generally that it may reduce the value of the statements of a witness if he is first reminded in detail of what he said when giving evidence before the lower court. However, it notes that the parties were given the opportunity of putting further questions to the witnesses in order to obtain further information or to question the correctness of their evidence. In these circumstances, the Commission finds that the method used was not of such a character that it could render the hearing unfair and it does not therefore constitute a violation of the Convention.

► *Erkapić v. Croatia*, 51198/08, 25 April 2013

79. As to the manner and circumstances in which the evidence was obtained, the Court notes that there is no dispute between the parties that I.G.H., V.Š. and N.S. were heroin addicts in the period when they gave their statements to the police. In addition, I.G.H. had a personality disorder, which was also not disputed by the parties

... All of them claimed that during the police questioning they had suffered from withdrawal, and I.G.H. and N.S. alleged that they were denied medical assistance during their police custody ... The Court observes, however, that the trial court never took any actions to ascertain the circumstances surrounding these complaints.

80. Furthermore, the Court notes that I.G.H. and V.Š. complained before the trial court that their legal representation during the police questioning had fallen short of the requirements of effective defence, since they had not been given an opportunity to be represented by lawyers of their own choosing ... The same complaints were also raised by N.S., who had already complained to the investigating judge that during the police questioning he had been represented by a lawyer not of his choosing ... They also claimed that the lawyers imposed on them by the police had not in fact been present during the questioning but had only come to sign the ready-prepared statements.

81. On the other hand the record of the questioning of I.G.H. by the police indicates that his questioning commenced at 11.15 p.m. and ended on 28 April 2001 at 1 a.m., and that he was assisted by a lawyer with whom he had a five-minute opportunity for consultation ...

82. The Court further notes that I.G.H., V.Š. and N.S. were not represented by the same lawyers during the police questioning and before the investigating judge ... In view of their complaints, this can be observed against the fact that I.G.H., V.Š. and N.S. all provided statements to the police incriminating the applicant. However, when they were brought before the investigating judge I.G.H. and V.Š. remained silent ... and N.S. complained that he had given his statement to the police under pressure ... while represented by a lawyer not of his own choosing.

83. The domestic courts, however, merely limited themselves to the finding that the records of the statements did not provide any indication of unlawfulness, without any further assessment of the circumstances surrounding the police questioning. This appears particularly insufficient in view of the concordant objections raised by the applicant's co-accused and supported by the statements of other witnesses; namely M.S., who also complained about the alleged pressure by the police ... Therefore, the Court considers that the national courts did not conduct the proper examination of the submissions by the applicant and his co-accused without prejudice.

84. Consequently, in the absence of an adequate explanation by the domestic authorities, the Court has serious doubts about the reliability and accuracy of the statements given to the police by I.G.H., V.Š. and N.S. as well as about the quality of such evidence.

Perjury

► *X. and Y. v. Federal Republic of Germany (dec.)*, 8744/79, 2 March 1983

Witnesses appearing at the trial or before the investigating judge are under a formal and severe obligation to speak the truth. In the present case it is clear that witness D did not speak the truth when he gave evidence on 26 April. This led to his later

conviction for perjury which is not in dispute. Since the witness had testified differently before the investigating judge a severe suspicion was immediately created by his statements on 26 April. Under these circumstances the prosecuting authorities were, under German law, bound to investigate the matter. When they decided to arrest witness D on the spot they may have done so in the expectation that this would show that perjury in a trial will not go unpunished. However, as there existed a very clear suspicion in the sense which later proved to be correct the Commission cannot find that this action interfered with the fairness of the trial against the applicants. The position would be different where the prosecution would resort to such a measure without good reasons in order to bring pressure on witnesses. Where, however, a possible pressure is only the result of consequences brought about by clearly untrue statements it must be accepted as an element of the general protection of the criminal procedure as such. The Commission must take into account in this context that the system of criminal justice protecting society in general presupposes that the witness' obligation to speak the truth is being enforced scrupulously.

EXPERT WITNESSES

Neutrality

► *Bönisch v. Austria*, 8658/79, 6 May 1985

32. It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his report that in fact prompted the bringing of a prosecution. In the present case, appearances suggested that the Director was more like a witness against the accused. In principle, his being examined at the hearings was not precluded by the Convention, but the principle of equality of arms inherent in the concept of a fair trial ... required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence.

33. The Court considers ... that such equal treatment had not been afforded in the two proceedings in issue.

In the first place, the Director of the Institute had been appointed as "expert" by the Regional Court in accordance with Austrian law; by virtue of that law, he was thereby formally invested with the function of neutral and impartial auxiliary of the court. By reason of this, his statements must have carried greater weight than those of an "expert witness" called, as in the first proceedings, by the accused ..., and yet his neutrality and impartiality were, in the particular circumstances, capable of appearing open to doubt ...

► *Brandstetter v. Austria*, 11170/84, 28 August 1991

44. ... the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence

raised any objection, either at the first hearing of 4 October 1983 when the District Court appointed Mr Bandion, or at the second hearing of 22 November 1983 when Mr Bandion made an oral statement and was asked to draw up a report; it was not until 14 February 1984, after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticized the expert for his close links with the Agricultural Institute ...

45. The mere fact that Mr Bandion belonged to the staff of the Agricultural Institute does not justify his being regarded ... as a witness for the prosecution. Nor does the file disclose other grounds for so considering him. It is true that to a certain extent Mr Bandion stepped outside the duties attaching to his function by dealing in his report with matters relating to the assessment of evidence, but this does not warrant the conclusion that the position which he occupied in the proceedings under review was that of a witness for the prosecution either.

Accordingly, the District Court's refusal of the defence's request to appoint other experts ... cannot be seen as a breach of the principle of equality of arms.

Equality of arms/counter-expertise

► *Bönisch v. Austria*, 8658/79, 6 May 1985

33. ... In addition, various circumstances illustrate the dominant role that the Director was enabled to play.

In his capacity of "expert", he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment ...

The lack of equal treatment was particularly striking in the first proceedings, by reason of the difference between the respective positions of the court expert and the "expert witness" of the defence. As a mere witness, Mr. Prändl was not allowed to appear before the Regional Court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert; thereafter he was relegated to the public gallery ... The Director of the Institute, on the other hand, exercised the powers available to him under Austrian law. Indeed, he directly examined Mr. Prändl and the accused.

34. In addition, as the applicant experienced in his case, there was little opportunity for the defence to obtain the appointment of a counter-expert ...

If the competent court has need of clarification in respect of the Institute's opinion, it must first hear a member of the Institute's staff ...; the court may not have recourse to another expert except in the contingencies referred to in Articles 125 and 126 of the Code of Criminal Procedure ..., none of which obtained in the present case.

35. Consequently, there has been a breach of Article 6 para. 1 ...

► *G. B. v. France*, 44069/98, 2 October 2001

68. The Court would point out that the mere fact that an expert expresses a different opinion to that in his written statement when addressing an assize court is

not in itself an infringement of the principle of a fair trial ... Similarly, the right to a fair trial does not require that a national court should appoint, at the request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case ... Accordingly, the refusal to order a second opinion cannot in itself be regarded as unfair.

69. The Court notes, however, that ... the expert not only expressed a different opinion when addressing the court from that set out in his written report – he completely changed his mind in the course of one and the same hearing ... It also notes that the application for a second opinion lodged by the applicant followed this “volte-face” which the expert had effected having rapidly perused the new evidence, adopting a highly unfavourable stance towards the applicant. While it is difficult to ascertain what influence an expert’s opinion may have had on the assessment of a jury, the Court considers it highly likely that such an abrupt turnaround would inevitably have lent the expert’s opinion particular weight.

70. Having regard to these particular circumstances, namely the expert’s volte-face, combined with the rejection of the application for a second opinion, the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (b) of the Convention taken together.

► ***Accardi and Others v. Italy (dec.)*, 30598/02, 20 January 2005**

As to the decision not to order a psychologist’s report or to question the defence’s expert witness during the hearing, the Court notes that the domestic courts, on the basis of logical and pertinent arguments, concluded that such investigative measures were of no relevance to the proceedings. The Florence Court of Appeal stressed that X and Y had been under observation for a long time by a psychologist employed by the social services department, and that there were no grounds for doubting the children’s ability to recount their experiences. Moreover, the questioning of the children had been conducted with the assistance of Mrs B., an expert in child psychology.

Accordingly, the Court cannot conclude that the rights of the defence were restricted to the extent that there was an infringement of the principles of a fair hearing established by Article 6 of the Convention.

► ***Rhodorkovskiy and Lebedev v. Russia*, 11082/06, 25 July 2013**

720. The District Court’s reasons for rejecting “expert evidence” produced by the defence were not always clear ... Some ... related to relevance, usefulness and reliability of the defence’s “expert evidence”, whereas other[s] related to formal inadmissibility thereof ...

721. As regards the first group, the Court reiterates that the requirement of a fair trial does not impose an obligation on a trial court to order an expert opinion or any other investigative measure merely because a party has sought it. In the present case, the District Court held that opinions by several “experts” for the defence

touched upon legal matters, namely on the interpretation of the Russian legislation and were therefore useless for the court. ...

722. ... the Court is prepared to admit that legal matters are normally within the judge's competence and experience (*iura novit curia*), and it is for the judge to decide whether or not he needs assistance in a particular field of law. In the Court's opinion, in this part the rejection by a national court of the "expert evidence" produced by the defence remained within the former's margin of appreciation.

723. Some other reports and studies produced by the defence also touched, at least to some extent, upon other fields of knowledge, such as economic analysis or accounting ... The court rejected those reports in bulk, without distinguishing between various issues touched in those reports. Whereas such an indiscriminate approach is pregnant with dangers, the Court is prepared to admit that the primary reason for not admitting those reports was, again, their irrelevance or uselessness, and that it was within the trial court's discretion to so conclude ...

724. The Court will now turn to "expert evidence" rejected by the District Court for reasons related not to its content but the form and origins.

725. The Court notes that the defence produced to the court the audit reports by Ernst and Young and Price Waterhouse Coopers ...

726. The Court notes that, unlike the "expert evidence" analysed above, the reports by Ernst and Young and Price Waterhouse Coopers were essentially non-legal. The first evaluated Apatit shares at different periods of time, whereas the second analysed the price of the apatite concentrate. The Court further stresses that these two reports concerned essentially the same matters as the reports produced by the prosecution ..., which were accepted by the District Court in evidence. In the circumstances the applicants' attempts to obtain opinions of professionals in the fields of accounting, evaluation of assets and market prices were justified. Therefore, the "irrelevance" of those reports could not and should not play any major role in dismissing them.

727. As transpires from the procedural rulings of the Meshchanskiy District Court, those reports were rejected, *inter alia*, due to some defects related to their form ... There was, however, no doubt that the reports emanated from the audit firms in question ... If the court needed any further information about the names or qualifications of experts involved in the preparation of the reports, it was easy to obtain it. The Court considers that defects as to the form were not a decisive argument for their rejection ...

728. The District Court decided that those audit reports did not correspond to any type of "evidence" which is admissible under domestic law. For the purposes of the present case the Court is prepared to accept the reading of the CCrP [Code of Criminal Procedure] proposed by the Meshchanskiy District Court as reasonable ... That being said, the Court stresses that the rules on admissibility of evidence may sometimes run counter to the principles of equality of arms and adversarial proceedings, or affect the fairness of the proceedings otherwise ... Although "Article 6 does not go as far as requiring that the defence be given the same rights as the prosecution in taking evidence" ..., the accused should be entitled to seek and produce evidence "under the same conditions" as the prosecution ... Clearly, those "conditions" cannot

be exactly the same in all respects; thus, for example, the defence cannot have the same search and seizure powers as the prosecution. However, as follows from the text of Article 6 § 3 (d) the defence must have an opportunity to conduct an active defence – for example, by calling witnesses on its behalf or adducing other evidence.

729. The prosecution ... tried to prove a particular point by obtaining expert reports and submitting them to the court. The reports were obtained within the preliminary investigation, i.e. not in adversarial proceedings, and, in this case, without any participation of the defence. Thus, the defence was unable to formulate questions to the experts, challenge the experts or propose their own experts for inclusion in the team, etc. The trial court admitted those reports in evidence because under the CCRP the prosecution had a right to collect them.

730. The defence, on the other hand, had no such right. Under the CCRP, interpreted narrowly, only the prosecution or the courts were entitled to obtain “expert reports” ... Indeed, in theory the defence could challenge an expert report produced by the prosecution and ask the court to commission a fresh expert examination. However, to obtain such a fresh examination it was incumbent on the defence to persuade the court that the report produced by the prosecution was incomplete or deficient. The Court notes that the defence was unable to call some of the experts who had prepared the reports at the request of the prosecution, and to cast doubt on their credibility. That fact gave rise to a separate finding of a violation under Article 6 § 3 (d) ... and it undoubtedly made the defence’s task of proving the usefulness of the counter-reports more difficult.

731. Furthermore, the Court stresses that it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively the defence must have the same opportunity to introduce their own “expert evidence”.

732. That right is not absolute and the forms in which the defence may seek the assistance of experts may vary. In the present case the defence tried to introduce their own “expert evidence” by proposing to the court two reports which it had obtained from third parties. Those reports were relevant, but the court refused to admit them. In the District Court’s opinion, those reports were not admissible either as “specialist reports” or as “other documents” ...

733. The Government did not explain what other options were available for the defence to introduce their expert evidence. The CCRP, as interpreted by the District Court, did not allow the defence to collect written reports by “experts” or “specialists”. The defence lawyers were indeed able to obtain consultations from relevant specialists outside the trial, but this does not suffice to equalise the positions of the prosecution and the defence. Furthermore, in adversarial proceedings evidence must normally be produced directly at the trial.

734. The last option available for the defence was to obtain oral questioning of “specialists” at the trial ... However, it is clear that the status of “specialist” in Russian law is different from that of an “expert”. Although a specialist may “explain to the parties and to the court matters which come within his or her professional competence”,

his primary role is to assist the court and the parties in conducting investigative actions which require special skills or knowledge ... In any event, the defence would only be able to rely on oral questioning of the “specialists” at the trial, whereas the prosecution was able to produce written reports prepared beforehand by “experts”. Finally, as transpires from the Meshchanskiy District Court’s reasoning, “specialists” invited by the defence, unlike “experts” for the prosecution, did not have direct access to the original copy of the case file, and the court was not prepared to admit their conclusions based on the copies of materials of the case provided to them by the defence ...

735. In the circumstances the Court concludes that the CCrP, as interpreted by the Meshchanskiy District Court, created a disbalance between the defence and the prosecution in the area of collecting and adducing “expert evidence”, thus breaching the equality of arms between the parties. There was, therefore, a violation of Article 6 §§ 1 and 3 (d) on that account.

Cross-examination

► *Cottin v. Belgium*, 48386/99, 2 June 2005

32. The applicant was prevented from attending the proceedings before the medical expert on 4 April 1997, whereas D.H, who was accompanied there by his elder brother P.H., himself a party to the criminal proceedings concerned, was allowed to be assisted by a personal medical expert. Yet there was no technical reason why the applicant should not take part in the proceedings before the expert, which involved the hearing and examination of the civil party D.H. and the examination of the evidence. As a result the applicant had no opportunity, in person or through his counsel or a medical adviser, to cross-examine the witnesses who appeared before the expert, to comment on the materials examined and the information gathered by the expert or to ask the expert to make further inquiries. In such circumstances the applicant was unable to have an effective say before the expert report was submitted. The indirect possibility of discussing the expert report in subsequent submissions or appeal proceedings cannot be considered as a valid equivalent to the right to take part in the meeting with the medical expert in this case. The applicant was therefore deprived of the opportunity to comment effectively on a crucial piece of evidence, and a request for an additional expert report would not have made any difference. As Belgian law stood at the time, the new expert report proceedings would also have been one-sided.

► *Balsyte-Lideikiene v. Lithuania*, 72596/01, 4 November 2008

64. ... the conclusions provided by the experts during the pre-trial stage had a key place in the proceedings against the applicant. It is therefore necessary to determine whether the applicant expressed a wish to have the experts examined in open court and, if so, whether she had such an opportunity.

65. Relying on the documents at its disposition the Court draws attention to the applicant’s written request of 12 March 2001, received by the Vilnius City Second District Court the following day, by which the applicant asked the court to postpone

the hearing as the experts had not appeared at the hearing for the third time in a row ... The applicant also asked the court to determine the reasons behind the experts' absence and to punish them. Furthermore, in her appeal the applicant referred to her request to have the experts present at the hearing at the first-instance court and the refusal of that court to summon them. However, the Supreme Administrative Court rejected the applicant's request, noting that under the circumstances of the case her inability to question the experts did not violate any of the procedural legal norms.

66. Having analysed all the material submitted to it, the Court considers that neither at the pre-trial stage nor during the trial was the applicant given the opportunity to question the experts, whose opinions contained certain discrepancies, in order to subject their credibility to scrutiny or cast any doubt on their conclusions. Relying on its case-law on the subject, the Court concludes that ... the refusal to entertain the applicant's request to have the experts examined in open court failed to meet the requirements of Article 6 § 1 of the Convention.

ADMISSIBILITY OF EVIDENCE

Issue must be scrutinised

► *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003

91. The Court notes that it has held that the conditions in which the applicant was kept in police custody breached Article 3 of the Convention. It would observe in that connection that Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence ... Although it is not its task to examine in the abstract the issue of the admissibility of evidence in criminal law, the Court finds it regrettable that ... the National Security Court did not determine that issue before going on to examine the merits of the case. Such a preliminary investigation would clearly have given the national courts an opportunity to condemn any unlawful methods used to obtain evidence for the prosecution.

Use of torture and inhuman and degrading treatment

See also INTERROGATION (Illegal methods), p. 174 above

Torture

► *Harutyunyan v. Armenia*, 36549/03, 28 June 2007

64. ... the Court notes that the applicant was coerced into making confession statements and witnesses T. and A. into making statements substantiating the applicant's guilt ... the Court notes with approval the findings of the Avan and Nor Nork District Court of Yerevan ..., condemning the actions of the police officers and evaluating them as having the attributes of torture ...

65. In this respect the Court notes that the domestic courts justified the use of the confession statements by the fact that the applicant confessed to the investigator and not to the police officers who had ill-treated him, the fact that witness T. confirmed his earlier confession at the confrontation of 11 August 1999 and the fact that both witnesses T. and A. made similar statements at the hearing of 26 October 1999 before the Syunik Regional Court. The Court, however, is not convinced by such justification. First of all, in the Court's opinion, where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter. Secondly, such justification clearly contradicted the finding made in the judgment convicting the police officers in question, according to which "by threatening to continue the ill-treatment the police officers forced the applicant to confess" ... Finally, there was ample evidence before the domestic courts that witnesses T. and A. were being subjected to continued threats of further torture and retaliation throughout 1999 and early 2000 ... Furthermore, the fact that they were still performing military service could undoubtedly have added to their fear and affected their statements, which is confirmed by the fact that the nature of those statements essentially changed after demobilisation. Hence, the credibility of the statements made by them during that period should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.

66. In the light of the foregoing considerations, the Court concludes that, regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of such evidence rendered his trial as a whole unfair ...

► ***El Haski v. Belgium*, 649/08, 25 September 2012**

85. ... the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6 ... This also holds true for the use of real evidence obtained as a direct result of acts of torture ...; the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence ...

The Court is of the view that these principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned ...

86. The Court examined the issue of evidence in the *Othman* case ... it took the view that it would be unfair to impose on the applicant a burden of proof that went

beyond the demonstration of a “real risk” that the evidence in question had been thus obtained ...

87. As to the standard of proof for the application of the exclusionary rule in respect of evidence allegedly obtained as a result of treatment contrary to Article 3, a number of situations may arise. Firstly, such treatment may be imputed to the authorities of the forum State or to those of a third State and the victim may be the actual defendant or a third party. Furthermore, in some cases the Court itself ..., the courts of the forum State ... or the courts of the third State have confirmed the veracity and nature of the alleged ill-treatment; in other cases there has been no such judicial decision.

88. The Court will not proceed to examine each of those situations. It is sufficient in the present case for it to observe that, at least in a case where a defendant asks the domestic court to exclude statements obtained in a third State as a result, in his submission, of treatment contrary to Article 3 inflicted on another individual, it is appropriate to follow the approach set out in the *Othman* judgment. Accordingly, in any event, where the judicial system of the third State in question does not offer meaningful guarantees of an independent, impartial and serious examination of allegations of torture or inhuman and degrading treatment, it will be necessary and sufficient for the complainant, if the exclusionary rule is to be invoked on the basis of Article 6 § 1 of the Convention, to show that there is a “real risk” that the impugned statement was thus obtained. It would be unfair to impose any higher burden of proof on him.

89. The domestic court may not then admit the impugned evidence without having first examined the defendant’s arguments concerning it and without being satisfied that, notwithstanding those arguments, no such risk obtains. This is inherent in a court’s responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained ...

Inhuman and degrading treatment

► *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention.

Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by the domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

► ***Gäfgen v. Germany* [GC], 22978/05, 1 June 2010**

171. ... For the purposes of its own assessment under Article 6, it considers it decisive that there is a causal link between the applicant's interrogation in breach of Article 3 and the real evidence secured by the authorities as a result of the applicant's indications, including the discovery of J's body and the autopsy report thereon, the tyre tracks left by the applicant's car at the pond, as well as J's backpack, clothes and the applicant's typewriter. In other words, the impugned real evidence was secured as a direct result of his interrogation by the police that breached Article 3.

172. Furthermore, an issue arises under Article 6 in respect of evidence obtained as a result of methods in violation of Article 3 only if such evidence was not excluded from use at the applicant's criminal trial ...

173. The Court is therefore called upon to examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture ...

177. ... The Court accepts that the State agents in this case acted in a difficult and stressful situation and were attempting to save a life. This does not, however, alter the fact that they obtained real evidence by a breach of Article 3. Moreover, it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies ...

178. ... in the context of Article 6, the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition

under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

179. The Court notes that, in the present case, the Regional Court expressly based its findings of fact concerning the execution of the crime committed by the applicant – and thus the findings decisive for the applicant’s conviction for murder and kidnapping with extortion – exclusively on the new, full confession made by the applicant at the trial ... Moreover, that court also considered the new confession the essential, if not the only, basis for its findings of fact concerning the planning of the crime, which likewise played a role in the applicant’s conviction and sentence ... The additional evidence admitted at the trial was not used by the Regional Court against the applicant to prove his guilt, but only to test the veracity of his confession. This evidence included the results of the autopsy as to the cause of J.’s death and the tyre tracks left by the applicant’s car near the pond where the child’s corpse had been found. The Regional Court further referred to corroborative evidence which had been secured independently of the first confession extracted from the applicant under threat, given that the applicant had been secretly observed by the police since the collection of the ransom and that his flat had been searched immediately after his arrest. This evidence, which was “untainted” by the breach of Article 3, comprised the testimony of J.’s sister, the wording of the blackmail letter, the note found in the applicant’s flat concerning the planning of the crime, as well as ransom money which had been found in the applicant’s flat or had been paid into his accounts ...

180. In the light of the foregoing, the Court considers that it was the applicant’s second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.

181. In the light of these findings, the Court further has to examine whether the breach of Article 3 in the investigation proceedings had a bearing on the applicant’s confession at the trial ...

182. The Court observes in the first place that prior to his confession on the second day of the trial, the applicant had been instructed about his right to remain silent and about the fact that none of the statements he had previously made on the charges could be used as evidence against him ... It is therefore satisfied that domestic legislation and practice did attach consequences to the confessions obtained by means of prohibited ill-treatment ... and that the status quo ante was restored, that is, to the situation the applicant was in prior to the breach of Article 3, in this respect.

183. Moreover, the applicant, who was represented by defence counsel, stressed in his statements on the second day and at the end of the trial that he was confessing freely out of remorse and in order to take responsibility for his offence despite the events of 1 October 2002 ... He did so notwithstanding the fact that he had previously failed in his attempt to have the impugned real evidence excluded. There is no reason, therefore, for the Court to assume that the applicant did not tell the truth

and would not have confessed if the Regional Court had decided at the outset of the trial to exclude the impugned real evidence and that his confession should thus be regarded as a consequence of measures which extinguished the essence of his defence rights.

184. In any event, it is clear from the Regional Court's reasoning that the applicant's second confession on the last day of the trial was crucial for securing his conviction for murder, an offence of which he might otherwise not have been found guilty ... The applicant's confession referred to many additional elements which were unrelated to what could have been proven by the impugned real evidence ..., his confession notably proved his intention to kill J., as well as his motives for doing so. In view of these elements, the Court is not persuaded that, further to the failure to exclude the impugned evidence at the outset of the trial, the applicant could not have remained silent and no longer had any defence option but to confess. Therefore, the Court is not satisfied that the breach of Article 3 in the investigation proceedings had a bearing on the applicant's confession at the trial either.

185. As regards the rights of the defence, the Court further observes that the applicant was given, and availed himself of, the opportunity to challenge the admission of the impugned real evidence at his trial and that the Regional Court had discretion to exclude that evidence. Therefore, the applicant's defence rights were not disregarded in this respect either ...

187. The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.

► ***Turbylev v. Russia*, 4722/09, 6 October 2015**

96. Even assuming that the applicant had been informed of the constitutional right not to incriminate himself before making his confession statement, as was found by the domestic courts, he cannot be said to have validly waived his privilege against self-incrimination in view of the Court's finding that he had given his confession statement as a result of his inhuman and degrading treatment by the police. In any event, no reliance can be placed on the mere fact that the applicant had been reminded of his right to remain silent and signed the relevant record ... especially because the record cited Article 51 of the Constitution without explaining its meaning. Furthermore, since the lack of access to a lawyer in the present case resulted from the systemic application of legal provisions, as interpreted by the domestic courts, and the applicant was not informed of the right to legal assistance before signing the statement of his surrender and confession, the question of the waiver of the right to legal assistance is not pertinent.

97. The Court concludes that the domestic courts' use in evidence of the statement of the applicant's surrender and confession obtained as a result of his ill-treatment in violation of Article 3 and in the absence of access to a lawyer has rendered the applicant's trial unfair.

Contrary to prohibition on self-incrimination

► *Allan v. United Kingdom*, 48539/99, 5 November 2002

52. ... the Court notes that in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. and instructed him to "push him for what you can". In contrast to the position in *Khan*, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the "voluntariness" of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination.

► *P. G. and J. H. v. United Kingdom*, 44787/98, 25 September 2001

80. In so far as the applicants complained of the underhand way in which the voice samples for comparison were obtained and that this infringed their privilege against self-incrimination, the Court considers that the voice samples, which did not include any incriminating statements, may be regarded as akin to blood, hair or other physical or objective specimens used in forensic analysis and to which privilege against self-incrimination does not apply ...

81. In these circumstances, the Court finds that the use at the applicants' trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

► *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

For this case see GATHERING EVIDENCE (Search and seizure, Use of force), p. 141 above, and PROOF AND EVIDENCE (Burden of proof, Prohibition on self-incrimination, and Admissibility of evidence, Use of torture and inhuman and degrading treatment) above

► ***Bykov v. Russia* [GC], 4378/02, 10 March 2009**

99. ... The applicant argued that the police had overstepped the limits of permissible behaviour by secretly recording his conversation with V., who was acting on their instructions. He claimed that his conviction had resulted from trickery and subterfuge incompatible with the notion of a fair trial ...

102. The Court notes that ... the applicant had not been under any pressure to receive V. at his “guest house”, to speak to him, or to make any specific comments on the matter raised by V. ... the applicant was not detained on remand but was at liberty on his own premises attended by security and other personnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him. Thus, the Court is not convinced that the obtaining of evidence was tainted with the element of coercion or oppression ...

103. The Court also attaches weight to the fact that in making their assessment the domestic courts did not directly rely on the recording of the applicant’s conversation with V., or its transcript, and did not seek to interpret specific statements made by the applicant during the conversation. Instead they examined the expert report drawn up on the conversation in order to assess his relations with V. and the manner in which he involved himself in the dialogue. Moreover, at the trial the recording was not treated as a plain confession or an admission of knowledge capable of lying at the core of a finding of guilt; it played a limited role in a complex body of evidence assessed by the court.

104. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation was put, the Court finds that the proceedings in the applicant’s case, considered as a whole, were not contrary to the requirements of a fair trial.

► ***Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010**

55. The Court considers that being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis for his prosecution for a criminal offence of theft. Consequently, the Court is not satisfied that the applicant validly waived the privilege against self-incrimination before or during the drawing of the inspection record. Moreover, given the weight accorded to the applicant’s admission at the trial, the Court does not need to determine the validity of the applicant’s subsequent waiver of the privilege against self-incrimination in the “Explanations”, which derived from his earlier admission ...

56. In sum, the evidence available to the Court supports the claim that the applicant’s pre-trial admission, whether directly self-incriminating or not, was used in the proceedings in a manner which sought to incriminate him. In the Court’s view,

statements obtained in the absence of procedural guarantees should be treated with caution ...

57. Hence, what remains to be determined is whether the criminal proceedings against the applicant can be considered fair on account of the use made of the applicant's pre-trial admission. Regard must be had to whether the rights of the defence have been respected and whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.

59. ... Thus, the Court concludes that the trial court based the conviction of the applicant on the statement that he had given to the police without being informed of his right to not incriminate himself.

60. In the light of the above considerations, given the particular circumstances of the present case and taking the proceedings as a whole, the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

► ***H. and J. v. Netherlands (dec.)*, 978/09, 13 November 2014**

64. Both applicants complained of the use made in the criminal proceedings against them of the statements which they had made in the asylum proceedings. They submitted that these statements had been extracted from them under coercion, though with a promise of confidentiality. They also complained of having been confronted with these statements during the criminal investigation. ...

75. The Court notes that the applicants entered the Netherlands of their own accord, asking for its protection. For their entitlement to protection – in the form of safe residence on Netherlands territory ... – to be recognised, they were required to satisfy the Netherlands Government that their stated fear of persecution was well-founded. Since they bore the burden of proof, the Court finds nothing incongruous in the Government's demanding the full truth from them. The suggestion that the applicants' statements to the immigration authorities were extracted under coercion is therefore baseless.

76. The applicants submitted in the second place that they had been required during the asylum proceedings to tell the whole truth, but had not been warned that any statement they might make might be forwarded to the public prosecutor with a view to initiating a criminal investigation and a prosecution.

77. The subordinate Government body charged with processing the applicants' asylum claims, the Immigration and Naturalisation Service, promised the applicants that their statements would be treated as confidential. The Court finds this natural. Indeed, it is difficult to imagine an asylum system functioning properly if asylum-seekers are not given the assurance that their statements will not come to the knowledge of the very entities or persons from whom they need to be protected.

78. Conversely, the Court considers that a practice of confidentiality appropriate to the processing of asylum requests should not be allowed to shield the guilty from condign punishment. Consequently, the Court cannot find that once these

statements were in the possession of the Government the Deputy Minister of Justice was precluded by Article 6 of the Convention from transferring them to the public prosecution service, another subordinate Government body, to be used by it within its area of competence.

79. Finally, the applicants complained of having been confronted during the criminal investigation with the statements which they had made to the Immigration and Naturalisation Service.

80. The fact that the applicants were confronted during the criminal investigation with the statements which they had made during the asylum proceedings has no bearing on the fairness of the criminal proceedings. The Court points out that the applicants were heard under caution and enjoyed the right to remain silent ... Moreover, neither applicant ever admitted torture, or any other crimes, either during the asylum proceedings or during the criminal proceedings; it is not, therefore, the case that they were induced to make a confession that was afterwards used to ground their conviction ...

81. It follows from the above that this part of the applications is manifestly ill-founded ...

See also GATHERING EVIDENCE (Obligation to give information), p. 152, INTERROGATION (Right to remain silent), p. 171, and PROOF AND EVIDENCE (Prohibition on self-incrimination), p. 241 above

Entrapment and incitement

See also DEFENCE (Disclosure of prosecution evidence, Withholding of evidence in the public interest), p. 306 below

► *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008

69. Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. It is therefore not sufficient for these purposes ... that general safeguards should have been observed, such as equality of arms or the rights of the defence.

70. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention ...

71. The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination ... of whether the prosecuting authorities had gone beyond the limits authorised by the criminal conduct simulation model ... , in other words whether or not they had incited the commission of a criminal act. To that end, they should have established

in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. This was especially important having regard to the fact that VS, who had originally introduced AZ to the applicant and who appears to have played a significant role in the events leading up to the giving of the bribe, was never called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of these points.

72. However, the domestic authorities denied that there had been any police incitement and took no steps at judicial level to carry out a serious examination of the applicant's allegations to that effect. More specifically, they did not make any attempt to clarify the role played by the protagonists in the present case, including the reasons for AZ's private initiative in the preliminary phase, despite the fact that the applicant's conviction was based on the evidence obtained as a result of the police incitement of which he complained.

Indeed, the Supreme Court found that there was no need to exclude such evidence since it corroborated the applicant's guilt, which he himself had acknowledged. Once his guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. However, a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects.

73. In conclusion ... the Court considers, ... that the actions of AZ and VS had the effect of inciting the applicant to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention.

► *Miliniene v. Lithuania*, 74355/01, 24 June 2008

39. ... the Court notes that the applicant was able to put clear entrapment arguments before the domestic courts ... a reasoned response was given to them, particularly by the Supreme Court in its rejection of her cassation appeal ... As the Court has already noted, there were clearly good reasons to commence the investigation after SŠ had contacted the police. It was established that SŠ had no special relationship with the applicant, from which can be inferred that he had no ulterior motive in denouncing the applicant ... The model had been lawfully conceived and put into action. Moreover it had been adequately supervised by the prosecution, even if court supervision would have been more appropriate for such a veiled system of investigation.

41. In the light of the foregoing considerations, the Court finds that there has been no violation of Article 6 § 1 of the Convention.

► *Lagutin and Others v. Russia*, 6228/09, 24 April 2014

121. In all those criminal cases, when the drugs police relied on classified information from undisclosed sources implicating the applicants in drug trafficking, it fell

to the domestic courts to verify the existence of such information prior to the first contact between the undercover agent and the suspect, to assess the content of that information and to decide whether or not it could be disclosed to the defence. In the circumstances of the present cases, the entrapment plea could not be examined without requesting all relevant materials concerning the allegedly pre-existing “operational information” incriminating the applicants prior to the undercover operations and questioning the undercover agents about the early stages of their infiltration. However, the courts made no attempts to check the allegations of the drugs police and accepted their uncorroborated statements that they had had good reasons for suspecting the applicants. They dismissed the entrapment plea in breach of their procedural obligations set out in the Court’s case-law ... That failure was particularly consequential given the importance of a judicial examination of the entrapment plea, which is the only safeguard against provocation provided for in the Russian system.

122. In cases such as the present ones the determination of an entrapment plea is inseparable from the question of the defendant’s guilt, and the failure to address it compromised the outcome of the applicants’ trials beyond repair. It was also at odds with the fundamental guarantees of a fair hearing, in particular the principles of adversarial proceedings and the equality of arms. The courts did not ensure that the prosecution had discharged the burden of proof by establishing that there had been no incitement and thus unduly placed the burden of adducing evidence of entrapment on the applicants. However, since the “operational information” was not disclosed, it was impossible for the applicants to challenge its content and relevance, and that burden was impossible to discharge. Consequently, the applicants were put at a disadvantage vis-à-vis the prosecution with nothing to counterbalance that, restore the equality of arms and achieve the overall fairness of the criminal proceedings.

123. In view of the above factors, the Court considers that in all five cases the trial courts failed to comply with their obligation to examine the plea of entrapment effectively ...

125. There has accordingly been a violation of Article 6 of the Convention as regards all five applicants.

See also GATHERING EVIDENCE (Undercover agents), p. 149 above

Breach of privacy

See also GATHERING EVIDENCE (Search and seizure, p. 132, Interception of communications, p. 144 and Audio and video surveillance, p. 146) above

Illegal searches and seizures

► *Mialhe v. France (No. 2)*, 18978/91, 26 September 1996

38. ... Essentially, the applicant said he was the victim of the consequences of the original breach of Article 8 of the Convention ... found by the Court in the *Mialhe* (no. 1) judgment; the prosecuting authorities had rendered his criminal conviction

unfair, based as it was almost exclusively on the documents seized by the customs in circumstances held to have been contrary to the Convention ...

44. The Court points out that ... the ordinary courts did, within the limits of their jurisdiction, consider the objections of nullity raised by Mr Mialhe and dismissed them.

Furthermore, it appears clearly from their decisions that they based their rulings – among other things as to residence for tax purposes – solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial ...

46. In conclusion, the proceedings in issue, taken as a whole, were fair. There has therefore been no breach of Article 6 para. 1 ...

► ***Lisica v. Croatia*, 20100/06, 25 February 2010**

58. The Court stresses that it might be that in certain circumstances, such as where the identity of perpetrators is unknown or where any delay in securing the evidence might cause it to perish, the police or other competent authorities will have to carry out searches or other acts aimed at securing evidence without the presence of the defendants. However in the present case the defendants had been identified as potential perpetrators and arrested as early as 24 May 2000 at 8.55 a.m. ..., that is to say before the search of the BMW vehicle was carried out. Furthermore, nothing in the case-file suggests that the evidence in question was of a perishable nature. Therefore, there was no good reason to carry out the searches in question without the presence, or even knowledge, of the applicants or their counsel or at least in the presence of some neutral witnesses ...

60. ... the search of the VW Golf vehicle carried out by the police on 24 May 2000 as well as the entry of the police into the first applicant's vehicle on 26 May 2000, both without the applicants or their counsel being present or even informed of these acts and without a search warrant for the search of the BMW on 26 May 2000, produced an important piece of evidence. The Court stresses that it was the only evidence which established direct links with the first applicant's vehicle and the Golf II vehicle driven by the robbers, while all other evidence had circumstantial quality. However, the circumstances in which it was obtained cannot eliminate all doubt as to its reliability and affected the quality of the evidence in question.

61. Viewed in light of all the above-mentioned principles, the foregoing considerations are sufficient to enable the Court to conclude that the manner in which this evidence was used in the proceedings against the applicant had an effect on the proceedings as a whole and caused them to fall short of the requirements of a fair trial.

Use of listening devices

► ***Khan v. United Kingdom*, 35394/97, 12 May 2000**

36. The Court notes at the outset that ... the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law ... Moreover, ... there was no suggestion that, in

fixing the device, the police had operated otherwise than in accordance with the Home Office Guidelines. In addition, as the House of Lords found, the admissions made by the applicant during the conversation with B. were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions. The “unlawfulness” of which complaint is made ... relates exclusively to the fact that there was no statutory authority for the interference with the applicant’s right to respect for private life and that, accordingly, such interference was not “in accordance with the law”, as that phrase has been interpreted in Article 8 § 2 of the Convention.

37. The Court next notes that the contested material ... was in effect the only evidence against the applicant and that the applicant’s plea of guilty was tendered only on the basis of the judge’s ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker ...

38. The central question ... is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that ... the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the *voir dire* and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE [Police and Criminal Evidence Act], and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference ...

39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.

40. In these circumstances, the Court finds that the use at the applicant’s trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

► **Bykov v. Russia [GC], 4378/02, 10 March 2009**

95. ... the Court reiterates that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance ... In the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and dismissed in reasoned decisions. The Court notes that the applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence.

98. ... the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant's conviction, corroborated as it was by other conclusive evidence. Nothing has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary.

Use of video surveillance

► *Perry v. United Kingdom (dec.)*, 63737/00, 26 September 2002

2. ... The applicant asserted that in this case the blatant disregard of procedure rendered the use of the material unfair. In particular, as he had not been warned of the making of the videotape, he did not have the opportunity to agree instead to an identification parade or to object to any of the volunteers who participated in the compilation. The Court would observe that the applicant had already been afforded a number of opportunities to participate in a conventional identification parade and failed to make use of them. It also recalls that the trial judge reviewed the making of the videotape in some detail and that he found that there was no unfairness in the use of the film for identification purposes as the eleven persons used as volunteers were suitable comparators, more in fact than the required eight. Though the applicant's solicitor had not been present at the showing of the film to the witnesses, the video film showed the process by which the tape was shown to witnesses and the applicant and the court were able to see how the witnesses had, or had not, reached an identification of the applicant. The Court further notes that ... this material was not the only evidence against the applicant.

In the circumstances however, the existence of fair procedures to examine the admissibility and test the reliability of the disputed evidence takes on importance. The Court recalls in that regard that the applicant's counsel challenged the admissibility of the video tape in a *voir dire*, which was in fact repeated due to the change of judge. He was able to put forward arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner. The second judge in a careful ruling however admitted the evidence and the applicant remained entitled to challenge it before the jury. The Court considers that there was no unfairness in leaving it to the jury, on the basis of a conscientious summing-up by the judge, to decide where the weight of the evidence lay. Furthermore, the judge's approach was reviewed on appeal by the Court of Appeal which found that he had taken into account all the relevant factors and that his ruling and summing-up could not be faulted. At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and quality of the identification evidence based on the videotape ...

The Court is satisfied in the circumstances that the applicant's trial and appeal satisfied the requirements of Article 6 § 1 of the Convention. It would observe that the use at trial of material obtained without a proper legal basis or through unlawful means will not generally offend the standard of fairness imposed by Article 6 § 1 where proper procedural safeguards are in place and the nature and source of the material is not tainted, for example, by any oppression, coercion or entrapment which would render reliance on it unfair in the determination of a criminal charge ... The obtaining of such information is rather a matter which calls into play the

Contracting State's responsibility under Article 8 to secure the right to respect for private life in due form.

Confessions made without the assistance of a lawyer

► *Brennan v. United Kingdom*, 39846/98, 16 October 2001

53. The applicant argued that in the absence of independent evidence of video or taped records of the police interviews, and the absence of the accused's solicitor, there were considerable difficulties for an accused to convince a court, against the testimony of the police officers, that any oppression took place. The Court agrees that the recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect's lawyer. However, it is not persuaded that these are an indispensable precondition of fairness within the meaning of Article 6 § 1 of the Convention. The essential issue in each application brought before this Court remains whether, in the circumstances of the individual case, the applicant received a fair trial. The Court considers that the adversarial procedure conducted before the trial court, at which evidence was heard from the applicant, psychological experts, the various police officers involved in the interrogations and the police doctors who examined him during his detention, was capable of bringing to light any oppressive conduct by the police. In the circumstances, the lack of additional safeguards has not been shown to render the applicant's trial unfair.

54. As regards the applicant's reliance on *Magee ...*, the Court observes that this case concerned a more extreme situation where the applicant was kept incommunicado by the police for a 48-hour period and his admissions were all made before he was allowed to see his solicitor. In the present case, the applicant's access to his solicitor was deferred for twenty-four hours and his admissions were made during the subsequent period when he was not being denied legal consultation ...

55. The Court concludes that there has been no violation of Article 6 § 1 of the Convention and/or Article 6 § 3 (c) as regards the police interviews.

► *Salduz v. Turkey* [GC], 36391/02, 27 November 2008

56. ... the applicant's right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively ... no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect ...

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution's arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police, both at the trial and on appeal. However, as is apparent from

the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge ... Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy ... In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's ... It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody ...

59. ... no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent ...

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody ... the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

61. Still, ... as explained above, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the state security courts.

62. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights ...

► ***Dvorski v. Croatia* [GC], 25703/11, 20 October 2015**

103 Turning next to the question whether the resulting restriction on the applicant's exercise of his informed choice of lawyer adversely affected the fairness of the proceedings as a whole, the Court notes at the outset that the applicant's statement to the police was used in convicting him, even though it was not the central platform of the prosecution's case ... It is also true that the trial court viewed his statement in the light of the complex body of evidence before it ... Specifically, in convicting the applicant, the trial court relied on the statements of a number of witnesses cross-examined during the trial, numerous expert reports and the records of the crime-scene investigation and searches and seizures, as well as relevant photographs and other physical evidence. In addition, the trial court had at its disposal the confessions made by the applicant's co-accused at the trial, and neither the applicant nor his

co-accused ever argued that any of their rights had been infringed when they had made those statements.

104. Nor did the applicant ever complain during the criminal proceedings that the lawyer M.R. had failed to provide him with adequate legal advice. Furthermore, in her closing arguments at the trial, the applicant's representative asked the court – in the event of its rejecting her client's plea of not guilty – to take into consideration in sentencing the applicant his confession to the police and his sincere regret ...

105. As to the manner in which M.R. was chosen to represent the applicant, the Court refers to Article 177 § 5 of the Code of Criminal Procedure, which requires that an accused should first be invited to hire a lawyer of his or her own choosing ... Only where the lawyer initially chosen by a suspect is unable to attend police questioning within a certain period of time should a replacement lawyer be chosen from the list of duty lawyers provided to the competent police authority by the county branches of the Croatian Bar Association. However, there is no conclusive evidence in the documents submitted to the Court as to whether these procedures were followed in the applicant's case. The Court finds it unfortunate that the procedures used and decisions taken were not properly documented so as to avoid any doubts raised about undue pressure in respect of the choice of lawyer ...

106. The Court notes that the record of the applicant's questioning by the police indicates that M.R. arrived at the police station at around 7.45 p.m. on 14 March 2007 and that the questioning of the applicant commenced at 8.10 p.m. ... There is no indication of the exact time when the applicant and M.R. actually commenced the consultation, nor is there any explanation of why that information was not provided in the record of the questioning. The Court notes also that the statement from D.H., the Rijeka County State Attorney, indicates that M.R. talked to the applicant in private for about ten minutes ... The judgment of the Rijeka County Court indicates that M.R. came to the police station at 7.45 p.m. and that the questioning started at 8.10 p.m. ... This was confirmed in the judgment of the Supreme Court ... In the Court's view, without speculating as to the effectiveness of the legal assistance provided by M.R., this period appears to have been relatively short, bearing in mind the scope and seriousness of the accusations, involving three counts of aggravated murder and further counts of armed robbery and arson. Regard should also be had in this context to the requirement in Article 6 § 3 (b) that an accused should be afforded adequate time and facilities for the preparation of his or her defence.

107. G.M. would already have been available to assist the applicant in the morning, long before the questioning started, and was a lawyer whom the applicant knew from a previous case. Had he been informed by the police of G.M.'s presence and had he actually chosen G.M. to represent him, the applicant would have had considerably more time to prepare himself for the questioning.

108. In this connection, the Court again underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial ... and emphasises that a person charged with a criminal offence should already be given the opportunity at this stage to have recourse to legal assistance of his or her own choosing ... The fairness of proceedings requires

that an accused should be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support for an accused in distress and checking of the conditions of detention ...

109. Where, as in the present case, it is alleged that the appointment or the choice by a suspect of the lawyer to represent him has influenced or led to the making of an incriminating statement by the suspect at the very outset of the criminal investigation, careful scrutiny by the authorities, notably the national courts, is called for. However, the reasoning employed by the national courts in the present case in relation to the legal challenge mounted by the applicant concerning the manner in which his confession had been obtained by the police was far from substantial. Neither the trial court nor the investigating judge nor any other national authority took any steps to obtain evidence from G.M. or the police officers involved in order to establish the relevant circumstances surrounding G.M.'s visit to Rijeka Police Station on 14 March 2007 in connection with the applicant's questioning by the police. In particular, the national courts made no real attempt to provide reasons supporting or justifying their decision in terms of the values of a fair criminal trial as embodied in Article 6 of the Convention.

110. In these circumstances, having regard to the purpose of the Convention, which is to protect rights that are practical and effective ..., the Court is not convinced that the applicant had an effective opportunity to challenge the circumstances in which M.R. had been chosen to represent him during police questioning.

111. In determining whether, taking the criminal proceedings as a whole, the applicant received the benefit of a "fair hearing" for the purposes of Article 6 § 1, the Court must have regard to the actions of the police in effectively preventing the applicant, at the very outset of the investigation, from having access to the lawyer chosen by his family and from freely choosing his own lawyer, and to the consequences of the conduct of the police for the subsequent proceedings. In the abstract, if a suspect receives the assistance of a qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair – subject to the proviso that there is no evidence of manifest incompetence or bias ... In the instant case, it can be presumed that the consequence of the police's conduct was that in his very first statement to the police, instead of remaining silent, as he could have done, the applicant made a confession, which was subsequently admitted in evidence against him. It is also significant that during the investigation and ensuing trial the applicant did not subsequently rely on his confession, save by way of mitigation in relation to the sentence, but took the first opportunity, before the investigating judge, to contest the manner in which the confession had been obtained from him by the police ... Although there was other evidence against him, the significant likely impact of his initial confession on the further development of the criminal proceedings against him cannot be ignored by the Court. In sum, in the Court's view, the objective consequence of the police's conduct in preventing the lawyer chosen by the applicant's family from having access to him was such as to undermine the fairness

of the subsequent criminal proceedings in so far as the applicant's incriminating initial statement was admitted in evidence.

Hearsay

► *X. v. Federal Republic of Germany (dec.)*, 8414/78, 4 July 1979

Article 6.1 of the Convention. ... does not exclude that the trial court, in order to establish the full truth, relies on indirect ("hearsay") evidence, as long as the use of such evidence is not in the circumstances unfair. In the present case there is no appearance of unfairness in the use of the indirect evidence relied on by the German Courts. The Commission here notes that the applicant's conviction was based not only on the evidence concerning the statements made by MM. A. and W. before the police but also on the testimony of Miss G., who at the trial stated that she had received heroin from the applicant, and on the evidence of two police officers, MM. H. and P. who, at the trial, stated that they had found traces of possession and consumption of drugs by the applicant. The Commission finally observes that, in view of the contradiction between MM. A.'s and W.'s statements before the police and their subsequent evidence at the trial, both the District Court and the Regional Court had to consider the credibility of their declarations. The Commission finds that the courts carefully examined this question and that their determination of credibility again raises no issue under Article 6.1 of the Convention.

► *Haas v. Germany (dec.)*, 73047/01, 17 November 2005

Having regard to the proceedings as a whole, and considering the alleged shortcomings together, as required by Article 6 §§ 1 and 3 (d) ..., the Court observes that there has been an accumulation of hearsay evidence in the proceedings against the applicant. Various witnesses had introduced into the main hearing the statements of witnesses whom the applicant, for different reasons, had no opportunity to examine or have examined. However, the domestic courts made considerable efforts to obtain oral testimony notably from Said S. and assessed his depositions, as well as those obtained from the anonymous informers and B., very carefully. Given that the applicant's conviction had also been based on several further items of evidence, the Court finds that the rights of the defence had not been restricted to an extent incompatible with the guarantees of Article 6 §§ 1 and 3 (d).

► *Donohoe v. Ireland*, 19165/08, 12 December 2013

14. The applicant was brought before the Special Criminal Court ("SCC") and charged with membership ... of an unlawful organisation, the IRA [Irish Republican Army] ...

16. On 18 November 2004 the SCC delivered its judgment convicting the applicant and his co-accused. In so doing, it identified four strands of evidence tendered by the prosecution: (i) the sworn testimony of Chief Superintendent PK that it was his belief that, independently of any matter discovered at the time of the Corke Abbey events or any matters following those events, the applicant was a member of the IRA; (ii) evidence that associated each of the accused with the activities at Corke

Abbey which the prosecution contended were of a type usually associated with the IRA and which it claimed supported or corroborated PK's evidence; (iii) evidence that, following a search of their homes, documentation was found which was said to be of a type one might expect to find in the possession of an active member of an organisation like the IRA; and (iv) inferences, it argued, that could properly be drawn, pursuant to statute, arising from the failure of the applicant to answer questions material to the investigation of the offence in question.

17. The trial court considered the first strand, which comprised the evidence of a Chief Superintendent who testified that he believed that, on 10 October 2002, the applicant was a member of the IRA. He stated that his belief was based on confidential information available to him, of an oral and written nature, from police and civilian sources. This information was independent of any matters discovered when five persons were arrested for unlawful activity at Corke Abbey and also independent of any matters discovered following those events. When asked to identify his sources, he claimed privilege stating that disclosure would endanger lives and State security ...

78. The Court notes that the present case does not involve the evidence of an absent or an anonymous witness. Unlike *Al-Khawaja and Tahery*, the non-disclosed material in issue here did not, in itself, form part of the prosecution's case. It was testimony of an identifiable and present witness (Chief Superintendent PK) that constituted the impugned evidence in question. It is true that Chief Superintendent's belief was based on sources which were not disclosed to the applicant, but those sources in themselves did not constitute evidence upon which the prosecution sought to rely. Nevertheless, the Court considers that in view of the potential unfairness caused to the defence by the domestic courts' upholding of the claim of privilege in respect of Chief Superintendent PK's sources, it should be guided by the general principles articulated by the Court in *Al-Khawaja and Tahery* in its consideration of the applicant's complaints.

79. Accordingly, the questions to be addressed by the Court are threefold: (i) whether it was necessary to uphold the claim of privilege asserted by Chief Superintendent PK as regards the source of his belief; (ii) if so, whether Chief Superintendent PK's evidence was the sole or decisive basis for the applicant's conviction; and, (iii) if it was, whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair within the meaning of Article 6 of the Convention ...

81. The applicant did not challenge, either before the domestic courts or this Court, PK's view that disclosure of his sources would endanger persons and State security ... The Court considers these justifications for the grant of privilege – effective protection of persons and State security as well as effective prosecution of serious and complex crime – to be compelling and substantiated.

82. As to whether the evidence of Chief Superintendent PK was the sole or decisive basis for the applicant's conviction, the Court notes that the SCC expressly stated that it would not convict the applicant on the basis of his evidence alone. In addition to his evidence, the trial court heard over 50 other prosecution witnesses. It also

examined what it regarded as 'significant' other material evidence and it identified therefrom three further strands of corroborative evidence against the applicant ...

85. In conclusion, the SCC was careful to point out that none of the four strands of evidence, if taken in isolation, was sufficient to ground the applicant's conviction. However, its assessment was that, when viewed in conjunction with Chief Superintendent PK's belief, the applicant's association with the Corke Abbey activities, the material found during the search of his home and the negative inference to be drawn from his failure to respond to material questions, were supportive of the charge of membership of the IRA.

86. The CCA [Court of Criminal Appeal], on appeal, reviewed the evidential analysis of the SCC in detail ... It found that in view of the SCC's express statement that it had not convicted on the basis only of Chief Superintendent PK's evidence, still less on the basis of anything appearing in the documents examined by the trial judges as part of their monitoring of procedures, the information in the documentation could not be regarded as having been 'determinative'. The CCA approved the SCC's conclusion that, when taken cumulatively, the four strands of evidence established, beyond reasonable doubt, that the applicant was guilty, as charged.

87. In view of the foregoing, the Court considers that Chief Superintendent PK's evidence cannot be considered to have been the sole or decisive evidence grounding the applicant's conviction. However, the Court observes that his evidence clearly carried some weight in the establishment of the applicant's guilt. Accordingly, it considers it necessary to examine, carefully, whether there were adequate counterbalancing factors and safeguards in place ... in order to ensure that the disadvantage caused to the applicant by upholding PK's claim of privilege did not restrict his defence rights to an extent incompatible with the requirements of Article 6 of the Convention.

88. The Court observes, at the outset, that the trial court was alert to the need to approach the Chief Superintendent's evidence with caution having regard to his claim of privilege and was aware of the necessity to counterbalance the restriction imposed on the defence as a result of its decision upholding that claim. It proceeded to adopt a number of measures having regard to the rights of the defence.

Firstly, the court reviewed the documentary material upon which PK's sources were based in order to assess the adequacy and reliability of his belief. While the Court does not regard such a review, in itself, to be sufficient to safeguard the rights of the defence ..., it nevertheless considers that the exercise of judicial control over the question of disclosure in this case provided an important safeguard in that it enabled the trial judges to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed material ...

Secondly, the trial court in considering the claim of privilege was alert to the importance of the 'innocence at stake' exception to any grant of privilege. It confirmed, expressly, that there was nothing in what it had reviewed that could or might assist the applicant in his defence and that, if there had been, then its response would have been different. The trial court was thus vigilant in exploring whether the non-disclosed material was relevant or likely to be relevant to the defence and was attentive to the requirements of fairness when weighing the public interest in concealment against

the interest of the accused in disclosure ... The Court considers that if the applicant had any reason to doubt the trial judges' assessment in this regard he could have requested the appeal court to review the material and to check the trial court's conclusions. However, he chose not to do so.

Thirdly, in coming to its judgment the trial court stated, specifically, that it had expressly excluded from its consideration any information it had reviewed when it was weighing the Chief Superintendent's evidence in the light of the proceedings as a whole. It further confirmed that it would not convict the applicant on the basis of PK's evidence alone and that it required his evidence to be corroborated and supported by other evidence.

The Court further notes that, in advance of taking its intended procedural steps, the trial court informed the applicant and his co-accused of its intentions as regards its procedures and it afforded them an opportunity to make detailed submissions *inter partes* which they did ...

89. In addition to the above measures taken by the trial court to safeguard the rights of the defence, the Court also considers that there existed other strong counterbalancing factors in the statutory provisions governing belief evidence.

90. In the first place, as noted above, providing belief evidence involves a complex intelligence gathering and analytical exercise. Section 3(2) therefore requires that those doing so must be high-ranking police officers and, moreover, they are generally officers with significant experience of such organisations and in gathering and analysing relevant intelligence ...

91. In addition, the Chief Superintendent's evidence is not admitted as an assertion of fact but as the belief or opinion of an expert. It is not, therefore, conclusive and, indeed, it has no special status it being one piece of admissible evidence to be considered by the trial court having regard to all the other admissible evidence ...

92. The Court further notes that while the scope of cross-examination was restricted by the trial court's ruling, the possibility to cross-examine the witness on his evidence was not entirely eliminated. The possibility to test the Chief Superintendent's evidence in a range of ways still remained. Consistently, such evidence could be tested by the defence even if privilege had been granted as regards the sources upon which that opinion was based ..., the Chief Superintendent's evidence can, therefore, be challenged on all matters collateral and accessory to the content of the privileged information. He could be cross-examined on the nature of his sources (documentary, civilian, police and amount); on his analytical approach and process; on whether he knew or personally dealt with any of the informants; and on his experience in gathering related intelligence, in dealing with informants as well as in rating and analysing informants and information obtained. His responses would allow the trial court to assess his demeanour and credibility and, in turn, the reliability of his evidence. This possibility of testing the witness distinguishes this case from those where the evidence of absent/anonymous witnesses is admitted ..., and where the cross-examination of these witnesses is hindered or not possible at all. There is, however, no evidence that the present applicant attempted to test the Chief Superintendent's belief evidence in any way other than by asking him to

disclose his sources. In this respect, it remains relevant also to note the comment of O'Donnell J in *DPP [Director of Public Prosecutions] v. Donnelly and Others* to the effect that an accused may decide not to cross-examine a Chief Superintendent, not because of the constraints imposed by a grant of source privilege, but for other reasons including to avoid the risk of unwittingly strengthening the prosecution's case against him.

93 In such circumstances, and recalling that this Court's task is to ascertain whether the proceedings in their entirety were fair, the Court considers that the weight of the evidence other than the belief evidence, combined with the counterbalancing safeguards and factors, must be considered sufficient to conclude that the grant of privilege as regards the sources of the Chief Superintendent's belief did not render the applicant's trial unfair.

See also PROOF AND EVIDENCE (Witnesses, Cross-examination), p. 246 above

Previously given statements and confrontations

► *S. v. Federal Republic of Germany (dec.)*, 8945/80, 13 December 1983

9. ... the Commission ... notes that the applicant's conviction was based not only on the records of statements made in the Netherlands but also, and primarily, on his own statements before the German courts: when convicting the applicant the Frankfurt Regional Court referred in the first place to his own declarations at the trial in connection with his admission, at the earlier hearing before the Frankfurt District Court, that he had tried to procure heroin in Amsterdam. It is true that, at the trial, the applicant refused to make detailed statements. He did not expressly repeat the admission made earlier before the District Court, but he did not deny having made it nor revoke it either. On the contrary he argued that his offence had been sufficiently sanctioned by his punishment in the Netherlands and, in his final address, he requested a mild sentence, observing that he thereby contradicted counsel's plea for an acquittal. The Commission does not find that in these circumstances, the Frankfurt Regional Court proceeded unfairly in convicting the applicant on the basis of his admission at the earlier hearing before the District Court in connection with his declarations at the trial and – as to further details, i.e. the exact location in Amsterdam, the time and the amount of heroin – on the indirect evidence obtained from the Netherlands.

► *Ninn-Hansen v. Denmark (dec.)*, 28972/95, 18 May 1999

The Court recalls that the Court of Impeachment did not base its conviction of the applicant on previously made statements by witnesses who were not heard by the Court of Impeachment as well.

The Court considers that the Court of Impeachment's admission of the transcripts of the Court of Inquiry in order merely to confront witnesses with their previous statements cannot be considered contrary to Article 6 of the Convention. There

is therefore no appearance of a violation of Article 6 with regard to the Court of Impeachment's decision to admit the transcripts of the Court of Inquiry.

Immunity given to witnesses

► *X. v. United Kingdom (dec.)*, 7306/75, 6 October 1976

The Commission observes in this connection that the use at the trial of evidence obtained from an accomplice by granting him immunity from prosecution may put in question the fairness of the hearing granted to an accused person and thus raise an issue under Art. 6 (1) of the Convention. In the present case, however, the manner in which the evidence given by S. was obtained was openly discussed with counsel for the defence and before the jury. Furthermore the Court of Appeal examined carefully whether due account was taken of these circumstances in the assessment of the evidence and whether there was corroboration. The Commission concludes, therefore, that an examination of the trial as a whole does not disclose any appearance of a violation of Art. 6(1) of the Convention.

Breach of national law

► *Parris v. Cyprus (dec.)*, 56354/00, 4 July 2002

... the Court notes that a first post mortem examination was carried out by two pathologists instructed by the coroner. As the family of the victim were not satisfied with the conclusions of the report, they asked the coroner to authorise a second examination. The coroner, who had in the meantime ordered the burial of the body, refused to grant the authorisation. However, the Attorney General gave his authorisation and a second post mortem examination was carried out by another pathologist [Dr Matsakis] who concluded that another cause had led [to] the victim's death.

... The Supreme Court stressed that besides the evidence of Dr Matsakis, there was also the testimony of the victim's father whose narration corroborated the findings of Dr Matsakis and which seriously contradicted the applicant's line of defence that the victim had jumped out of the window by herself. Moreover the Court notes that the applicant was able to challenge the accuracy of the second report and its author seems to have been exhaustively cross-examined by the defence ...

Furthermore, the Court cannot overlook the nature and the scope of the provision of the domestic law which was breached. It notes that Section 15 (2) of the Coroner's Law forms part of the provisions regarding the viewing of bodies and as such is primarily intended, as the Government also emphasise, to ensure respect of the corpse of a deceased and not of the procedural rights of an accused.

Finally, the Court notes that the applicant did not fail to draw the attention of the courts to a possible violation of Article 6 of the Convention and that the Supreme Court assessed the effect of admission of the evidence on the fairness of the trial.

In these circumstances, the Court considers that the proceedings as a whole were fair.

Chapter 12

Defence

NOTIFICATION OF CHARGE

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE (Charging, Notification), p. 181 above

► ***Gea Catalán v. Spain, 19160/91, 10 February 1995***

25. Mr Gea Catalán alleged a violation of Article 6 para. 3 (a) ... The violation derived from the fact that he had been sentenced on the basis of paragraph 7 of Article 529 of the Criminal Code and not on the basis of paragraph 1 of that Article, which had been relied on by the prosecuting authority and the civil party.

28. ... the Court considers that the discrepancy complained of was clearly the result of a mere clerical error, committed when the prosecution submissions were typed and subsequently reproduced on various occasions by the prosecuting authority and the civil party ...

29. Having regard to the clarity of the legal classification given to the findings of fact set out in the investigating judge's committal order of 1 July 1986 ..., the Court fails to see how Mr Gea Catalán could complain that he had not been informed of all the components of the charge, since the prosecution submissions were based on the same facts ... Furthermore in the instant case it would, as the Supreme Court rightly noted ..., have been absurd to have applied paragraph 1 of Article 529 of the Criminal Code, whereas the inference that it was paragraph 7 that applied, although not an automatic conclusion, could at any event have been arrived at through minimal recourse to logic.

30. In sum, the Court holds the applicant's complaint to be unfounded and therefore finds that there has been no breach of Article 6 para. 3 (a) ...

► ***De Salvador Torres v. Spain, 21525/93, 24 October 1996***

27. Mr de Salvador Torres alleged that the fact that he had been convicted of an offence with an aggravating circumstance with which he had never been expressly charged constituted a violation of Article 6 para. 3 (a) ...

33. ... the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the possibility that the courts ... would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence.

Therefore, the Court finds no infringement of the applicant's right under Article 6 para. 3 (a) ... to be informed of the nature and cause of the accusation against him.

► ***Mattoccia v. Italy*, 23969/94, 25 July 2000**

71. ... the Court is conscious of the fact that rape trials raise very sensitive and important issues of great concern to society and that cases concerning the very young or the mentally disabled often present the prosecuting authorities and the courts with serious evidential difficulties in the course of the proceedings. It considers, however, that in the present case the defence was confronted with exceptional difficulties. Given that the information contained in the accusation was characterised by vagueness as to essential details concerning time and place, was repeatedly contradicted and amended in the course of the trial, and in view of the lengthy period that had elapsed between the committal for trial and the trial itself (more than three and a half years) compared to the speed with which the trial was conducted (less than one month), fairness required that the applicant should have been afforded greater opportunity and facilities to defend himself in a practical and effective manner, for example by calling witnesses to establish an alibi.

72. Against this background, the Court finds that the applicant's right to be informed in detail of the nature and cause of the accusation against him and his right to have adequate time and facilities for the preparation of his defence were infringed.

► ***Vaudelle v. France*, 35683/97, 30 January 2001**

58. ... The applicant was accused of sexual abuse of minors aged under 15. The offences were therefore particularly serious, as the Criminal Court itself indicated ... The nature of the offences also made an assessment of the applicant's mental condition necessary since, after the applicant had been questioned by the gendarmerie, the public prosecutor ordered a psychiatric report on him. The applicant did not, however, attend either of the two appointments he was given and offered no explanation for his failure to do so, so that the Criminal Court had no means of knowing the reason for his absence.

65. ... the Court considers that in a case such as the present one, which concerns a serious charge, the national authorities should take additional steps in the interests of the proper administration of justice. They could have ordered the applicant to attend the appointment with the psychiatrist ... and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6 § 3 (a) of the Convention; it would also

have enabled the Criminal Court to reach its decision entirely fairly. However, that did not happen.

66. In the special circumstances of this case, the Court therefore holds that there has been a violation of Article 6 of the Convention.

► ***Sadak and Others v. Turkey (No. 1)*, 29900/96, 17 July 2001**

51. ... the Court notes first of all that in the bill of indictment filed by the prosecution on 21 June 1994 the applicants were accused solely of the crime of treason against the integrity of the State, as provided for by Article 125 of the Criminal Code. Although the applicants' links with PKK [Partiya Karkerên Kurdistan] members were mentioned by the prosecution, the Court notes that throughout the investigation those links were examined only with a view to establishing the constituent elements of the offence of which the applicants were initially accused by the prosecution. It is not disputed that, up to the last day, the hearing before the National Security Court had related solely to the crime of treason against the integrity of the State.

52. That being so, the Court must ascertain whether it was sufficiently foreseeable for the applicants that the characterisation of the offence could be changed from the one of treason against the integrity of the State of which they were initially accused to that of belonging to an armed organisation set up for the purpose of destroying the integrity of the State.

53. The Court takes account of the interpretation made by the National Security Court in its judgment of 8 December 1994, according to which Article 125 of the Criminal Code defined a crime in terms of the ends pursued and Article 168 in terms of the means deployed. The two crimes were considered to differ both in their material and in their mental aspects. Treason against the integrity of the State could only be perpetrated through the commission of acts that were serious enough to pose a genuine threat to the survival of the State. On the other hand, the material element of the offence punished under Article 168, paragraph 2, of the Criminal Code lay in belonging to an armed organisation already regarded as acting for a purpose contrary to Article 125 and having its own system of disciplinary rules and a hierarchical structure. It was not necessary in the context of that offence for the defendants themselves to have committed acts likely to pose a genuine threat to the survival of the State. Furthermore, the crime required a specific mental element, namely awareness of belonging to an illegal organisation ...

54. The Court therefore cannot accept the argument that the Government appear to put forward that the offences covered by Articles 125 and 168, paragraph 2, of the Criminal Code amount to varying degrees of the same offence. Although they appear in the same section of the Criminal Code, entitled "Crimes against the State", there is a clear distinction between the two Articles in both their material and their mental constituent elements.

55. It is not for the Court to assess the merits of the defences the applicants could have relied on if they had had enough time to prepare their defence against the accusation of belonging to an illegal armed organisation. It merely notes that it would be reasonable to argue that the defences would have been different from

those used to contest the accusation of treason against the integrity of the State. The hearing on that accusation focused on the question whether the applicants' activities as such were likely to pose a real threat to the integrity of the State. Yet on being accused of belonging to an illegal armed organisation the applicants had to convince the National Security Court both that they had not taken up a position within the hierarchical structure of the PKK and not been forced to abide by its disciplinary rules and that they had not been aware of belonging to that organisation.

56. In the light of the foregoing, the Court considers that belonging to an illegal armed organisation did not constitute an element intrinsic to the offence of which the applicants had been accused since the start of the proceedings.

57. The Court therefore considers that, in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Ankara National Security Court should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner, particularly by giving them the necessary time to do so. The case file shows that the National Security Court, which could, for example, have decided to adjourn the hearing once the facts had been recharacterised, did not give the applicants the opportunity to prepare their defence to the new charge, which they were not informed of until the last day of the trial, just before the judgment was delivered, which was patently too late. In addition, the applicants' lawyers were absent on the day of the last hearing. Whatever the reason for their absence, the fact is that the applicants could not consult their lawyers on the recharacterisation of the facts by the prosecution and the National Security Court.

58. Having regard to all the above considerations, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed ...

59. Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, which requires a fair trial.

► ***Miroux v. France*, 73529/01, 26 September 2006**

33. In the instant case, the court observes that the question at issue arose at the end of the hearing in the Assize Court and before the jury retired to consider its verdict, the reclassification of the charge becoming effective only through the response to this question during the deliberations ...

35. Moreover, the committal for trial before the Seine-Maritime Assize Court was on charges of "attempted rape" and "sexual assault", and it was only at the end of the hearing that the subsidiary question that led to the reclassification at issue was read out. As the classification "rape" had been considered at a previous committal on 18 February 1997, found non-existent by the Court of Cassation on 21 May 1997 and then expressly dismissed by the committal to the Assize Court of 23 October 1997, the applicant could reasonably consider that he no longer had to defend himself against the charge of "rape" and concentrate on defending himself against

the classification of “attempted rape” that was ultimately proceeded with. The Court considers, in the light of these elements, the “duty of extreme care when notifying the interested party” and the decisive role played by the indictment in criminal proceedings ..., that it has not been established that the applicant was aware that he might be convicted of rape ...

36. The Court observes that, while it is true that the legal basis of “rape” and “attempted rape” is the same, namely Article 222-23 of the Criminal Code, and that, more generally, in French criminal law a person who attempts to commit an offence is considered the author of the offence in the same way as a person who actually commits it ... It can nonetheless be observed that the two offences, in this case rape and attempted rape, differ significantly in their degree of performance. Indeed, unlike the complete offence, which involves the material accomplishment of a criminal intention through a particular result, attempt is characterised by a beginning of performance, in other words the partial accomplishment of an offence consisting of actions leading directly to its completion and accomplished with intent, as well as the lack of voluntary discontinuance by the author. Therefore “rape” requires the accomplishment of a specific result, namely sexual penetration, whereas this element is not necessary for the offence of “attempted rape” to be levelled against the applicant. It can therefore be argued that there is a difference in the degree of seriousness of the two offences, which would undoubtedly influence a jury in assessing the facts and determining sentence. This is especially true as juries tend to be particularly sensitive to the fate of victims in general, and victims of sexual offences in particular, an area in which, subjectively and despite the psychological trauma the victim suffers in either case, attempt is less “harmful” than the completed offence. Whilst an attempted offence attracts the same maximum sentence as that attracted by the complete offence, it could not be excluded that an Assize Court might take into account, when determining the *quantum* of the sentence, the difference between the attempted and the completed offence in terms of their “actual” seriousness and the harmful result. It can therefore legitimately be argued that the alteration of the charge by the Assize Court was likely to result in a harsher sentence for the applicant, without his being given the opportunity to prepare and present a defence against the new charge and its consequences, including if necessary with regard to the actual sentence liable to be imposed. The Court further notes that, while the maximum sentence applicable was 15 years’ imprisonment, the applicant was sentenced to 12 years’ imprisonment, a sentence not far short of the maximum.

37. In the light of all these elements, the Court finds that there was a violation of the applicant’s right to be informed in detail of the nature and cause of the accusation against him, and of his right to have adequate time and facilities for the preparation of his defence.

SUMMONS TO TRIAL

► *X. v. United Kingdom (dec.)*, 8231/78, 6 March 1982

2. ... It appears on the other hand, that the applicant was not informed about the precise date of the trial until immediately beforehand. The Commission considers

it desirable that accused persons be informed with reasonable notice of the date and place of the trial. However, this particular aspect of the applicant's trial alone cannot in this case be considered decisive for the question whether the applicant was granted a fair hearing. In view of the fact that he had ample time to prepare his defence, and considering the trial in its entirety, the Commission is satisfied that the conditions in which the applicant's case was heard by the Court were not incompatible with the notion of a fair hearing as understood by Article 6(1) of the Convention.

► ***Vaudelle v France*, 35683/97, 30 January 2001**

See Notification of charge, above.

ADEQUATE TIME AND FACILITIES

► ***Ferrari-Bravo v. Italy (dec.)*, 9627/81, 14 March 1984**

23. In this connection, the applicant also complains that his counsel were not given the time and facilities which they needed to prepare his defence (Article 6 para. 3(b)).

The Commission emphasizes that the applicant has not shown how the fact of his lawyers' having only two months to inspect the file [which consisted of more than 56,000 pages] before the investigating judge committed him for trial violated the right which he claims. It points out that the trial is still under way. There is thus nothing in the file to indicate that the provision in question has been violated.

► ***Padin Gestoso v. Spain (dec.)*, 39519/98, 8 December 1998**

2. The applicant complained that after his detention in June 1990 his lawyers had to wait until August 1990 before they could inspect the file ... the Court notes that, at the time when the applicant was charged and remanded in custody by the investigating judge on 11 June 1990 a lawyer was appointed under the legal aid scheme to defend his interests during the period of solitary confinement, which continued until 6 August 1990. In that connection, the applicant did not contest the fact that he was able to speak to a lawyer appointed under the legal aid scheme in order to prepare his defence. Furthermore, the applicant accepted that from the time when the solitary confinement was rescinded, that is from 6 August 1990 onwards, he had had access to the file. The Court notes in particular that after the forty-seven persons charged, including the applicant, were committed on 19 February 1992 for trial before the Criminal Division of the *Audiencia Nacional*, that court, by a decision of 29 October 1992, ordered that each of their lawyers be supplied with a complete copy of the investigation file, which ran to more than eighty volumes, so that they could make a provisional classification of the offences. The Court therefore notes that investigation of the case continued for several years, so that the applicant had sufficient time, after being served with the decision to charge him of 11 June 1990, for the preparation of his defence, which is the main purpose of Article 6 § 3 (b) of the Convention. In addition, there is nothing in the file which supports the conclusion that after the order to keep the investigation secret was lifted on 6 August 1990 the

applicant suffered any hindrance preventing him from instructing or consulting a lawyer in order to prepare the case for his defence. That being so, the Court considers that this part of the application must be rejected as being manifestly ill-founded ...

► ***Makhfi v. France*, 59335/00, 19 October 2004**

34. The Court notes that the applicant appeared before the Assize Court charged with rape and theft as a member of a gang, having had previous convictions for similar offences.

35. On 4 December the proceedings before the Assize Court resumed at 9.15 a.m. and went on until 1 p.m., then continued from 2.30 to 4.40 p.m., from 5 to 8 p.m. and from 9 p.m. to 12.30 a.m. the next day. During this last recess counsel for the applicant requested an adjournment, in the interests of the rights of the defence.

36. The court rejected the request and the proceedings resumed at 1 a.m. on 5 December and continued until 4 a.m.

37. The Court notes accordingly that after the proceedings resumed at 4.25 a.m. the applicant's counsel closed his case at about 5 a.m., following his colleague who was defending the other accused, by which time, in all, the proceedings had lasted 15 hours and 45 minutes. The accused, including the applicant, were heard last.

38. The hearings thus lasted a total of 17 hours and 15 minutes, following which the court withdrew to deliberate. The Court further notes that the Assize Court judges and jury deliberated from 6.15 to 8.15 a.m. on 5 December. The applicant was finally sentenced to eight years' imprisonment.

39. The Court reiterates that it has found in the past that tiredness must have placed the accused in a state of lowered physical and mental resistance at a time when they "had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed ... Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel ...".

40. The Court is of the opinion that it is essential that, not only those charged with a criminal offence, but also their counsel, should be able to follow the proceedings, answer questions and make their submissions without suffering from excessive tiredness. Similarly it was vital that judges and jurors should be in full control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment.

41. The Court finds that the conditions described above in the present case did not fulfil the requirements of a fair trial, and in particular the rights of the defence and the principle of equality of arms.

42. Accordingly, there was a violation of Article 6 § 3, combined with § 1 of the Convention.

► ***Galstyan v. Armenia*, 26986/03, 15 November 2007**

85. ... the Court notes that the applicant's case was examined in an expedited procedure under the CAO [Code of Administrative Offences]: according to Article 277 of the CAO, cases concerning offences of minor hooliganism were to be examined within one day. The Court recalls, however, that the existence and utilisation of expeditious proceedings in criminal matters is not in itself contrary to Article 6 of the Convention as long as they provide the necessary safeguards and guarantees contained therein ... the Government have failed to demonstrate convincingly that the applicant unequivocally enjoyed, both in law and in practice, the right to have the examination of his case adjourned in order to prepare his defence and that such an adjournment would have possibly been granted, had the applicant made a relevant request ...

86. The Court notes that, according to the Government, the entire pre-trial procedure lasted two hours from 17h30 to 19h30. The Government claimed that, since the applicant's case was not a complex one, two hours had been sufficient, taking into account that he had refused to have a lawyer, had not availed himself of his right to lodge motions and challenges, and had voluntarily signed the record of an administrative offence. The Court considers, however, that the mere fact that the applicant signed a paper in which he stated that he did not wish to have a lawyer and chose to defend himself in person does not mean that he did not need to be afforded adequate time and facilities to prepare himself effectively for trial. Nor does the fact that the applicant did not lodge any specific motions during the short pre-trial period necessarily imply that no further time was needed for him to be able – in adequate conditions – to properly assess the charge against him and to consider various avenues to defend himself effectively. Finally, the Court agrees that the applicant had the choice of refusing to sign the record of an administrative offence. However, contrary to what the Government claim, nothing in law or in the materials of the applicant's administrative case suggests that the applicant's signing of the record pursued any other purpose than confirming the fact of him having been familiarised with it and made aware of his rights and the charge against him.

87. The Court notes that the record of an administrative offence, which contained the charge and was the main evidence against the applicant, does not indicate precisely at what time he was presented with this document and how much time he was given to review it. Nor can this be established in respect of the police report and other materials prepared by the police. The parties disagreed as regards the exact length of the pre-trial period but, in any event, it is evident that this period was not longer than a few hours. The Court further notes that during this time the applicant was either in transit to the court or was being kept in the police station without any contact with the outside world. Furthermore, during this short stay at the police station, the applicant was subjected to a number of investigative activities, including questioning and a search. Even if it is accepted that the applicant's case was not a complex one, the Court doubts that the circumstances in which the applicant's trial was conducted – from the moment of his arrest up until his conviction – were such as to enable him to familiarise himself properly with and to assess adequately the charge and evidence against him, and to develop a viable legal strategy for his defence.

88. The Court concludes that the applicant was not afforded adequate time and facilities for the preparation of his defence. There has accordingly been a violation of Article 6 § 3 taken together with Article 6 § 1 of the Convention.

► ***Moiseyev v. Russia, 62936/00, 9 October 2008***

222. ... the Court takes note of its ... findings under Article 3 of the Convention that the applicant had been detained, transported and confined at the courthouse in extremely cramped conditions, without adequate access to natural light and air or appropriate catering arrangements. The applicant could not read or write, since he was confined to such a tiny space with so many other detainees. The suffering and frustration which the applicant must have felt on account of the inhuman conditions of transport and confinement undoubtedly impaired his faculty for concentration and intense mental application in the hours immediately preceding the court hearings. Admittedly, he was assisted by a team of professional attorneys who could make submissions on his behalf. Nevertheless, taking into account the nature of the issues raised in the proceedings and their close connection to the applicant's field of competence, the Court considers that his ability to instruct his counsel effectively and to consult with them was of primordial importance. The cumulative effect of the above-mentioned conditions and inadequacy of the available facilities excluded any possibility for the advance preparation of the defence by the applicant, especially taking into account that he could not consult the case file or his notes in his cell.

223. The Court therefore holds that the applicant was not afforded adequate facilities for the preparation of his defence, which undermined the requirements of a fair trial and equality of arms.

► ***Khodorkovskiy and Lebedev v. Russia, 11082/06, 25 July 2013***

575. ... It follows that the second applicant had eight months and twenty days to study over 41,000 pages, whereas the first applicant had five months and eighteen days to study over 55,000 pages... In order to go through the case file at least once the second applicant would have to read at a rate of over 200 pages per working day. The first applicant would have needed to read more than 320 pages per working day in order to study the prosecution case. Those figures might be higher if one excludes public holidays, days when the applicants were brought to the court or when they were considering defence evidence.

576. The Court notes that the applicants' case files consisted mostly of financial and legal documentation. Thus, in order to prepare for the trial it was not enough simply to read all of the documents; the applicants had to keep notes and, most probably, re-read some of the documents many times, compare them with other documents and discuss them with the lawyers.

577. The Court also takes note of the conditions in which the applicants had to work with their case files. In the Court's opinion those conditions were uncomfortable at best ... Thus, only one copy of each case file was made available to the defence. If one of the lawyers was studying a particular volume of the case-file in the premises of the GPO [General Prosecutor of the Russian Federation], the applicants were unable to study that volume at the remand prison. Although the applicants were allowed to

take handwritten notes, it was impossible for them to make photocopies. The lawyers, by contrast, were allowed to make photocopies, but mostly for their own use. If they needed to give a copy of a document to the applicants, this was possible only through the remand prison administration and, in any event, the applicants could keep only a limited amount of printed materials in their cells. The second applicant was not allowed to use a magnifying glass and a calculator for some time, which must have slowed down his work. The case file was made available to the defence only in special rooms. The applicants and their lawyers were unable to discuss the case confidentially and, simultaneously, to work with the case file: if they needed to have the case file before them, the presence of an investigator was obligatory. In 2004 the case files were transferred to the remand prison, and, as follows from the applicants' lawyers' complaints to the investigative authorities, this made photocopying of documents impossible. All this made the work of the defence team very difficult.

578. After the joinder of the two cases in June 2004 ... each applicant was given twenty-two days to familiarise himself with the materials related to the co-defendants; this meant that the second applicant, for instance, had to go through 2,500 pages per day related to the first applicant's case, without rest days and without spending time on other tasks.

579. That being said, the Court reiterates that "the issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case" ... First and foremost, the Court observes that in the present case each applicant was assisted by a team of highly professional lawyers, many of them of great renown. All of them were privately retained and all had spent a considerable amount of time working with the applicants' cases ...

580. The Court stresses that even where the lawyer has access to the materials of the case, this cannot fully replace personal examination of the case-file by the defendant. ... When in *Öcalan* the applicant was finally given direct access to the materials of the prosecution case, he had only twenty days to read 17,000 pages. The time given to the applicants in the present case was much longer. Finally, in *Öcalan v. Turkey* ... "the applicant's lawyers may have been prevented from giving the applicant an assessment of the importance of all these items of evidence by the sheer number and volume of documents and the restriction imposed on the number and length of their visits". No such drastic restrictions were imposed on the applicants in the present case ...

581. The Court concludes that even if the applicants were unable to study each and every document in the case file personally, that task might have been entrusted to their lawyers. Importantly, the applicants were not limited in the number and duration of their meetings with the lawyers. The defence lawyers had at their disposal portable copying and scanning devices and were thus able to make and keep copies of the most important documents in the case file. The Court is aware that certain restrictions applied to the meetings between the applicants and their respective defence teams, in particular as regards the exchange of notes and documents ... However, they were not such as to make it impossible for the applicants to obtain

the assistance of their lawyers in examining the case file and ascertaining the position of the prosecution before the start of the trial.

582. Secondly, the Court notes that the applicants were able to keep handwritten notes and use them at the trial. Furthermore, at least until the end of 2003 – beginning of 2004 there was a possibility for the defence lawyers to make copies of the materials. The Court previously held that unrestricted use of any notes and the possibility of obtaining copies of relevant documents were important guarantees of a fair trial. The failure to afford such access weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached ... However, the applicants in the present case, unlike in *Matyjek* or *Moiseyev*, were not bound by any rules on State secrets; they could make notes and keep their notebooks with them, and their lawyers were allowed to make copies of pages from the case file, at least until the end of 2003 – beginning of 2004.

583. Thirdly, the Court notes that both applicants were senior executives of one of the largest oil companies in Russia and had university degrees. Their ability to absorb and analyse information was necessarily above average; they knew the business processes at the heart of the case and were, arguably, more competent in those matters than any other participants in the proceedings. Their professional status is also an additional factor in favour of the Court's finding that the applicants' inability to study every document personally was somehow compensated by their lawyers' participation in examination of the case file: it must have been natural for the applicants, as senior managers, to delegate certain tasks to their lawyers.

584. Fourthly, it is possible that some of the materials in the case files were not directly pertinent to the subject-matter of the case. For example, contracts between Yukos and its affiliates were important only in so far as they contained information about the price of oil and about the parties involved. It follows that the applicants did not need to read every page of such contracts in order to counter the prosecution's arguments. As transpires from the judgment in the applicants' case, a large part of the materials in both cases must have been identical. This means that in reality the number of pages which the applicants needed to scrutinise after the joinder of the two cases was less than the overall number of pages in each co-defendant's case.

585. Fifthly, there is no indication that the applicants' and their lawyers' access to the case file was in any way restricted later on, during the trial itself ...

586. The above five elements lead the Court to the conclusion that although the defence had to work in difficult conditions at the pre-trial stage, the time allocated to the defence for studying the case file ... was not such as to affect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). It follows that there was no violation of those Convention provisions on this account ...

587. As to the "time and facilities" allocated to the defence during the trial, the Court observes that the timing of the hearings during the first stage of the trial proceedings, when the prosecution was presenting their case, was indeed more relaxed and made greater allowance for the preparation of arguments by the parties. However, the timing changed and the hearings became more intensive as soon as the court began examining evidence by the defence. Thus, without any apparent reason the

court started hearings much earlier in the day ... and discontinued the practice of Wednesday recesses ...

588. Although that change in the hearing arrangements may have made the task of the defence more difficult, the Court is not persuaded that it was impossible for the applicants to follow the proceedings. The defence was able to request short adjournments when needed, and there is no evidence that the court did not treat such requests favourably ...

589. The Court is aware of the difficulties which the defence experienced in the courtroom, in particular as concerns the conditions in which the applicants communicated with their lawyers. The Court considers, however, that those aspects of the case should be examined through the prism of the applicants' complaint under Article 6 § 3 (c) of the Convention. The Court concludes that the change of the hearing schedule during the trial was not, as such, contrary to Article 6 §§ 1 and 3 (b) of the Convention.

DISCLOSURE OF PROSECUTION EVIDENCE

Access to the case file

► *Miaillhe v. France (No. 2)*, 18978/91, 26 September 1996

44. ... Furthermore, it appears clearly from their decisions that they based their rulings – among other things as to residence for tax purposes – solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial. The failure to produce certain documents during the procedure of consulting the CIF [the Tax Offences Board] or in the criminal proceedings therefore did not infringe Mr Miaillhe's defence rights or the principle of equality of arms ...

► *Foucher v. France*, 22209/93, 18 March 1997

35. In the instant case, three considerations are of crucial importance.

Firstly, Mr Foucher chose to conduct his own case, which he was entitled to do both under the express terms of the Convention and under domestic law ...

Secondly, as the applicant had been committed directly for trial in the police court without a preliminary investigation, the question of ensuring the confidentiality of the investigation did not arise.

Lastly, the applicant's conviction by the Caen Court of Appeal was based solely on the game wardens' official report, which, under Article 537 of the Code of Criminal Procedure ..., was good evidence in the absence of proof to the contrary.

36. The Court ... therefore considers that it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him ...

As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3 ...

► **Moiseyev v. Russia, 62936/00, 9 October 2008**

215. The Government acknowledged that the applicant's request for a copy of the bill of indictment had been refused on the ground that it had contained sensitive information. Throughout the proceedings the bill of indictment had been kept either at the special department of the remand prison or special registry of the City Court, from where it could not be removed. The Government did not contest the applicant's submission that all other case materials and the notes taken during the hearings, whether by the applicant or his representatives, had to be handed in to the special registry after the hearings.

216. The Court accepts that national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, ... the Government did not invoke any act or regulation or other provision of domestic law governing the functioning of special departments in remand prisons or special registries in the courts. Nor did they put forward any justification for the sweeping nature of the restrictions on the applicant's access to the case materials. They did not explain why the domestic authorities had not been able to present the bill of indictment in such a way that the classified information be contained in a separate annex, which would have then been the only part with restricted access. Likewise, it does not appear that the Russian authorities considered separating the case materials constituting State secrets from all the other materials, such as for instance, the courts' procedural decisions, to which access should in principle be unrestricted. Finally, the Court considers that the fact that the applicant and his defence team could not remove their own notes in order to show them to an expert or use them for any other purpose effectively prevented them from using the information contained in them, since they had then to rely solely on their recollections ...

217. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, were important guarantees of a fair trial in the context of lustration proceedings. The failure to afford such access weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached ... This finding applies *a fortiori* in the circumstances of the present case, where the applicant stood trial and could forfeit not just his good name or possibility to hold public office (as in lustration proceedings) but his liberty. Moreover, as the Court found above, the restrictions on the applicant's access to the case materials and notes had no basis in domestic law and were excessively broad in their scope.

218. The Court therefore holds that the fact that the applicant and his defence team were not given appropriate access to the documents in the case file and were also restricted in the use of their notes, served to compound the difficulties encountered in the preparation of his defence.

► ***Natunen v. Finland*, 21022/04, 31 March 2009**

46. The Court reiterates that the requirements of Article 6 presuppose that having given specific reasons for the request for disclosure of certain evidence which could enable the accused to exonerate himself, he should be entitled to have the validity of those reasons examined by a court. Although the applicant, in this case, must have known the contents of the destroyed recordings, as far as they involved him, and even if he had been able to put questions during the trial concerning all of the conversations with the other defendants, the Court points out that the national courts did not find the defendants' allegations about the purchase of illegal weapons credible, for lack of other supporting evidence ... Furthermore, the Court of Appeal did not refuse to order the disclosure of the requested recordings on the ground that the applicant had not given specific and acceptable reasons for his request. Instead, it declined to render a decision in that respect, as the recordings had been destroyed and could thus not have been disclosed to the defence or produced to the court ...

47. Even though the police and the prosecutor were obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of Article 6 § 1. Moreover, it is not clear to what extent the prosecutor was, in fact, involved in the decision to destroy those recordings which were not included in the case file. In this case, the destruction of certain material obtained through telephone surveillance made it impossible for the defence to verify its assumptions as to its relevance and to prove their correctness before the trial courts.

48. ... in this case, the decision regarding the undisclosed evidence was, presumably, made in the course of the pre-trial investigation without providing the defence with the opportunity to participate in the decision-making process.

49. ... the Court further notes that the contested measure stemmed from a defect in the legislation, in that it failed to offer adequate protection to the defence, rather than any misconduct of the authorities, who were obliged by law, in force at the time, to destroy the impugned recordings ...

50. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3 (b) of the Convention.

Withholding of evidence in the public interest

► ***Rowe and Davis v. United Kingdom* [GC], 28901/95,
16 February 2000**

63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1 ...

64. It is true that at the commencement of the applicants' appeal, prosecution counsel notified the defence that certain information had been withheld, without however revealing the nature of this material, and that on two separate occasions the Court of Appeal reviewed the undisclosed evidence and, in *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, decided in favour of non-disclosure.

65. However, the Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence.

66. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.

► ***P. G. and J. H. v. United Kingdom, 44787/98, 25 September 2001***

71. The Court is satisfied ... that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds ... The Court also notes that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6 § 1. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial ...

► ***Edwards and Lewis v. United Kingdom [GC], 39647/98, 27 October 2004***

46. The "Law" part of the Chamber's judgment ... stated as follows ...:

"...

In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover

police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police ... Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications.

Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue ... Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure ...

In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 § 1 in this case ..."

47. As noted ... above, the Government, which requested the referral of this case to the Grand Chamber, no longer wish to pursue the referral and confirm that they are content for the Grand Chamber simply to endorse the judgment of the Chamber... The applicants accept the Chamber's judgment and do not object to the procedure proposed by the Government.

48. Having examined the issues raised by the case in the light of the Chamber's judgment, the Grand Chamber sees no reason to depart from the Chamber's findings. It therefore concludes that there has been a violation of Article 6 § 1 of the Convention ...

► ***Mirilashvili v. Russia*, 6293/04, 11 December 2008**

200. At the outset, the Court notes that the materials withheld from the defence did not contain information about the events of 7-8 August 2000. They rather concerned the manner in which the "direct" evidence against the applicant (the audiotapes) had been obtained. However, it does not make them less relevant. Not only should the evidence directly relevant to the facts of the case be examined in an adversarial procedure, but also other evidence that might relate to the admissibility, reliability and completeness of the former ...

202. ... Organising criminal proceedings in such a way as to protect information about the details of undercover police operations is a relevant consideration for the purposes of Article 6. The Court is prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence.

203. The question arises whether the non-disclosure was counterbalanced by adequate procedural guarantees. The Court notes in this connection that the materials relating to the authorisation of the wiretapping were examined by the presiding judge *ex parte* at the hearing of 12 September 2002. Therefore, the decision to withhold certain documents was taken not by the prosecution unilaterally ... but by a member of the judiciary ...

206. The Court notes that the essential point in the reasoning of the domestic court was that the materials at issue related to the OSA and, as such, could not have been disclosed to the defence. It appears that the court did not analyse whether those materials would have been of any assistance for the defence, and whether their disclosure would, at least arguably, have harmed any identifiable public interest. The court's decision was based on the type of material at issue (material relating to the OSA), and not on an analysis of its content.

207. The military court probably had no other choice in the situation at hand, having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to the OSA in such situations and did not provide for any "balancing exercise" by a judge. Still, the fact remains that the court's role in deciding on the disclosure request lodged by the defence was very limited.

208. Having regard to the above the Court finds that the decision-making process was seriously flawed. As regards the substantive justification for the decision, the Court notes that the impugned decision was vague; it did not specify what kind of sensitive information the court's order of 11 July 2000, and other materials relating to the operation could have contained. The court accepted the blanket exclusion of all the materials from the adversarial examination. Furthermore, the Court observes that the surveillance operation did not target the applicant or his co-accused.

209. In sum, the Court concludes that the decision to withhold materials relating to the surveillance operation was not accompanied by adequate procedural guarantees, and, furthermore, was not sufficiently justified ...

Right of defendant to represent himself

► *Correia de Matos v. Portugal (dec.)*, 48188/99, 15 November 2001

... the decision to allow an accused to defend himself or herself in person or to assign him or her a lawyer does still fall within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.

It should be stressed that the reasons relied on for requiring compulsory representation by a lawyer for certain stages of the proceedings are, in the Court's view, sufficient and relevant. It is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests. The domestic courts are therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer.

The fact that the accused is himself also a lawyer, as is the case here – even if the applicant’s name has been temporarily removed from the Bar Council’s roll – does not in any way undermine the preceding observations. Although it is true that, as a general rule, lawyers can act in person before a court, the relevant courts are nonetheless entitled to consider that the interests of justice require the appointment of a representative to act for a lawyer charged with a criminal offence and who may therefore, for that very reason, not be in a position to assess the interests at stake properly or, accordingly, to conduct his own defence effectively. In the Court’s view, the issue again falls within the limits of the margin of appreciation afforded to the national authorities.

The Court considers that ... the applicant’s defence was conducted appropriately. It points out in that connection that the applicant did not allege that he had been unable to submit his own version of the facts to the courts in question and that he was represented by an officially assigned lawyer at the hearing of 15 December 1998.

There is therefore no evidence to support the allegation that the trial in question was unfair or that the applicant’s rights of defence were breached.

► ***Barberà, Messegué and Jabardo v. Spain, 10590/83, 6 December 1988***

69. On 11 January 1982, that is to say the day before the opening of the hearing before the Audiencia Nacional, the applicants were still in Barcelona Prison. They did not leave for Madrid until the evening of 11 January. They arrived early in the morning of the following day after a journey of more than 600 kilometres in a prison van, although the hearing was due to start at 10.30 a.m. ...

70. Mr Barberà, Mr Messegué and Mr Jabardo thus had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance.

Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.

► ***Galstyan v. Armenia, 26986/03, 15 November 2007***

91. The Court notes that all the materials before it indicate that the applicant expressly waived his right to be represented by a lawyer both before and during the court hearing ... It is clear from the text of Article 6 § 3 (c) that an accused has the choice of defending himself either “in person or through legal assistance”. Thus, it will normally not be contrary to the requirements of this Article if an accused is self-represented in accordance with his own will, unless the interests of justice require otherwise. In the present case, there is no evidence that the applicant’s choice to be self-represented was the result of any threats or physical violence. Furthermore,

there is no evidence to support the applicant's allegation that he was "tricked" into refusing a lawyer. Even though the PACE [Parliamentary Assembly of the Council of Europe] and Human Rights Watch reports referred to ... contain relevant information, these materials are, nevertheless, not sufficient for the Court to conclude that actions, similar to the ones described in these reports, happened in the applicant's particular case. Finally, noting that the applicant was accused of a minor offence and the maximum possible sentence could not exceed 15 days of detention, the Court does not discern in the present case any interests of justice which would have required a mandatory legal representation.

92. Having concluded that it was the applicant's own choice not to have a lawyer, the Court considers that the authorities cannot be held responsible for the fact that he was not legally represented in the course of the administrative proceedings against him. There has accordingly been no violation of Article 6 §§ 1 and 3 (c) of the Convention taken together.

► ***Jemeljanovs v. Latvia*, 37364/05, 6 October 2016**

88. Having interpreted the applicant's dismissal of D. as an express waiver of his right to legal assistance, the first-instance court dismissed his application for appointment of another legal aid lawyer. Therefore, from 1 September 2005 onwards the applicant defended himself in person in the proceedings.

89. The Court notes that the interests of justice in principle call for legal representation both before and during a hearing on all questions of guilt or innocence and where a deprivation of liberty is at stake ... Nevertheless, the interests of justice are to be judged with reference to the facts of a case as a whole, having regard, *inter alia*, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case, and the personal situation of an applicant ...

90. In the present case the applicant faced twelve years' imprisonment. Nevertheless, the legal issues were not of particular complexity – the applicant had consistently stated facts which, in substance, did not deviate from those given by the witnesses ... No other questions of law which could only be settled by a legal professional were raised ...

91. The Court further observes that the first-instance court provided sufficient safeguards allowing the applicant to conduct his own defence. The applicant was on several occasions given the opportunity to call and examine witnesses against him ..., and to call witnesses in his defence ... Even though the applicant did not make use of some of his defence rights, especially in relation to asking witnesses questions, the case-file shows that he had explicitly waived these rights ...

92. Furthermore, the Daugavpils Court adjourned court hearings during its adjudication, allowing the applicant time to make applications, give statements at court ... and prepare for court arguments ... With regard to the applicant's motives, the charge in question was clarified ...

93. In the light of the above, the Court considers that the applicant was provided with an effective right to defend himself in person before the trial court.

LEGAL REPRESENTATION

Timing

See also INTERROGATION (Right to assistance of a lawyer), p. 163 above

Waiver

► ***Galstyan v. Armenia*, 26986/03, 15 November 2007**

See DEFENCE (Disclosure of prosecution evidence, Right of defendant to represent himself), p. 309 above

► ***Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010**

46. The Court notes at the outset that the applicant only complained that he had not been afforded enough time to contact a lawyer in a nearby town. The Court cannot but note that, as confirmed by the applicant's representative in his letter to the European Court ..., the applicant "chose not to exercise his right to legal representation with the hope that the court would give him a fair trial even without counsel".

47. Moreover, the Court observes that the present case is different from previous cases concerning the right to legal assistance in pre-trial proceedings ... because the applicant was not formally arrested or interrogated in police custody. He was stopped for a road check. This check and the applicant's self-incriminating statements were both carried out and made in public in the presence of two attesting witnesses. It is true that the trial record contains a statement by the applicant suggesting that the writing down of the inspection record and/or his subsequent statement were started on the spot but were completed in the village of Birofeld. Nevertheless, the Court concludes on the basis of the materials in the case file that the relevant events, namely the drawing of the inspection record and the taking of the applicant's explanation, were carried out in a direct sequence of events.

48. Although the applicant ... was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings.

49. The Court notes that the role of the police in a situation such as in the present case was to draw up an inspection record and receive the applicant's explanation as to the origin of the cans in his car ... Having done so, the police transferred the documents to the inquirer who, in his turn, compiled a report to his superior indicating that there was a case to answer against the applicant on suspicion of theft ... This report prompted the inquirer's superior to open a criminal case against the applicant ...

50. At that stage, namely on 2 March 2001, the applicant was apprised of his right to legal assistance. It was open to him to consult a lawyer before attending the meeting on 2 March 2001. At that meeting the applicant was presented with the version

of the events based on his statements made on 21 February 2001. The applicant voluntarily and unequivocally agreed to sign the act of accusation and waived his right to legal assistance, indicating that he would defend himself at the trial.

51. The foregoing considerations suffice for the Court to conclude that the absence of legal representation on 21 February and 2 March 2001 did not violate the applicant's right to legal assistance under Article 6 § 3 (c) of the Convention.

► ***Sakhnovskiy v. Russia* [GC], 21272/03, 2 November 2010**

89. The Government considered that the applicant had waived his right under Article 6 § 3 (c) of the Convention. It is suggested that Ms A. should be regarded as the applicant's representative from the time of her appointment by the Supreme Court. The Government argued that, as the applicant's representative, Ms A. should have asked for a replacement lawyer or for a private meeting with the applicant, which she had not done. They treated this as an implicit waiver.

90. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial ... However, such a waiver must be established unequivocally and must not run counter to any important public interest ...

91. The Court notes that the applicant is a lay person and has no legal training ... He was unaware of Ms A.'s appointment and eventually refused her services for the very reason that he perceived her participation in the proceedings as a mere formality. He made his position known to the Supreme Court as best he could. The applicant should not be required to suffer the consequences of Ms A.'s passive attitude when one of the key elements of his complaint is precisely her passivity. Accordingly, the inaction of Ms A. cannot be regarded as a waiver.

92. The Government emphasised that the applicant had refused to accept Ms A.'s services but had not asked to be assigned somebody else as a lawyer. Neither had he asked for additional time to meet the court-appointed lawyer or to find a lawyer of his own choosing. Again, the Court notes that in that context the applicant could not be expected to take procedural steps which normally require some legal knowledge and skills. The applicant did what an ordinary person would do in his situation: he expressed his dissatisfaction with the manner in which legal assistance was organised by the Supreme Court. In such circumstances, the applicant's failure to formulate more specific claims cannot count as a waiver either.

93. The Court, like the Chamber ..., finds that the applicant's conduct, as well as the inaction of Ms A., did not absolve the authorities from their obligation to take further steps to guarantee the effectiveness of his defence.

► ***Jemeljanovs v. Latvia*, 37364/05, 6 October 2016**

83. The applicant further argued in substance that by dismissing D., his second legal aid lawyer, he had not intended to waive his right to a lawyer.

84. In this connection, the Court reiterates that a waiver must be established unequivocally and must not run counter to any important public interest (see *Sakhnovskiy v. Russia*) ... Before an accused can be said to have, through his conduct, waived implicitly an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen the consequences of his conduct in this regard (see *Idalov v. Russia*¹² ...) ...

85. The Court observes that, before the applicant asked the first-instance court to dismiss D., the domestic authorities had made him aware that the relevant legislation did not provide for an accused's right to freely choose a legal aid lawyer. The authorities also stated that, in the event of an unjustified refusal of the services of a legal aid lawyer, the applicant had a right to hire a lawyer of his own choosing and at his own expense, or defend himself without a lawyer ... In such circumstances, the Court considers that the applicant should have foreseen the high probability that the Daugavpils Court might thereafter dismiss his request for replacement of a legal aid lawyer.

86. The Court also observes that, as is apparent from the case file, the applicant's dismissal of his legal aid lawyer was based on a legal provision which explicitly served as grounds for waiving a right to legal assistance ... Furthermore, on the date the adjudication of his criminal case started, the domestic legislation clearly set out an exhaustive list of circumstances where legal representation was mandatory ... There is nothing in the case file to suggest that the applicant fell within any of the categories requiring legal representation, that he was unaware of the above legal provision, or that he lacked sufficient means to pay for legal assistance ... In these circumstances, the Court considers that it would not have been unreasonable to expect the applicant to foresee that a repeated application to dismiss a legal aid lawyer – deemed by the court to be unfounded – might lead to his having to hire a lawyer of his own choosing at his own expense, or defend himself.

87. In the light of the above, particularly the fact that the applicant was informed about the applicable legal provision, the Court considers that, by lodging another unfounded application to release his legal aid lawyer from his duties, the applicant *de facto* waived his right to defend his case with the benefit of legal aid.

Interests of justice require state provision

Relevant circumstances

► *Quaranta v. Switzerland*, 12744/87, 24 May 1991

32. In order to determine whether the “interests of justice” required that the applicant receive free legal assistance, the Court will have regard to various criteria ...

33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked ... Under section 19 para. 1 of the Federal Misuse of Drugs Act, in conjunction with

12. See DEFENCE (Ability of defendant to be heard and adduce evidence, Presence), p. 344 below.

Article 36 of the Swiss Criminal Code, the maximum sentence was three years' imprisonment ... In the present case, free legal assistance should have been afforded by reason of the mere fact that so much was at stake.

34. An additional factor is the complexity of the case ... the case did not raise special difficulties as regards the establishment of the facts ... However, the outcome of the trial was of considerable importance for the applicant since the alleged offence had occurred during the probationary period to which he was made subject in 1982 ... The Criminal Court therefore had both to rule on the possibility of activating the suspended sentence and to decide on a new sentence. The participation of a lawyer at the trial would have created the best conditions for the accused's defence, in particular in view of the fact that a wide range of measures was available to the Court.

35. Such questions, which are complicated in themselves, were even more so for Mr Quaranta on account of his personal situation: a young adult of foreign origin from an underprivileged background, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.

36. In the circumstances of the case, his appearance in person before the investigating judge, and then before the Criminal Court, without the assistance of a lawyer, did not therefore enable him to present his case in an adequate manner ...

► ***Benham v. United Kingdom, 19380/92, 10 June 1996***

61. ... where deprivation of liberty is at stake, the interests of justice in principle call for legal representation ... In this case, Mr Benham faced a maximum term of three months' imprisonment.

62. Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and to operate ...

64. In view of the severity of the penalty risked by Mr Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr Benham ought to have benefited from free legal representation during the proceedings before the magistrates.

► ***Talat Tunç v. Turkey, 32432/96, 27 March 2007***

57. In this case, the applicant risked the death penalty for matricide. In addition to this, the applicant, who pleaded not guilty during the criminal proceedings, had difficulty countering the confession he had made during the investigation stage ...

58. It follows that the second condition provided for in Article 6 § 3 was fulfilled ...

60. In the instant case, the Court notes that, on 26 December 1994, the applicant stated to the prosecution office of Alaşehir that he had been unable to act of his own free will when questioned by the prosecution and the investigating judge because of the police officers who had threatened to mistreat him. It cannot be considered that the applicant, who has no professional training and comes from a

humble background, could reasonably assess the consequences of not asking for the assistance of a lawyer during the criminal proceedings in which he risked the death penalty.

62. ... In view of the severity of the possible sentence, the Court considers that the interests of justice required that, in order to have a fair trial, the applicant should have enjoyed free legal assistance during the criminal proceedings against him.

► ***Zdravko Stanev v. Bulgaria, 32238/04, 6 November 2012***

39. ... the Nova Zagora District Court did not impose a prison sentence but instead fined him BGN 500 and, in response to the civil claims for damages ordered him to pay the injured parties non-pecuniary damages totalling BGN 16,900. As the prosecution did not seek to appeal against this decision, the Sliven Regional Court could not have imposed a heavier penalty on the applicant. Consequently, deprivation of liberty was not at stake in the proceedings before the Sliven Regional Court. Nevertheless, the fine imposed on the applicant amounted to approximately 250 euros (EUR), and the damages he was required to pay amounted to more than EUR 8,000, which was a significant amount in view of his financial situation.

40. Moreover, although it is not in dispute that the applicant had a university degree, there is no suggestion that he had any legal training, and while the proceedings were not of the highest level of complexity, the relevant issues included the rules on admissibility of evidence, the rules of procedure, and the meaning of intent. In addition, the Court notes that the applicant was charged with a criminal offence which involved the impugment of a senior member of the judiciary and which called into question the integrity of the judicial process in Bulgaria. Furthermore, the domestic courts appear to have dealt with the civil claims for damages in the course of the criminal proceedings. As such, a qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution ... The fact that the applicant, as an educated man, might have been able to understand the proceedings does not alter the fact that without the services of a legal practitioner he was almost certainly unable to defend himself effectively ...

41. The Court therefore accepts that ... the interests of justice demanded that, in order to receive a fair hearing, the applicant ought to have benefited from free legal representation during the proceedings before the Sliven Regional Court ...

► ***Mikhaylova v. Russia, 46998/08, 19 November 2015***

(i) The charge under Article 19.3 of the CAO [Code of Administrative Offences]

90. It is noted that the applicant ran a risk of receiving a sentence of up to fifteen days' detention. In this context, the Court is not oblivious to the requirement under Russian law that administrative detention was to be applied only in "exceptional circumstances" ... However, this is a question to be decided by a domestic judge in each given case, and thus cannot, as such, weigh in the analysis of whether legal assistance should have been made available free of charge, to comply with the requirements of Article 6. It does not appear that the applicant fell within the excluded

categories of people on whom administrative detention could not be imposed as a possible statutory penalty. Thus, the Court considers that a lot was at stake for the applicant ...

91. As to other factors (such as the seriousness of the offence, the seriousness of the specific charge, and the complexity of the case against the applicant), the Court observes that she faced an accusation for one episode relating to her resistance to an order from the police. Arguably, a proper determination of this charge could require, *inter alia*, that the lawfulness of the officer's order be ascertained (with particular reference to other legislation such as the Public Gatherings Act and the Police Act), or legal conclusions to be drawn on account of the defendant's exercise of her freedom of assembly or freedom of expression ... Although the Court accepts that the applicant's submissions before the domestic courts were not devoid of substance, this could not have been reliably assumed in advance as far as a question of legal aid was concerned. In any event, any possibility of legal aid being ruled out by law, the question of the applicant's possibly (in)sufficient knowledge of law was not and is not a relevant consideration. In so far as the applicant's personal situation may be relevant, the Court rather notes that the applicant was a pensioner, with no legal or other relevant training.

92. Be that as it may, the gravity of the penalty suffices for the Court to conclude that the applicant should have been given legal assistance free of charge since the "interests of justice" so required ...

94. For its part, the Court reiterates that Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that the right to legal assistance is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial ... However, the applicant could not benefit from legal assistance during the trial hearing, nor did she obtain another form of assistance, for instance, a legal consultation or assistance/representation before a court hearing or for the purpose of drafting an appeal, or a combination of the above ...

95. The foregoing considerations are sufficient for the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

(ii) The charge under Article 20.2 of the CAO

96. As regards the gravity of the statutory penalties, the Court observes that at the material time the only statutory penalty was a fine of up to RUB 1,000 (or EUR 28), which was relatively low, even by national standards.

97. The Court also observes that the case concerned one event, for which the relevant legal elements, including the *corpus delicti*, were relatively straightforward. At the same time, the Court notes that the determination of the charge required that the applicable rules and the acts punishable under Article 20.2 of the CAO be determined and assessed with reference to, and on the basis of, other legislation such as the Public Gatherings Act ..., and, eventually, with reference to legal considerations on account of the defendant's exercise of her freedom of assembly and/or freedom of expression ... Arguably, this task was capable of disclosing some degree of complexity where the applicant had no requisite legal training or knowledge.

98. In particular, it was relevant to determine whether the public gathering did or did not comply with the notification requirement under the Public Gathering Act ..., and that the defendant took part in this demonstration. It is also observed that the CAO did not require in the circumstances the participation of a public prosecutor, who would present the case against the defendant before a judge ... While the police were in charge of compiling the administrative offence file before transmitting it to a court, it appears that the accusation against the defendant was then both presented and examined by the judge dealing with the case ...

99. In the present case the Court attaches importance to the fact that the proceedings against the applicant directly related to her exercise of the fundamental freedoms protected under Articles 10 and 11 of the Convention. Thus, it cannot be assumed that little was at stake for the applicant.

100. It is also noted that the applicant could not benefit from legal assistance during the trial hearing, nor did she obtain another form of assistance, for instance, a legal consultation or assistance/representation before a court hearing or for the purpose of drafting an appeal, or a combination of the above.

101. Lastly, the Court considers that, for the purpose of complying with Article 6 of the Convention, it should be preferable that the pertinent factual and legal elements (such as the means test and the question of "the interests of justice") be first assessed at the domestic level when the issue of legal aid is decided, especially when, as in the present case, a fundamental right or freedom protected under the Convention is at stake in the domestic proceedings in question. However, in view of the state of the national law, no such assessment was made at the domestic level ...

102. Therefore, having examined all relevant elements and despite the low amount of the statutory fine, the Court concludes that in the particular circumstances of the case the "interests of justice" required availability of free legal assistance. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

Duty of reimbursement

► *Croissant v. Germany*, 13611/88, 25 September 1992

33. Unlike the rights embodied in other provisions of Article 6 para. 3 ... the right to free legal assistance conferred by sub-paragraph (c) ... is not absolute; such assistance is to be provided only if the accused "has not sufficient means to pay".

35. ... under German law an accused who is acquitted is, irrespective of his means, under no obligation to pay either the court costs or the fees of the court-appointed lawyers; all these items are borne by the State. On the other hand, a convicted person is in principle always bound to pay the fees and disbursements of his court-appointed lawyers, this being held to be a normal consequence of the conviction. It is only in the enforcement procedure that follows the final judgment that the financial situation of the convicted person plays a role; in this respect, it is immaterial whether he had sufficient means during the trial, only his situation after the conviction being relevant.

36. Such a system would not be compatible with Article 6 ... of the Convention if it adversely affected the fairness of the proceedings. However, it cannot be said that the system generally produces such a result or did so in the present case. As already stated, the appointment of the three defence counsel was compatible with the requirements of Article 6 ... Accordingly, it is not incompatible with that provision that the applicant is liable to pay their fees. The national courts were entitled to consider it necessary to appoint them and the amounts claimed for them are not excessive.

... there is no reason to doubt that, should the applicant be able to establish that he cannot afford to pay the entire amount, the relevant legislation and practice will be applied ... In this respect the Court considers it admissible, under the Convention, that the burden of proving a lack of sufficient means should be borne by the person who pleads it.

38. The Court concludes that the reimbursement order is not incompatible with Article 6 para. 3 (c) ...

► ***Ognyan Asenov v. Bulgaria*, 38157/04, 17 February 2011**

44. ... contrary to what the applicant seems to suggest, the question of costs did not adversely affect the fairness of the criminal proceedings against him ... There is no indication that the possibility of being ordered to bear the costs of his defence in the event of his being convicted inhibited the applicant from asking the trial court to appoint counsel for him. On the contrary, he stated at the outset of his trial that he could not afford to retain counsel and that he was illiterate, and the court appointed counsel for him ... It is true that the appointment of counsel was not premised on the applicant's indigence, but on the fact that he did not have sufficient command of the Bulgarian language ... Even so, as correctly pointed out by the Government, the applicant benefited from a proper defence, irrespective of whether he had sufficient means during the proceedings ...

45. However, the question remains whether it was compatible with Article 6 § 3 (c) for the State to seek reimbursement of the fees paid to counsel appointed for the applicant after the end of the proceedings.

46. ... In the case at hand, there is no indication that the authorities have taken any steps to enforce the court order requiring the applicant to pay the costs of the criminal proceedings against him, including the fees of his court-appointed counsel ... Nor is there any indication that the applicant has made any payments in relation to that matter (contrast *Croissant*, cited above ...). The mere issuing of a writ of execution cannot be equated with the order's actual enforcement. If the authorities try to enforce it, they will be bound by the provisions ... which shield certain assets and classes of income from execution ... The effect of those provisions is similar to the practice disclosed in *Croissant* to grant at least a partial remission of costs where the individual concerned was able to establish that he or she could not afford to pay the entire amount (see *Croissant*, cited above ...) ...

47. Furthermore, although the applicant appears not to have been in formal employment during the bulk of the period 1994-2007, has five young children and was

sentenced to five years' imprisonment ..., he has not produced evidence which gives a full picture of his overall financial situation (assets, liabilities and income), at the time when the costs order against him became final or afterwards. The Court thus lacks an adequate basis on which to conclude that throughout that time the applicant remained unable to reimburse the relatively modest fees of his counsel ... As already mentioned, it is not contrary to the Convention that the burden of proving a lack of sufficient means should be borne by the person who pleads it.

Choice

► ***Ensslin, Baader and Raspe v. Federal Republic of Germany (dec.), 7572/76, 8 July 1978***

19. ... By stipulating that the accused may have legal assistance of his own choosing, Article 6 (3) (c) does not secure the right to an unlimited number ... the purpose of this provision is to ensure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional. By limiting the number of lawyers freely chosen by the accused to three, without prejudice to the *ex officio* addition of other defence counsel appointed by the Court, an arrangement peculiar to the German procedural system, the authorities of the Federal Republic of Germany therefore did not violate the right secured by this provision ...

20. Refusal to accept, or the exclusion of, a defence is a more difficult question, both in its principle and its effects. It is a measure which may intimidate other potential defence counsel or cast discredit on the defence in general; further, a succession of defence lawyers may be damaging to the presentation of the case and introduce greater uncertainty into the barrister's role as "the watchdog of procedural regularity". However, ... the right to defend one's case with the assistance of the defence counsel of one's choice ... is not an absolute right: it is limited by the State's right to make the appearance of barristers before the courts subject to regulations ... and the obligation on defence counsel not to transgress certain principles of professional ethics. In the case in point, certain barristers were excluded from the defence because they were strongly suspected of supporting the criminal association of the accused. This was not simply a measure taken by the Court in the interests of procedural order, since the lawyers in question are currently the subject of criminal proceedings before the courts. Their exclusion did not end the effective defence of the applicants, since they were still represented by an average of ten defence counsel, some of them ... having been chosen by them.

► ***X. v. United Kingdom (dec.), 8295/78, 9 October 1978***

1. ... Considering the applicant's defence as a whole therefore, the Commission notes that he was given an ample opportunity to present his own case. The restriction imposed on the applicant's choice of representation was limited to excluding his son on reasonable grounds of professional etiquette. The applicant could have chosen any other barrister to represent him but apparently made no effort to do so. An examination of the trial transcript does not disclose any disadvantage to the defence or unfairness in this respect. The Commission finds therefore that the

exclusion of the applicant's son from representing the applicant at his trial does not disclose any appearance of a violation of Article 6(3)(c) of the Convention.

► ***Croissant v. Germany*, 13611/88, 25 September 1992**

27. ... The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings ... – which finds parallels in the legislation of other Contracting States – cannot, in the Court's opinion, be deemed incompatible with the Convention.

Again, the appointment of more than one defence counsel is not of itself inconsistent with the Convention and may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel a court should pay heed to the accused's views as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under Article 6 para. 1 if ... it lacks relevant and sufficient justification.

28. ... In the first place, avoiding interruptions or adjournments corresponds to an interest of justice which is relevant in the present context and may well justify an appointment against the accused's wishes. Moreover, the nomination of Mr Hauser had additional aims. It was based, according to the Regional Court's decision of 1 March 1978 ... on the need to ensure that Mr Croissant was adequately represented throughout his trial, having regard to its probable length and to the size and complexity of the case; the Regional Court stressed that its selection of Mr Hauser was grounded on its view that he possessed the qualifications called for by those special features ...

29. ... When appointing defence counsel the national courts must certainly have regard to the defendant's wishes ... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.

30. In its decision of 1 March 1978, the Regional Court stressed that it had selected Mr Hauser because it considered that, having regard to the subject-matter of the trial, the complexity of the factual and legal issues involved and the defendant's personality, he offered the best guarantees of an adequate defence. Furthermore, it found that the reason advanced by the applicant for his being unable to place confidence in Mr Hauser was not valid; in this connection, it also had regard to the fact that the applicant himself had chosen the other two court-appointed lawyers ... The Stuttgart Court of Appeal, which upheld the Regional Court's decision, added that Mr Hauser had been appointed because, unlike those two lawyers, he had his office within the Regional Court's jurisdiction ...; this would have had advantages, having regard to the expected length of the trial, in the event that they had been unable to attend ...

Finally, in the opinion of the Regional Court there were valid reasons – namely a possible conflict of interests between Mr Croissant and one of his former employees – for refusing to designate Mr Künzel ...

The grounds on which the national courts based their appointment of Mr Hauser and their rejection of the reasons advanced by the applicant in favour of its revocation are, in the Court's view, relevant and sufficient.

31. Furthermore ... Mr Hauser took an active part in the defence and was closely involved with the other two counsel in planning the strategy to be adopted. Accordingly, his designation cannot be said to have adversely affected the applicant's defence.

► ***Mayzit v. Russia*, 63378/00, 20 January 2005**

68. The Court notes that Article 47 of the CCrP [Code of Criminal Procedure] sets as a general rule the requirement that defenders must be professional advocates, members of the bar. Pursuant to the same provision the Moskovskiy District Court could, if it had seen fit, have let the applicant's mother and sister act as his defenders. The court considered, however, that as lay persons they would not be able to ensure the applicant's efficient defence in compliance with the procedure. Furthermore, the court concluded that they would not, for the reasons of health or occupation, be able sufficiently to attend to the proceedings. In the Court's opinion, these considerations were legitimate and outweighed the applicant's wishes ...

69. Considering the applicant's defence as a whole, the Court notes that he was given an ample opportunity to present his own case. The restriction imposed on the applicant's choice of representation was limited to excluding his mother and sister on the grounds cited above. The applicant could have chosen any advocate to represent him but apparently made no effort to do so. The facts of the case do not disclose any disadvantage to the defence or unfairness in this respect.

► ***Prehn v. Germany (dec.)*, 40451/06, 24 August 2010**

In examining whether ... there were relevant and sufficient grounds for the domestic courts to consider that it was necessary in the interests of justice to appoint the applicant a different defence counsel (K.) than the counsel named by him (B.), the Court observes that the main reason for the Regional Court, as confirmed by the Court of Appeal, to appoint counsel K. instead of counsel B. was that, unlike K., B. was not practising within the courts' judicial district. The Court accepts that, as was stressed by the domestic courts, proximity of counsel to his client in detention and the court did not only avoid additional costs entailed by the appointment of an external counsel, but notably facilitated a proper defence and counsel's communication both with his client and the court. It lay within the domestic courts' margin of appreciation to consider that the fact that counsel resided more than 100 kilometres from the court and from the prison in which the applicant was detained and the fact that modern means of communication were only to a limited extent, if at all, available to exchange information with a detainee impeded the conduct of a proper defence in the present case. The said grounds correspond to an interest of justice which is relevant in the present context, in particular as a decision on the applicant's placement in preventive detention was to be given until 12 March 2006 and as the applicant also wished to obtain that decision speedily.

The Court further notes that the domestic courts acknowledged that a detainee nevertheless had to be appointed an external counsel in exceptional circumstances, namely if there was a firm relationship of trust between the detainee and that counsel. However, according to the findings of the domestic courts, such a relationship did not exist between the applicant and counsel B. who had never previously defended the applicant and had never met him in person.

Moreover, there was no evidence before the domestic courts that counsel K., who was specialised in criminal law, was unable to provide the applicant effective legal assistance. She was considered by those courts not to be less experienced in proceedings concerning the execution of sentences than counsel B. Finally, there was nothing to indicate that for any specified reason, the applicant was unable to place confidence in counsel K.

Having regard to the foregoing, the Court is satisfied that there were relevant and sufficient grounds for the domestic courts to consider that it was necessary in the interests of justice to appoint the applicant a different defence counsel than the counsel named by him.

Competence and diligence

► *W. v. Switzerland (dec.)*, 9022/80, 13 July 1983

4. ... Mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of this, the authorities must replace him or persuade him to perform his task. It is only in this way that the Convention's aim of guaranteeing not theoretical or illusory rights, but rights that are practical and effective, can be achieved.

6. ... It does indeed seem that throughout the proceedings the authorities were unaware of the differences of opinion between the applicant and his lawyers as to the way in which the defence should be conducted, and did not know that the applicant might have been misled about the desirability of more active intervention by his defence lawyers. It was only at the reading of the judgment that this situation was brought to the notice of the judicial authorities, together with an offer of supplementary evidence. As from that time the applicant benefited from an effective defence and no intervention by the authorities was called for. In the light of these considerations, the Commission is of the opinion that at no time did the competent authorities fail to fulfil their obligations under Article 6 (3) (c) of the Convention.

► *Daud v. Portugal*, 22600/93, 21 April 1998

39. ... The Court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification

of the replacement of the lawyer ... and the hearing ... [3 days] was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds ...

Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 § 3 (c) ...

40. The Court must therefore ascertain whether it was for the relevant authorities, while respecting the fundamental principle of the independence of the Bar, to act so as to ensure that the applicant received the effective benefit of his right, which they had acknowledged.

41. The Court notes, firstly, that the application for a judicial investigation made by the applicant on 15 October 1992 was refused by the investigating judge on the principal ground that it was written in Spanish ...

42. In his letter of 15 December 1992, after more than eight months had elapsed, the applicant also asked the court for an interview with his lawyer, who had still not contacted him ... Because the letter was written in a foreign language, the judge disregarded the request. Yet the request should have alerted the relevant authorities to a manifest shortcoming on the part of the first officially assigned lawyer, especially as the latter had not taken any step since being appointed in March 1992. For that reason, and having regard to the refusal of the two applications made during the same period by the defendant himself, the court should have inquired into the manner in which the lawyer was fulfilling his duty and possibly replaced him sooner, without waiting for him to state that he was unable to act for Mr Daud. Furthermore, after appointing a replacement, the Lisbon Criminal Court, which must have known that the applicant had not had any proper legal assistance until then, could have adjourned the trial on its own initiative. The fact that the second officially assigned lawyer did not make such an application is of no consequence. The circumstances of the case required that the court should not remain passive.

► ***Sannino v. Italy*, 30961/03, 27 April 2006**

50. ... on 18 January 1999 Mr G., the lawyer chosen by the applicant, withdrew from the case ... Mr B., the lawyer appointed by the court to represent the applicant, was informed of the date of the next hearing, but not of his appointment ... That omission on the part of the authorities partly explained Mr B.'s absence, which led to the situation complained of by the applicant, namely, the fact that at each hearing he was represented by a different replacement lawyer ... There was nothing to suggest that the replacement lawyers had any knowledge of the case. However, they did not request an adjournment in order to acquaint themselves with their client's case. Nor did they ask to examine the defence witnesses whom the District Court had given the applicant's first two lawyers leave to call ...

51. Admittedly, the applicant, who until 2 November 1999 had attended a lot of hearings, never informed the authorities of the difficulties he had been having preparing his defence ... The applicant also failed to get in touch with his court-appointed

lawyers to seek clarification from them about the conduct of the proceedings and the defence strategy. Nor did he contact the court registry to ask about the outcome of his trial. However, the Court considers that the applicant's conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene. However, there is nothing to suggest that the latter took measures to guarantee the accused an effective defence and representation.

52. Accordingly, there has been a violation of Article 6 of the Convention.

► ***Bogumil v. Portugal, 35228/03, 7 October 2008***

47. The Court notes that, during the initial phase of the proceedings, the applicant was assisted by a trainee lawyer, who acted on several occasions. On 15 January 2003, since the applicant faced a heavy sentence, the prosecutor assigned a new, supposedly more experienced, lawyer to his case under the duty scheme. The new lawyer took no action in the proceedings other than to ask to be released from the case on 15 September 2003, three days before the trial. A replacement lawyer was then assigned on the day the trial began and was able to study the case file between 10 a.m. and 3.15 p.m.

48. In this case, the Court first observes that, owing to the manner in which the case was prepared and conducted by the duty lawyers, the aim of Article 6 § 3 was not fulfilled. As regards in particular the lawyer assigned on the day of the hearing, the period of a little over five hours she had to prepare the defence was quite clearly too short for such a serious offence that might result in a heavy sentence ...

49. The applicant drew the attention of the judicial authorities to the "manifest inadequacy" of the defence. However, the 9th Chamber of the Lisbon Criminal Court did not respond appropriately to his requests and did not take steps to ensure that he received proper assistance from a duty lawyer. Accordingly, after assigning a replacement, the Lisbon Criminal Court, which must have known that until that time the applicant had not received proper legal assistance, could have adjourned the hearing on its own initiative. The fact that the duty lawyer in question did not submit such a request is irrelevant. In the circumstances of the case, the domestic court should have ensured concrete and effective respect of the applicant's defence rights rather than remain passive ...

50. All these considerations lead the Court to find that the requirements of Article 6 §§ 1 and 3(c) were not fulfilled ...

► ***Güveç v. Turkey, 70337/01, 20 January 2009***

129. The lawyer, who declared during the third hearing, held on 18 April 1996, that she would be representing the applicant from then on, failed to attend 17 of the 25 hearings. In fact, in the course of the retrial this particular lawyer attended only one of the hearings, held on 18 March 1999. During the crucial final stages of the retrial from 18 March 1999 until he was represented by Ms Avcı on 10 October 2002 ... the applicant was completely without any legal assistance.

130. At this juncture the Court reiterates its established case-law according to which the State cannot normally be held responsible for the actions or decisions of an accused person's lawyer ... because the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed ... Nevertheless, in case of a manifest failure by counsel appointed under the legal aid scheme to provide effective representation, Article 6 § 3 (c) of the Convention requires the national authorities to intervene ...

131. In the present case the lawyer representing the applicant was not appointed under the legal aid scheme. Nevertheless, the Court considers that the applicant's young age, the seriousness of the offences with which he was charged, the seemingly contradictory allegations levelled against him by the police and a prosecution witness ..., the manifest failure of his lawyer to represent him properly and, finally, his many absences from the hearings, should have led the trial court to consider that the applicant urgently required adequate legal representation. Indeed, an accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require" ...

132. The Court has had regard to the entirety of the criminal proceedings against the applicant. It considers that the shortcomings highlighted above, including in particular the *de facto* lack of legal assistance for most of the proceedings, exacerbated the consequences of the applicant's inability to participate effectively in his trial and infringed his right to due process.

133. There has, therefore, been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c).

► **Hanzevacki v. Croatia, 17182/07, 16 April 2009**

22. The Court notes that the applicant in the present case was constantly represented by a lawyer of his own choosing in the criminal proceedings against him, save for the final hearing held before the trial court ... at the final hearing before the trial court the applicant asked for an adjournment on account of the absence of his defence counsel who had suddenly fallen ill. However, this request was denied. The applicant then gave his further evidence and presented his closing arguments.

23. ... the requirement of efficiency of the conduct of the criminal proceedings ... cannot run contrary to the protection of the defence rights to a degree incompatible with the guarantees of a fair trial under Article 6 of the Convention. In this connection the Court notes that it is true that the applicant's counsel asked for the adjournment of the hearing scheduled for 29 December 2003 on account of a previously planned journey. However, in view of the date of that hearing falling so close to a public holiday and the fact that the counsel had informed the trial court of his inability to attend in advance, the Court considers that these circumstances do not indicate that the applicant or his counsel acted in bad faith or tried to unnecessarily delay the proceedings.

24. As to the circumstances surrounding the request for the adjournment of the final hearing, the Court notes that in his appeal the applicant's counsel explained in detail that he had suddenly fallen ill a day before the hearing and on the morning of the hearing contacted the trial court by telephone. He gave the name of the

usher who had received the call and who had gone to inform the trial judge about his inability to attend. He also enclosed a medical certificate showing that he had been on sick leave as of 8 March 2004. The appellate court made no comments on these circumstances and instead concluded that the counsel's presence was not necessary in view of the evidence hitherto already presented before the trial court and the features of the crime held against the applicant.

25. ... The Court notes that one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial. The Court considers that the choice made by the prosecution not to attend the concluding hearing in the case against the applicant cannot have any effect on the right of the accused to be represented by a lawyer of his own choosing.

26. In the Court's view the absence of the applicant's counsel gave good cause for the hearing of 9 March 2004 to be adjourned, in view of the significance of the concluding hearing in the criminal proceedings against the applicant ...

29. In these circumstances, the Court finds that the applicant was not able to defend himself through legal assistance of his own choosing to the extent required under the Convention. There has accordingly been a violation of Article 6 § 1 taken together with Article 6 § 3(c) of the Convention.

► *Jemeljanovs v. Latvia*, 37364/05, 6 October 2016

79. The Court observes that the applicant was first represented by S. and later by D. before the first-instance court. Both representatives were legal aid lawyers. At the applicant's request, the Daugavpils Court, acting as a first-instance court, released both lawyers from their responsibilities on the grounds that the applicant had a different view from them on the conduct of his defence ... According to the applicant, the reason for refusing their services was the poor quality of their legal assistance, which the domestic courts had failed to address ...

80. On the quality of legal assistance, the Court reiterates that it is for the Contracting States to choose the means of ensuring that Article 6 § 3 (c) guarantees are secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way ...

81. The Court observes that, before it dismissed as unfounded the applicant's allegations about the quality of D's services, the first-instance court duly assessed the applicant's complaint ... Those allegations were also examined by the appellate court ... and the Court finds no reason to disagree with the domestic courts' assessment.

82. Noting D's conduct in the proceedings ..., the nature of his applications, and the fact that the adjudication of the case was at an early stage, it cannot be concluded that his activities could be characterised as passive or manifestly negligent to the

extent of denying the applicant the right to defend himself through legal assistance (compare with the case of *Gabrielyan*, cited above, in which the somewhat passive behaviour of the defence did not amount to a manifest failure to provide legal assistance, and contrast with the case of *Sannino v. Italy* ... in which the Court found a violation on the grounds that replacement lawyers had no knowledge of the case).

Independence

► *Morris v. United Kingdom*, 38784/97, 26 February 2002

90. ... had the applicant accepted the Legal Aid Authority's offer of legal aid as communicated in its letter of 21 April 1997, he would have been represented at his court martial by an independent legal representative. Instead, the applicant refused that offer before the Legal Aid Authority had even responded to his solicitor's request for reconsideration of the terms of the offer. Indeed, the applicant certified on 2 May 1997 that he wanted to be represented by no other than his defending officer, and that he had made this choice of his own free will ...

91. As a result, the Court finds no merit in the applicant's complaints about the independence of his defending officer and that officer's handling of his defence. In any event, it finds on the evidence that the defending officer did not fail adequately to advise or represent the applicant, save as regards the risks consequent to his appealing against the court martial's verdict. Even in that regard, the applicant went on to pursue an appeal with the assistance of legal representation, so that this error proved to be without consequence for the applicant.

Communication

Meetings

► *Bonzi v. Switzerland (dec.)*, 7854/77, 12 July 1978

2. ... In the absence of any explicit provision, it cannot be maintained that the right implicitly guaranteed by Article 6 (3) to confer with one's counsel and exchange confidential instructions or information with him is subject to no restriction whatsoever. In the case in point, while the lawyer's visits were forbidden after the decision to place the accused in solitary confinement, it must be pointed out that the applicant was free to inform his counsel in writing, under supervision of the court, of the progress of the investigatory proceedings. In addition, he could have requested a relaxation of his isolation where his counsel's visits were concerned. This being so, the relative and temporary limitation of contacts between the applicant and his defence counsel, seen in the context of the criminal proceedings as a whole, cannot be said to have constituted a refusal on the part of the judicial authorities to grant the applicant the necessary facilities for the preparation of his defence.

► *Öcalan v. Turkey* [GC], 46221/99, 12 May 2005

132. In the absence of any specific observations by the parties on this point in the proceedings before it, the Grand Chamber endorses the Chamber's findings:

“... the applicant’s first visit from his lawyers took place under the supervision and within sight and hearing of members of the security forces and a judge, all of whom were present in the same room as the applicant and his lawyers. The security forces restricted the visit to twenty minutes. The record of the visit was sent to the National Security Court.

... As regards subsequent visits, ... the Court accepts that meetings between the applicant and his lawyers after the initial visit took place within hearing of members of the security forces, even though the security officers concerned were not in the room where the meetings took place.”

133. The Grand Chamber agrees with the Chamber’s assessment of the effects of the applicant’s inability to consult his lawyers out of the hearing of third parties:

“... an accused’s right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective ... The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments ... However, as stated above ... restrictions may be imposed on an accused’s access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing.

... In the present case, the Court accepts ... that the applicant and his lawyers were unable to consult out of the hearing of the authorities at any stage. It considers that the inevitable consequence of that restriction, which was imposed during both the preliminary investigation and the trial, was to prevent the applicant from conversing openly with his lawyers and asking them questions that might prove important to the preparation of his defence. The rights of the defence were thus significantly affected.

... The Court observes in that connection that the applicant had already made statements by the time he conferred with his lawyers and made further statements at hearings before the National Security Court after consulting them. If his defence to the serious charges he was required to answer was to be effective, it was essential that those statements be consistent. Accordingly, the Court considers that it was necessary for the applicant to be able to speak with his lawyers out of the hearing of third parties.

... As to the Government’s contention that the supervision of the meetings between the applicant and his lawyers was necessary to ensure the applicant’s security, the Court observes that the lawyers had been retained by the applicant himself and that there was no reason to suspect that they threatened their client’s life. They were not permitted to see the applicant until they had undergone a series of searches. Mere visual surveillance by the prison officials, accompanied by other measures, would have sufficed to ensure the applicant’s security.”

Consequently, the Court holds that the fact that it was impossible for the applicant to confer with his lawyers out of the hearing of members of the security forces infringed the rights of the defence.

► ***Moiseyev v. Russia*, 62936/00, 9 October 2008**

204. ... counsel for the applicant were required to seek special permits to visit and confer with him. Permits were valid for one visit only and the lawyers' attempts to have extended their period of validity proved to be unsuccessful. Permits were issued by the authority in charge of the case. ... It follows that for the entire duration of the criminal proceedings against the applicant visits by the applicant's counsel were conditional on authorisation by the authorities.

205. The prosecution in the applicant's case was instituted and conducted by the Federal Security Service. The Lefortovo remand centre, in which the applicant was held, was also under the jurisdiction of the Federal Security Service. Under these circumstances the prosecuting authority enjoyed unrestricted access to the applicant for its own purposes but exercised full and effective control over his contacts with the defence counsel, who were required to apply for a permit from the investigator – an officer of the Federal Security Service – each time they wished to visit him in the remand centre. The Court takes note of the Government's assertion that at no point in the proceedings was permission for a visit by counsel unreasonably withheld. Nevertheless, it has no doubt that the need to apply for an individual permit for every visit created considerable practical difficulties in the exercise of the rights of the defence because it detracted time and effort from pursuing the defence team's substantive mission. What causes the Court still greater concern is that this arrangement put the defence in a position of dependence on, and subordination to, the discretion of the prosecution and therefore destroyed the appearance of the equality of arms. On several occasions the Federal Security Service abused the dominant position it had in the matter by refusing to accept Mrs Moskalenko's request for an unrestricted permit or threatening criminal prosecution against her in the absence of any evidence that the permit had been forged ...

206. ... Nothing in the text of section 18 of the Custody Act suggests that a mandate from the legal services office and an identity document were not sufficient for allowing visits to the applicant by professional advocates, which all of the applicant's legal representatives were. Whereas section 18 explicitly requires consent by the competent authority for a family visit, it does not mention that visits by counsel may be subordinate to any such consent. It follows that the requirement on the applicant's counsel to seek permission to visit him was not only excessively onerous for the defence team but also devoid of legal basis and therefore arbitrary.

207. In the light of the above, the Court finds that the control exercised by the prosecution over access to the applicant by his counsel undermined the appearances of a fair trial and the principle of equality of arms.

► ***Rybacki v. Poland*, 52479/99, 13 January 2009**

58. ... on 17 May 1996 the prosecutor reserved the right to be present whenever the applicant saw his defence counsel ... no reference was made to the grounds on which this decision was given ...

59. In particular, the Court observes that it was not shown or argued ... that when imposing the measures the prosecuting authorities considered that there were any

indications pointing to a risk of collusion arising out of the lawyer's contacts with the applicant. Neither the professional ethics of the lawyer nor the lawfulness of his conduct were at any time called into question ... The Court can only conclude that it has not been shown that there were sufficient grounds for the imposition of the measures complained of.

60. The Court further notes that as a result of the order of 17 May 1996 the applicant's contacts with his lawyer were, from that date until 7 November 1996, supervised by police officers present at their meetings. Not only were they present in the same room, but they also listened to the conversations between the applicant and the lawyer. The Court notes the applicant's contention that during the supervised visits of his lawyer, whenever they started to talk about the case a police officer interrupted their conversation and warned them that if they continued the visit would have to be stopped ... The Government have not countered this contention. Hence it cannot be said that the applicant's contacts with his lawyer were, in such a setting, capable of assisting him in the effective exercise of his defence rights.

61. Lastly, the Court notes that it has not been argued that the fairness of the proceedings was vitiated by reason of the prosecution's reliance on, for example, incriminating statements made by the applicants in the period between May and November, namely when the applicant could not benefit from unsupervised legal advice. However, ... the Court cannot but observe that the restrictions concerned were applied for over six months during the investigation which lasted, overall, seven months and two weeks ... The Court further notes that throughout this period the prosecution authorities gathered very voluminous evidence ... The fact that the authorities were actively preparing the bill of indictment against the applicant taken together with the considerable length of that period cannot but strengthen the conclusion that the absence of unhindered contacts with his lawyer throughout that period negatively affected the effective exercise of his defence rights.

62. Having regard to the circumstances of the case seen as a whole, the Court is therefore of the view that there has been a violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention.

Correspondence and telephone calls

► *Moiseyev v. Russia*, 62936/00, 9 October 2008

208. In addition to seeking permission for visits, counsel for the applicant and the applicant himself were required to obtain special permission from the remand centre administration for any documents they wished to pass to each other. The documents were read by the administration before being exchanged ...

210. The Court observes that section 20 of the Custody Act – which apparently was the legal basis for perusing the documents passed between the applicant and his lawyers – provided for censorship of all correspondence by detainees in general terms, without exception for privileged correspondence, such as that with legal counsel. The Court reiterates in this connection that correspondence with lawyers, whatever its purpose, is always privileged and that the reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, when the

authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature ...

211. As noted above, the Lefortovo remand centre was managed by the same authority that prosecuted the case against the applicant. Thus, the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent. This flagrant breach of confidentiality of the client-attorney relationship could not but adversely affect the applicant's right to defence and deprive the legal assistance he received of much of its usefulness. It has not been claimed that the application of such a sweeping measure throughout the entire duration of the criminal proceedings was justified by any exceptional circumstances or previous abuses of the privilege. The Court considers that perusal of the documents passed between the applicant and his counsel encroached on the rights of the defence in an excessive and arbitrary fashion.

212. Accordingly, the Court finds that the routine reading of the defence materials by the prosecuting authority was in breach of the principle of equality of arms and eroded the rights of the defence to a significant degree.

► ***Khodorkovskiy and Lebedev v. Russia*, 11082/06, 25 July 2013**

635. ... the applicants complained about the interference by the authorities with written communications between the detained applicants and their lawyers. They referred, in particular, to several identical episodes with the applicants' lawyers ... all concerning seizure of their working papers by the prison administration ...

637. The Court observes that not only the applicants' letters to their relatives or friends were subject to perusal; also the notes and drafts prepared by the applicants' lawyers and brought to the meetings with their clients were regarded by the prison administration as "prohibited objects" ... and seized. Such limitations, however, had no firm basis in domestic law ... The Court reiterates in this respect that any limitations imposed on a detainee concerning his contacts with lawyers should have a lawful basis and that the law should be sufficiently precise ...

638. Furthermore, even assuming that the Russian law at the time prevented the defence from keeping and exchanging notes during the meetings, the Court is not persuaded that such a measure was necessary in the applicants' case. Secrecy of written communications is no less important than the secrecy of oral exchanges, especially where the case is factually and legally complex ... The Court reiterates that in *Campbell*, cited above, it stressed that the prisoner's correspondence with a lawyer should not be "susceptible to routine scrutiny". Such correspondence can be opened only when the prison authorities have "reasonable cause to believe that it contains an illicit enclosure". The letter should, however, only be opened and should not be read. The reading of a prisoner's mail to and from a lawyer should only be permitted "in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature" ...

639. In the present case the authorities took as their starting point the opposite presumption, namely that all written communications between any detained person and his lawyer were suspect. This went so far as to assimilate “correspondence” with written notes made by the lawyers in preparation for the meetings with the client or during them. The only way for the defence to overcome that presumption was to submit their working papers to the prison authorities for inspection, i.e. to reveal their arguments to a body which could hardly be regarded as independent, and which was required by law to communicate all suspicious correspondence to the investigative authorities ...

640. Again, the principle of confidentiality of lawyer-client contacts is not absolute. However, the fact that a criminal defendant is detained is not sufficient to subject all of his written communications with his lawyers to perusal, and that for an indefinite period of time and without any justification specific for that particular case. The Court has repeatedly condemned the practice of “indiscriminate, routine checking of all of the applicant’s correspondence” with his lawyer ... This is *a fortiori* true in respect of papers brought by the lawyer to a meeting with his client or prepared during the meeting. To have a reasonable cause for interfering with the confidentiality of lawyer-client written communications the authorities must have something more than a sweeping presumption that lawyers always conspire with their clients in disregard of the rules of professional ethics and despite the serious sanctions which such behaviour entails.

641. ... There was nothing in the behaviour of the applicants and their lawyers during those meetings to give rise to any reasonable suspicion of abuse of confidentiality; they were not “extraordinarily dangerous [criminals] whose methods had features in common with those of terrorists” ... The applicants were accused of non-violent economic crimes and had no criminal record ... There were no ascertainable facts showing that the applicants’ lawyers might abuse their professional privilege. The Court stresses that the measures complained of were not limited to the first days or weeks after the applicants’ arrest, when the risk of tampering with evidence, collusion or re-offending was arguably higher, but lasted for over two years. In the circumstances the Court concludes that the rule whereby working documents of the defence, drafts, notes etc. were subject to perusal and could have been confiscated if not checked by the prison authorities beforehand was unjustified ...

In court

► ***Saknovskiy v. Russia* [GC], 21272/03, 2 November 2010**

103. ... the applicant was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing. The Court considers that, given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that Ms A’s knowledge of the case and legal position were appropriate.

104. Moreover, it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the *Marcello Viola* case ... the applicant

was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A.

105. In addition, in the *Marcello Viola* case (cited above), counsel for the defendant had also been able to send a replacement to the video-conference room or, conversely, attend on his client personally and entrust the lawyer replacing him with his client's defence before the court. A similar conclusion was reached in the case of *Golubev*, where the Court did not find a violation of Article 6 on account of a hearing via video link because, *inter alia*, "the applicant's two lawyers were present at the appellate hearing [in the hearing room] and could have supported or expanded the arguments of the defence ... The applicant was able to consult with his lawyer in private before the hearing. Furthermore, since the applicant had two lawyers, he could choose one of them to assist him in the detention centre during the hearing and to consult with him in private." None of the options described above was available to the applicant in the case at hand. Instead, the applicant was expected either to accept a lawyer he had just been introduced to, or to continue without a lawyer.

106. The Court ... accepts that transporting the applicant from Novosibirsk to Moscow for a meeting with his lawyer would have been a lengthy and costly operation ... While emphasising the central importance of an effective legal assistance, the Court must examine whether in view of this particular geographic obstacle the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant's rights. The Court notes in this respect that nothing prevented the authorities from organising at least a telephone conversation between the applicant and Ms A. more in advance of the hearing. Nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention centre and have been with him during the hearing. Furthermore, it is unclear why the Supreme Court did not confer the representation of the applicant to the lawyer who had already defended him before the first-instance court and prepared the original statement of appeal. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with Ms A.

107. The Court concludes that the arrangements made by the Supreme Court were insufficient and did not secure effective legal assistance to the applicant during the second set of the appeal proceedings.

► ***Khodorkovskiy and Lebedev v. Russia*, 11082/06, 25 July 2013**

642. After the start of the trial most of the communication between the applicants and their lawyers took place in the courtroom, especially during the second phase of the trial when the court stopped the practice of Wednesday recesses ...

643. The Court observes that the rule whereby all written materials had to be checked before being passed to the applicants or received from them continued to apply

throughout the trial. However, it was no longer a prison official but a judge who was reading the documents exchanged between the applicants and their lawyers.

644. The Court takes note of the Government's argument that the defence agreed to such security arrangements ... However, the Court cannot regard this as a valid waiver of the defence's rights under Article 6 § 3 (c) ... having consulted with the prosecution and the escort service the judge proposed an alternative solution, namely that all defence documents would be passed through her. The defence seemingly had no other choice but to accept that new rule. Therefore, Mr Padva's remark that he would comply with the new rule cannot be interpreted as an unequivocal and voluntary acceptance of it.

645. The Court accepts that a judge offers better guarantees of independence and impartiality than an escort officer. Nevertheless, in the circumstances the new rule still fell short of the requirements of Article 6 § 3 (c). The Court reiterates in this respect that, first, the applicants' case was not such as to give reason to stringent restrictions on confidential exchanges, and that the authorities did not refer to specific facts which would justify the departure from the general rule of confidentiality of the lawyer-client contacts, including written communications. Second, the Court observes that Judge Kolesnikova, who requested the defence lawyers to show her all written communications, was also a judge of fact and law in the trial. While checking drafts and notes prepared by the defence lawyers or the applicants the judge might have come across information or arguments which the defence would not wish to reveal ... Consequently, her role in checking the defence papers might have affected her opinion about the factual and legal issues involved in the case ... In the Court's opinion, it would be contrary to the principle of adversarial proceedings if the judge's decision was influenced by arguments and information which the parties did not present and did not discuss at an open trial.

646. The Court further notes the applicants' complaint that the confidentiality of their oral communications with the lawyers was not respected ... the Court notes that the lawyers were not allowed to come closer than 50 cm to their clients when they wished to speak to them, and that escort officers were always standing in close proximity. The Court concludes that their oral exchanges might have been overheard by the convoy officers, at least occasionally.

647. The Court reiterates that not every measure hindering communication between the defendant and his lawyer must necessarily lead to a violation to Article 6 § 3 (c) ... in the present case the applicants did not have "an opportunity for private communication" with their lawyers, due to the permanent presence of escort officers near the metal cage and the minimal distance the lawyers had to respect. The fact that the defence was able to request adjournments during the hearings is irrelevant: it appears that even during those adjournments the lawyers were unable to discuss the case with their clients anywhere but in the hearing room, i.e. in the close vicinity of the prison guards. The Court concludes that even though the applicants benefited from legal assistance by several lawyers, the secrecy of their exchanges, both oral and written, was seriously impaired during the hearings.

See also THE TRIAL COURT (The courtroom), p. 222 above

Papers

► *Khodorkovskiy and Lebedev v. Russia*, 11082/06, 25 July 2013

633. ... the Court notes that Mr Drel was not only a lawyer and a member of the Bar – he was also a legal representative of both applicants in the same criminal case within which the searches were ordered ..., and the investigators could not have been unaware of that fact. From the search record itself it is clear that the investigators knew that they were entering a law firm’s office and were seizing the working files of a lawyer who represented the applicants ... Thus, by searching in Mr Drel’s office and seizing his working files the authorities deliberately interfered with the secrecy of the lawyer-client contacts protected under Article 6 § 3 (c) of the Convention ...

634. The Court sees no compelling reasons for such interference. The Government did not explain what sort of information Mr Drel might have had, how important it was for the investigation, and whether it could have been obtained by other means. At the relevant time Mr Drel was not under suspicion of any kind. Most significantly, the search in Mr Drel’s office was not accompanied by appropriate procedural safeguards, for example a court warrant, as required by the Advocacy Act and confirmed by the Constitutional Court ... There were no specific considerations which might have justified the departure from the general rule requiring a court warrant, and this omission strengthens the Court’s conclusion that the search and seizure were arbitrary and thus contrary to the requirements of Article 6 § 3 (c) of the Convention ...

See also the cases under GATHERING EVIDENCE (Search and seizure), p. 132 above

Liability of representative for statements

► *Nikula v. Finland*, 31611/96, 21 March 2002

51. It is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant’s view, constituted “role manipulation ... breaching his official duties”. Although some of the terms were inappropriate, her criticism was strictly limited to T.’s performance as prosecutor in the case against the applicant’s client, as distinct from criticism focusing on T.’s general professional or other qualities. In that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel.

52. The Court notes, moreover, that the applicant’s submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media ... Nor can the Court find that the applicant’s criticism of the prosecutor, being of a procedural character, amounted to personal insult ...

53. The Court further reiterates that even though the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court. There is no indication

that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question ... In that connection, the Court would stress the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.

54. It is true that, following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. It is likewise relevant that the Supreme Court waived her sentence, considering the offence to have been minor in nature. Even though the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an *ex post facto* review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred ...

56. In these circumstances the Court concludes that Article 10 of the Convention has been breached in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

► ***Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005**

178. The Limassol Assize Court sentenced the applicant to five days' imprisonment. This cannot but be regarded as a harsh sentence, especially considering that it was enforced immediately. It was subsequently upheld by the Supreme Court.

179. The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.

180. Having regard to the above, the Court is not persuaded by the Government's argument that the prison sentence imposed on the applicant was commensurate with the seriousness of the offence, especially in view of the fact that the applicant was a lawyer and considering the alternatives available ...

181. Accordingly, it is the Court's assessment that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel ... The Court's finding of procedural unfairness in the summary proceedings for contempt ... serves to compound this lack of proportionality ... This being so, the Court considers that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom

of expression. The fact that the applicant only served part of the prison sentence ... does not alter that conclusion.

183. The Court accordingly holds that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant.

► ***Coutant v. France (dec.)*, 17155/03, 24 January 2008**

... the Court agrees that the “Chalabi” trial was unusual in terms of its magnitude and the material conditions in which it was held. It notes that fifty-odd defence lawyers refused to attend the hearings, and takes note of the criticisms voiced by, *inter alia*, human rights organisations and members of the judiciary, such as the President of the Paris Bar Association, who denounced the “mass trial”.

However, the Court further notes that the applicant chose, one week after the start of the trial, to express herself through a press release, part of which was then taken up in an AFP [Agence France-Presse] news report. She did this, she says, to denounce the questionable conditions of her client’s arrest and the fact that it was impossible for her to defend him properly in such a trial. Now, there is nothing in the file before the Court to indicate that, in the circumstances, this was the only means of expression open to the applicant to avail herself of the arguments she intended to put forward in her client’s defence. On the contrary, the Court notes first of all that the applicant presented no grounds of nullity during the investigation, and secondly that in the impugned press release she went beyond the bounds of her client’s criminal defence to launch a general diatribe against the methods of the police and judicial services involved in the fight against terrorism.

The Court therefore sees no contradiction with its case-law in the findings of the domestic courts that the impugned statements, made public outside the court buildings, did not constitute a “defence” before a court in the procedural sense, and that the applicant could not expect to enjoy the immunity provided for in section 41 of the 1881 Act ... this reasoning is in keeping with the Court’s own case-law, including, from the reverse angle, its judgment in the *Nikula v. Finland* case ..., where it found a violation of the applicant’s right to freedom of expression because the critical remarks she (a defence lawyer) had made against a public prosecutor “were confined to the courtroom” and were “strictly limited to [his] performance as prosecutor in the case against the applicant’s client”.

The Court also notes that the domestic courts, in particular the Court of Appeal, found that certain passages in the press release insulted the honour and reputation of the police, notably those denouncing the use of “terrorist methods”, “police raids using methods worthy of the Gestapo and the Militia”, or “brutality and torture during four days of police custody, under the supervision of judges from the special section”. The Court notes that the Court of Appeal, after carefully analysing each of the impugned passages, found that the applicant had failed to substantiate her case, that she could not be accorded the benefit of good faith, and that she had expressed herself in partial and vindictive terms, without the slightest caution or moderation.

Overall, ... certain expressions used by the applicant overstepped the limits required for the proper discussion of ideas.

In the Court's view, the excessive nature of the impugned statements and the lack of factual substantiation are aggravated by the fact that they were made by a lawyer. ... the Court considers that the applicant failed to show the moderation and dignity expected of representatives of her profession ...

The applicant's remarks were aimed specifically at the State services responsible for the fight against terrorism. The Court reiterates that the authorities in a democratic system must tolerate criticism, even when it may be considered provocative or insulting ..., and that the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals ... Nevertheless, it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith ...

... considering the insulting character of the applicant's statements for the national police and the fact that they were published in the press, the Court considers that it was legitimate to impose criminal sanctions on the applicant, especially as the fine, although not negligible, cannot be considered excessive. In the opinion of the Court, this moderate penalty, which moreover had no impact on her professional activity, did not constitute a disproportionate response to the applicant's statements.

► ***Morice v. France* [GC], 29369/10, 23 April 2015**

145. The Court notes that, in convicting the applicant, the Court of Appeal took the view that to say that an investigating judge had shown "conduct which [was] completely at odds with the principles of impartiality and fairness" was in itself a particularly defamatory accusation ... That court added that the applicant's comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term "connivance", merely confirmed the defamatory nature of the accusation ..., the "veracity" of the allegations not having been established ... and the applicant's defence of good faith being rejected ...

174. The Court is of the view that the impugned remarks by the applicant did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis" ...

175. As to the sentences imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account ... In the present case, the Court of Appeal sentenced the applicant to pay a fine of EUR 4,000. This amount corresponds precisely to that fixed by the first-instance court, where the judges had expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him "a fine of a sufficiently high amount" ... In addition to ordering the insertion of

a notice in the newspaper *Le Monde*, the court ordered him to pay, jointly with the journalist and the publication director, EUR 7,500 in damages to each of the two judges, together with EUR 4,000 to Judge L.L. in costs. The Court notes, moreover, that the applicant alone was ordered to pay a sum to Judge M. in respect of costs, amounting to EUR 1,000.

176. ... in the present case the applicant's punishment was not confined to a criminal conviction: the sanction imposed on him was not the "lightest possible", but was, on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity ...

177. In view of the foregoing, the Court finds that the judgment against the applicant for complicity in defamation can be regarded as a disproportionate interference with his right to freedom of expression, and was not therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention.

See also INVESTIGATION (Criticism of officials), p. 33 above

Presence at hearing

► *Balliu v. Albania*, 74727/01, 16 June 2005

35. The Court notes that, as the applicant did not wish to defend himself in person and his chosen lawyer did not fulfil his duty, different courses were open to the Albanian authorities. Either they could cause Mr Leli, the applicant's chosen lawyer, to fulfil his duty, or they could replace him with an officially appointed lawyer. However, it was impossible, in view of the independence of the Bar, to force the applicant's counsel to act. Moreover, the applicant refused to be defended through the officially appointed lawyer. Thus, the domestic court chose a third course, namely to adjourn the hearings and then to proceed in the absence of the applicant's counsel, albeit in the applicant's presence.

36. The Court further notes that the applicant never informed the Durrës District Court of any shortcomings on the part of his representative or of the officially appointed lawyer, nor did he ask for a different one.

37. In this situation the Court finds that the authorities adequately discharged their obligation to provide legal assistance, both by adjourning the hearings in order to give the applicant's counsel an opportunity to fulfil his duty and by appointing a lawyer under the legal-aid scheme.

38. Bearing in mind also the authorities' obligation under Article 6 § 1 of the Convention to conduct the proceedings "within a reasonable time", the circumstances of the applicant's representation during his trial do not disclose a failure to provide legal assistance as required by Article 6 § 3 (c) of the Convention or a denial of a fair hearing under paragraph 1 of that provision ...

► *Konstantin Stefanov v. Bulgaria*, 35399/05, 27 October 2015

62. ... It is of particular importance in the present case that the fine was imposed on a professional lawyer, by a trial court before which he was appearing in his professional

capacity. Under those circumstances the applicant must have been fully aware of the ultimate responsibility of the judge presiding the judicial proceedings for their proper conduct. The applicant was instructed in no unclear terms by the domestic court that he was appointed as defense counsel, before he was fined for choosing to leave the court hearing. The domestic court fined the applicant specifically referring to a legal provision which was part of the Criminal Procedure Code [CPC], vesting ultimate authority for the proper administration of the proceedings in the judge. Given that the applicant was a lawyer, both this basic principle and the content and meaning of the particular provision of the CPC should have been sufficiently clear to him and the consequences of its application foreseeable. Any dispute about the remuneration of the applicant as an *ex officio* counsel could not have been expected to take precedence over the proper conduct of the judicial proceedings and those judicial proceedings could not have been expected to be the forum where such a dispute should be resolved.

63. In view of the above, the Court is prepared to accept that the applicant, as a representative of a party in criminal proceedings, was fined as a result of his absence from the hearing. As it cannot be said that the application of the law to the applicant's situation was arbitrary, the Court finds that he was fined lawfully, that is to say on the basis of an accessible, clear and foreseeable legal provision.

64. Furthermore, the law pursued the legitimate aim of ensuring the smooth operation of the justice system ... The Court recognises that, undeniably, it is in the general interest of society to have a justice system which operates efficiently and this includes court proceedings unhindered by unjustified delays.

65. ... In the present case, causing the postponement of the hearing without a valid reason, as established by the national courts, represented an obstacle to the smooth functioning of the justice system; courts are called upon to ensure the latter. The issue of whether the conduct leading to that obstacle should be punished by a financial sanction with a deterrent effect, such as the fine in the present case, comes within the margin of appreciation of the State. That margin is a wide one ...

66. Importantly, the applicant had at his disposal a procedural guarantee by which to challenge the penalty, specifically a possibility to bring judicial review proceedings in respect of the fine. He made use of that remedy ... and there is nothing to show that the decision-making process resulting in the fine complained of was unfair or arbitrary.

67. Lastly, although the fine imposed on the applicant was in the maximum possible amount under the relevant legal provision, it is neither prohibitive, nor oppressive or otherwise disproportionate ...

69. In the circumstances of the present case, in view of all said above the Court finds that the authorities have struck a fair balance between, on the one hand, the general interest and, on the other, respect for the applicant's right to property. The interference did not, therefore, impose an excessive burden on the applicant.

70. It follows that there has been no violation of Article 1 or Protocol No. 1 to the Convention.

Payment of fees

► *Morris v. United Kingdom*, 38784/97, 26 February 2002

88. The Court recalls that, in *Croissant v. Germany* ..., it held that there was no violation of Article 6 § 3 (c) where an individual was required to pay a contribution to the cost of providing legal assistance and had sufficient means to pay.

89. The Court notes that the applicant was offered legal aid subject to a contribution of GBP 240. It does not regard the terms of the offer as arbitrary or unreasonable, bearing in mind the applicant's net salary levels at the time, regardless of whether or not the applicant was given the option of paying by way of instalments.

Financial penalties for misconduct

► *X. and Y. v. Austria (dec.)*, 7909/74, 12 October 1978

4. ... the costs of the adjournment of the trial ... were imposed under Section 274 of the Code of Criminal Procedure which provides that in certain cases such costs have to be borne by the lawyer who is responsible for causing them. This provision ... corresponds to similar regulations in the law of other High Contracting Parties, can reasonably be considered as "necessary" within the meaning of Article 1 (2) of the Protocol, and the only remaining question is therefore whether its application in the particular case can also be justified ...

Withdrawal

► *Panovits v. Cyprus*, 4268/04, 11 December 2008

96. The Court notes that the applicant's lawyer and the judges of the Assize Court engaged in various disagreements over the course of the applicant's trial, and that the applicant's lawyer had felt the need to request leave to withdraw from the proceedings due to the court's interferences with his conduct of the applicant's defence. His request was refused and he continued to represent the applicant.

97. The Court further notes that upon the resumption of the main trial following the contempt proceedings Mr Kyprianou felt that it was necessary for another lawyer to represent the applicant and request the court itself to withdraw from the further examination of the case. The request was refused as the Assize Court considered that no reasonable person could conclude that the applicant could have been prejudiced in any way by the contempt proceedings.

98. ... Although the contempt proceedings were separate from the applicant's main trial, the fact that the judges were offended by the applicant's lawyer when he complained about the manner in which his cross-examination was received by the bench undermined the conduct of the applicant's defence.

99. ... although the conduct of the applicant's lawyer could be regarded as disrespectful for the judges of the Assize Court, his comments were aimed at and were

limited to the manner in which the judges were trying the case and, in particular, their allegedly insufficient attention to his cross-examination of a witness carried out in the course of defending the applicant. In this respect, the interference with the freedom of expression of the applicant's lawyer in conducting the applicant's defence, had breached Article 10 of the Convention ... Moreover, the Court held that the sentence imposed on the applicant's lawyer had been capable of having a "chilling effect" on the performance of the duties attached to lawyers when acting as defence counsel.

100. The Court finds that the refusal of Mr Kyprianou's request for leave to withdraw from the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner exceeded, in the present circumstances, the limits of a proportionate response given the impact on the applicant's rights of defence.

101. In these circumstances, the Court concludes that the Assize Court's handling of the confrontation with the applicant's defence counsel rendered the trial unfair. It follows that there has been a violation of Article 6 § 1 in this respect.

AVAILABILITY OF EVIDENCE

► *Sofri and Others v. Italy (dec.)*, 37235/97, 27 May 2003

1. ... it is extremely regrettable that items of evidence in a homicide trial should have been destroyed shortly after the suspects were charged. Responsibility for the destruction of that evidence, which was probably due to an administrative mix-up at the Milan court, lies with the Italian authorities.

However, this is not sufficient for the Court to find a violation of Article 6 of the Convention. It must also be established that the consequences of the malfunctioning put the applicants at a disadvantage compared to the prosecution ...

In that connection, the Court notes that the applicants have not indicated how Superintendent Calabresi's clothes could have assisted the defence case. On the other hand, forensic tests on the car and bullets could have shed light on the dynamics of the road-traffic accident that took place after the murder and the sequence in which the shots were fired. If the results of such tests had contradicted all or part of Mr Marino's account, his credibility would have been affected.

The Court observes, however, that the public prosecutor's office found itself in a similar situation to the applicants, as the inability to perform forensic tests also prevented the public prosecutor's office from relying on the evidence that had been lost or destroyed. In these circumstances, the parties to the trial were therefore on an equal footing.

Moreover, both the car and the bullets were described, examined and photographed prior to their destruction, so that the applicants were able to exercise their defence rights in respect of that evidence. In particular, they were able to obtain expert evidence and a computer presentation of the photographs and that evidence helped them to obtain a ruling that their application for review was admissible. Lastly, they

had an opportunity to contest many other aspects of their accuser's version of events throughout the various stages of the adversarial judicial proceedings.

In these circumstances, the Court cannot conclude that the destruction or loss of the items of evidence mentioned above affected the fairness of the proceedings ...

It follows that this complaint is manifestly ill-founded ...

See also DEFENCE (Disclosure of prosecution evidence, Access to the case file), p. 304 above

ABILITY OF DEFENDANT TO BE HEARD AND TO ADDUCE EVIDENCE

Presence

► *Ensslin, Baader and Raspe v. Federal Republic of Germany (dec.), 7572/76, 8 July 1978*

22. ... The decision at issue was taken on the 40th day of a trial which lasted 191 days. Subsequently, the applicants again attended the proceedings intermittently, at least until 8 May 1976, the date of U. Meinhof's death; whatever their reason for refusing the traditional form of judicial exchange, they were able to explain their motives and attitudes and to criticise the legitimacy of the system established to try them, these being the main lines of their own defence. The reason for the decision was their-medically attested unfitness to attend the hearings for more than three hours each day, over a period of least six months. It refers to statements by the accused indicative of their wish to make it impossible for the trial to begin, particularly by recourse to hunger strikes. In the circumstances, the judge was able legitimately to make use of the only means at his disposal for preventing the proceedings from grinding to a halt, without however placing the defence at any disadvantage, their lawyers being present and having practically unlimited opportunities for contact with their clients. In the light of all the factors recapitulated above, the continuation of the hearings in absence of accused cannot therefore be deemed to have infringed the rights and freedoms guaranteed by the Convention, and particularly by the above-mentioned provisions.

► *Zana v. Turkey, 18954/91, 25 November 1997*

69. ... the Court notes that Mr Zana was not requested to attend the hearing before the Diyarbakır National Security Court, which sentenced him to a twelve-month prison term ... In accordance with Article 226 § 4 of the Code of Criminal Procedure, the Aydın Assize Court had been asked to take evidence from him in his defence, under powers delegated by the National Security Court ...

71. In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person ... If the applicant had been present at the hearing, he would have had an

opportunity, in particular, to say what his intentions had been when he had made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording.

72. Neither the “indirect” hearing by the Aydın Assize Court nor the presence of the applicant’s lawyers at the hearing before the Diyarbakır National Security Court can compensate for the absence of the accused.

73. The Court accordingly considers ... that such an interference with the rights of the defence cannot be justified ...

► ***Ninn-Hansen v. Denmark (dec.)*, 28972/95, 18 May 1999**

The applicant maintains that the continuation and conclusion of the trial against him regardless of his state of health constituted a violation of Article 6 § 3 (d) of the Convention. The fact that he had suffered a stroke made him unable to follow the remaining sessions in a qualified way and participate in the preparation of his defence by, *inter alia*, questioning witnesses and making statements. Although quantitatively the major part of the trial had been concluded at the time when the applicant fell ill, a qualitatively important part of the trial still remained, namely the re-hearing of the applicant and five key witnesses ...

The Court notes that the Court of Impeachment’s decision of 6 April 1995 to continue the trial was made on the basis of extensive medical evidence ... On the basis of the medical evidence produced the court found that the applicant’s physical health did not prevent him from being present during continuing proceedings. Nor did the statements from the doctors provide any reasons to believe that his continuing presence would increase the risk of deteriorating his health. With regard to the applicant’s mental state there was evidence that his intellect had been reduced considerably. However, the Medico-Legal Council refrained from stating whether he was incapable of participating at a qualified level in a trial since the answer would depend on a legal evaluation of the medical information.

... Having regard, in particular, to the fact that the major part of the taking of evidence had been concluded, that the applicant had been present during all court sessions prior to his illness and to the fact that the remaining part of the trial could be conducted in a way that the necessary considerations be taken to his state of health, the Court of Impeachment found that the applicant’s state of health should not prevent the conclusion of the trial and the imposition of a normal penalty on him ...

In assessing whether the applicant was adequately defended during the remaining part of the trial the Court have had regard to, *inter alia*, the fact that he was represented by counsel and that the major part of the trial had been concluded when he fell ill, the only remaining part of the proceedings being the announced re-hearing of the applicant and five witnesses and the parties’ closing statements ... The Court further recalls that, as a result of the decision of the Court of Impeachment not to adjourn the trial, the applicant’s defence withdrew the request to have a re-hearing of the applicant and of five witnesses. Consequently, the remaining part of the trial only concerned the closing statements of the parties.

Having regard to the above the Court does not find any appearance of a violation of Article 6 § 1 or § 3 (c) and (d) of the Convention with regard to the Court of Impeachment's decision to conclude the trial despite the applicant's illness, and in his absence.

► ***Idalov v. Russia* [GC], 5826/03, 22 May 2012**

175. ... the Court notes that during the trial the applicant was excluded from the courtroom for improper behaviour. The judge directed that the applicant should be brought back to the courtroom at the end of the trial to make his final submissions. As a result, all the evidence, including, but not limited to, the testimony of the witnesses, was examined in his absence ...

176. The Court considers at the outset that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can nor should be tolerated ...

177. ... the applicant's behaviour might have been of such a nature as to justify his removal and the continuation of his trial in his absence. However, it remained incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to her decision to order his removal from the courtroom ...

178. The Court discerns nothing in the material in its possession to suggest that the judge had either issued a warning or considered a short adjournment in order to make the applicant aware of the potential consequences of his ongoing behaviour in order to allow him to compose himself. In such circumstances, the Court is unable to conclude that, notwithstanding his disruptive behaviour, the applicant had unequivocally waived his right to be present at his trial. His removal from the courtroom meant that he was not in a position to exercise that right. The judge proceeded to examine the evidence in his absence and it does not appear that she made any inquiries as to whether the applicant would agree to conduct himself in an orderly manner so as to permit his return to the trial ...

180. ... Both the applicant and his lawyer attended the appeal hearing and were able to plead the case before the appellate court. Further, the appellate court had the possibility of reviewing the evidence which had been taken at trial. However, it was not open to the applicant or his counsel to obtain a re-examination of that evidence or, for example, to cross-examine those witnesses who had testified against him while he was absent from the trial ... In such circumstances, the appeal hearing did not cure the defects of the trial. In the Court's view, the only possible means of redressing the defects of the trial proceedings would have been for the appellate court to quash the verdict in its entirety and to refer the matter back for a hearing *de novo*. By not doing so, the appellate court failed to redress the violation of the applicant's right to a fair trial ...

182. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (c) and (d) of the Convention.

Need to be heard

► *Constantinescu v. Romania*, 28871/95, 27 June 2000

58. ... the Court notes that, having quashed the decision to acquit reached at first instance, the Bucharest County Court determined a criminal charge against the applicant, convicting him of criminal libel, without hearing evidence from him. The Court is not satisfied with the Government's argument according to which the fact that the accused addressed the court last was sufficient in the present case. It notes, first, that the Government and the applicant disagree as to whether the applicant did in fact address the court last. Secondly, it stresses that, although an accused's right to address the court last is certainly of importance, it cannot be equated with his right to be heard by the court during the trial.

59. Accordingly, the Court finds that the Bucharest County Court determined a criminal charge against the applicant and found him guilty of libel without his having the opportunity to give evidence and defend himself. It considers that the Bucharest County Court should have heard evidence from the applicant, having regard, in particular, to the fact that it was the first court to convict him in proceedings brought to determine a criminal charge against him.

Ability to adduce evidence

► *Georgios Papageorgiou v. Greece*, 59506/00, 9 May 2003

37. ... the instant case does not concern the concealment of evidence, but the refusal to order production of the originals of documents used as evidence for the prosecution. At no stage of the proceedings were the courts dealing with the case able to examine extracts from the log file of the bank's computer or the original cheques, or to check whether the copies submitted to them corresponded to the originals. Furthermore, the first-instance court ordered the destruction of the cheques presumed to have been forged, the crucial piece of evidence in the applicant's trial. The applicant's conviction for fraud was, moreover, based to a large extent on the photocopies of the cheques in question. It is also apparent from the Court of Appeal's judgment that the means used to carry out the fraud were the cheques and the computer, which was necessary to alter the data from the bank's central computer. In those circumstances, the Court considers that production of the original cheques was vital to the applicant's defence since it would have enabled him, as he himself pointed out, to show that the instructions for the payment in issue had been given by employees of the bank other than him, which would have compelled the judges to conclude that the accusation of fraud was unfounded ...

39. Having regard to the fact that, in spite of his repeated requests, essential pieces of evidence were not adequately adduced and discussed at the trial in the applicant's presence, the Court concludes that the proceedings in issue, taken as a whole, did not satisfy the requirements of a fair trial.

40. There has therefore been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

► ***Craxi v. Italy*, 34896/97, 5 December 2002**

83. ... Furthermore, insofar as the applicant states that Mr Pacini Battaglia was a defence witness, the Court notes that Mr Craxi had not precisely indicated the circumstances on which he should have testified. He has, therefore, not shown that it was necessary to call this witness in order to establish the truth or that the refusal to examine him infringed the rights of the defence ...

► ***Popov v. Russia*, 26853/04, 13 July 2006**

184. The Court notes that the applicant sought leave to call before the trial court several witnesses who, according to him, could have confirmed his alibi ... However, the court dismissed the witnesses' statements on the ground that being the applicant's relatives they had tried to help him ...

185. The Court further notes that in refusing to examine Mrs R. and Mr Kh. [who were not relatives] the trial court did not consider whether their statements could have been important for the examination of the case. However, from the fact that the defence's previous motions to have them examined were formally granted a number of times both during the preliminary investigation and the court proceedings, it follows that the domestic authorities agreed that their statements could have been relevant.

188. ... Taking into account that the applicant's conviction was founded upon conflicting evidence against him, the Court finds that the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in Article 6 ...

► ***Perna v. Italy* [GC], 48898/99, 6 May 2003**

31. ... The Court agrees with the Italian courts that, even supposing that adding the two press articles to the file and taking evidence from Mr Caselli could have shed light on the latter's political leanings and his relations with third parties, those measures would not have been capable of establishing that he had failed to observe the principles of impartiality, independence and objectivity inherent in his duties. On that crucial aspect, at no time did the applicant try to prove the reality of the conduct alleged to be contrary to those principles. On the contrary, his defence was that these were critical judgments which there was no need to prove.

32. In the light of the above considerations, the Court considers that the decisions in which the national authorities refused the applicant's requests are not open to criticism under Article 6, as he had not established that his requests to produce documentary evidence and for evidence to be taken from the complainant and witnesses would have been helpful in proving that the specific conduct imputed to Mr Caselli had actually occurred. From that point of view, it cannot therefore be considered that the defamation proceedings brought by Mr Caselli against the applicant were unfair on account of the way the evidence was taken ... In conclusion, there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

► ***Kasparov and Others v. Russia*, 21613/07, 3 October 2013**

60. ... the Court observes that Mr Kasparov was brought before the Justice of the Peace after being apprehended in Tverskaya Street, allegedly for taking part in an unauthorised march. It observes, next, that the circumstances surrounding his arrest, such as the purpose of his being there, the time of the alleged march and even the time and the exact place of the arrest were in dispute between the parties ...

62. In the proceedings before the Justice of the Peace, Mr Kasparov contended that he had been walking with a small group of people towards the Griboyedov monument, the venue for a meeting that had been duly authorised by the Moscow authorities. The police, on the other hand, alleged that Mr Kasparov had not simply been walking but had been taking part in an unauthorised demonstration, and they insisted that he had been doing so at a time when the event at the Griboyedov monument had ended. Another controversy between the parties relates to the place of arrest. According to the police, the applicants, including the first applicant, were arrested when the demonstration threatened to spill over into Red Square, a designated high-security area. The first applicant, meanwhile, claimed that he had been arrested in Tverskaya Street when he and his companions had reached the security barrier set up by the riot police at a considerable distance from Red Square.

63. The Court has previously held that in circumstances where the applicant's conviction was based primarily on the assumption of his being in a particular place at a particular time, the principle of equality of arms and, more generally, the right to a fair trial, imply that the applicant should be afforded a reasonable opportunity to challenge the assumption effectively ...

64. In the first applicant's case, however, the court rejected the attempts by the applicant to clarify the time and place of his arrest, although these facts were central to the determination of the administrative charges. Presented with two irreconcilable statements, the Justice of the Peace decided to base the judgment exclusively on the version put forward by the police because they had been a "party with no vested interest". However, the Court considers that, given the significance of the disputed facts for the outcome of the case and the role of the police officer who arrested the applicant and drew up the report, it was indispensable for the Justice of the Peace to exhaust every reasonable possibility of finding out exactly when and where the first applicant had been arrested.

65. The Court notes that calling the eyewitnesses who could have shed light on these events would have been a straightforward matter. Their names and addresses were known; four of them had been arrested at the same time as the applicant, and they were, according to the applicant's counsel, waiting outside the court to give evidence. In any event, the Justice of the Peace did not refer to any technical obstacles to finding these persons. She simply considered it superfluous to the proceedings.

66. The Court cannot but conclude that the Justice of the Peace accepted the submissions of the police readily and unequivocally and denied the first applicant any possibility of adducing any proof to the contrary. The Court recognises that the charges against the applicant were rather trivial and that the proceedings concerning such matters are meant to be conducted expeditiously. However, taking into account

the fact that the applicant's conviction was founded upon conflicting evidence against him, the Court finds that the domestic courts' unreserved endorsement of the police report and their refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair hearing ... Accordingly, there has been a breach of the principles enshrined in Article 6 of the Convention.

► ***Navalnyy and Yashin v. Russia*, 76204/11, 4 December 2014**

83. ... The Court considers that in the dispute over the key facts underlying the charges where the only witnesses for the prosecution were the police officers who had played an active role in the contested events, it was indispensable for the Justice of the Peace and the Tverskoy District Court to exhaust every reasonable possibility of verifying their incriminating statements ... The failure to do so ran contrary to the basic requirement that the prosecution has to prove its case and one of the fundamental principles of criminal law, namely, *in dubio pro reo* ...

84. Moreover, the Court observes that the courts limited the scope of the administrative case to the applicants' alleged disobedience, having omitted to consider the "lawfulness" of the police order, and having disallowed the relevant questions during the cross-examination of the police officers ... They thus punished the applicants for actions protected by the Convention without the police having to justify the interference with the applicants' right to freedom of assembly, contrary to the principle of equality of arms.

85. The foregoing considerations are sufficient to enable the Court to conclude that the administrative proceedings against the applicants, taken as a whole, were conducted in violation of their right to a fair hearing under Article 6 § 1 of the Convention.

RIGHT TO AN INTERPRETER

When applicable

► ***X. v. Austria (dec.)*, 6185/73, 29 May 1975**

1. The applicant complains that he was not given the free assistance of an interpreter for contacts with his defence counsel who did not speak the applicant's own language ... Article 6 (3) (e) in fact only applies to the relations between the accused and the judge ... In the circumstances of the present case, the Commission cannot exclude that the preparation of the defence was made more difficult as a result of misunderstandings between the applicant and his counsel. Nevertheless the applicant must be taken to be responsible for that situation. It was indeed for him, either to appoint another lawyer with a good knowledge of French or to call for an interpreter he would have remunerated. If he had not sufficient means to pay for a defence counsel and/or an interpreter, he could still have applied for free legal aid. The Commission notes in this respect that, according to Austrian practice, specific linguistic requirements are taken into account by the designation of a court appointed defence counsel. Furthermore free legal aid may be extended to include the service of an interpreter ...

2. ... one cannot derive from [Article 6(3)] ... a general right for the accused to have the court files translated. The Commission recalls that the rights secured under Art. 6(3) are those of the defence in general and not those of the accused considered separately ... It should thus be pointed out that part of the file was drafted in German so that the applicant's lawyer could understand it while many documents were in French and could be read by the applicant himself. Again the applicant must assume personal responsibility for any remaining linguistic difficulty, for the very reasons set out above ...

► ***Kamasinski v. Austria, 9783/82, 19 December 1989***

74. The right, stated in paragraph 3 (e) of Article 6 ... to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Paragraph 3 (e) ... signifies that a person "charged with a criminal offence" who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial ...

However, paragraph 3 (e) ... does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.

Duty to provide

► ***K. v. France (dec.), 10210/82, 7 December 1983***

7. The applicant further complains that the Tribunal did not permit him the services of an interpreter to enable him to conduct his defence in the Breton language.

8. ... it is clear from the decision of the Tribunal that the applicant was born and educated in France and had no difficulty in understanding and speaking the French language in which the proceedings were conducted. The Convention right to the assistance of an interpreter contained in Article 6, para. 3 (e) clearly applies only where the accused cannot understand or speak the language used in court.

► ***Cuscani v. United Kingdom, 32771/96, 24 September 2002***

38. The Court observes that the applicant's alleged lack of proficiency in English and his inability to understand the proceedings became a live issue for the first time on 4 January 1996 when the trial court was informed by his legal team that the applicant wished to enter a guilty plea to the charges brought against him. At the request of the applicant's counsel, the trial judge directed that an interpreter be present at the hearing on sentence to be held on 26 January 1996 ... The judge was thus put on clear notice that the applicant had problems of comprehension. However, notwithstanding his earlier concern to ensure that the applicant could follow the subsequent proceedings it would appear that the judge allowed himself to

be persuaded by the applicant's counsel's confidence in his ability to "make do and mend" ... Admittedly, the trial judge left open the possibility of the applicant having recourse to the linguistic assistance of his brother if the need arose. However, in the Court's opinion the verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel's own difficulties in communicating with the applicant. It is to be noted that the applicant had pleaded guilty to serious charges and faced a heavy prison sentence. The onus was thus on the judge to reassure himself that the absence of an interpreter at the hearing on 26 January 1996 would not prejudice the applicant's full involvement in a matter of crucial importance for him. In the circumstances of the instant case, that requirement cannot be said to have been satisfied by leaving it to the applicant, and without the judge having consulted the latter, to invoke the untested language skills of his brother ...

39. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(e).

Quality

► *Kamasinski v. Austria*, 9783/82, 19 December 1989

74. ... In view of the need for the right guaranteed by paragraph 3 (e) ... to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided ...

83 ... The Court does not find it substantiated on the evidence taken as a whole that Mr Kamasinski was unable because of deficient interpretation either to understand the evidence being given against him or to have witnesses examined or cross-examined on his behalf.

► *Husain v. Italy (dec.)*, 18913/03, 24 February 2005

... the applicant received free assistance from an Arabic interpreter when the committal warrant was served on him. There is nothing in the case file to show that the interpreter's translation was inaccurate or otherwise inadequate. Moreover, the applicant did not contest the quality of the translation, and this may have led the authorities to believe that he had understood the content of the document concerned ...

Subsequent charging where provided free

► *Luedicke v. Federal Republic of Germany (dec.)*, 6210/73, 28 November 1978

46. ... the ordinary meaning of the terms "gratuitement" and "free" in Article 6 para. 3 (e) ... is not contradicted by the context of the sub-paragraph and is confirmed by the object and purpose of Article 6 ... The Court concludes that the right protected

by Article 6 para. 3 (e) ... entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.

► ***Isyar v. Bulgaria*, 391/03, 20 November 2008**

45. The Court refers to its established case law according to which the right protected in Article 6 § 3(e) of the Convention includes, for anyone who does not speak or does not understand the language used at the hearing, the right to the free assistance of an interpreter, without subsequently being asked to pay the costs resulting from such assistance ...

46. ... The Court notes that the district court of Svilengrad ordered the applicant to pay all the costs incurred during the preliminary investigation and the examination of the case at first instance ... The Supreme Court of Cassation ordered the applicant to pay the interpretation costs incurred in the proceedings before it ... the Court finds that the applicant was required to pay the interpretation costs incurred at the preliminary investigation stage, during the examination of his case at first instance and before the Supreme Court of Cassation.

47. The Court notes that the present case reveals a certain inconsistency in the case law of the Bulgarian Supreme Court of Cassation as to whether convicted criminals can be required to pay interpretation costs: in an identical case the same court exempted the offender from paying interpretation costs ...

48. ... In the present case it notes that the manner in which the courts interpreted domestic law resulted in the applicant being required to pay all the interpreting costs incurred in the criminal proceedings against him, which deprived him of his right to the free assistance of an interpreter.

See also INTERROGATION (Availability of an interpreter), p. 170 above

NEED FOR A PRESCRIBED PROCEDURE

► ***Coëme v. Belgium*, 32492/96, 22 June 2000**

99. ... There is no doubt that the Court of Cassation, which in Belgian law was the only court which had jurisdiction to try Mr Coëme, was a "tribunal established by law" ...

100. The Court notes that no legislation implementing Article 103 of the Constitution was in force when the applicants stood trial in the Court of Cassation ... Yet Article 103 § 2 required Parliament to lay down the procedure before the Court of Cassation, and Article 139 of the Constitution of 7 February 1831 insisted on the need to do so as soon as possible ... When the trial opened on 5 February 1996 ... the President of the Court of Cassation himself confirmed that the procedure of the ordinary criminal courts would be followed, announcing that the case would be tried in accordance with the provisions of Article 190 of the Code of Criminal Investigation.

101. However, the Government acknowledged that the procedure of the ordinary criminal courts could not be adopted as such by the Court of Cassation sitting as a full court. In its interlocutory judgment of 12 February 1996 ... the Court of Cassation announced that the rules governing the procedure in the ordinary criminal courts would be applied only in so far as they were compatible "with the provisions governing the procedure in the Court of Cassation sitting as a full court". As a result, the parties could not ascertain in advance all the details of the procedure which would be followed. They could not foresee in what way the Court of Cassation would amend or modify the provisions governing the normal conduct of a criminal trial, as established by the Belgian parliament.

In so doing, the Court of Cassation introduced an element of uncertainty by not specifying which rules were contemplated in the restriction adopted. Even if the Court of Cassation had not made use of the possibility it had reserved for itself of making certain changes to the rules governing procedure in the ordinary criminal courts, the task of the defence was made particularly difficult because it was not known in advance whether or not a given rule would be applied in the course of the trial.

102. The Court reiterates that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim "*nullum iudicium sine lege*". It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms ... The Court further observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.

103. Consequently, the Court considers that the uncertainty caused by the lack of procedural rules established beforehand placed the applicant at a considerable disadvantage vis-à-vis the prosecution, which deprived Mr Coëme of a fair trial for the purposes of Article 6 § 1 of the Convention.

APPEARANCE OF ACCUSED IN COURT

Clothing

► ***Samoila and Cionca v. Romania*, 33065/03, 4 March 2008**

99. Finally, concerning the presentation of the applicants before the court in prison garments, the Court notes that, contrary to the Government's assertions, it is clear from the refusal of the president of the Court of Appeal addressed to them on 27 October 2003 ... that the applicants were presented before the court wearing prison clothes usually worn only by convicts.

100. The Court observes that this practice was contrary to the provisions of Law No. 23/1969 and Decision No. 348/1994 of the Constitutional Court ... As it was not established that the applicants had no suitable clothes of their own, this practice was

entirely unjustified and likely to confirm the public's impression that the applicants were guilty.

101. All these considerations lead the Court to conclude that there was a violation of the principle of presumption of innocence guaranteed in Article 6 § 2 of the Convention.

Use of restraining measures

► *Gorodnichev v. Russia*, 52058/99, 24 May 2007

104. The Court further states that, from the point of view of a fair trial, the Government, as well as the domestic courts in their decisions, conceded that the disputed wearing of handcuffs did not comply with the applicant's rights of defence guaranteed by Article 46 of the Code of Criminal Procedure ... The Court deduces from this that the use of handcuffs in the instant case was not normal practice connected with the detention of the person concerned ...

105. ... The Court finds that none of the evidence in the file suggests that, had the applicant not worn handcuffs when appearing before the Kirovskii court, there might have been a risk of violence or damage, or of his absconding or of interference with the proper administration of justice. Accordingly, it does not find that the use of handcuffs was intended to exercise reasonable restraint ... and finds that this was disproportionate to the security requirements cited by the Government ...

108. Therefore, although it has not been shown that the measure was aimed at debasing or humiliating the applicant, the Court finds that his appearance in handcuffs at the public hearings on 5 and 22 February 1999 ... when such a measure was not reasonably necessary for public security or the administration of justice, amounted to degrading treatment within the meaning of Article 3 of the Convention.

109. Consequently, there was a violation of this provision.

Chapter 13

Rights of victims

NO RIGHT TO HAVE SOMEONE PROSECUTED

► ***Perez v. France* [GC], 47287/99, 12 February 2004**

70. The Court considers that in such cases the applicability of Article 6 has reached its limits. It notes that the Convention does not confer any right, as demanded by the applicant, to “private revenge” or to an *actio popularis*. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation” ...

► ***Jankovic v. Croatia*, 38478/05, 5 March 2009**

48. ... violent acts committed by private individuals are prohibited in a number of separate provisions of the Criminal Code. The Court observes further that the Croatian criminal law distinguishes between criminal offences to be prosecuted by the State Attorney’s Office, either of its own motion or upon a private application, and criminal offences to be prosecuted by means of a private prosecution. The latter category concerns criminal offences of a lesser nature. The Court also notes that the applicant alleged that the acts of violence committed against her constituted, *inter alia*, the criminal offences of violent behaviour and making threats. Prosecution in respect of both these offences is to be undertaken by the State Attorney’s Office, of its own motion in the case of the former offence and on a private application in the case of the latter.

49. ... In respect of criminal offences for which the prosecution is to be undertaken by the State Attorney’s Office, either of its own motion or upon a private application, where the Office declines to prosecute on whatever ground, the injured party may take over the prosecution as a subsidiary prosecutor. In contrast, a private prosecution is undertaken from the beginning by a private prosecutor. Furthermore, a criminal complaint lodged in due time in respect of a criminal offence subject to private prosecution is to be treated as a private prosecution ...

50. ... the Court cannot accept the applicant's arguments that her Convention rights could be secured only if the attackers were prosecuted by the State and that the Convention requires State-assisted prosecution. ... the Court is satisfied that in the present case domestic law afforded the applicant a possibility to pursue the prosecution of her attackers, either as a private prosecutor or as the injured party in the role of a subsidiary prosecutor, and that the Convention does not require State-assisted prosecution in all cases ...

52. ... the applicant's decision not to bring a private prosecution on the charges of causing bodily injury of a lesser nature but instead to request an investigation against her attackers on charges of violent behaviour and making serious threats was in compliance with the rules of the Code of Criminal Procedure concerning the role of the injured party as a subsidiary prosecutor.

53. ... in her initial request for an investigation the applicant had already made it clear that she sought an investigation, *inter alia*, into her allegations that on 6 June 2003 three individuals had attacked her. She named the individuals concerned and listed their addresses. She alleged that the acts of violence against her constituted, *inter alia*, the criminal offences of making threats and violent behaviour. She submitted relevant medical documentation in support of her allegations. However, the domestic authorities declared her request inadmissible as being incomplete, without specifying exactly what formal requirements were not met.

54. It might be true that the applicant's submission did not strictly follow the exact form required for requests lodged with the State Attorney's Office in criminal proceedings. In this connection the Court notes that the applicant was not legally represented in the proceedings at issue. She is unemployed and obviously lacking the means for legal representation at her own expense. Furthermore, under the relevant provisions of the Code of Criminal Procedure ..., the applicant had no right to legal aid since the alleged criminal offences did not carry a sentence of imprisonment exceeding three years.

55. The Court also notes that there had already been a police report on the incident, which also described the acts of violence against the applicant, and that the Split Municipality State Attorney's Office had also produced an account of the event in question. Therefore, it is difficult to accept the conclusion of the Split County Court investigation judge that the applicant's request for an investigation was to be dismissed on the grounds that it was incomprehensible and incomplete. On the contrary, the Court finds that the applicant had made it clear that she was seeking an investigation into an act of violence against her. She showed great interest in her case and made serious attempts to have the attackers prosecuted. Her submissions were sufficient to enable the competent investigation judge to proceed upon her request. They contained all the information required under Article 188(3) of the Code of Criminal Procedure, namely the identification of the person against whom the request was submitted, a description and the legal classification of the offence at issue, the circumstances confirming a reasonable suspicion that the person concerned had committed the offence at issue, and the existing evidence.

56. As to the Government's assertion that the applicant had failed to bring a private prosecution, the Court notes that the applicant did lodge a timely criminal complaint with the Split Municipality State Attorney's Office ... On 11 November 2003 that

office decided not to open an official investigation on the ground that the act in question qualified as a criminal offence for which a prosecution had to be brought privately by the victim ... Under Article 48(3) of the Code of Criminal Procedure, in these circumstances the applicant's criminal complaint had to be treated as a private prosecution ... However, the competent authorities completely ignored that rule and failed to proceed with the applicant's criminal complaint.

57. The above analysis shows firstly that the relevant State authorities decided not to prosecute the alleged perpetrators of an act of violence against the applicant. Furthermore, the relevant authorities did not allow the applicant's attempts at a private prosecution. Lastly, as to the Government's contention that adequate protection was given to the applicant in the minor-offences proceedings, the Court notes that those proceedings were terminated owing to statutory limitation and were thus concluded without any final decision on the attackers' guilt. In view of these findings, the Court holds the view that the decisions of the national authorities in this case reveal inefficiency and a failure to act on the part of the Croatian judicial authorities.

58. In the Court's view, the impugned practices in the circumstances of the present case did not provide adequate protection to the applicant against an attack on her physical integrity and showed that the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE (Discontinuance), p. 184 above

RESTRICTIONS ON JOINING PROSECUTION AS A CIVIL PARTY

► *Ernst and Others v. Belgium*, 33400/96, 15 July 2003

49. The Court notes that both the Brussels first instance court in chambers and the Court of Cassation were required to decide upon the settlement of the proceedings and that the applicants had access to the Court of Cassation only to hear their application to join the proceedings as civil parties declared inadmissible on the ground that it was directed against a law officer who enjoyed exemption from jurisdiction ...

54. In this regard, the Court attaches importance to the fact that in Belgian law joining proceedings as a civil party before an investigating judge is one way of bringing a civil action and that in principle other means of claiming their civil rights were available to the victims. In the instant case, insofar as their complaint was directed against persons other than the law officer, they could have brought a civil action against those persons in the civil court.

Bringing a civil action against a law officer would appear to be subject to restrictive conditions, provided for in the Judicial Code, for an action for damages against a law officer for misuse of authority (Articles 1140 and 1147). It is an extraordinary procedure that may be used only in exceptional cases. The Court doubts that it could have been used in the instant case; it notes that the Government, in their memorials, did not devote particular attention to it.

55. While the applicants did not bring a civil action against any individuals, they did, in addition to their application to join the proceedings as civil parties, on 21 November 1995, bring a case for damages against the Belgian State in the civil court on the same grounds as those relied upon in their claim with application to join the proceedings as civil parties ...; these proceedings are pending. More fundamentally, the facts demonstrate that the inadmissibility of the applicants' joining the proceedings and the discontinuance of their claim by the Court of Appeal state prosecutor did not result in their being deprived of any action to claim damages.

56. In these conditions, the Court, confining itself to recognising the special nature of immunity from jurisdiction, finds that the restrictions imposed on the right of access did not infringe the very essence of their right to a court and were not disproportionate from the point of view of Article 6 § 1 of the Convention.

► ***Ligue du Monde Islamique and Organisation Islamique Mondiale du Secours Islamique v. France*, 36497/05, 15 January 2009**

30. The applicants complain that their complaints and application to join the proceedings as civil parties were declared inadmissible on the ground that they had not completed the formalities required under Section 5 of the Law of 1 July 1901 and therefore did not have the right to take part in court proceedings in France. They consider this an infringement of their right to access to a court because, not having any establishment in French territory, the requirement that they declare the headquarters of such an establishment constituted, in view of the time-limit applicable, an insurmountable obstacle to introducing their civil action before the criminal courts ...

58. In the circumstances of the instant case, the Court finds that by requiring from a foreign association without a "principal establishment" in France that wished to institute proceedings for defamation the declaration provided for in Section 5 of the Law of 1901 in order to enable it to take part in court proceedings, the French authorities not only penalised the failure to comply with a simple formal step that was necessary to protect public order and third parties, they also imposed an actual restriction on the applicant associations that was not sufficiently foreseeable and infringed the very essence of their right of access to court. Consequently, there was a violation of Article 6 of the Convention. By the same token, the Court rejects the second part of the Government's objection.

ABILITY TO PARTICIPATE IN THE INVESTIGATION

► ***Sottani v. Italy (dec.)*, 26775/02, 24 February 2005**

2. The applicant also complained under Article 6 § 1 and Article 13 of the Convention that the public prosecutor had failed to order a judicial autopsy during the initial investigation ... Whilst it is admittedly true that under Italian law injured parties cannot join the proceedings as a civil party until the preliminary hearing ..., at the preliminary investigation stage they can exercise the rights and powers expressly recognised by law ... Those rights include, by way of example, the possibility of

requesting that the prosecutor apply to the investigating judge for the immediate production of evidence ... and the right to appoint a statutory representative for the exercise of the rights and powers enjoyed by the injured party ... Moreover, the exercise of those rights may prove to be essential for effective participation in the proceedings as a civil party, especially where, as in the instant case, certain evidence is likely to deteriorate over time and will no longer be obtainable at later stages in the proceedings. In addition, the injured party is entitled to submit pleadings at all stages of the proceedings and, except in cassation proceedings, may request the inclusion of evidence ...

Accordingly, the Court considers that, in view of the foregoing, Article 6 § 1 of the Convention is applicable in the present case.

However ... the applicant should have requested that the public prosecutor apply to the investigating judge for the immediate production of evidence, namely a judicial autopsy. As the applicant failed to make use of the remedy available to him under domestic law, the Court considers that this part of the application must be rejected for failure to exhaust domestic remedies ...

► ***Menet v. France*, 39553/02, 14 June 2005**

48. In the instant case, the Court notes that the applicant, who was never represented by a lawyer ... was unable to consult the investigation file. It therefore acknowledges that the presentation of the case to the domestic courts may have been affected by the fact that access to the investigation file was restricted to lawyers.

49. The court notes, however, that in French law the accused and civil parties, as private individuals, are not subject to professional confidentiality rules, unlike lawyers. The fact that access to the investigation file is reserved either for lawyers directly, or through lawyers, and that as a result the applicant was unable to consult it, arises from the need to preserve the secrecy of the investigation.

50. The Court points out that the secrecy of the investigation may be justified by reasons relating to the protection of the privacy of the parties to the proceedings and to the interests of justice, within the meaning of the second sentence of Article 6 § 1 of the Convention and that, while this Article may play a role before the case is brought before the courts, the manner in which it is applied during the investigation depends upon the specific nature of the proceedings and the circumstances of the case ...

52. In the light of all the circumstances and in view of the interests at stake, the restriction on the applicant's rights did not excessively impair his right to a fair trial.

► ***Ramsahai and Others v. Netherlands* [GC], 52391/99, 15 May 2007**

347. The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next of kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures ...

348. The Court does not consider that Article 2 imposes a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.

349. The Chamber found that the applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in proceedings aimed at challenging the decision not to prosecute Officer Brons ...

353. Article 2 does not go so far as to require all proceedings following an inquiry into a violent death to be public ... the test is whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. It must be accepted in this connection that the degree of public scrutiny required may well vary from case to case.

DISCONTINUANCE AND ACQUITTAL AS A DETERMINATION OF A CIVIL RIGHT

► *Cordova v. Italy (No. 1)*, 40877/98, 30 January 2003

49. ... the Court notes that the applicant, considering himself defamed by Mr Cossiga's behaviour, had lodged a complaint against him and had joined the subsequent criminal proceedings as a civil party. From that moment, those proceedings covered a civil right – namely the right to the protection of his reputation – to which the applicant could, on arguable grounds, claim to be entitled ...

50. The Court notes further that, by its resolution of 2 July 1997, the Senate declared that Mr Cossiga's behaviour was covered by the immunity provided for in Article 68 § 1 of the Constitution ..., so making it impossible for any criminal or civil proceedings aimed at establishing his liability or at securing reparation for the damage suffered to be continued ...

63. The Court takes the view that the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed ...

64. The Court therefore considers that in this case the decisions that Mr Cossiga had no case to answer and that no further proceedings could be brought to secure the protection of the applicant's reputation did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.

65. The Court also attaches some significance to the fact that the Senate's resolution of 2 July 1997 left the applicant with no reasonable alternative means of effectively protecting his Convention rights ...

66. In the light of the foregoing, the Court finds that there has been a violation of the applicant's right of access to a court guaranteed by Article 6 § 1 of the Convention.

► ***Atanasova v. Bulgaria*, 72001/01, 2 October 2008**

36. The issue before the Court in the instant case is whether the criminal courts' decision not to examine her civil claim once the criminal proceedings had been discontinued under the statute of limitations infringed her right of access to a court competent to hear civil claims. ...

44. However, in a number of cases the Court has found there to be a violation of Article 6 when the discontinuance of the criminal proceedings and the failure to examine the civil claim were the result of circumstances attributable to the judicial authorities, including excessive delays in the proceedings that led to the offence being time-barred ...

45. In the Court's opinion, the present case should be distinguished from the aforementioned *Matos e Silva, Lda., and Others* and *Buonfardieci* cases in which the applicants' actions were pending before a domestic court and the principle of their examination by those courts was not at issue. In the present case, the applicant's civil claim could not be examined because the criminal proceedings were discontinued under the statute of limitations. The applicant exercised her right under domestic law to seek compensation in the criminal proceedings as a civil party. She therefore had a legitimate expectation that the courts would determine her claim one way or the other. It was solely because of the Bulgarian authorities' delays in dealing with the case that the prosecution of the offence became time-barred with the result that she could no longer obtain a decision on her compensation claim in the criminal proceedings.

46. The Court therefore finds that the present case raises a distinct question concerning the right to access to a court. As in its conclusion in the *Anagnostopoulos* judgment, the Court considers that where the domestic legal system offers a remedy to the public, such as reporting a case and introducing a civil action, the state has a duty to ensure that they enjoy the fundamental guarantees of Article 6. In circumstances such as those of the instant case, the applicant could not be expected to have to wait until the prosecution of the offence became time-barred through the negligence of the judicial authorities before she was allowed, years after the accident took place, to bring a new action in the civil courts for compensation for her injuries.... The Court notes in particular that initiating such a procedure would involve the need to again gather the evidence, for which the applicant would henceforth be responsible, and that establishing the possible liability of the driver could prove extremely difficult so long after the event.

47. In view of these observations, the Court finds that the applicant did not benefit from an effective right of access to a court. Accordingly, there was a violation of Article 6 § 1.

► ***Gorou v. Greece (No. 2)* [GC], 12686/03, 20 March 2009**

38. ... the Court notes that, when an acquittal has been decided, under domestic law the civil party is not, in principle, entitled to appeal directly on points of law or to seek redress from the public prosecutor at the Court of Cassation. The Court has nevertheless acknowledged that the existence of an established judicial practice

cannot be disregarded in this case and that, in view of the specific features of the applicant's request to the public prosecutor at the Court of Cassation, Article 6 § 1 of the Convention is applicable. That same practice should be taken into account in assessing the extent of the reasoning to be given by the public prosecutor in his reply.

39. The Court has already observed that the public prosecutor is accustomed to responding, albeit in a summary manner, to requests from the civil party to appeal on points of law. In practice, the civil party draws the public prosecutor's attention to certain specific circumstances of the case, while the prosecutor remains free to take his decision after weighing up the arguments submitted.

40. Moreover, it should be noted that, under Article 506 of the Code of Criminal Procedure, a "positive" decision by a public prosecutor is not addressed to the civil party but gives rise to the prosecutor's own appeal on points of law. Similarly, a "negative" decision means that the public prosecutor declines to lodge an appeal on points of law himself ...

41. Lastly, the Court observes that, as regards the preliminary procedure for the examination and admission of appeals on points of law by an organ operating within the Court of Cassation, it has previously acknowledged that an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation ... The Court considers that the same principle may apply in the case of a public prosecutor at the Court of Cassation who is requested by the civil party to lodge an appeal on points of law in his own name.

42. To sum up, the handwritten note placed on the applicant's request simply gives information about the discretionary decision taken by the public prosecutor. Seen from that perspective, and having regard to the existing judicial practice, the public prosecutor does not have a duty to justify his response but only to give a response to the civil party. To demand more detailed reasoning would place on the public prosecutor at the Court of Cassation an additional burden that is not imposed by the nature of the civil party's request for him to appeal on points of law against an acquittal. The Court therefore considers that, by indicating that "[t]here [were] no legal or well-founded grounds of appeal to the Court of Cassation", the public prosecutor gave sufficient reasons for his decision to reject the request.

Having regard to the foregoing, there has been no violation of Article 6 § 1 of the Convention.

RESTRICTION ON PARTICIPATION IN THE PROCEEDINGS

► *Berger v. France*, 48221/99, 3 December 2002

35. ... Under the criminal law, an appeal to the Court of Cassation is open to any party to criminal proceedings who has an interest in appealing on a point of law. Although the admissibility of an appeal by the civil party is – other than in the seven exhaustively listed situations – conditional on the existence of an appeal by the prosecution, this limitation derives from the nature of judgments given by the investigation divisions and the role accorded to civil actions in criminal proceedings.

The Court agrees with the Government that civil parties should not have an unlimited right to appeal to the Court of Cassation against judgments discontinuing the proceedings ...

38. ... the applicant's right to a court as guaranteed by Article 6 § 1 of the Convention was not infringed as a result of the conditions imposed on her for the admissibility of her appeal to the Court of Cassation. Having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution, the Court cannot accept that the equality-of-arms principle has been infringed in the instant case. In that connection the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.

NON-DISCLOSURE OF SUBMISSIONS

► *Chesnay v. France*, 56588/00, 12 October 2004

20. The applicant complains that neither he nor his lawyer at the Court of Cassation received communication of the report of the reporting judge before the hearing, although it had been given to the Advocate-General.

21. The Court considers that the question of lack of communication of the reporting judge's report to the litigant raises a problem under Article 6 only insofar as the report was communicated to the Advocate-General before the hearing ... Such is the case in the instant case.

22. The Court also considers that the report consisted of two parts: the first contained the facts, the proceedings and the grounds of the appeal to the Court of Cassation; the second contained a legal analysis of the case and an opinion on the merits of the appeal ... In the Court's opinion, while the second part of the report, intended for the deliberations, may (like the draft decision) remain confidential, both with regard to the parties and the Advocate-General, the first part, which is not covered by the confidentiality of the deliberations, should be communicated, if applicable, in the same conditions to the parties and the Advocate-General.

23. Consequently there was a violation of Article 6 § 1 of the Convention.

EXCESSIVE DELAY

► *Tomasi v. France*, 12850/87, 27 August 1992

125. ... A reading of the decisions given in these proceedings ... shows that the case was not a particularly complex one. In addition, the applicant hardly contributed to delaying the outcome of the proceedings by challenging in the Bordeaux indictments division the decision finding no case to answer and by requesting that division to order a further inquiry ... Responsibility for the delays found lies essentially with the judicial authorities. In particular, the Bastia public prosecutor allowed more than a year and a half to elapse before asking the Court of Cassation to designate the competent investigating authority ... The Bordeaux investigating judge heard Mr

Tomasi only once and does not seem to have carried out any investigative measure between March and September 1985, and then between January 1986 and January 1987 ... There has accordingly been a violation of Article 6 para. 1 ...

► ***Calvelli and Ciglio v. Italy* [GC], 32967/96, 17 January 2002**

65. ... the Court notes that the proceedings concerned were undeniably complex. Further, although after the applicants were initially joined as civil parties to the proceedings on 7 July 1989 the proceedings at first instance were affected by regrettable delays (notably, between E.C.'s committal on 12 June 1991 and the first hearing – a year later, on 2 July 1992 ...), there were no further significant periods of inactivity attributable to the authorities (apart from the adjournment of the first hearing, which was caused by a lawyers' strike – ...).

66. In those circumstances the Court considers that a period of six years, three months and ten days for proceedings before four levels of jurisdiction cannot be regarded as unreasonable.

67. Consequently, there has been no violation of Article 6 § 1 of the Convention.

► ***Beganović v. Croatia*, 46423/06, 25 June 2009**

81. As regards the proceedings instituted by the State authorities, the Court notes that on 4 July 2000 the Zagreb Police Department lodged a criminal complaint against B.B. with the Zagreb State Attorney's Juvenile Office. However, initially no further steps were taken by that Office.

82. On 12 June 2000 the applicant lodged a criminal complaint with the Zagreb State Attorney's Office against six identified assailants, including B.B., and a seventh unknown individual. The Office remained inactive for eight months, until 12 March 2001, when it forwarded the complaint to the Velika Gorica State Attorney's Office. The latter, however, decided not to institute criminal proceedings against B.B. on the ground that the injury he had allegedly inflicted on the applicant was only of a lesser nature and thus subject to private prosecution. This decision was in contravention of section 45 of the Juvenile Courts Act, which provides that criminal proceedings against minors are to be instituted at the request of the State Attorney in respect of all criminal offences. This error was eventually rectified only when the applicant brought a private prosecution against B.B. in the Juvenile Division of the Velika Gorica Municipal Court. Thus, the criminal proceedings against B.B. were properly instituted by the Zagreb County Court Juvenile Council only on 4 February 2002, almost two years after the incident, although the interviews conducted at the investigation stage had ended on 8 June 2000.

83. Even when the criminal proceedings against B.B. were eventually instituted before the competent court, the first hearing was scheduled only for 2 November 2002, only to be adjourned because counsel for the defendant failed to appear. Another significant period of inactivity occurred between 26 May 2003 and 12 February 2004, and two months later, on 23 April 2004, the prosecution for the offence with which B.B. had been charged became time-barred, although a decision to that effect was adopted only on 21 December 2005.

84. As to the criminal proceedings concerning the remaining six assailants, the Court notes that the applicant lodged a criminal complaint against them with the Velika Gorica State Attorney's Office on 12 June 2000. However, this Office declared the complaint inadmissible only on 30 September 2002, again on the ground that a prosecution in respect of the criminal offence of inflicting bodily harm had to be brought privately by the victim. As stated above, this conclusion was contrary to section 45 of the Juvenile Courts Act in respect of four assailants, S.C., I.Š., F.P. and S.T., who were also minors at the time of the incident at issue. This error was actually never rectified and in the end it was the applicant who lodged a private subsidiary indictment against the five suspects (all the assailants but B.B. and the one unidentified assailant) with the Velika Gorica Municipal Court, on 11 November 2002. During these proceedings reports were prepared by the competent Social Welfare Centre, but no hearing was held prior to 23 April 2004, when the prosecution became time-barred. The first hearing was held after that date, on 28 October 2005, and on 11 May 2006 the proceedings were discontinued.

85. Thus, the facts of the case were never established by a competent court of law. In this connection the Court notes that the main purpose of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be obtained without having the facts of the case established by a competent criminal court. While the Court is satisfied that criminal sanctions against minors may in certain circumstances be replaced by such measures as community service, it cannot accept that the purpose of effective protection against acts of ill-treatment is achieved in any manner where the criminal proceedings are discontinued owing to the fact that the prosecution has become time-barred and where this occurred, as is shown above, as a result of the inactivity of the relevant State authorities.

86. In the Court's view, the outcome of the criminal proceedings in the present case cannot be said to have had a sufficient deterrent effect on the individuals concerned, or to have been capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. In conclusion, the Court considers that the above elements demonstrate that, in the particular circumstances of this case, the relevant State authorities did not fulfil their positive obligations under Article 3 of the Convention.

87. In the Court's view, the impugned practices, in the circumstances of the present case, did not provide adequate protection to the applicant against an act of serious violence and, together with the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's procedural obligations under Article 3 of the Convention.

PROTECTION DURING CROSS-EXAMINATION

► *Y. v. Slovenia*, 41107/10, 28 May 2015

105. As regards the manner in which the applicant's rights were protected in the criminal proceedings in issue, the Court observes, firstly, that her testimony at the trial

provided the only direct evidence in the case. In addition, other evidence presented was conflicting, the psychologist's report confirming sexual abuse being countervailed by the orthopaedics report. In this light, it must be reiterated that the interests of a fair trial required the defence to be given the opportunity to cross-examine the applicant, who by that time was no longer a minor. Nevertheless, it needs to be determined whether the manner in which the applicant was questioned struck a fair balance between her personal integrity and X's defence rights.

106. In this connection the Court reiterates that, as a rule, the defendant's rights under Article 6 §§ 1 and 3 (d) require that he be given an adequate and proper opportunity to challenge and question a witness against him either when he makes his statements or at a later stage of the proceedings ... Furthermore, the Court must be cautious in making its own assessment of a specific line of questioning, considering that it is primarily the role of the competent national authorities to decide upon the admissibility and relevance of evidence ... This being said, the Court has also already held that a person's right to defend himself does not provide for an unlimited right to use any defence arguments ... Thus, since a direct confrontation between the defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatising on the latter's part, in the Court's opinion personal cross-examination by defendants should be subject to most careful assessment by the national courts, the more so the more intimate the questions are.

107. The applicant's questioning stretched over four hearings ... held over seven months, a lengthy period, which, in the Court's opinion, in itself raises concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings X, the defendant, who was otherwise represented by counsel throughout the proceedings, personally cross-examined the applicant. In addition to claiming that he was physically incapable of assaulting her, X based his cross-examination on the premise that the applicant had considered him a person of trust and had sought his company, rather than the other way round, and that her accusations against him were prompted by her mother's wish to extort money from him. Accordingly, most of X's questions were of a distinctly personal nature.

108. The Court notes that some of the questions asked by X were phrased in such a manner as to suggest the answers, and a number of others were asked more than once ... X also continually contested the veracity of the applicant's answers, advancing his own version of events. Of course, the defence had to be allowed a certain leeway to challenge the reliability and credibility of the applicant and to reveal possible inconsistencies in her statement. However, the Court considers that cross-examination should not be used as a means of intimidating or humiliating witnesses. In this connection, the Court is of the view that some of X's questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men, were not aimed only at attacking the applicant's credibility, but were also meant to denigrate her character.

109. The Court considers that it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial. In its opinion, the sensitivity of the situation in which the applicant was questioned directly, in detail and at length by the man she accused of sexually assaulting her, required the presiding judge to oversee the form and content of X's questions and comments and, if necessary, to intervene. Indeed, the record of the hearing indicates that the presiding judge prohibited X from asking certain questions which were of no relevance to the case. However, the Court takes the view that X's offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction. Considering the otherwise wide scope of cross-examination afforded to X, in the Court's opinion curtailing his personal remarks would not have unduly restricted his defence rights. Yet such an intervention would have mitigated what was clearly a distressing experience for the applicant ...

110. Further, as regards the applicant's assertion that X's counsel M. should have been disqualified from representing X in the proceedings, having been consulted by her regarding the sexual assaults even before the police were informed about the matter, it is not the Court's task to speculate on whether, and if so in what capacity, the applicant and M. might have known each other prior to the trial, that being the task of the domestic authorities. However, it appears that under domestic law the possibility of prior informal consultation between the applicant and M. did not raise an issue of conflict of interests which could lead to the latter's disqualification ... Hence, finding that no statutory ground had been adduced by the applicant in support of her application to have M. disqualified, the Maribor District Court dismissed it.

111. Nevertheless, assuming that the applicant's allegation was true, the Court cannot but consider that the negative psychological effect of being cross-examined by M. considerably exceeded the apprehension that the applicant would have experienced if she had been questioned by another lawyer. Accordingly, this was a consideration which should not have been entirely disregarded in deciding whether M. should be disqualified as X's counsel. Moreover, on a more general note, the Court would add that any information that M. might have received from the applicant in his capacity as a lawyer, even without a retainer agreement, should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter. Thus, the Court finds that the domestic law on disqualification of counsel, or the manner in which it was applied in the present case, did not take sufficient account of the applicant's interests.

112. Lastly, the applicant complained that B., the expert in gynaecology who was called upon to establish whether she had engaged in sexual intercourse at the material time, had made her answer a number of accusatory questions unrelated to his task. In this connection, the Court considers firstly that the personal integrity of the victims of crime in criminal proceedings must, by the very nature of the situation, be primarily protected by the public authorities conducting the proceedings. In this regard, the Court is of the view that the authorities are also required to ensure that other participants in the proceedings called upon to assist them in the investigation or the decision-making process treat victims and other witnesses with dignity, and do not cause them unnecessary inconvenience. As regards the present case, it is noted

that, irrespective of B's status in the proceedings, the Government did not dispute that the State could be held responsible for his conduct. The Court sees no reason to hold otherwise, observing that the expert was appointed by, and the disputed examination ordered by, the investigating judge in the exercise of his judicial powers.

113. Further, regarding B's examination of the applicant, the Court notes that he confronted the applicant with the findings of the police and orthopaedics reports, and questioned her on why she had not defended herself more vigorously ... , thus addressing issues that were indeed not related to the question he was requested to examine. In the Court's opinion, B's questions and remarks, as well as the legal findings he made in his expert opinion, exceeded the scope of his task, as well as of his medical expertise. Moreover, it does not appear that B. was trained in conducting interviews with victims of sexual abuse; hence, it is difficult to see what purpose was to be served by his intervention in matters within the jurisdiction of the prosecuting and judicial authorities. More importantly, as argued by the applicant, she was put in a defensive position which, in the Court's opinion, unnecessarily added to the stress of the criminal proceedings.

114. The Court is mindful of the fact that the domestic authorities, and in particular the judge presiding over the trial in issue, had the delicate task of balancing the competing interests and of ensuring effective exercise of the defendant's rights to legal assistance and to examine witnesses against him. It is also true that a number of measures were taken to prevent further traumatising of the applicant. Her statement before the investigating judge was taken in the absence of the defendant and his counsel, the public was excluded from the trial, and the defendant was removed from the courtroom when she gave her testimony ... Owing to the applicant's stress during her testimony and cross-examination, the trial hearings were on several occasions adjourned for a few minutes or rescheduled to another date ... Furthermore, the presiding judge warned the defendant against repeating questions in cross-examination and prohibited a number of them ... Nevertheless, in the Court's opinion, the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age – she was a minor when the alleged sexual assaults took place – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue. Taking into account the cumulative effect of the factors analysed above, which adversely affected the applicant's personal integrity ... , the Court considers that they substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial.

115. Therefore, the Court is of the view that the manner in which the criminal proceedings were conducted ... failed to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention.

116. It follows that there has been a violation of Article 8 of the Convention.

Chapter 14

Trial *in absentia*

WAIVER OF RIGHT TO PARTICIPATE

► ***Colozza v. Italy*, 9024/80, 12 February 1985**

28. ... the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption ..., inferred from the status of “latitante” which they attributed to Mr. Colozza that there had been such a waiver.

In the Court’s view, this presumption did not provide a sufficient basis. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General’s records (via Fonteiana), yet it was known that he was no longer living there ... The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor’s office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr. Colozza’s new address ...; it was thus possible to locate him even though – as the Government mentioned by way of justification – no data-bank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 ... are enjoyed in an effective manner ...

In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question.

► ***Somogyi v. Italy*, 67972/01, 18 May 2004**

70. ... the applicant repeatedly challenged the authenticity of the signature attributed to him, which was the only evidence capable of proving that the defendant had been informed that proceedings had been instituted against him. It could not be considered that the applicant's allegations were prima facie without foundation, particularly in view of the difference between the signatures he produced and the one on the return slip acknowledging receipt and the difference between the applicant's forename (Tamas) and that of the person who signed the slip (Thamas). In addition, the mistakes in the address were such as to raise serious doubts about the place to which the letter had been delivered.

71. In response to the applicant's allegations, the Italian authorities dismissed all the applicant's attempts to seek a domestic remedy and refused to reopen the proceedings or the time allowed for an appeal, without examining the question which, in the Court's view, lay at the heart of the case, namely the identity of the person who had signed the return slip. In particular, no investigation was ordered to look into the disputed facts and, despite the applicant's repeated requests, there was no comparison of the signatures by means of expert handwriting analysis.

72. The Court considers that, in view of the prominent place held in a democratic society by the right to a fair trial ... Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit ...

73. ... however, the Bologna Court of Appeal and the Court of Cassation did not make any such check, thereby depriving the applicant of the possibility of remedying, if that should prove necessary, a situation contrary to the requirements of the Convention. Thus there was no close scrutiny to determine whether, beyond a reasonable doubt, the convicted man had unequivocally waived the right to appear at his trial.

74. It follows that ... the means employed by the national authorities did not achieve the result required by Article 6 of the Convention.

75. Lastly, as regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 § 3 (a) of the Convention; vague and informal knowledge cannot suffice ...

► ***Mariani v. France*, 43640/98, 31 March 2005**

41. In the instant case ... Mr Mariani did not refuse to attend. He was physically incapable of attending because of the sentence he was serving in Italy. In this regard, the Court notes that the French authorities, notwithstanding the comment of the Paris Assize Court judgment that the applicant had been declared on the run, knew

of his criminal situation since the decision to refer him to the Assize Court had previously informed it of his place of incarceration ...

42. ... In conclusion, there was a violation of Article 6 §§ 1 and 3 (c), (d) and (e) of the Convention, taken together.

LEGAL REPRESENTATION

► ***Van Geyselhem v. Belgium* [GC], 26103/95, 21 January 1999**

34. ... The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended. The Court notes that Article 185 § 3 of the Code of Criminal Procedure ... provides that in any event the Criminal Court may order an accused to attend and that no appeal lies against such a decision.

35. ... Even if Mrs Van Geyselhem did have several opportunities of defending herself, it was the Brussels Court of Appeal's duty to allow her counsel – who attended the hearing – to defend her, even in her absence.

That was particularly true in this case since the defence which Mr Verstraeten intended to put forward concerned a point of law ... Mr Verstraeten intended to plead statutory limitation, an issue which the Court has described as crucial ... Even if, as the Government maintained, the Court of Appeal must have examined of its own motion the issue of statutory limitation, the fact remains that counsel's assistance is indispensable for resolving conflicts and his role is necessary in order for the rights of the defence to be exercised. Furthermore, it does not appear from the judgment of 4 October 1993 ... that any ruling was given on the issue.

36. In conclusion, there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

► ***Krombach v. France*, 29731/96, 13 February 2001**

90. ... the Court observes that the wording of Article 630 of the French Code of Criminal Procedure makes the bar on lawyers representing an accused being tried *in absentia* absolute and that an assize court trying such an accused has no possibility of derogating from that rule.

The Court considers, however, that it should have been for the Assize Court, which was sitting without a jury, to afford the applicant's lawyers, who were present at the hearing, an opportunity to put forward the defence case even in the applicant's absence as, in the instant case, the argument they intended to rely on concerned a point of law ..., namely an objection on public-policy grounds based on an estoppel *per rem judicatam* and the *non bis in idem* rule ... The Government have not suggested that the Assize Court would have had had [sic] no jurisdiction to examine the issue had it given the applicant's lawyers permission to plead it. Lastly, the

Court observes that the applicant's lawyers were not given permission to represent their clients at the hearing before the Assize Court on the civil claims. To penalise the applicant's failure to appear by such an absolute bar on any defence appears manifestly disproportionate.

91. In conclusion, there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c).

See also APPEAL (Legal representation), p. 440 below

NEED FOR RETRIAL

► *Medenica v. Switzerland*, 20491/92, 14 June 2001

57. It is true that Article 331 of the Geneva Code of Procedure in principle allows persons convicted *in absentia* to have the proceedings set aside and to secure a rehearing of both the factual and the legal issues in the case. However, ... the Canton of Geneva Court of Justice dismissed the applicant's application to have the conviction quashed on the grounds that he had failed to show good cause for his absence, as required by that provision, and that there was nothing in the case file to warrant finding that he had been absent for reasons beyond his control ... That judgment was upheld by the Geneva Court of Cassation and the Federal Court. In the Court's view, there is nothing to suggest that the Swiss courts acted arbitrarily or relied on manifestly erroneous premisses ...

58. ..., the Court likewise considers that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the Geneva Assize Court. It refers, in particular, to the opinion expressed by the Federal Court in its judgment of 23 December 1991 that the applicant had misled the American court by making equivocal and even knowingly inaccurate statements – notably about Swiss procedure – with the aim of securing a decision that would make it impossible for him to attend his trial.

59. In the light of the foregoing, and since the instant case did not concern a defendant who had not received the summons to appear ... or who had been denied the assistance of a lawyer ..., the Court considers that, regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant's conviction *in absentia* and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty.

► *Sejdovic v. Italy* [GC], 56581/00, 1 March 2006

100. ... The establishment of the applicant's guilt according to law was the purpose of criminal proceedings which, at the time when the applicant was deemed to be a fugitive, were at the preliminary investigation stage.

101. In those circumstances, the Court considers that it has not been shown that the applicant had sufficient knowledge of his prosecution and of the charges against him. It is therefore unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court ...

103. In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time ... the applicant would have encountered serious difficulties in satisfying one of the legal preconditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition ... Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected ... Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 § 2 of the CCP [Code of Criminal Procedure] ...

104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence ...

105. In the light of the foregoing, the Court considers that the applicant, who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights.

106. There has therefore been a violation of Article 6 of the Convention ...

► ***Stoichkov v. Bulgaria*, 9808/02, 24 March 2005**

57. ... the applicant was convicted *in absentia* ... There is no indication – and it has not been argued by the respondent Government – that he has waived, either expressly or tacitly, his right to appear and defend himself. Therefore, in order for the proceedings leading to his conviction to not represent a "denial of justice", he should have had the opportunity to have them reopened and the merits of the rape charges against him determined in his presence. Since 1 January 2000 Bulgarian law expressly provides for such a possibility ... However, when the applicant requested reopening on the basis of the new Article 362a of the CCP in February 2001 – approximately one year after his arrest –, the Supreme Court of Cassation refused, essentially on the ground that the case-file of the original proceedings had been destroyed in 1997, which, in its view, rendered a rehearing impossible in practice ... In this connection, it is noteworthy that the applicant subsequently requested the restoration of the case-file by the Pernik District Court, but has apparently received no reply to his request ... The applicant was thus deprived of the possibility to obtain from a court, which has heard him, a fresh determination of the merits of the charges on which he was convicted.

58. The Court therefore considers that the criminal proceedings against the applicant, coupled with the impossibility to obtain a fresh determination of the charges against him from a court which had heard him, were manifestly contrary to the principles embodied in Article 6. Therefore, while his initial deprivation of liberty in February 2000 may be deemed justified under Article 5 § 1 (a), having been effected for the purpose of enforcing a lawful sentence, it ceased to be so after 19 July 2001, when the Supreme Court of Cassation refused reopening of the proceedings. This conclusion makes it unnecessary to determine whether the applicant was imprisoned despite the expiry of the limitation period for the enforcement of his sentence.

59. There has therefore been a violation of Article 5 § 1 of the Convention.

► ***Dembukov v. Bulgaria*, 68020/01, 28 February 2008**

53. ... the Court notes that the applicant had been present and had been assisted by a lawyer of his own choosing when he had been initially charged with the theft of the electricity cables on 15 October 1997, when the charges had been amended on 16 January 1998 and also when the results of the preliminary investigation had been presented to him on 30 January 1998. Thus, the Court finds that the applicant was in possession of sufficient knowledge of the criminal proceedings against him and his accomplices, that they were progressing rather rapidly as the case file had been forwarded to the public prosecutor's office and, accordingly, that it was probable that he would be indicted and brought to trial.

54. Separately, when the applicant had been charged on 15 October 1997 the authorities had placed a restriction on his movements. This entailed that he should not leave the village of Brod without an authorisation from the public prosecutor's office. However, in violation of the imposed restriction and without informing the prosecuting authorities of his new address, the applicant changed his place of residence. The Court notes that there is no indication or claim that the applicant had good cause in violating the restriction order or that he had moved for reasons beyond his control. Moreover, he changed his residence relatively soon after having been presented with the results of the preliminary investigation on 30 January 1998 because he appears to have been residing in Plovdiv from July 1998 onwards at the latest ... The Court notes that there is disagreement between the parties as to whether the applicant had moved to live at his permanent address in the town of Plovdiv which had been registered with the police or had changed residence more than once ... In so far as the parties failed to provide documentary evidence in support of their respective claims, the Court considers that it should not give any particular weight to either of their assertions.

55. Consequently, even though the authorities had been unable to serve the applicant with the indictment against him and the summons to attend the hearings before the District Court, the latter decided to examine the case against the applicant and his accomplices in the absence of the former as it found that this would not impede the proceedings. It then assigned a court-appointed lawyer to defend the applicant and proceeded to examine the case. The District Court found the accused guilty as charged and sentenced the applicant to three years' imprisonment.

56. Subsequently, the Supreme Court of Cassation refused to reopen the criminal proceedings conducted in the absence of the applicant because it found that he had known about them and had, by violating the restriction placed on his movement and changing his place of residence without informing the public prosecutor's office, wilfully made himself unavailable to participate in the proceedings against him and had therefore lost the right to seek their reopening.

57. In the light of the circumstances taken as a whole, the Court likewise considers that through his actions the applicant had brought about a situation that made him unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against him. It refers in particular to the order restricting his freedom of movement, the most lenient restriction on his liberty which the authorities could have imposed in order to guarantee his appearance in court, and the violation of the same by the applicant soon after having been informed of the results of the preliminary investigation. Moreover, up to that stage of the proceedings he had been assisted by a lawyer of his own choosing and should reasonably have foreseen what the consequences of his conduct would be.

58. In the light of the foregoing, the Court considers that, regard being had to the margin of appreciation allowed to the Bulgarian authorities, the applicant's conviction *in absentia* and the refusal to grant him a retrial at which he would be present did not amount to a denial of justice.

59. Consequently, there has been no violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b), (c) and (d) of the Convention.

► **Sanader v. Croatia, 66408/12, 12 February 2015**

78. ... It therefore remains to be determined whether the domestic legislation afforded the applicant with sufficient certainty the opportunity of appearing at a new trial ... In other words, the Court must establish whether the procedural means for retrial offered by the domestic authorities complied with the requirement of effectiveness ...

79. In that connection the Court notes that the Government referred to two legal avenues in the domestic legal system. The first is provided under Article 497 § 2 of the Code of Criminal Procedure as a special ground for reopening proceedings conducted *in absentia*, and the second is provided under the provision of Article 501 § 1 (3) of the Code of Criminal Procedure allowing for the general possibility of a retrial ...

80. As regards the remedy under Article 497 § 2 of the Code of Criminal Procedure, the Court notes that it is essentially a measure allowing for the automatic reopening of proceedings conducted *in absentia* based on a request by the convicted person. It provides for no further substantive requirements and, generally speaking, depends solely on the convicted person's wish ...

81. According to the wording of Article 497 § 2 of the Code of Criminal Procedure, the reopening of proceedings depends on "the possibility of a re-trial in [the convicted person's] presence" ... This "possibility" has been interpreted in the case-law of the domestic courts to mean that a person convicted *in absentia* must appear before the domestic authorities to request a retrial and provide an address of residence

in Croatia during the criminal proceedings. Accordingly, a request for a retrial by a convicted person who is not under the jurisdiction of the Croatian authorities cannot lead to the reopening of the proceedings ...

82. As regards the Government's argument that the applicant could have sought a retrial by providing guarantees that he would attend the trial even though he was not in Croatia ..., the Court observes from the domestic practice that the requirement of the presence under the jurisdiction of the domestic authorities is a very strict condition ... and that the domestic courts are not inclined to accept any promises. For instance, when a person convicted *in absentia* who was living in Bosnia and Herzegovina requested a reopening of the proceedings and provided all the necessary details of his whereabouts and promised to come to every court hearing, the domestic courts rejected his request on the grounds that in any event he was not available to the Croatian judicial authorities and was out of their jurisdiction. Similarly, in another case, the Supreme Court held that a person who had requested a retrial should personally approach the court and provide his or her address in Croatia where he or she would be available during the criminal proceedings, but also allow the execution of the final conviction to the prison sentence, which could then be, under the conditions provided in the law, postponed, suspended or terminated ...

83. There is no evidence showing that in the case of the applicant, whose exact address in Serbia had also been known to the domestic authorities and who had submitted to the domestic courts that he was prepared to confront any witness or counter any evidence against him ..., the domestic authorities required or would have accepted any other promises or guarantees. Neither is it possible to ascertain what such guarantees should have been, given that the Government has not specified them. On the contrary, the Court observes that the Supreme Court, when examining the applicant's request for a retrial, outwardly rejected this possibility on the grounds that the applicant lived in Serbia and was not available to the Croatian judicial authorities, making no mention that any guarantees or promises could be accepted ...

84. In view of the above, the Court considers that the requirement that an individual tried *in absentia*, who has not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, has to appear before the domestic authorities and provide an address of residence in Croatia during the criminal proceedings in order to be able to request a retrial, appears disproportionate for two reasons.

85. Firstly, this requirement essentially provided that individuals sentenced *in absentia* to imprisonment who did not live on the territory of Croatia, as was the case in the present application ..., could not apply for the, in principle, automatic reopening of the proceedings unless they presented themselves to the Croatian judicial authorities which would in the ordinary course of action mean that they would be deprived of their liberty based on their conviction ... Only then, once the reopening was granted, which according to the materials available before the Court could even take more than a month ..., and once such a decision became final, would the enforcement of the sentence be stayed and, if there were no other grounds warranting pre-trial detention, the person concerned released pending trial ...

86. As to the Government's suggestion that the enforcement of the sentence could be postponed even before a decision on the request for reopening was taken, the Court firstly notes that such a possibility primarily relates to the requests for retrial based on new facts and evidence and not for the requests for an automatic retrial of those tried *in absentia* ... In any case, such a possibility is discretionary as the relevant domestic law provides no possibility for the convicted person to request its application and, in case of an unfavourable outcome, to have an opportunity to appeal ... Moreover, the materials available to the Court do not show that any such consideration was given in the applicant's case ... Therefore, given that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" ... the Court cannot accept that such a possibility was sufficiently probable in practice.

87. In this connection, in view of the obligation of persons who did not live on the territory of Croatia to appear before the Croatian judicial authorities as a requirement for seeking a retrial, which would in the ordinary course of action lead to their custody based on the conviction *in absentia*, the Court reiterates, as already explained above, that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention ...

88. This does not, of course, call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law ... However, if applicable, that would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention ...

89. Secondly, even taking into account the particular circumstances of the present case, which concerns serious charges of war crimes, the Court considers that the obligation that an individual tried *in absentia* has to appear before the domestic authorities and provide an address of residence in Croatia during the criminal proceedings in order to be able to request a retrial, is unreasonable and disproportionate from a procedural point of view ...

90. In this connection the Court notes that, under the relevant domestic law, the mere reopening of proceedings does not have any effect on the substantive validity of the judgment delivered in the previous proceedings. Such judgment remains in force until the end of the retrial and only then can it be set aside partially or in whole, or fully remain in force ... Thus, had the domestic courts accepted the applicant's request and ordered a retrial, it would have postponed the execution of the judgment ... but his conviction would not as such be affected. At the same time, the domestic authorities would have allowed the applicant an opportunity to seek a retrial without bringing him to a situation where he would trade that opportunity with his liberty. It would then have been the applicant's responsibility to participate effectively and diligently in the proceedings. His failure to do that would legitimately have led to the discontinuation of the proceedings and his previous conviction being upheld ...

91. Against the above background, the Court considers that by obliging the applicant to appear before the domestic authorities and provide an address of

residence in Croatia during the criminal proceedings in order to be able to request a retrial, the domestic authorities created a disproportionate obstacle to the use by the applicant of the remedy provided under Article 497 § 2 of the Code of Criminal Procedure, restricting the exercise of his right to obtain a retrial in such a way or to such an extent that the very essence of the right is impaired ... Accordingly, the Court rejects the Government's preliminary objection previously joined to the merits ...

92. As to the remedy under Article 501 § 1(3) of the Code of Criminal Procedure, the Court notes that this is a general legal avenue for seeking a retrial after a judgment convicting a defendant has become final and enforceable which is open to both those tried *in absentia* and those tried in their presence. Unlike the remedy under Article 497 § 2 of the Code of Criminal Procedure, the use of this remedy does not require the physical presence of the convicted person. However, this remedy is applicable only to a restricted category of cases tried *in absentia* since the condition for its use is the existence of new evidence or facts capable of leading to acquittal or resentencing under a more lenient provision ... It is thus of a secondary and subsidiary nature for those tried *in absentia*.

93. In this connection the Court also notes that the applicant, who was tried *in absentia*, had no opportunity to put the evidence on which his charges were based to adversarial argument or to contest his conviction before the competent courts of appeal. By the use of the remedy under Article 501 § 1 (3) of the Code of Criminal Procedure he was essentially required, simply in order to obtain a retrial, to challenge the factual findings of the final judgment by which he was convicted by submitting new facts and evidence of such a strength and significance that they could at the outset convince the court that he should be acquitted or convicted. Such demand appears disproportionate to the essential requirement of Article 6 that a defendant should be given an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him ..., an opportunity which the applicant never had.

94. The Court therefore finds that the legal avenue under Article 501 § 1(3) of the Code of Criminal Procedure did not guarantee effectively and with sufficient certainty that the applicant would have the opportunity of a retrial.

95. In the light of the foregoing, the Court considers that the applicant, who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, was not afforded with sufficient certainty the opportunity of obtaining a fresh determination of the merits of the charges against him by a court in full respect of his defence rights ...

96. There has accordingly been a violation of Article 6 § 1 of the Convention.

ABSENCE FROM SENTENCING

► ***B. v. France* (dec.), 10291/83, 12 May 1986**

... if an accused person is sentenced *in absentia* without his express consent and is later able, on learning of the sentence, to have proceedings on the merits re-opened,

the right to a hearing, and thus the concrete rights of the defence, have not be[en] weakened in a way that has the result of depriving such rights of any practical effect.

The Commission considers that an issue of this kind would arise if it were shown, in the circumstances of the case, that the accused sentenced *in absentia* had at no stage been aware of the proceedings against him and had thus been prevented from participating in the investigatory phase of those proceedings.

This was not the case in this instance, and the question does not arise since, as the applicant himself admits, he participated in all the investigatory proceedings against him.

It appears from Section 627 of the Code of Criminal Procedure, taken in conjunction with Section 639 of the same Code, that, although re-trial after conviction *in absentia* automatically annuls the sentence, the proceedings up to the decision to commit for trial remain valid.

In conclusion, having regard to the circumstances of the case, and particularly both the fact that the applicant participated in the investigatory proceedings and refused to accept notification of the decision committing him for trial, the Commission takes the view that the application must be rejected as being manifestly ill-founded ...

See also DETENTION ON REMAND (Use of alternatives, Bail), p. 85 above

Chapter 15

Judgment

See also PROOF AND EVIDENCE (Burden of proof, Suspect benefits from reasonable doubt), p. 235 above

CONVICTION

Need for reasons

► ***Taxquet v. Belgium* [GC], 926/05, 16 November 2010**

91. In proceedings conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions ... Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case ... While courts are not obliged to give a detailed answer to every argument raised ..., it must be clear from the decision that the essential issues of the case have been addressed ...

► ***Hadjianastassiou v. Greece*, 12945/87, 16 December 1992**

34. In this instance the judgment read out by the President of the Courts-Martial Appeal Court contained no mention of the questions as they appeared in the record of the hearing ... Admittedly it referred to Article 366 et seq. of the Military Criminal Code ... and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court. Question 1 (a), dealing with the communication of "general information concerning the guided missile" which had to be kept secret, appeared for the first time in the proceedings before the appeal court. When, the day after the delivery of the judgment, the applicant sought to obtain the full text of the questions, the registrar allegedly informed him that he would have to wait for the "finalised version" of the judgment ... In his appeal on points of law, filed within the five-day time-limit laid down in Article 425 para. 1 of the Military Criminal Code ..., Mr Hadjianastassiou could rely only on what he had been able to hear or gather during the hearing and could do no more than refer generally to Article 426.

35. In the Government's contention, the applicant could have made further submissions by means of an additional memorial, ...

36. The Court is not persuaded by this argument. When Mr Hadjianastassiou received the record of the hearing, on 10 January 1986, he was barred from expanding upon his appeal on points of law. According to a consistent line of cases, additional submissions may be taken into account only if the initial appeal sets out at least one ground which is found to be admissible and sufficiently substantiated ...

37. In conclusion, the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of paragraph 3 (b) of Article 6, taken in conjunction with paragraph 1 ...

► ***Suominen v. Finland*, 37801/97, 1 July 2003**

32. The applicant argued that the fact that the District Court's minutes of the case had not included the District Court's decision not to accept the evidence offered by the applicant, had also been the reason for the Court of Appeal's dismissal of her appeal in this respect. As the evidence rejected by the District Court had been assessed as "new" evidence before the Court of Appeal, the Court of Appeal could not have taken it into account. Therefore, the District Court's failure to give a reasoned decision for not accepting the evidence offered had caused the applicant's loss of her rights before the Court of Appeal. Even though the Court of Appeal had examined the case in accordance with law, it had not redressed the District Court's failure. The applicant had not therefore received a fair trial.

33. The Court recalls first, in accordance with its case-law, that the requirement of equality of arms applies in principle to civil cases as well as to criminal cases. As regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. However, the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge ...

34. The Court then reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. Article 6 § 1 obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case ...

35. ... the Court notes that the Government does not dispute that the applicant had prepared a list of all the documents she had wanted to present as her evidence in the

case and that she had copied all the documents mentioned in the list. The applicant having offered them to the District Court judge as her evidence in the preparatory meeting, the judge had admitted only the list and two of the documents. It is left unclear whether the applicant was given the impression that she could present all the evidence at the main hearing or not. The answer to that question is, however, irrelevant as the main issue here is whether the court's decision to refuse to admit the evidence submitted by the applicant was given in a reasoned decision, allowing the applicant a possibility of appealing against it.

36. The Court notes that, even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions. The Court notes that it is not its task to examine whether the court's refusal to admit the evidence submitted by the applicant was well-founded; it falls to the national courts to determine questions of that nature.

37. The Court emphasises that a further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice ...

38. In the light of the foregoing considerations, the Court considers that the applicant did not have the benefit of fair proceedings in so far as the court's refusal to admit the evidence proposed by her was concerned. The lack of a reasoned decision also hindered the applicant from appealing in an effective way against that refusal. This is shown by the Court of Appeal's decision to reject the request to consider the evidence on the ground that it should have been adduced in the District Court and that the applicant had not shown that she had not been allowed, or had been unable, to do so.

There has therefore been a violation of Article 6 § 1.

► ***Salov v. Ukraine*, 65518/01, 6 September 2005**

92. ... the Court considers that the applicant did not have the benefit of fair proceedings in so far as the domestic courts gave no reasoned answer as to why the Kuybyshevsky District Court of Donetsk had originally found no evidence to convict the applicant of the offences with which he was charged and remitted the case for additional investigation on 7 March 2000 and yet, on 6 July 2000, found the applicant guilty of interfering with voters' rights. The lack of a reasoned decision also hindered the applicant from raising these issues at the appeal stage ...

► ***Gradinar v. Moldova*, 7170/02, 8 April 2008**

111. The Court notes that a number of findings of the Chişinău Regional Court were not contradicted by the findings of the higher courts and that, accordingly, they must be considered as established facts ... These included the fact that G. and the other accused were arrested and detained on the basis of a fabricated administrative offence, during which period of detention they were questioned and made self-incriminating statements in the absence of any procedural safeguards ... There was

no response to the finding that G. had unlawfully been shown the video recording of D.C.'s statement at the crime scene ... in order to obtain consistent statements by all the accused.

112. The Court further notes that the higher courts did not deal with the finding of the lower court that G. and the other co-accused had an alibi for the presumed time of the crime ..., and that a number of serious procedural violations made unreliable most of the expert reports ...

113. The higher courts also relied on the many witness statements in G.'s case. However, the Court observes that no comment was made on the finding by the lower court that some of those statements were fabricated by the police ...

114. The Court concludes that while accepting as "decisive evidence" ... the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect.

115. In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting G. and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention.

116. The Court recalls its finding that the proceedings against G. concerned directly the applicant's own rights ... It concludes that G.'s conviction, in the absence of sufficient reasons, necessarily breached the applicant's right to a fair trial.

► ***Sakit Zahidov v. Azerbaijan*, 51164/07, 12 November 2015**

50. ... The applicant was ultimately convicted of illegal possession of a quantity of narcotic substances exceeding that necessary for personal use, without intent to sell. His final conviction was therefore based on physical evidence, namely narcotic substances found on his person during a search carried out at the NDMIA [Narcotics Department of the Ministry of Internal Affairs] on 23 June 2006. In convicting the applicant, the Assize Court also referred to the medical forensic opinion of 5 July 2006 which said that he was at the initial stages of drug addiction ...

52. ... the Court will examine ... whether the applicant was given the opportunity to challenge [the] authenticity [of the physical evidence] and oppose its use in the domestic proceedings ...

55. ... the Court considers that the quality of the physical evidence on which the domestic courts' guilty verdict was based is questionable because the manner in which it was obtained casts doubt on its reliability.¹³

56. As to the second question, the Court observes that the applicant raised the matter of the authenticity of the physical evidence and its use against him before

13. See this case under GATHERING EVIDENCE (Search and seizure), p. 132 above.

all the domestic courts. However, it was not properly considered by them as their judgments were silent on this point.

57. In this connection, the Court observes that, despite the applicant's specific complaints, the domestic courts remained silent about the use of the evidence obtained from the search of 23 June 2006. In particular, they failed to examine why a search of the applicant had not been immediately conducted at the place of his arrest and whether the search had been conducted in compliance with the procedural requirements ... The domestic courts contented themselves with noting that the applicant's assertion that the evidence had been planted was defensive in nature and was not confirmed in the proceedings without examining the applicant's above-mentioned specific complaints. The Court therefore cannot but conclude that the applicant was not given the opportunity to raise this issue as his complaints in this respect were not considered by the domestic courts without any reason being given.

58. In view of the fact that the physical evidence found on the applicant's person was the main evidence on which his final criminal conviction was based, the Court considers that the foregoing considerations are sufficient to enable it to conclude that the manner in which the physical evidence used at trial against the applicant was obtained, and the domestic courts' failure to address his objections and justified arguments regarding the authenticity of that evidence and its use against him, rendered the proceedings as a whole unfair ...

59. Accordingly, there has been a violation of Article 6 of the Convention.

► ***Navalnyy and Ofitserov v. Russia, 46632/13, 23 February 2016***

110. Turning to the point of the allegedly arbitrary application of criminal law, the Court observes that the second applicant, Mr Ofitserov, was convicted of facilitating embezzlement committed by X. The acts imputable to him consisted of setting up a timber trading company VLK, concluding on behalf of that company a framework contract with a timber supplier, Kirovles, and buying Kirovles' timber and reselling it to customers at 7% commission, in accordance with the framework contract and its annexes containing specific sales contracts based on its heads of terms. The first applicant, Mr Navalnyy, was convicted of introducing the second applicant to X, Kirovles' director, and of fostering commercial ties between VLK and Kirovles, acts defined as organising embezzlement.

111. In the original charges, these acts had been defined as deception or abuse of trust, an offence under Article 165 of the Criminal Code, allegedly committed against X, but those charges were dropped for lack of *corpus delicti*. Subsequently, the prosecution and the courts decided that it had been X who had embezzled Kirovles' assets by entering into a loss-making transaction, and the applicants were assigned the roles of his accomplices.

112. The Court observes that under Russian law, limited liability companies such as VLK are defined as commercial entities whose main purpose is deriving profits ... The Court also notes that the domestic courts did not establish, and it was not even argued, that VLK by signing the contract and charging commission had pursued a

goal other than deriving profit from timber resale. Moreover, neither the validity of the sales contract between VLK and Kirovles, nor its legal nature, were called into question. It had not been imputed to either X or the applicants that they had concluded a sham transaction or that it had implied a money laundering, tax evasion or kick-back scheme, or that the parties had conspired in advance to turn the proceeds from VLK's commission to some other unlawful or dubious purpose. On the contrary, it transpires from the material in the case file that the two parties to the contract had pursued commercial goals independently of each other and that those goals were precisely those that had been stipulated in the contract. It is also noteworthy that when the court referred to Article 10 § 1 of the Civil Code and found that the transaction had caused damage to Kirovles, it had not established that doing so had been the applicants' exclusive goal, or that they had acted in bad faith or in breach of fair competition rules, contrary to that Article.

113. As regards Kirovles' losses imputed to VLK and, ultimately, the applicants, the Court observes that neither the nature of the transaction nor the context in which it was concluded imposed or implied a requirement that the buyer, VLK, would have to exercise a special duty of care towards the seller, Kirovles, to ensure that the latter sold the timber at the best possible price. Such a requirement would have indeed been an exception to the principle that each party carries the risks associated with a transaction in accordance with the terms of contract. In the present case, there was no basis for such an exception or legal obstacle for the parties to agree on VLK's commission and set it out in the contract the way they did.

114. It may be derived from X's statements at the applicants' trial that he concluded the contract with VLK because he was under the impression that he was obliged to do so by the first applicant because he had associated him with the Governor's team. However, the trial court also found that the first applicant had no mandate to compel X to choose VLK as a commercial partner and had not made any false representations to the contrary. Accordingly, even if X's assertions were true and he had indeed entered into an unprofitable transaction for the wrong reasons, no causal link was established between the applicants' conduct and Kirovles' losses, if any. Moreover, the losses of Kirovles were not established on the basis of VLK's commission, *inter alia*, but were found to constitute the total amount payable for the timber under the contract.

115. As such, the courts found the second applicant guilty of acts indistinguishable from regular commercial middleman activities, and the first applicant for fostering them. The Court considers that in the present case the questions of interpretation and application of national law go beyond a regular assessment of the applicants' individual criminal responsibility or the establishment of *corpus delicti*, matters which are primarily within the domestic courts' domain. It is confronted with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim. In other words, the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial.

116. The foregoing findings demonstrate that the domestic courts have failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances. It is noteworthy that the courts dismissed without examination the applicants' allegations of political persecution which were at least arguable ... for the following reasons.

119. It is obvious for the Court, as it must also have been for the domestic courts, that there had been a link between the first applicant's public activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinise his allegations of political pressure and to decide whether, despite that link, there had been a genuine cause for bringing him to justice. The same goes for the second applicant who had an arguable claim that he was only targeted as a vehicle for also bringing the first applicant into the orbit of the criminal case, a reason equally unrelated to the true purposes of a criminal prosecution. Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one.

120. The foregoing considerations lead the Court to conclude that the criminal proceedings against the applicants, taken as a whole, constituted a violation of their right to a fair hearing under Article 6 § 1 of the Convention.

Reasoning in jury trials

► *Taxquet v. Belgium* [GC], 926/05, 16 November 2010

90. It follows from the case-law cited above that the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness ...

92. In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions ... In these circumstances likewise, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction ... Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced ..., and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers ... Lastly, regard must be had to any avenues of appeal open to the accused ...

94. ... the applicant was charged with the murder of an honorary minister and the attempted murder of the latter's partner. However, neither the indictment nor the questions to the jury contained sufficient information as to the applicant's involvement in the commission of the offences of which he was accused.

95. With regard, firstly, to the indictment drawn up by the Principal Public Prosecutor, the CCP [Code of Criminal Procedure] provides that it should indicate the nature of the offence forming the basis of the charge and any circumstances that may cause the sentence to be increased or reduced, and that it must be read out at the start of the trial ... Admittedly, the accused may challenge the indictment by filing a statement of defence, but in practice the statement will have only limited effect since it is filed at the start of the proceedings, before the trial itself, which must serve as the basis for the jurors' personal conviction. The value of such a statement for a convicted defendant's understanding of why the jury has reached a guilty verdict is therefore limited. ... an analysis of the indictment of 12 August 2003 shows that it contained a detailed sequence of the police and judicial investigations and the many contradictory statements made by the co-accused. Although it mentioned each of the offences with which the applicant was charged, it did not indicate which items of evidence the prosecution could use against him.

96. Furthermore, in order to be able to reach a verdict, the jury had to answer thirty-two questions put by the President of the Assize Court. The applicant, who was appearing in court with seven co-defendants, was concerned by only four of the questions, each of which was answered by the jury in the affirmative ... The questions, which were succinctly worded and were identical for all the defendants, did not refer to any precise and specific circumstances that could have enabled the applicant to understand why he was found guilty. In that respect the present case differs from the *Papon* case ..., in which the Assize Court referred to the jury's answers to each of the 768 questions put by the court's president and also to the description of the facts held to have been established and the Articles of the Criminal Code which had been applied ...

97. It follows that, even in conjunction with the indictment, the questions put in the present case did not enable the applicant to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the four questions concerning him in the affirmative. Thus, the applicant was unable, for example, to make a clear distinction between the co-defendants as to their involvement in the commission of the offence; to ascertain the jury's perception of his precise role in relation to the other defendants; to understand why the offence had been classified as premeditated murder (*assassinat*) rather than murder (*meurtre*); to determine what factors had prompted the jury to conclude that the involvement of two of the co-defendants in the alleged acts had been limited, carrying a lesser sentence; or to discern why the aggravating factor of premeditation had been taken into account in his case as regards the attempted murder of A.C.'s partner. This shortcoming was all the more problematic because the case was both factually and legally complex and the trial lasted more than two months, from 17 October 2003 to 7 January 2004, during which time many witnesses and experts gave evidence.

98. In this connection, it should be emphasised that precise questions to the jury were an indispensable requirement in order for the applicant to understand any guilty verdict reached against him. Furthermore, since the case involved more than one defendant, the questions should have been geared to each individual as far as possible.

99. Lastly, it should be noted that the Belgian system makes no provision for an ordinary appeal against judgments of the Assize Court. An appeal to the Court of Cassation concerns points of law alone and accordingly does not provide the accused with adequate clarification of the reasons for his conviction. As regards Article 352 of the CCP, which provides that if the jurors have made a substantive error, the Assize Court must stay the proceedings and adjourn the case until a later session for consideration by a new jury, that option, as recognised by the Government ..., is used only rarely.

100. In conclusion, the applicant was not afforded sufficient safeguards enabling him to understand why he was found guilty. Since the proceedings were not fair, there has accordingly been a violation of Article 6 § 1 of the Convention.

► ***Lhermitte v. Belgium* [GC], 34238/09, 29 November 2016**

75. The Court observes at the outset that while the present case concerns the reasons why the applicant was convicted and sentenced to life imprisonment for the premeditated intentional homicide of her five children, the question before it does not relate either to whether and how those acts were committed – both of which matters were established and were admitted by the applicant – or to the legal characterisation of the offences or the severity of the sentence. The issue to be determined in the present case is whether or not the applicant was able to understand the reasons why the jury found that she had been responsible for her actions at the material time, notwithstanding the unanimous findings to the contrary reached by the psychiatric experts, who presented their new report at the end of the trial in the Assize Court ...

76. The Court observes that at the start of the trial the indictment was read out in full and the nature of the offence forming the basis of the charge and any circumstances that might aggravate or mitigate the sentence were likewise indicated. The case against the applicant was then the subject of adversarial argument, each item of evidence being examined and the defendant, assisted by counsel, having the opportunity to call witnesses and respond to the testimony heard. The questions put by the president to the twelve members of the jury at the end of the ten-day hearing were read out and the parties were given a copy.

77. With regard to the combined impact of the indictment and the questions to the jury in the present case, the Court notes firstly that the indictment, which ran to fifty-one pages, gave an account of the precise sequence of events, the steps taken and evidence obtained during the investigation, and the forensic medical reports; a substantial part of it also focused on the applicant's personal history and family life and the motives and reasons that had prompted her to carry out the killings, particularly in the light of the expert assessments of her psychological and mental state ... It observes, however, that the indictment was of limited effect in assisting an understanding of the verdict to be reached by the jury, since it was filed before the trial hearing, which forms the crucial part of proceedings in the Assize Court ... Furthermore, as to the findings of fact set out in the indictment and their value in assisting an understanding of the verdict, the Court cannot speculate as to whether such findings influenced the deliberations and the decision ultimately reached by

the jury ... The provisions of Article 6 require in particular an understanding not of the reasons that prompted the judicial investigating bodies to send the case for trial in the Assize Court, but rather of the reasons that persuaded the members of the jury, after the trial hearing at which they had been present, to reach their decision on the issue of guilt.

78. As regards the five questions put to the jury in the present case, it answered the first two in the affirmative and the fifth in the negative. The first question was the principal question concerning the applicant's guilt, the second concerned the aggravating circumstance of premeditation and the fifth – contrary to what the applicant appears to maintain ... – related to her current mental state; the other questions were subsidiary and ultimately devoid of purpose.

79. The Court notes, firstly, that counsel for the applicant did not raise any objections on learning of the president's questions to the jury, seeking neither to amend them nor to propose others. Furthermore, since the first question concerned the applicant's guilt, a positive answer necessarily implied that the jury found that she had been responsible for her actions at the material time. The applicant cannot therefore maintain that she was unable to understand the jury's position on this matter.

80. Admittedly, the jury did not provide any reasons for its finding in that regard, and this was the subject of the applicant's grievance. The Court reiterates, however, that compliance with the requirements of a fair trial must be assessed on the basis of the proceedings as a whole by examining whether, in the light of all the circumstances of the case, the procedure followed made it possible for the accused to understand why he or she was found guilty ... Such an examination in the present case may reveal a number of factors that should have dispelled any doubts on the applicant's part as to the jurors' conviction regarding her criminal responsibility at the time of the events. The Court observes that from its preliminary stage, the investigation focused on the applicant's personal history, character and psychological state at the time of the killings, as is shown by the indictment, a substantial part of which was devoted to these matters. Moreover, not only was there an adversarial trial, with the defendant and her counsel present, but above all, the emergence of new evidence, namely the letters disclosed by the applicant's personal psychiatrist, led the president to order a further psychiatric assessment ... The psychiatric experts thereupon changed their opinion and came back to present their new findings ... It is clear that while the trial hearing always forms the crucial part of proceedings in the Assize Court, in the present case the question of the applicant's criminal responsibility was indeed a central focus of the hearing.

81. The Court further notes that the sentencing judgment adopted by the Assize Court, composed of the twelve members of the jury together with the three professional judges, also includes reasoning that could assist the applicant in understanding why the jury found her criminally responsible. Thus, while noting the applicant's psychological problems and the possible factors causing her to act as she did, the Assize Court explicitly mentioned both her resolve to commit the murders and the cold-blooded manner in which she had carried them out ...; this was a logical conclusion in view of the jury's answers to the questions. The Court of Cassation,

moreover, did not interpret the sentencing judgment in any other way, since it held that consideration of the applicant's cold-blooded manner and her determination to carry out her crimes had constituted the Assize Court's reason for finding that she had been criminally responsible at the time of the events ...

82. In the Court's view, the fact that the sentencing judgment was drafted by professional judges who had not attended the deliberations on the issue of guilt cannot call into question the value and impact of the explanations provided to the applicant. It observes firstly that these explanations were provided without delay, at the end of the Assize Court session, since the sentencing judgment was delivered on 19 December 2008. It further notes that although the professional judges formally drafted the judgment in question, they were able to obtain the observations of the twelve members of the jury, who in fact sat alongside them in deliberating on the sentence and whose names appear in the judgment. Lastly, the professional judges were themselves present throughout the trial hearing, and must therefore have been in a position to place those observations in their proper context.

83. The fact remains that the applicant criticised the lack of specific explanations for the difference in opinion between the jury, which had found her criminally responsible, and the three psychiatric experts, who in their last report had stated their unanimous opinion that the applicant had been "suffering at the time of the events from a severe mental disturbance making her incapable of controlling her actions" ... Besides the fact that the experts themselves played down the impact of their findings by stating that their answers reflected their personal conviction while acknowledging that "[t]hey are only ever an informed opinion, and not an absolute scientific truth"..., the Court has already found that statements made by psychiatric experts at an Assize Court trial form only one part of the evidence submitted to the jury ... Accordingly, the fact that the jury did not indicate the reasons that prompted it to adopt a view at variance with the psychiatric experts' final report in favour of the applicant was not capable of preventing her from understanding, as noted above, the decision to find her criminally responsible.

84. In conclusion, having regard to all these circumstances, the Court considers that the applicant was afforded sufficient safeguards enabling her to understand the guilty verdict against her.

85. There has therefore been no violation of Article 6 § 1 of the Convention.

Further proceedings on same facts

► ***Sergey Zolotukhin v. Russia* [GC], 14939/03, 10 February 2009**

82. ... the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same.

83. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first "penal procedure" was concluded

and the list of charges levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal ...

84. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings. ...

97. The facts that gave rise to the administrative charge against the applicant related to a breach of public order in the form of swearing at the police officials Ms Y. and Captain S. and pushing the latter away. The same facts formed the central element of the charge under Article 213 of the Criminal Code, according to which the applicant had breached public order by uttering obscenities, threatening Captain S. with violence and offering resistance to him. Thus, the facts in the two sets of proceedings differed in only one element, namely the threat of violence, which had not been mentioned in the first proceedings. Accordingly, the Court finds that the criminal charge under Article 213 § 2 (b) embraced the facts of the offence under Article 158 of the Code of Administrative Offences in their entirety and that, conversely, the offence of "minor disorderly acts" did not contain any elements not contained in the offence of "disorderly acts". The facts of the two offences must therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7. As the Court has emphasised above, the facts of the two offences serve as its sole point of comparison, and the Government's argument that they were distinct on account of the seriousness of the penalty they entailed is therefore of no relevance for its inquiry ...

109. ... the administrative judgment of 4 January 2002 was printed on a standard form which indicated that no appeal lay against it and that it took immediate effect ... However, even assuming that it was amenable to an appeal within ten days of its delivery as the Government claimed, it acquired the force of *res judicata* after the expiry of that time-limit. No further ordinary remedies were available to the parties. The administrative judgment was therefore "final" within the autonomous meaning of the Convention term by 15 January 2002, while the criminal proceedings began on 23 January 2002 ...

110. ... the Court reiterates that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice ... Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and

provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence ...

111. The applicant in the present case was finally convicted of minor disorderly acts and served the penalty imposed on him. He was afterwards charged with disorderly acts and remanded in custody. The proceedings continued for more than ten months, during which time the applicant had to participate in the investigation and stand trial. Accordingly, the fact that he was eventually acquitted of that charge has no bearing on his claim that he was prosecuted and tried on that charge for a second time ...

116. ... The applicant's acquittal under Article 213 § 2 of the Criminal Code was not based on the fact that he had been tried for the same actions under the Code of Administrative Offences. The reference to the administrative proceedings of 4 January 2002 in the text of the judgment of 2 December 2002 was merely a statement that those proceedings had taken place. On the other hand, it emerges clearly from the text of the judgment that the District Court had examined the evidence against the applicant and found that it failed to meet the criminal standard of proof. Accordingly, his acquittal was founded on a substantive rather than a procedural ground ...

119. ... the Court finds that the applicant's acquittal of the charge under Article 213 § 2 of the Criminal Code did not deprive him of his status as a "victim" of the alleged violation of Article 4 of Protocol No. 7.

121. In the light of the foregoing, the Court considers that the proceedings instituted against the applicant under Article 213 § 2 (b) of the Criminal Code concerned essentially the same offence as that of which he had already been convicted by a final decision under Article 158 of the Code of Administrative Offences.

122. There has therefore been a violation of Article 4 of Protocol No. 7.

DISCONTINUANCE

► *Panteleyenko v. Ukraine*, 11901/02, 29 June 2006

70. ... the court decisions terminating the criminal proceedings against the applicant were couched in terms which left no doubt as to their view that the applicant had committed the offence with which he was charged. In particular, the Desniansky Court indicated that the investigation case file contained sufficient evidence to establish that the applicant had forged a notarial document and had wittingly carried out an invalid notarial action, its only reason for discontinuing the proceedings being the impracticality of prosecuting an insignificant offence ... In the Court's view, the language employed by the Desniansky Court was in itself sufficient to constitute a breach of the presumption of innocence. The fact that the applicant's compensation claim was rejected on the basis of the findings reached in the criminal proceedings merely exacerbated this situation. Although the Desniansky Court reached its conclusion after a hearing held in the presence of the applicant, the proceedings before it were not criminal in nature and they lacked a number of key elements normally pertaining to a criminal trial. In that respect, it cannot be concluded that the proceedings before that court resulted, or were intended to result in the applicant

being “proved guilty according to law”. In these circumstances, the Court considers that the reasons given by the Desniansky Court, as upheld on appeal, combined with the rejection of the applicant’s compensation claim on the basis of those same reasons, constituted an infringement of the presumption of innocence.

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE (Discontinuance), p. 184 above

SENTENCE

► *Ilaşcu and Others v. Moldova and Russia* [GC], 48787/99, 8 July 2004

461. The requirement of lawfulness laid down by Article 5 § 1 (a) (“lawful detention” ordered “in accordance with a procedure prescribed by law”) is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it, particularly the principle of the rule of law, which is expressly mentioned in the Preamble to the Convention. The notion underlying the expression “in accordance with a procedure prescribed by law” is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary ...

In addition, as the purpose of Article 5 is to protect the individual from arbitrariness ... a “conviction” cannot be the result of a flagrant denial of justice ...

The Court also refers to its conclusions under Article 3 of the Convention regarding the nature of the proceedings in the “Supreme Court of the MRT [Moldavian Republic of Transdnistria]” ...

462. The Court accordingly finds that none of the applicants was convicted by a “court”, and that a sentence of imprisonment passed by a judicial body such as the “Supreme Court of the MRT” at the close of proceedings like those conducted in the present case cannot be regarded as “lawful detention” ordered “in accordance with a procedure prescribed by law”.

► *Başkaya and Okçuoğlu v. Turkey* [GC], 23536/94, 8 July 1999

42. ... the second applicant complained that he had been sentenced to a term of imprisonment under a provision in section 8(2) which expressly applied to the sentencing of editors, while publishers could only be punished by a fine. In this connection, the Government stressed that the application of section 8(2) to publishers would normally entail a more favourable sentence than under section 8(1). Although this may be so, it rather appears that section 8(2) was a *lex specialis* on the sentencing of editors and publishers and that the sentence imposed on the applicant publisher in the present case was based on an extensive construction, by analogy, of the rule in the same subsection on the sentencing of editors.

In these circumstances, the Court considers that the imposition of a prison sentence on the second applicant was incompatible with the principle “*nulla poena sine lege*” embodied in Article 7.

► ***Böhmer v. Germany*, 37568/97, 3 October 2002**

61. The Court first notes that in accordance with section 56 of the Penal Code, the execution of a sentence to imprisonment will be suspended, if it can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence. In making this prognosis, the criminal court has to consider the personality of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his living conditions and the effects which can be expected as a result of the suspension.

62. The Court is prepared to consider ... that the decision to revoke a suspension, to the extent that it is based on an assessment, with the benefit of hindsight, that the convicted person showed that he or she did not fulfill the expectations upon w[hic]h the suspension was based, may be no more than a correction of the initial prognosis.

63. Section 56f (1) of the Penal Code, however, requires a court to base this assessment on a finding that the person has committed a criminal offence during the period of probation.

64. In this legal situation, the reasoning contained in the Court of Appeal's decision was not limited to assessing the applicant's personality or to describing a "state of suspicion" that the applicant had committed a criminal offence during his period of probation.

65. In the Court's opinion, the Court of Appeal, sitting as court supervising the execution of sentences, had assumed the role of the Hamburg District Court, the competent trial court, and had unequivocally declared that the applicant was guilty of a criminal offence. That is evidenced by the clear phrasing that it had obtained "certainty" that the applicant had committed fraud ... This conclusion is further supported by facts that the Court of Appeal opted for the taking of evidence under section 308 of the Code of Criminal Procedure and proceeded to a substantial and detailed evaluation of the probative value of the statements made by the witnesses in its decision ...

69. In these circumstances, the Court finds that the Hamburg Court of Appeal's reasoning, in its decision of 14 October 1996, offended the presumption of innocence, which is a specific aspect of the requirements of a fair trial.

► ***Geerings v. Netherlands*, 30810/03, 1 March 2007**

43. ... Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention ...

44. The Court has in a number of cases been prepared to treat confiscation proceedings following on from a conviction as part of the sentencing process and therefore as beyond the scope of Article 6 § 2 (see, in particular, *Phillips* ... and *Van*

Offeren v. the Netherlands ...). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.

45. The present case has additional features which distinguish it from *Phillips* and *Van Offeren*.

46. Firstly, the Court of Appeal found that the applicant had obtained unlawful benefit from the crimes in question although in the present case he was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.

47. The Court considers that “confiscation” following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, “deprivation of illegally obtained advantage” – is a measure (*maatregel*) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2 ...

48. Secondly, unlike in the *Phillips* and *Van Offeren* cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.

49. ... Article 6 § 2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused’s innocence is no longer admissible.

50. The Court of Appeal’s finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant’s guilt without the applicant having been “found guilty according to law” ...

51. There has accordingly been a violation of Article 6 § 2.

ACQUITTAL

Duty of compliance

► ***Assanidze v. Georgia* [GC], 71503/01, 8 April 2004**

172. ... the applicant was detained by the Ajarian authorities for the purposes set out in Article 5 § 1 (c) from 11 December 1999 onwards, that being the date he was charged in a fresh set of proceedings ... However, that situation ended with his acquittal on 29 January 2001 by the Supreme Court of Georgia, which at the same time ordered his immediate release ... Since then, despite the fact that his case

has not been reopened and no further order has been made for his detention, the applicant has remained in custody. Thus, there has been no statutory or judicial basis for the applicant's deprivation of liberty since 29 January 2001. It cannot, therefore, be justified under any sub-paragraph of Article 5 § 1 of the Convention ...

174. As the documents in the case file show, the central State authorities themselves pointed out on a number of occasions that there was no basis for the applicant's detention. The central judicial and administrative authorities were forthright in telling the Ajarian authorities that the applicant's deprivation was arbitrary for the purposes of domestic law and Article 5 of the Convention. However, their numerous reminders and calls for the applicant's release went unanswered ...

175. The Court considers that to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty ... and arbitrary, and runs counter to the fundamental aspects of the rule of law.

176. The Court accordingly finds that since 29 January 2001 the applicant has been arbitrarily detained, in breach of the provisions of Article 5 § 1 of the Convention.

Suggestion of guilt

► *Guisset v. France*, 33933/96, 26 September 2000

68. ... despite acquitting the applicant, the judgment of the Disciplinary Offences (Budget and Finance) Court of 12 April 1995 expressly stated in its reasoning that the applicant had "infringed the Rules governing State Income and Expenditure and [was] liable to the penalties laid down by section 5 of the Law of 25 September 1948, as amended". The Court points out in that connection that the reasoning in a decision forms a whole with and cannot be dissociated from the operative provisions ...

69. Thus, the applicant was considered guilty and liable to the imposition of a fine. Furthermore, the Disciplinary Offences (Budget and Finance) Court expressly dismissed his complaints under the Convention. Accordingly, the fact that he was ultimately exonerated from the penalty to which he was liable cannot, in the particular circumstances in which the offence was committed, be regarded as a remedy for the alleged violation.

70. Consequently, having regard to both the reasoning in and the operative provisions of the judgment of ... of 12 April 1995, the Court concludes that the applicant has not ceased to be a "victim" within the meaning of Article 34 of the Convention ...

► *Cleve v. Germany*, 48144/09, 15 January 2015

59. The Court notes that the Regional Court, in its reasons for the acquittal for want of evidence, found, on the one hand, that the specific offences the applicant had been charged with had not been proven with the certainty necessary for a criminal conviction. The Regional Court stated that it was not convinced by A.'s testimony in the hearing that the charges were completely correct, in particular, in terms of a clear definition of the criminal acts and their time. Owing to the inconsistencies in A.'s statements, it had been impossible to establish precise facts, in particular in respect of

the intensity of the applicant's acts, as necessary for their classification as an offence, but also in respect of the number of acts and the place and the time frame in which they were carried out. The Regional Court therefore did not consider the applicant proven guilty, in accordance with the law, of the criminal offences as defined in the Criminal Code he had been charged with. On the other hand, and despite these findings, the Regional Court, considering that A. had not been influenced by third persons, made its impugned statement that the core events described by the victim had a factual basis and that the accused actually carried out sexual assaults on his daughter in his car.

60. Furthermore, in determining the true meaning of the impugned statements in that context, the Court must have regard to the language used by the Regional Court. It observes that by referring to "sexual assaults" ("*sexuelle[n] Übergriffe[n]*") the Regional Court used a general, non-judicial term which is not contained in the definition of the offences of serious sexual abuse of children and sexual abuse of a person entrusted to him for upbringing the applicant was charged with ... It is true that this term as such therefore does not legally specify the criminal (as opposed to moral) relevance of the applicant's acts.

61. However, the Regional Court's finding "that the accused actually carried out sexual assaults on his daughter in his car" is phrased in a straightforward and unconditional manner. Read in the context of the charges against the applicant of serious sexual abuse of his daughter mostly in his car, it cannot but convey to the reader of the judgment that the applicant was in fact guilty of having sexually abused his daughter.

62. The Court further takes note of the applicant's argument that the Regional Court's impugned statements had negative consequences, in particular, because the family court, in subsequent proceedings, excluded any contacts with his daughter. It refers in this context to its above case-law that the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence after the applicant's final acquittal. Every authority which refers, directly or indirectly, to his criminal responsibility in respect of the offences he was charged with must respect the operative provisions of the Regional Court's judgment acquitting him ...

63. ... in view of the potential relevance of the reasoning of a criminal court's judgment for subsequent legal proceedings, it is of critical importance to avoid in that judgment any reasoning suggesting that the court considers the accused as guilty even in the absence of any formal finding of guilt. Only in that manner the protection guaranteed by the presumption of innocence enshrined in Article 6 § 2 is rendered practical and effective ...

64. In view of these elements, the Court considers that the Regional Court's impugned statements went beyond a mere description of a state of (remaining) suspicion by using unfortunate language. They must be said, in the circumstances, to have contradicted or "set aside" the applicant's acquittal ... by amounting to a finding that the applicant was guilty of the offences he was charged with.

65. In view of the foregoing considerations, the Court concludes that there has been a violation of Article 6 § 2 of the Convention.

Subsequent proceedings

► *Ringvold v. Norway*, 34964/97, 11 February 2003

38. ... the fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence cannot, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being “charged with a criminal offence”. Nor can the fact that evidence from the criminal trial is used to determine the civil-law consequences of the act warrant such a characterisation ...

... while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof ...

In the present case the impugned national ruling on compensation, which appeared in a separate judgment from the acquittal, did not state, either expressly or in substance, that all the conditions were fulfilled for holding the applicant criminally liable with respect to the charges of which he had been acquitted ... The ensuing civil proceedings were not incompatible with, and did not “set aside”, that acquittal.

39. Furthermore, the purpose of establishing civil liability to pay compensation was, unlike that of establishing criminal liability, primarily to remedy the injury and suffering caused to the victim. The amount of the award – 75,000 Norwegian kroner – could be considered justified on account of the damage caused. It seems clear that neither the purpose of the award nor its size conferred on the measure the character of a criminal sanction for the purposes of Article 6 § 2.

40. Against this background, the Court does not find that the compensation claim amounted to the bringing of another “criminal charge” against the applicant after his acquittal.

41. ... The Court reiterates that the outcome of the criminal proceedings was not decisive for the issue of compensation. In this particular case, the situation was reversed: despite the applicant’s acquittal it was legally feasible to award compensation. Regardless of the conclusion reached in the criminal proceedings against the applicant, the compensation case was thus not a direct sequel to the former. In this respect, the present case is clearly distinguishable from those ... where the Court found that the proceedings concerned were a consequence and the concomitant of the criminal proceedings, and that Article 6 § 2 was applicable to the former.

42. In sum, the Court concludes that Article 6 § 2 was not applicable to the proceedings relating to the compensation claim against the applicant and that this provision has therefore not been violated ...

► *Kapetanios v. Greece*, 3453/12, 30 April 2015

86. The Court notes at the outset that the administrative proceedings and the context in which the decisions of the administrative courts were taken were criminal in nature ... In other words, through the proceedings subsequent to the applicants’

acquittal by the criminal courts, the administrative courts examined, within the meaning of the Convention, the “merits” of the criminal charges; in both the criminal and administrative proceedings, the penalties provided for were criminal in nature. Moreover, it is clear from the case file that the charges brought against the applicants before the administrative and criminal courts referred specifically to the same conduct occurring over the same periods.

87. The present case is therefore clearly distinguishable from the cases already examined by the Court in which an administrative body with disciplinary powers had imposed a penalty as a result of accusations against a state employee following his or her acquittal in criminal proceedings ... In these cases, the disciplinary proceedings enjoyed a certain autonomy *vis-à-vis* the criminal proceedings, particularly in terms of the conditions for their implementation and their non-punitive purpose ... On account of this autonomy, the imposition of an administrative penalty on the employee in question was not considered, in itself, to be in breach of the principle of the presumption of innocence, insofar as the administrative body’s decision did not contain a statement imputing criminal liability to the applicant.

88. In the present case, after an assessment of the material in the case files different from that applied by the criminal courts, the administrative courts held that the applicants had committed the same offences of contraband of which they had previously been acquitted by the criminal courts. These conclusions were subsequently upheld, at final instance, by the Supreme Administrative Court. Given the identical nature of the two sets of proceedings at issue, the acts in dispute and the constituent elements of the offences concerned, this finding by the administrative courts breached the applicants’ right to be presumed innocent which had already been established by their acquittal by the criminal courts. Consequently, there was a violation of Article 6 § 2 of the Convention.

Accuracy of the record

► *Cemalettin Canli v. Turkey*, 22427/04, 18 November 2008

40. ... Of particular importance for the purposes of the present case, the Regulations authorise the police to keep such information in their records in respect of persons accused of serious offences, including membership of an illegal organisation, that is, the offence with which the applicant was charged in the past but of which he was subsequently cleared in 1990.

41. The Regulations also contain provisions for the correction and revision of the information contained in police records. They oblige the police to include in their records all information regarding the outcome of any criminal proceedings relating to the accusations ...

42. Nevertheless, as pointed out above, not only was the information set out in the report false, but it also omitted any mention of the applicant’s acquittal and the discontinuation of the criminal proceedings. Moreover, the decisions rendered in 1990 were not appended to the report when it was submitted to the Ankara court in 2003. These failures, in the opinion of the Court, were contrary to the unambiguous

requirements of the Police Regulations and removed a number of substantial procedural safeguards provided by domestic law for the protection of the applicant's rights under Article 8 of the Convention ...

43. Accordingly, the Court finds that the drafting and submission to the Ankara court by the police of the report in question was not "in accordance with the law", within the meaning of Article 8 § 2 of the Convention.

ACCESS TO THE COURT RECORD

► *Z. v. Finland*, 22009/93, 25 February 1997

111. As regards the complaint that the medical data in issue would become accessible to the public as from 2002, the Court notes that the ten-year limitation on the confidentiality order did not correspond to the wishes or interests of the litigants in the proceedings, all of whom had requested a longer period of confidentiality ...

112. The Court is not persuaded that, by prescribing a period of ten years, the domestic courts attached sufficient weight to the applicant's interests. It must be remembered that, as a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for her private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years is not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 ...

► *Craxi v. Italy (No. 2)*, 25337/94, 17 July 2003

75. In the present case the Court recalls that disclosures of a private nature inconsistent with Article 8 of the Convention took place ... It follows that once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction the persons responsible for the shortcomings which had occurred.

76. ... There has consequently been a violation of Article 8 of the Convention ...

Chapter 16

Appeal

COMPLIANCE WITH ARTICLE 6

► ***Dorado Baúlde v. Spain (dec.)*, 23486/12, 1 September 2015**

18. As regards the applicant's complaint under Article 13 in conjunction with Article 6 of the Convention, the Court recalls that neither Article 6 of the Convention nor Article 13 guarantees, as such, a right of appeal or a right to a second level of jurisdiction ...

► ***Ross v. United Kingdom (dec.)*, 11396/85, 11 December 1986**

3. ... although Article 6 ... does not guarantee an appeal in criminal proceedings, where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided under domestic law, the guarantees of Article 6 ... continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue ...

► ***Hajiyev v. Azerbaijan*, 5548/03, 16 November 2006**

39. The Court considers that the applicant's understanding of the system must be assessed at the time when he tried to make use of the remedy in question ... the Transitional Law provided for a right to have his case re-examined by "the appellate court or the Supreme Court". This wording ... could not reasonably give the applicant a clear understanding that his appeal was within the competence of the Supreme Court as a cassation instance, thus bypassing the appellate instance which was ordinarily available to other convicted persons under the new criminal procedure introduced by the new CCrP [Code of Criminal Procedure].

40. The applicant lodged his full appellate complaint on 7 March 2002. Despite the fact that he re-submitted his appeal several times thereafter, it has neither been examined on the merits nor rejected by a formal court decision due to lack of the Court of Appeal's competence to hear the appeal. Moreover, following the applicant's continuous inquiries, he was twice re-assured by letters from the Court of Appeal's clerk of 24 October and 27 November 2002 that his case would be examined shortly. Until 31 March 2004, more than two years after the time of lodging his appeal, the applicant had not been specifically informed by the Court of Appeal of the fact that the appeal was within the competence of the Supreme Court, and not the Court of Appeal. On the contrary, he was led to believe that his case was actually pending examination in the Court of Appeal, albeit with a significant delay.

41. The Court further notes that, during the same period, the cases of three other persons, who appeared to be in a comparable position from a procedural standpoint, were actually examined under the appellate procedure by the Court of Appeal pursuant to the same provision of the Transitional Law ...

42. The Court is not convinced by the Government's argument that these three cases were distinguishable from the applicant's case to any significant degree ...

43. In such circumstances, the Court concludes that, given the ambiguity of the Transitional Law and the absence of a clear domestic judicial interpretation of its relevant provisions, as well as the existence of at least three domestic precedents where the re-consideration of cases based on the Transitional Law had been carried out by the Court of Appeal, it was reasonable for the applicant to believe that it was for the Court of Appeal to examine his appellate complaint ...

45. However, for more than two years, the Court of Appeal failed to either deal with the applicant's appeal and institute appellate proceedings or formally reject the appeal due to lack of competence. As noted above, the letter of 31 March 2004 signed by a clerk working in the Court of Appeal does not constitute, under the domestic law, a formal judicial decision of that court.

46. ... At the time of lodging his appeal and during the following period of at least two years, the applicant was not afforded sufficient safeguards to prevent a misunderstanding of the procedure made available to him under the Transitional Law and was led to believe that his case would be examined by the Court of Appeal. In view of the peculiarities of this case, the Court finds that it was for the Court of Appeal to take steps to ensure that the applicant enjoyed effectively the right to which he was entitled under the Transitional Law. However, the Court of Appeal has failed to do so. The Court also finds that, in such circumstances, the applicant could not be required to apply to the Supreme Court.

47. In the light of the foregoing considerations, the Court concludes that the applicant suffered a restriction in his right of access to a court and, therefore, in his right to a fair trial.

Accordingly, the Court ... holds on the merits that there has been a violation of Article 6 § 1.

► ***Bayar and Gürbüz v. Turkey, 37569/06, 27 November 2012***

43. In the instant case, in the light of the judgment of the Constitutional Court ... the Court finds that the restriction imposed on the right of access to a court pursued the legitimate aim of avoiding the overloading of the Court of Cassation's list by cases of lesser importance ...

45. In the instant case, however, it observes that Turkish criminal procedure has certain particular features. First, unlike the case cited above in which the applicant's case was examined not only by the first instance court, but also by the *Audiencia Provincial* sitting as an appeal court and in which these two tribunals enjoyed full jurisdiction ..., the applicants' case was examined by a single court. Moreover, in the Turkish court system, the role of the Court of Cassation is often not limited to reviewing compliance with the law ... The Court notes that in Turkish law, as in French law,

while the Court of Cassation is bound by the facts established by the lower courts and its competence is limited by law, it also has the role of ensuring that the findings of the trial court are consistent with the facts of the case ... in particular because the Turkish criminal justice system currently has two-tier proceedings.

46. In addition, the Court notes that the Turkish Constitutional Court invalidated paragraph 2 of Article 305 of the Code of Criminal Procedure, finding in particular that “in the event of imposition of a fine of less than a given amount, the fact of restricting the defendant’s right to appeal on points of law, without taking account of the characteristics of the sentence or any harmful consequences that it may have, cannot be regarded as compatible with Articles 2 and 36 of the Constitution” ...

47. The Court shares this view, especially as the offence in the present case certainly did not fall into the category of petty offences, since it concerned the printing or publication “of statements or leaflets of terrorist organisations”, acts that, under Section 6 § 2 of the Anti-Terrorism Act, were, since the enactment of Law No. 5532 of 29 June 2006 amending the provisions applicable to such offences, punishable by a prison sentence of between one and three years ... The applicants were fined in their capacities as proprietor and editor-in-chief of a newspaper. Moreover, the amount of the fine applicable to this type of offence varies depending on the newspaper’s circulation.

48. The Court further notes that in Turkish criminal law the prosecutor can take the case to the Court of Cassation to challenge the criminal classification of the facts by a first instance court ... It considers that the defendants, who are unable to appeal on points of law, are at a disadvantage in relation to the public prosecutor, who is by contrast able to take the case to the higher court to challenge the classification of the facts. Consequently, the restriction imposed on the applicants in the present case, on account of the amount of the fine imposed on them, cannot be considered compatible with the principle of equality of arms in view of what was at stake for them in the case and the fact that in criminal cases the requirements of “a fair trial” are more strict ...

49. In the light of the above and in view of the proceedings as a whole and what was at stake in the case, the Court finds that the applicants suffered a disproportionate restriction to their right of access to a court guaranteed by Article 6 §1, and that that right was impaired in its very essence.

Accordingly, there was a violation of this provision.

RIGHT UNDER PROTOCOL NO. 7, ARTICLE 2

► *Krombach v. France*, 29731/96, 13 February 2001

96. The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any

restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right ... This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: "... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court".

97. ... at the material time ... the only available appeal was an appeal on points of law. At first sight, the French rules of criminal procedure therefore appear to comply with Article 2 of Protocol No. 7 ...

98. However, the Court notes that the French declaration regarding the interpretation of the Protocol does not relate to Article 636 of the Code of Criminal Procedure, which expressly provides that persons convicted after trial *in absentia* have no right of appeal to the Court of Cassation. Consequently, the applicant had no "remedy" before a tribunal, within the ordinary meaning of that word, against his conviction, *in absentia*, by a single level of jurisdiction ...

99. The applicant's complaint ... was that he had no right of appeal to the Court of Cassation against defects in the trial *in absentia* procedure itself. The Court considers that the fact that the accused may purge his or her contempt is not decisive in that connection ..., as although purging the contempt may enable the accused to obtain a full retrial of his case in his presence, the positive obligation thus imposed on the State in the event of an arrest is intended essentially to guarantee adversarial process and compliance with the defence rights of a person accused of a criminal offence.

100. In the present case the applicant wished both to defend the charges on the merits and to raise a preliminary procedural objection. The Court attaches weight to the fact that the applicant was unable to obtain a review, at least by the Court of Cassation, of the lawfulness of the Assize Court's refusal to allow the defence lawyers to plead ...

By virtue of Articles 630 and 639 of the Code of Criminal Procedure taken together ... the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer ..., and, on the other, was unable to appeal to the Court of Cassation as he was a defendant *in absentia*. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court.

Consequently, there has also been a violation of Article 2 of Protocol No. 7 to the Convention.

► **Gurepka v. Ukraine, 61406/00, 6 September 2005**

60. The Court has examined the extraordinary review procedure prescribed by the Code of Administrative Offences. It could only be initiated by a prosecutor or by a motion of the president of the higher court ... Given that this procedure was not directly accessible to a party to the proceedings and did not depend on his or her motion and arguments, the Court considers that it was not a sufficiently effective remedy for Convention purposes.

61. As to the Government's argument that the decision ordering the applicant's administrative arrest and detention was actually reviewed by a higher court, the Court finds no evidence that the extraordinary appeal lodged by the Prosecutor's Office was initiated upon the applicant's own motion. Moreover, this appeal reflected the position of the Prosecutor's Office, and not of the applicant. During these proceedings the applicant was not given an opportunity to present any arguments, and the issue under consideration was the dispute between the Prosecutor's Office and the court over the competence to impose a sanction on the applicant. The Court considers that the mere fact that the review initiated by the Prosecutor's Office had some positive, albeit temporary, impact on the applicant's situation, namely the suspension of his sentence, was not in itself sufficient to conclude that the extraordinary appeal was an effective remedy which could have satisfied the requirements of Article 2 of Protocol No. 7.

► ***Galstyan v. Armenia*, 26986/03, 15 November 2007**

124. The Court first notes that the applicant was convicted under the CAO [Code of Administrative Offences], which prescribes penalties for offences that do not fall within the criminal sphere in the domestic law. This may raise a question as to whether or not the offence of which the applicant was convicted was of a minor character within the meaning of Article 2 § 2 of Protocol No. 7 and the exception contained in that provision should apply. The Court recalls that the Commission has previously found an offence, such as an "offence against the order in court", for which a maximum penalty of 10,000 Austrian shillings or, if indispensable for maintaining the order, imprisonment for a period not exceeding eight days was prescribed by the Austrian Code of Criminal Procedure, to be of a "minor character" ... In the present case, the applicant was sentenced to three days of detention. However, Article 172 of the CAO, under which this sentence was imposed, prescribed up to 15 days of detention as a maximum penalty. The Court considers that a penalty of 15 days of imprisonment is sufficiently severe not to be regarded as being of a "minor character" within the meaning of Article 2 § 2 of Protocol No. 7.

125. The Court recalls that Contracting States enjoy in principle a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. In certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on that right of review must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right ...

126. The Court is mindful of its finding above that the review procedure prescribed by Article 294 of the CAO does not provide an individual with a clear and accessible right to appeal ... This Article prescribes a power of review by the chairman of a superior court – whether or not upon the individual's request – which, moreover, lacks any clearly defined procedure or time-limits and consistent application in practice. In the Court's opinion, such a review possibility cannot be compatible with Article 2 of Protocol No. 7. It follows that the applicant did not have at his disposal an appeal procedure which would satisfy the requirements of this Article.

► ***Patsouris v. Greece*, 44062/05, 8 January 2009**

36. The Court notes first that, according to the evidence, Law No. 3346/2005 in principle benefits persons sentenced at first instance or on appeal to up to six months' imprisonment, in particular insofar as such sentences are neither enforced nor placed on the criminal record. On this latter point, the Court gives particular weight to the concurring agreement expressed by the prosecutors of the country that a sentence such as the one imposed on the applicant may not be placed on the criminal record ... Furthermore, the Court accepts that the new law pursues a legitimate aim, namely to speed up criminal justice by relieving the courts of less important cases.

37. With regard to the applicant's personal case, it remains for the Court to decide whether the discontinuance of the criminal case against him had other negative consequences which might have given him a legitimate interest in having his case heard again by a higher court.

38. ... In this case, the Court notes that the applicant clearly did not commit an offence in the eighteen months following the publication of the new law and that, consequently, the criminal case against him can never be revived and brought against him.

39. Having said that, it is true that the conviction of the applicant at first instance was also taken into account during the disciplinary proceedings against him that are currently in progress. The Court notes, however, that it was not the sole factor in the decision-making process.

40. Moreover, the Court finds that accepting the applicant's submission that the disciplinary authorities should have completely ignored the criminal proceedings of which he was the subject in order for the discontinuance of the case to be compatible with Protocol No. 7, Article 1, would amount to calling into question the jurisdiction of the disciplinary bodies, which are, however, authorised by domestic law and practice to take into account the decision of the criminal court and assess the facts on which the criminal proceedings were based ... The Court points out that the dispute brought before it in the instant case does not concern the fairness of the disciplinary proceedings at issue, which are in any case still in progress, but the restriction of the applicant's right to have his conviction examined by a higher court.

41. In view of the foregoing, the Court finds that, in the particular circumstances of the present case, the application of the provisions of Law No. 3346/2005 had effects comparable to exoneration. Consequently, the Court concludes that the termination of the criminal proceedings against the applicant under the new law presented no problem from the point of view of the right of appeal, even though, at an initial stage, the applicant was sentenced for an offence punishable by a prison sentence ...

42. Consequently, there was no violation of Protocol No. 7, Article 2.

► ***Natsvlshvili and Togonidze v. Georgia*, 9043/05, 29 April 2014**

96. Lastly, as regards the first applicant's complaint under Article 2 of Protocol No. 7, the Court considers that it is normal for the scope of the exercise of the right to appellate review to be more limited with respect to a conviction based on a plea

bargain, which represents a waiver of the right to have the criminal case against the accused examined on the merits, than it is with respect to a conviction based on an ordinary criminal trial. It reiterates in this connection that the Contracting States enjoy a wide margin of appreciation under Article 2 of Protocol No. 7 ... The Court is of the opinion that by accepting the plea bargain, the first applicant, as well as relinquishing his right to an ordinary trial, waived his right to ordinary appellate review. That particular legal consequence of the plea bargain, which followed from the clearly worded domestic legal provision ..., was or should have been explained to him by his lawyers. By analogy with its earlier findings as to the compatibility of the first applicant's plea bargain with the fairness principle enshrined in Article 6 § 1 of the Convention ..., the Court considers that the waiver of the right to ordinary appellate review did not represent an arbitrary restriction falling foul of the analogous requirement of reasonableness contained in Article 2 of Protocol No. 7 either ...

► ***Ruslan Yakovenko v. Ukraine*, 5425/11, 4 June 2015**

81. The Court notes that the domestic courts considered it necessary to keep the applicant in detention as a preventive measure until the first-instance court's judgment became final, even after the prison sentence imposed on him by that judgment had already expired. In the absence of an appeal, the period in question lasted for twelve days. Had the applicant decided to appeal, this would have delayed for an unspecified period of time the point at which the judgment became final.

82. Accordingly, the Court agrees with the applicant's argument that the exercise of his right to appeal would have been at the price of his liberty, especially given that the length of his detention would have been uncertain. The Court therefore finds that this circumstance infringed the very essence of his right under Article 2 of Protocol No. 7.

83. There has therefore been a violation of this provision.

REFUSAL

Failure to surrender to custody

► ***Khalfaoui v. France*, 34791/97, 14 December 1999**

43. ... the obligation to surrender to custody compels an appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, even though in French law appeals on points of law have suspensive effect and the judgments challenged by means of such appeals are not yet final. Consequently, a sentence becomes enforceable only if and when the appeal on points of law is dismissed.

44. While the concern to ensure that judicial decisions are enforced is in itself legitimate, the Court observes that the authorities have other means at their disposal whereby they can take the convicted person in charge, whether before ... or after the appeal on points of law is heard. In practice, the obligation to surrender to custody is intended to substitute for procedures having to do with the exercise of police powers an obligation which is imposed on defendants themselves, and which

is backed up moreover by the sanction of depriving them of their right to appeal on points of law.

45. Lastly, the Court observes that the obligation to surrender to custody is not justified by the special features of the cassation procedure either; the procedure in the Court of Cassation, to which only arguments on points of law can be submitted ... is essentially written, and it has not been contended that the defendant's presence was necessary at the hearing ...

46. In the present case, in accordance with the provisions of Article 583 of the Code of Criminal Procedure, the applicant's failure to comply with the obligation to surrender to custody was penalised by forfeiture of his right to appeal on points of law ...

47. Having regard to the importance of the final review carried out by the Court of Cassation in criminal matters, and to what is at stake in that review for those who may have been sentenced to long terms of imprisonment, the Court considers that this is a particularly severe sanction affecting the right of access to a court guaranteed by Article 6 of the Convention ...

53. ... the possibility of requesting exemption from the obligation to surrender to custody is not, in the Court's opinion, capable of eliminating the disproportionality of the sanction of forfeiture of the right to appeal on points of law.

54. In conclusion, having regard to all the circumstances of the case, the Court considers that the applicant suffered an excessive restriction on his right of access to a court, and therefore on his right to a fair trial.

► ***Karatas and Sari v. France*, 38396/97, 16 May 2002**

49. First of all, the Court notes that following their detention on remand the applicants were released on bail subject to a number of conditions, including, for the female applicant, not leaving the territory of metropolitan France and, for the male applicant, not leaving the *département* of Var. Shortly after, however, they failed to comply with these conditions by absconding. Judicial supervision was therefore withdrawn by the investigating judge, who, on 3 February and 7 April 1995, issued warrants for their arrest. The Court observes that, from that time, the applicants were ... subject to the obligation to comply with these arrest warrants and that, as the summons could not be served on them, the judgment *in absentia* handed down against them was served on them "at the prosecutor's office", in accordance with Article 492 § 1 of the Code of Criminal Procedure.

In the light of the above, the Court concludes that the applicants, whereas they had been released on bail, had deprived themselves of the opportunity to appear before the trial court without first surrendering to custody. It further observes that an application to set aside the judgment at issue would necessarily result in its being declared null and void.

50. The Court considers therefore that there is reason to distinguish the investigation phase from the judgment at issue since, even before the case was referred for trial, the applicants were subject to the obligation to comply with the arrest warrants

issued by the investigating judge. It follows that the obligation to surrender to custody in order to have access to a court of which the applicants complain resulted from the pre-existing obligation with which they had failed to comply before the judgment at issue, namely to remain at the disposal of the judicial system in order to gain access to a court. The Court observes, as the Government argue, that the arrest warrants maintained by the trial court are the necessary extension of those issued by the investigating judge insofar as the applicants, in the circumstances described, no longer provided any guarantee of representation by a lawyer, as the court noted in its judgment.

51. The Court therefore concludes, in view of both the particular circumstances of the case and the progress of the domestic proceedings, that the obligation imposed on the applicants did not constitute an obstacle to the right of access to a court.

Failure to attend the proceedings

► *Eliazar v. Netherlands*, 38055/97, 16 October 2001

33. ... the applicant was under no obligation to surrender to custody as a precondition to the objection proceedings before the Joint Court of Justice taking place. It was the applicant's choice not to appear at these proceedings because of the risk that he could have been arrested. Furthermore ... the path to the court of cassation opened itself to the applicant once he chose to be present at the objection proceedings ...

34. Against this background the Court finds that, in the present case, the State's interest in ensuring that as many cases as possible are tried in the presence of the accused before allowing access to cassation proceedings outweighs the accused's concern to avoid the risk of being arrested by attending his trial ...

35. In reaching this conclusion, the Court has taken into account the entirety of the proceedings, in particular the facts that the applicant's lawyer had been heard in the appeal proceedings before the Joint Court of Justice even though the applicant had not appeared at these proceedings ... and that it was open to the applicant to secure access to the Supreme Court by initiating proceedings which would lead to a retrial of the charges against him subject to the condition that he attend the proceedings. In the Court's view, it cannot be said that such a system, which seeks to balance the particular interests involved, is an unfair one.

36. The decision declaring the applicant's appeal in cassation inadmissible cannot, therefore, be considered as a disproportionate limitation on the applicant's right of access to a court or one that deprived him of a fair trial. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.

Non-compliance with procedural requirements

► *Osu v. Italy*, 36534/97, 11 July 2002

34. ... the applicant's request ... was declared inadmissible on the ground that it had not been filed within the ten-days time-limit provided for by Article 175 of the Code of Criminal Procedure ...

36. ... the Court observes that Section 1 of Law no. 742 of 7 October 1969 provides that the running of procedural terms is automatically suspended from 1 August to 15 September each year and that, should a term start running during this period, the starting-date is automatically postponed until the end of such period. The applicant in fact filed his request on 22 September, i.e. within the ten-days time-limit starting on 16 September 1995.

37. However, the Court of Cassation did not apply the provisions of Law no. 742 and rejected the applicant's request as being lodged out of time. There is no explanation in the decision of the Court of Cassation or in the observations from the Government why the clear wording of Section 1 of Law no. 742 was not applied in the applicant's case ...

38. In the light of the foregoing, the Court considers that the applicant could have reasonably expected that the suspension of procedural time-limits be applied in his case, and that under the relevant domestic legislation, the Court of Cassation's decision of 30 January 1996 was not foreseeable.

39. By introducing his request for leave to lodge a late appeal seven days after the end of the suspension period the applicant cannot be considered to have acted negligently. In these circumstances, the Court considers that failure to apply Section 1 of Law 747/69 without any reasons therefore deprived the applicant of the right of access to a court to challenge his conviction *in absentia*.

40. There has therefore been a violation of Article 6 § 1.

► **AEPI SA v. Greece, 48679/99, 11 April 2002**

24. The Court notes that, under Section 505 § 2 and 479 § 2, the time allowed for an appeal to the Court of Cassation by State Counsel is 30 days from delivery of the impugned judgment. Section 473 § 3 contains a special provision concerning when time begins to run in cases where an appeal on the facts is impossible: in such cases, time begins to run from the date on which the decision is finalised.

25. In the instant case, the applicant appealed to the Court of Cassation 20 days after becoming acquainted with the text of the judgment of the criminal court through the assistant prosecutor of the Court of Cassation, who concluded that the court had misinterpreted and wrongly applied Section 70 of the Intellectual Property Act. However, the Court of Cassation dismissed the appeal as being out of time; it noted that the judgment was subject to an appeal on the facts and that therefore the time began to run when it was delivered and not when it was finalised.

26. The Court notes that, irrespective of the possibility in the instant case of lodging an appeal against the decision of the criminal court, the applicant company wished to appeal to the Court of Cassation, not to challenge points of fact but legal points arising from the reasoning of the judgment. The full text of the judgment was therefore necessary to enable it to prepare its submissions to the Court of Cassation clearly and precisely.

27. But the Court notes above all that the applicant company submitted the appeal through the State Counsel. If the state of the relevant law was as described by the Government, the State Counsel, who was perfectly familiar with the procedural aspects of his duties, would doubtless have refused to lodge it.

28. By dismissing the appeal as out of time in these circumstances on the grounds that it was lodged within a period that ran from the delivery of the judgment rather than when it was finalised, the Court finds that the Court of Cassation deprived the applicant of the right to access to a court. Accordingly, it finds that there was a violation of Article 6 § 1.

► ***Reichman v. France*, 50147/11, 12 July 2016**

22. The applicant maintains that the fact that he gave his lawyer special power of attorney to bring proceedings before the Court of Cassation before the appeal court's verdict was delivered was simply a precaution in view of the very short time period within which the case could be taken to the Court of Cassation. He recalls that, under the provisions of Article 568 of the CCP, this period is five clear days from the delivery of the disputed decision.

23. The applicant considers this requirement concerning the issuance of a special power of attorney provided for by Article 576 of the same Code, as applied by the Court of Cassation, a disproportionate interference with his right of access to a court guaranteed by Article 6 § 1 of the Convention. He adds that this was why the legislature had abrogated these provisions through the Law of 25 January 2011 ...

35. In the light of the particular circumstances of the instant case, the Court is not convinced that the simple fact that the power of attorney was given by the applicant to his lawyer before the Court of Appeal delivered its verdict justifies the conclusion of lack of a genuine wish on his part to take the matter to the Court of Cassation. On the contrary, it notes that the terms of the power of attorney show an unequivocal and detailed wish to appeal to the Court of Cassation in the event of a guilty verdict ...

36. The Court further notes that the time period for an appeal to the Court of Cassation on this matter is five clear days, which is a particularly short period that should be taken into account in assessing the proportionality of the declaration of inadmissibility.

37. The Court observes, with the Government, that the subsequent abrogation by the French legislature of the requirement for the issuance to a lawyer of a special power of attorney ... did not result from the alleged excessive nature of this condition of admissibility. Nevertheless, it finds that this abrogation means, at the very least, that this rule did not play a fundamental role in regulating the admission of appeals to the Court of Cassation.

38. In view of the foregoing, the Court finds that by declaring the applicant's appeal to the Court of Cassation inadmissible, the authorities displayed excessive formalism, which was a disproportionate interference with his right of access to a court.

39. The applicant was denied any examination of the merits of his appeal, although he had been found guilty of a criminal offence and his freedom of expression was at issue.

40. Accordingly, the Court concludes that there was a violation of Article 6 § 1 of the Convention.

► ***Marpa Zeeland B.V. and Metal Welding B.V. v. Netherlands*, 46300/99, 9 November 2004**

47. It appears from the judgments of the Court of Appeal of 1 December 1997 that that court found that Mr Wouterse had been persuaded by the Advocate General on improper grounds to withdraw the appeals ... Bearing in mind that, in principle, it is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another ..., the Court sees no reason to disagree with the Court of Appeal's conclusion ...

49. The Court notes that, having been persuaded to withdraw their appeals, the applicant companies found themselves unable to reinstate them after their requests for remission of sentence were rejected. The Supreme Court noted that the Netherlands' closed system of legal remedies militated against an appeal being lodged more than fourteen days after a judgment. As no appeal on points of law had been lodged within that time frame against the Court of Appeal's judgments of 4 December 1995 – in which the withdrawal of the appeals was noted –, those decisions had become final and conclusive. As a result, the withdrawal of the appeals had become irrevocable.

50. However, the applicant companies had been persuaded by the Advocate General to withdraw the appeals, and it was their understanding that they would be granted remission of sentence. When such remission failed to materialise and the proceedings on their appeals had come to an end, the applicant companies were left with neither remission nor any possibility of arguing their case on appeal.

51. The Court considers that in these circumstances the applicant companies were denied effective access to a court and were not able to exercise their right of appeal in a meaningful manner. Consequently, there has been a violation of Article 6 § 1 of the Convention.

BODY

► ***Didier v. France (dec.)*, 58188/00, 27 August 2002**

3. ... a "tribunal" within the meaning of Article 6 is also one within the meaning of Article 2 of Protocol No. 7 ... The Court lastly notes that when reviewing decisions by the FMB [Financial Markets Board], the *Conseil d'Etat* is competent to deal with all aspects of the case, so that in that respect it too is a "judicial body that has full jurisdiction", and thus a "tribunal" ... That being so, the Court considers that the applicant was afforded the right of appeal in a criminal matter, in accordance with the first paragraph of Article 2 of Protocol No. 7 ...

IMPARTIALITY

See also THE TRIAL COURT (Impartiality), p. 203 above

► ***Bonazzi v. Italy (dec.)*, 7975/77, 13 December 1978**

9. ... As regards the conduct of the judges, the Commission observes that no evidence, tending to prove that the judges were biased, was furnished by the applicant to the Court of Cassation. The fact that the Assize Court of Appeal altered the charge and increased the sentence (from about 11 years to about 14 years) cannot, in the present case, be regarded as a proof of bias.

► ***Oberschlick v. Austria*, 11662/85, 23 May 1991**

51. ... Here, not only the President but also the other two members of the Court of Appeal should have withdrawn *ex officio* in accordance with Article 489 para. 3 of the Code of Criminal Procedure. Whatever the position might have been with respect to the presiding judge, neither the applicant nor his counsel were aware until well after the hearing of 17 December 1984 that the other two judges had also participated in the decision of 31 May 1983.

It is thus not established that the applicant had waived his right to have his case determined by an "impartial" tribunal.

► ***Borgers v. Belgium*, 12005/86, 30 October 1991**

28. Further and above all, the inequality was increased even more by the avocat général's participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended, as the Government also affirmed, to contribute towards maintaining the consistency of the case-law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the avocat général an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed.

► ***Daktaras v. Lithuania*, 42095/98, 10 October 2000**

33. ... the Court notes that the President of the Criminal Division of the Supreme Court lodged a petition with the judges of that division to quash the Court of Appeal's judgment following the request by the first-instance judge, who was dissatisfied with that judgment. The President proposed the quashing of the Court of Appeal's decision and the reinstatement of the first-instance judgment. The same President then appointed the judge rapporteur and constituted the Chamber which was to examine the case. The President's petition was endorsed by the prosecution at the hearing and eventually upheld by the Supreme Court ...

35. ... the Court considers that such an opinion cannot be regarded as neutral from the parties' point of view. By recommending that a particular decision be adopted or quashed, the President necessarily becomes the defendant's ally or opponent ...

In the present application the President was in effect taking up the case of the prosecution because at the hearing the President's petition was contested by the applicant but endorsed by the prosecution, which had not itself lodged an appeal ...

36. Furthermore, while it is true that the President did not sit as a member of the court which determined the petition, he did choose the judge rapporteur and the members of the Chamber from amongst those judges of the Criminal Division which he heads ...

... when the President of the Criminal Division not only takes up the prosecution case but also, in addition to his organisational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure. The fact that the President's intervention was prompted by the first-instance judge only aggravates the situation ...

► ***Chmelíř v. Czech Republic, 64935/01, 7 June 2005***

60. ... the Court thus notes that, as president of the division to which Mr Chmelíř's appeal was referred, M.V. became the defendant in an action brought by the applicant on 7 February 2000 for the protection of personality rights. Then on 15 February 2000, M.V. ordered the applicant to pay a disciplinary fine for contempt of court on the ground that he had made false allegations in his application for the judge's withdrawal of 3 December 1999 and that those allegations had constituted an insolent and unprecedented attack on his person and were intended to delay the proceedings. Lastly, on 1 March 2000, the High Court dismissed the applicant's second application for the judge's withdrawal, after the action had been brought against M.V. for the protection of personality rights.

67. ...an application for withdrawal is a statutory remedy that is available to litigants under the Code of Criminal Procedure. Moreover, the reasoning of that decision suggests that the president of the division was unable sufficiently to distance himself from the comments made about him in the context of the applicant's first application for withdrawal. In the Court's opinion, it would be academic to claim that the judge was acting without any personal interest and was simply defending the court's authority and status. In reality, courts are not impersonal institutions and operate through the intermediary of the judges on the bench. Since ... the contempt of court was constituted by an insolent and unprecedented attack on the president of the division, this indicates that the applicant's conduct was assessed by the judge concerned in relation to his personal understanding, his feelings, his sense of dignity and his standards of behaviour, since he felt personally targeted and insulted. Thus, his own perception and assessment of the facts and his own judgment were involved in the process of determining whether the court had been insulted in that specific case.

Emphasis should also be laid, in this context, on the severity of the penalty imposed (the highest possible fine provided for by the Code of Criminal Procedure) and on

the warning to the applicant to the effect that any similar attack in the future was likely to be classified as a criminal offence. All these elements show, in the Court's view, that the judge overreacted to the applicant's conduct ...

69. For the Court, these elements are sufficient to justify the objective existence of fears in the applicant's mind, namely that M.V., as president of the High Court division, lacked the requisite impartiality.

► ***D. P. v. France, 53971/00, 10 February 2004***

34. ... the fear of a lack of impartiality was due to the fact that two of the judges who ruled on 9 June 1999 on the applicant's appeal against conviction had previously sat in the Division which ruled on 12 February 1997 on the appeal against the judgment committing the applicant for trial in the Assize Court. The Court accepts that that situation could raise doubts in the applicant's mind concerning the Court of Cassation's impartiality. However, it has to consider whether those doubts were objectively justified ...

40. The Court considers that, in reaching its decision, it must take account of the special features of the role and nature of the judicial review exercised by the Court of Cassation. While it is true that the Court of Cassation judges who sat on two separate appeals in the proceedings ruled on each occasion on the lawfulness of and reasons for the decisions given by the lower courts, the questions raised by the first appeal concerned the lawfulness of the investigation while those raised in the second concerned the lawfulness of the judgment. Thus, the judges concerned were never required to assess the merits of the charges against the applicant and were obliged to consider different questions of law in each of the appeals.

41. In other words, the issues they were called upon to consider in the second appeal were not analogous to those they had been required to deal with in the first appeal.

42. Accordingly, the Court accepts that the applicant may have harboured suspicions regarding the Court of Cassation's impartiality. However, on account of the difference in the questions submitted to the Criminal Division in the two appeals, it considers that he did not have objective reasons to fear that it would display bias or prejudice with regard to the decision that it was required to reach in the appeal against conviction.

43. Consequently, there has been no violation of Article 6 § 1 of the Convention ...

► ***Lindon, Otchakovsky-Laurens and July v. France [GC], 21279/02, 22 October 2007***

77. ... the fear of a lack of impartiality stemmed from the fact – moreover a proven one – that two out of the three judges on the bench of the Paris Court of Appeal which upheld the third applicant's conviction for defamation on account of the publication of the impugned petition had previously, in the case of the first two applicants, ruled on the defamatory nature of three of the offending passages from the novel which were cited in the petition ...

78. The Court notes that, even though they were connected, the facts in the two cases differed and the "accused" was not the same: in the first case the question was

whether the publisher and author ... had been guilty of the offence of defamation and of complicity in that offence; in the second, the court had to decide whether, in a journalistic context, the publication director of *Libération* had committed the same offence by publishing the text of a petition which reproduced those same passages ... It is moreover clear that the judgments delivered in the case of the first two applicants did not contain any presupposition as to the guilt of the third applicant ...

79. Admittedly, in the judgment given on 21 March 2001 in the third applicant's case, the Paris Court of Appeal referred back, in respect of the defamatory nature of the impugned passages, to the judgment that it had given ... in the case of the first two applicants. However, in the Court's view this does not objectively justify the third applicant's fears as to a lack of impartiality on the part of the judges. The first judgment of the Court of Appeal ... had found to be defamatory certain passages of the book written by the first applicant and published by the second. On this point that judgment had become *res judicata*. The second judgment ... was bound to apply that authority to this aspect of the dispute, whilst the question of the good or bad faith of the third applicant, who was responsible for the publication of a petition approving that book and criticising the conviction of the first two applicants, remained open and had not been prejudiced by the first judgment. It would therefore be excessive to consider that two judges who sat on the bench which successively delivered the two judgments in question could taint the court's objective impartiality. In reality, as regards the characterisation of the text as defamation, any other judge would have been bound by the *res judicata* principle, which means that their participation had no influence on the respective part of the second judgment. And as regards the issue of good faith, which was a totally different issue in the two cases even though they were connected, there is no evidence to suggest that the judges were in any way bound by their assessment in the first case ...

80. Lastly, the present case is manifestly not comparable to that of *San Leonard Band Club v. Malta ...*, where the trial judges had been called upon to decide whether or not they themselves had committed an error of legal interpretation or application in their previous decision, that is to say, to judge themselves and their own ability to apply the law.

81. Consequently, any doubts the third applicant may have had as regards the impartiality of the Court of Appeal when it ruled in the second case cannot be regarded as objectively justified.

► **Morice v. France [GC], 29369/10, 23 April 2015**

79. ... the fear of a lack of impartiality lay in the fact that Judge J.M., who sat on the Court of Cassation bench which adopted the judgment of 10 December 2009, had expressed his support for Judge M. nine years earlier, in the context of disciplinary proceedings that had been brought against her ... Speaking as a judge and a colleague in the same court, in the course of a general meeting of judges of the Paris *tribunal de grande instance* on 4 July 2000, at which he had subsequently voted in favour of the motion of support for Judge M., J.M. had stated: "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.] It is not forbidden to say that Judge [M.] has our support and trust." ...

80. ... the applicant acknowledged in his observations that it was not established that Judge J.M. had displayed any personal bias against him. He argued merely that regardless of his personal conduct, the very presence of J.M. on the bench created a situation which rendered his fears objectively justified and legitimate ...

82. ... the Court firstly takes the view that the language used by Judge J.M. in support of a fellow judge, Judge M., who was precisely responsible for the bringing of criminal proceedings against the applicant in the case now at issue, was capable of raising doubts in the defendant's mind as to the impartiality of the "tribunal" hearing his case.

83. Admittedly, the Government argued in their observations, among other things, that the remarks by J.M. were not sufficient to establish a lack of objective impartiality on his part, as they had been made a long time before and the words used reflected a personal position which concerned only the conditions in which the information about the bringing of disciplinary proceedings against a colleague of the same court had been forthcoming.

84. The Court takes the view, however, that the very singular context of the case cannot be overlooked. It would first point out that the case concerned a lawyer and a judge, who had been serving in that capacity in connection with two judicial investigations in particularly high-profile cases: the Borrel case, in the context of which the applicant's impugned remarks had been made, and the "Scientology" case, which had given rise to the remarks by J.M. It further notes, like the Chamber, that Judge M. was already conducting the investigation in the Borrel case, with its significant media coverage and political repercussions, when J.M. publicly expressed his support for her in the context of the "Scientology" case ... As emphasised by the Chamber, J.M. had then expressed his view in an official setting, at the general meeting of judges of the Paris *tribunal de grande instance*.

85. The Court further observes that the applicant, who in both cases was the lawyer acting for civil parties who criticised the work of Judge M., was subsequently convicted on the basis of a complaint by the latter: accordingly, the professional conflict took on the appearance of a personal conflict, as Judge M. had applied to the domestic courts seeking redress for damage stemming from an offence that she accused the applicant of having committed.

86. The Court would further emphasise, on that point, that the judgment of the Court of Appeal to which the case had been remitted itself expressly established a connection between the applicant's remarks in the proceedings in question and the Scientology case, concluding that this suggested, on the part of the applicant, an "*ex post facto* settling of scores" and personal animosity towards Judge M., "with whom he had been in conflict in various cases" ...

87. It was precisely that judgment of the Court of Appeal which the applicant appealed against on points of law and which was examined by the bench of the Criminal Division of the Court of Cassation on which Judge J.M. sat. The Court does not agree with the Government's argument to the effect that this situation does not raise any difficulty, since an appeal on points of law is an extraordinary remedy and the review by the Court of Cassation is limited solely to the observance of the law.

88. In its case-law the Court has emphasised the crucial role of cassation proceedings, which form a special stage of the criminal proceedings with potentially decisive consequences for the accused, as in the present case, because if the case had been quashed it could have been remitted to a different court of appeal for a fresh examination of both the facts and the law. As the Court has stated on many occasions, Article 6 § 1 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, but a State which does institute such courts is required to ensure that persons having access to the law enjoy before such courts the fundamental guarantees in Article 6 ... and this unquestionably includes the requirement that the court must be impartial.

89. Lastly, the Court takes the view that the Government's argument to the effect that J.M. was sitting on an enlarged bench comprising ten judges is not decisive for the objective impartiality issue under Article 6 § 1 of the Convention. In view of the secrecy of the deliberations, it is impossible to ascertain J.M.'s actual influence on that occasion. Therefore, in the context thus described ..., the impartiality of that court could have been open to genuine doubt.

90. Furthermore, the applicant had not been informed that Judge J.M. would be sitting on the bench and had no reason to believe that he would do so. The Court notes that the applicant had, by contrast, been notified that the case would be examined by a reduced bench of the Criminal Division of the Court of Cassation, as is confirmed by the reporting judge's report, the Court of Cassation's on-line workflow for the case and three notices to parties, including two that were served after the date of the hearing ... The applicant thus had no opportunity to challenge J.M.'s presence or to make any submissions on the issue of impartiality in that connection.

91. Having regard to the foregoing, the Court finds that ... the applicant's fears could have been considered objectively justified.

► ***Karelin v. Russia*, 926/08, 20 September 2016**

72. The Court further notes that the lack of a prosecuting party had an effect on the operation of the presumption of innocence during the trial and, by implication, on the question of the trial court's impartiality and vice versa. The Court reiterates in this connection that Article 6 § 2 of the Convention safeguards the right to be "presumed innocent until proved guilty according to law". The presumption of innocence will be infringed where, as a matter of fact or on account of the operation of the applicable law (for instance, a legal presumption), the burden of proof is shifted from the prosecution to the defence ...

73. The available information concerning the content and application of the pertinent provisions of domestic law do not enable the Court to ascertain the manner in which the presumption of innocence and the burden of proof operated in the administrative offence cases examined by the courts of general jurisdiction, including the present case. In such circumstances the Court accepts that the trial court had no alternative but to undertake the task of presenting – and, what is more pertinent, to carry the burden of supporting – the accusation during an oral hearing.

74. Furthermore, the CAO [Code of Administrative Offences] provided that the trial court could decide whether to require oral evidence or the production of documents or to commission a report. The Government submitted that such decisions could be taken “*inter alia*, at the defendant’s request”. By implication, this may also mean that such decisions could be taken by the trial court *proprio motu*. The Court has examined a number of constitutional decisions relating to the matter and does not find their rationale conclusive as regards the question of the search and collection of evidence by a court ...

75. Having examined the available material and the relevant provisions of domestic legislation and case-law, the Court is not convinced that sufficient safeguards were in place to exclude legitimate doubts as to the adverse effect the procedure had on the trial court’s impartiality. While noting that the impartiality issue here relates to the context of a relatively minor offence while arising from the specific procedure itself rather than from any action or inaction in the circumstances of the case, the Court considers that impartiality is not commensurate to the nature and severity of the penalties incurred or to what is at stake for the defendant in the proceedings.

76. The Court considers that where an oral hearing is judged opportune (for instance, because a possible penalty of detention is at stake, as in the present case) for the judicial determination of a “criminal charge” against a defendant and where, having been afforded an adequate opportunity to attend, the defence has not validly waived it, the presence of a prosecuting party is, as a rule, appropriate in order to avert legitimate doubts that may otherwise arise in relation to the impartiality of the court (see, in the same vein, *Ozerov*¹⁴ ...).

78. The remaining question before the Court is whether the issue of impartiality also arose in the appeal proceedings before the District Court and, if not, whether the appeal proceedings remedied the issue that had arisen during the first-instance examination of the case against the applicant.

79. The Court notes that the appeal proceedings in the present case were initiated by the applicant. At the time, the official who had initiated the case was not authorised to appeal against the trial judgment in the administrative offence case, whereas a public prosecutor did have such a right, irrespective of whether he had participated in the trial proceedings ...

80. It also appears that the above-mentioned official did not make any written submissions to the appeal court, for instance in reply to the applicant’s statement of appeal. In fact, it appears that the official who had initiated the case had no such right. The appeal court did not hear any officials. Having examined the applicant, the appeal court upheld the trial judgment. In the Court’s view, the applicant has not raised any meritorious complaints relating to the fairness of the appeal proceedings per se.

81. Arguably, the issue arising from the lack of a prosecuting authority might be different on appeal, when an appellate court reviews, at the defendant’s request, a judgment that has already been rendered. The Court does not rule out the possibility

14. See THE TRIAL COURT (Impartiality, Absence of prosecutor), p. 209 above.

that once a “charge” has been “determined” in procedure devoid of the defects discussed above and the defendant lodges an appeal on points of law only, the prosecution’s role might be perceived as less compelling, also in so far as the notion of impartiality is concerned.

82. The Court observes in this connection that the statutory scope of appeal proceedings under the CAO was such as to afford the appeal court an opportunity to reassess the existing evidence, examine additional evidence and review the case as a whole, whether or not prompted to do so in the statement of appeal ... Therefore, the Court considers that, as a matter of law, an appeal court was empowered to proceed in a manner that might remedy some of the shortcomings adversely affecting the fairness of the trial proceedings ...

83. At the same time, given the wide statutory scope of review on appeal, the impartiality requirement must also be respected in such appeal proceedings. By implication, the Court concludes that the lack of a prosecuting party in the appeal proceedings was a serious shortcoming too. Thus, the appeal proceedings did not remedy the impartiality matter arising at the trial ...

84. There has therefore been a violation of Article 6 § 1 of the Convention in relation to the impartiality requirement.

NOTICE OF HEARING

► *Vacher v. France*, 20368/92, 17 December 1996

25. Under Articles 585 and 588 of the Code of Criminal Procedure ... a convicted appellant has the choice between instructing a member of the Conseil d’Etat and Court of Cassation Bar or presenting his own case. However, the reporting judge will only give a time-limit for filing a pleading in the first of those eventualities. In the instant case Mr Vacher, assisted by Mr Ricard (who is not a member of the Conseil d’Etat and Court of Cassation Bar), had until the date of the hearing to file his pleading.

27. On the basis of the information supplied by the Government, the average time taken by the Court of Cassation to consider a case is approximately three months from the date of the appeal – two months for the case file to reach the Court of Cassation and one month for the court to deliver judgment. In the instant case the appeal was dismissed within a shorter period without the applicant being informed of the date of the hearing. Mr Vacher may have been taken by surprise by the fact that the proceedings took less time than average and, consequently, believing himself to be within the usual time for filing a pleading, may have seen no reason to worry about the hearing date.

28. The Court emphasises that States must ensure that everyone charged with a criminal offence benefits from the safeguards provided by Article 6 para. 3 ... Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the “diligence” which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 ... are enjoyed in an effective manner ...

30. In conclusion, since there was no fixed date for filing a pleading and the Court of Cassation took less time than usual to hear the appeal, without Mr Vacher being either warned of the fact by the registry or able to foresee it, he was deprived of the possibility of putting his case in the Court of Cassation in a concrete and effective manner.

There has therefore been a violation of Article 6 ...

► ***Wynen v. Belgium*, 32576/96, 5 November 2002**

35. ... the date of the hearing in the Court of Cassation was displayed at the registry and in the courtroom of the Court of Cassation on 8 January 1996, sixteen days before the hearing. The applicants were represented by four lawyers ... even if they were unusual or outmoded, the applicable rules were apparent from the CCP and were therefore accessible and sufficiently coherent and clear, so that lawyers, being professionally concerned with judicial procedure, cannot legitimately claim to have been unaware of them ...

Furthermore, and above all, there was a practice whereby the parties and their counsel could request the registry of the Court of Cassation to inform them in writing of the date of the hearing, or to obtain the relevant information by telephone ... The Court considers that it is not unreasonable to require appellants wishing to be personally informed of the date on which their case has been set down for hearing in the Court of Cassation to avail themselves of these additional notification arrangements ...

That being so, the applicants cannot argue that the authorities made it impossible for them to attend the hearing in the Court of Cassation. In conclusion, there has been no violation of Article 6 § 1 of the Convention on that account.

► ***Hermi v. Italy* [GC], 18114/02, 18 October 2006**

90. ... the Grand Chamber considers that it is clear from the case file that the applicant had sufficient command of Italian to grasp the meaning of the notice informing him of the date of the appeal court hearing ... Moreover ... at the time of the appeal proceedings the applicant had been living in Italy for at least ten years, and when he was arrested in 1999 had been able to provide the *carabinieri* with details about the factual basis of the allegations against him ...

91. In the Court's view, these elements gave the domestic judicial authorities sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing, and that it was not necessary to provide any translation or interpretation. The Court also notes that the applicant does not appear to have informed the prison authorities of any difficulties in understanding the document in question.

► ***Zaytsev v. Russia*, 22644/02, 16 November 2006**

22. In so far as the applicant's complaint concerns the failure to notify him of the appeal hearing of 26 October 2001, the Court notes that the appeal judgment was quashed precisely on that ground and the case remitted for a fresh appeal examination. The Court reiterates that, where criminal proceedings are reopened

after a conviction has become final, a decision quashing the conviction is, in itself, not sufficient to deprive an individual of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and afforded redress for, the breach of the Convention ...

23. In the present case, on 27 June 2005 the Presidium of the Tula Regional Court quashed the applicant’s final conviction on the ground that the examination of his appeal in his absence, without his having been duly notified of the hearing, had violated his right to a defence. Accordingly, the Presidium expressly acknowledged that the applicant’s right to a fair trial had been breached.

► ***Sibgatullin v. Russia, 32165/02, 23 April 2009***

48. The Court observes that on 23 May 2006 the applicant was informed that “case will be heard by the Supreme Court of the Russian Federation at 10 am on 29 June 2006”. However, according to the applicant, by that date he was not aware that his case had been sent to a fresh appeal hearing as a result of the supervisory review and therefore, he could not know what kind of hearing would be held by the Supreme Court. The Court notes that the Government have not provided any information to prove that the applicant and/or his counsel were duly informed of the supervisory review proceedings or of their outcome. The Court further notes that on 4 November 2005 it forwarded to the applicant a copy of the Government’s observations in which they submitted that on 26 October 2005 the Deputy Prosecutor had applied for a supervisory review of the appeal decision of 15 August 2002. On 23 May 2006 the Court forwarded to the applicant the Government’s letter from which it followed that on 5 April 2006 the Presidium of the Supreme Court had quashed the appeal decision of 15 August 2002 and had remitted the case for a fresh appeal examination. It follows that, at least until the date on which the applicant received the Court’s letter of 23 May 2006, he was not aware of the results of the supervisory review proceedings. It means that on 23 May 2006, the date on which the applicant read the telegram informing him that his case would be heard by the Supreme Court, he could not have known what hearing was to be held by the Supreme Court, a supervisory review hearing or a fresh appeal hearing. In those circumstances, the Court considers that the applicant was not duly notified of the appeal hearing of 29 June 2006. The Court also notes that the Government have not submitted any document which demonstrates that the applicant’s counsel received notification.

49. Furthermore, it follows from the appeal decision of 29 June 2006 that the appeal court did not verify whether the applicant and his representative had been duly notified of the hearing. Neither did that decision state that the applicant had failed to submit a request for participation in the hearing and had waived his right, and that his failure to appear would not preclude examination of the case. In such circumstances, the Court considers that it cannot be said that in the present case the applicant had waived his right to take part in the hearing in an unequivocal manner.

50. ... the Court considers that the appeal hearing of 29 June 2006 did not comply with the requirements of fairness.

RECHARACTERISATION OF CHARGE

► *Pelissier and Sassi v. France* [GC], 25444/94, 25 March 1999

61. ... the Court also finds that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings ...

62. The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late.

63. In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.

► *Dallos v. Hungary*, 29082/95, 1 March 2001

48. ... the Court observes that the applicant was indeed not aware that the Regional Court might reclassify his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of.

49. However ... the Court attributes in this respect decisive importance to the subsequent proceedings before the Supreme Court.

52. ... the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the proceedings as a whole – and in view of the nature of the examination of the case before the Supreme Court – the Court is satisfied that any defects in the proceedings before the Regional Court were cured before the Supreme Court.

The Court is therefore convinced that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed.

► *Bäckström and Andersson v. Sweden* (dec.), 67930/01, 5 September 2006

... the Court notes that, by the prosecutor's bill of indictment of 11 February 2000, the applicants were ... charged with attempted aggravated robbery ... By the District Court's judgment of 17 April 2000, the applicants were convicted of the offence in question ...

On 19 June 2000, towards the end of the hearing in the Court of Appeal and following the intervention of its president, the prosecutor adjusted the charge to concern a completed offence of aggravated robbery. In its judgment of 4 July 2000, the appellate court considered that the prosecutor had not introduced an additional charge of theft of the vehicle but that, following the adjustment, he had claimed that the robbery had been completed through the appropriation of the vehicle. In agreeing with this contention, the court found that the very fact that the applicants had taken possession of the vehicle with its money contents meant that the offence had been completed.

In the Court's view, it follows from these circumstances that the applicants were made aware of all the material facts of the offence ascribed to them already by way of the prosecutor's bill of indictment. The new element introduced on 19 June 2000 was whether their actions had progressed to the point where the offence could be considered to have been completed ... it must be determined whether they were promptly informed of the possibility that they might be convicted of the completed offence, and whether they were afforded an adequate opportunity to prepare their defence.

In this respect, the Court notes that the applicants were made aware of this possibility only on 19 June 2000, on the penultimate day of the appellate court hearing. While this short notice gives rise to some concern, the Court observes that all the facts underlying the adjusted charge were known to the applicants long before. Moreover, counsel for the second applicant was of the opinion that the charge of aggravated robbery could be considered as having been covered by the original indictment. Further, counsel for both applicants stated their position on the adjusted charge on the day when it was introduced. They did not submit any additional arguments on this issue the following day, the last day of the hearing, although they would have been free to do so. Nor did they request an adjournment of the proceedings in order to have more time to consider the issue ... the Court finds that there is nothing in the case which supports the applicants' contention that a request for an adjournment would obviously have been refused by the Court of Appeal.

The Court considers that the intervention of the president of the Court of Appeal was made in order to make the parties aware that the acts with which the applicants were charged could constitute a completed robbery offence. The applicants were thus given an opportunity to present their arguments on this issue. Moreover, as the court was not bound by the prosecutor's characterisation of the offence and, accordingly, his adjustment of the charge was not a prerequisite for finding the applicants guilty of the completed offence, the president's intervention cannot be considered to have upset the principle of "equality of arms".

In these circumstances, the Court considers that, in reality, defence counsel had an adequate opportunity to state comprehensively the applicants' position on the adjusted charge before the Court of Appeal. Moreover, the appellate court could reasonably and justifiably conclude that this had indeed been the case.

Finally, the Court finds that the present case can be distinguished from the case of *Miroux v. France*, simultaneously examined by the Court¹⁵ ..., where a violation of

15. See CHARGING, PLEA BARGAINING AND DISCONTINUANCE (Charging, Notification), p. 181 above.

Articles 6 §§ 1 and 3 was found. In that case, a new factual element – penetration – was introduced in the proceedings when the president of the court, after the parties' closing statements, asked the jury the supplementary question whether the accused was guilty of rape rather than attempted rape. In contrast, the facts which the applicants in the present case had to address remained the same throughout the proceedings; the prosecutor's adjustment of the robbery charge did not alter the description of events, but only changed the legal characterisation of the offence. Moreover, whereas the accused in the French case was not given an opportunity to present his arguments in relation to the new factual element, counsel for the present applicants were able [to] – and did – state their position on the adjusted charge. It should further be noted that the French case involved a jury trial concerning a sexual offence, where special prudence is called for due to the sensitive nature of such offences and the possibility that jurors could be swayed by a proposition that the act charged might constitute an offence of a more aggravated nature. The present case did not give rise to any such special concerns.

Considering the proceedings ... as a whole, the Court therefore finds that the information given to the applicants about the accusation against them was sufficiently prompt, and that they had adequate time and facilities for the preparation of their defence, within the meaning of Article 6 § 3 (a) and (b) of the Convention.

► ***Mattei v. France*, 34043/02, 19 December 2006**

41. Regarding the substance of the reclassification of the offence, the Court considers that it cannot be argued that aiding and abetting merely represents a degree of involvement in the offence ... Emphasising its attachment to the principle that criminal law must be strictly interpreted, the Court cannot accept that it is possible to avoid determining the specific elements of aiding and abetting. In this regard, it notes ... that it is not required to assess the merits of the grounds of defence that the applicant could have relied upon had she had the possibility of disputing the charge of aiding and abetting attempted extortion, but observes simply that it is plausible to maintain that these grounds would have been different from those chosen to dispute the principal cause of action.

42. As for the sentences imposed on the applicant, the Court cannot subscribe to the arguments put forward by the Government. It considers, first, that it cannot be argued that the reclassification of the offence had no effect on the sentence on the ground that, in any case, the applicant was convicted for participation in a conspiracy to prepare acts of terrorism, as one can only speculate as to the sentence she might have received had she been able to prepare an effective defence against the reclassified charge. Admittedly, the sentence passed by the court of appeal following reclassification was more lenient than that handed down by the criminal court, three years in prison with one year suspended instead of four years; however, the Court emphasises that the reasons given for the sentence imposed on appeal were the applicant's state of health at the time and the fact that she had not been convicted of any offences in the previous five years.

43. In view of all these factors, the Court finds that there was a violation of the applicant's right to be informed in detail of the nature and legal basis of the case against her and of her right to the necessary time and facilities to prepare her defence.

► ***D. M. T. and D. K. I. v. Bulgaria*, 29476/06, 24 July 2012**

82. The Court must then seek to establish whether, although the applicant was not notified of the charge of attempted aggravated fraud, he could have foreseen such a reclassification of the acts of which he was accused. The Government argue in this regard that the offence of accepting or soliciting bribes and the offence of fraud, on the assumption that the author of the acts was a civil servant, covered the same wrongful behaviour of improperly obtaining material assets ... The Court observes that, under the Bulgarian Criminal Code, the respective material constituent elements of these two criminal offences are very different: accepting or soliciting bribes means the improper acceptance or soliciting of remuneration by a public servant as consideration for an action or omission in the context of his or her duties, whereas fraud is the act of creating in another person a false impression of certain factual circumstances in order to obtain material gain that results in material prejudice to the victim ... The Court is not required to examine the merits of the grounds of defence the applicant could have relied upon had he been able to dispute the new charge brought against him. It notes that it is plausible to maintain that those grounds would have been different from those chosen by the applicant to dispute the initial charge ...

83. For these reasons, the Court finds that the Supreme Court of Cassation ought to have given the applicant the possibility of disputing the new charges of attempted aggravated fraud. It could, for example, have adjourned the hearing in order to enable the parties to present their arguments or ordered them to submit written pleadings on this matter. That did not happen because no provision in domestic law requires the Supreme Court of Cassation to do so: Article 285 § 3 of the old Code of Criminal Procedure required such an adjournment of the hearing only in the event of a change in the factual basis of the charge or where the reclassification of the offence might result in the imposition of a heavier sentence ...

84. In view of all these factors, the Court finds that there was a violation of the applicant's right to be informed in detail of the nature and legal basis of the charge brought against him and of his right to the necessary time and facilities to prepare his defence. Accordingly, it finds that the criminal proceedings brought against him did not fulfil the requirement of fairness. There was therefore a violation of Article 6 § 1 combined with Article 6 § 3(a) and (b) of the Convention.

NON-COMMUNICATION OF SUBMISSIONS

► ***Brandstetter v. Austria*, 11170/84, 28 August 1991**

67. ... it is common ground that no copy of the submissions of the Senior Public Prosecutor was sent to the applicant and that he was not informed of their having been filed either. The Government's argument is ... that the submissions – the so-called "croquis" ... were filed according to a standing practice which enables the

Senior Public Prosecutor to file such a croquis in such cases as he deems appropriate. They suggest that this practice must have been known to the applicant's lawyer who, accordingly, could have enquired whether in the applicant's case a croquis had been filed. If so, he could have requested leave to inspect the file under section 82 of the Code of Criminal Procedure and thus could have commented on it. Section 82, as it is formulated, however, does not seem to grant an unconditional right to inspect the complete file but only the possibility to ask for leave to do so ...

The Court notes that the croquis apparently has considerable importance and that the alleged practice requires vigilance and efforts on the part of the defence; against this background, the Court is not satisfied that this practice sufficiently ensures that appellants in whose cases the Senior Public Prosecutor has filed a croquis on which they should comment are aware of such filing.

68. ... An indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution ...

69. The Court therefore concludes that, in the appeal proceedings concerning the defamation case, there was a violation of Article 6 para. 1 ... of the Convention.

► ***Reinhardt and Slimane-Kaid v. France*, 23043/93, 31 March 1998**

105. It was common ground that well before the hearing the advocate-general had received the report and draft judgment that had been prepared by the reporting judge. As the Government said, the report was in two parts: the first contained a description of the facts, procedure and grounds of appeal and the second a legal analysis of the case and an opinion on the merits of the appeal.

Those documents were not communicated to either the applicants or their lawyers. ... Mrs Reinhardt's and Mr Slimane-Kaid's lawyers could have made oral submissions if they had so requested; at the hearing they would have had the right to address the court after the reporting judge, which would have meant that they would have been able to hear the first part of his report and to comment on it. The second part of the report and the draft judgment – which were legitimately privileged from disclosure as forming part of the deliberations – could not in any event be communicated to them; at best, they would thus have learnt of the recommendation in the reporting judge's report a few days before the hearing.

Conversely, the entire report and the draft judgment were communicated to the advocate-general. The advocate-general is not a member of the court hearing the appeal. His role is to ensure that the law is correctly applied when it is clear and correctly construed when ambiguous. He "advises" the judges on the solution in each individual case and, through the authority of his office, he may influence their decision in a way that is either favourable or runs counter to the case put forward by appellants ...

Given the importance of the reporting judge's report (and in particular the second part thereof), the advocate-general's role and the consequences of the outcome of the proceedings for Mrs Reinhardt and Mr Slimane-Kaid, the imbalance thus created

by the failure to give like disclosure of the report to the applicants' advisers is not reconcilable with the requirements of a fair trial.

106. The fact that the advocate-general's submissions were not communicated to the applicants is likewise questionable ...

107. Consequently, regard being had to the circumstances referred to above, there has been a violation of Article 6 § 1.

► **Göç v. Turkey [GC], 36590/97, 11 July 2002**

57. ... The Government have contended that the applicant's lawyer should have known that consultation of the case file was possible as a matter of practice. However, the Court considers that to require the applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment on the opinion since he was never made aware of the timetable for the processing of the appeal ... It notes in this connection that the opinion was drawn up on 17 October 1996 and submitted to the competent division on 21 October 1996 along with the case file. The division reached its decision on 7 November 1996.

58. Having regard to the above considerations, the Court, like the Chamber, finds that Article 6 § 1 has been violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion.

► **Verdu Verdu v. Spain, 43432/02, 5 February 2007**

26. ... the Court notes that the court that convicted the applicant on appeal restricted itself to giving a different legal classification to the acts declared proven by the first instance criminal court, having gone no further than the memorials of final conclusions and grounds of appeal of the prosecution, and without referring to any element not included in the principal charge.

27. In these circumstances, the Court observes that the communication of the pleadings endorsing the prosecution's grounds of appeal and giving the applicant an opportunity to reply to them could not have had any effect on the outcome of the case before the *Audiencia provincial*. It does not see how the absence of such a document could have violated his rights or reduced his chances of presenting the arguments he considered necessary to his defence before the *Audiencia provincial* since the applicant himself acknowledged that the pleadings in question were similar in substance to the prosecution's grounds of appeal.

28. Accordingly, the conviction of the applicant by the *Audiencia provincial*, which was upheld by the Constitutional Court, cannot give rise to any discussion from this point of view. Consequently, in the particular circumstances of the case, the applicant cannot argue that the fact that he was unable to challenge the pleadings endorsing the prosecution's grounds of appeal because he had not received a copy of them amounted to a denial of his defence rights in breach of Article 6 § 1 of the Convention. To find otherwise would be to confer on him a right having no real scope or substance ...

ADEQUATE TIME AND FACILITIES

► *Melin v. France*, 12914/87, 22 June 1993

19. ... He maintained that, when the Criminal Division of the Court of Cassation had delivered its judgment on 27 May 1986, he had still been waiting to be sent the text of the Court of Appeal's judgment, a copy of which he had requested. Without knowledge of the Court of Appeal's reasoning he had not been able to draw up his memorial setting out the grounds for his appeal. He had needed a copy of the judgment, despite the fact that he had been present when it was pronounced, because the President had only read out its operative provisions. ...

24. ... Mr Melin had practised as a lawyer and had worked in the chambers of a lawyer of the Conseil d'État and Court of Cassation Bar. He therefore knew that in accordance with the legislation in force the authorities were under no obligation to serve on him the judgment delivered on 15 January 1986, whose pronouncement he had attended. ... it was thus not unreasonable to expect him to adopt one of the following three courses of action. First, even though he was under no legal obligation to do so, he could have consulted the original of the judgment in question at the registry of the Versailles Court of Appeal. Secondly, assuming that he did unsuccessfully request a copy as he claimed, he could and should have repeated that request during the four and a half months which followed the pronouncement of the judgment. A final possibility remained open to him; he could have made enquiries at the Court of Cassation's registry as to the date on which the court was to give judgment and sought an adjournment so as to be able to file a memorial in good time and to have the opportunity to present his case. Being well versed in the routines of judicial procedure, he must have known that the latter is subject to relatively short time-limits, especially as the relevant rules were sufficiently coherent and clear ...

25. In conclusion, the applicant cannot claim that the authorities made it impossible for him to produce a memorial. As he had deliberately waived his right to be assisted by a lawyer, he was under a duty to show diligence himself. Accordingly, he did not suffer any interference with the effective enjoyment of the rights guaranteed under Article 6 ...

► *Zoon v. Netherlands*, 29202/95, 7 December 2000

37. ...Whether or not the applicant's counsel were aware of the said policy, the fact remains that it is not disputed that the judgment in abridged form was available for inspection forty-eight hours after delivery.

38. The Court must therefore conclude that, apart from the fact that the applicant was aware of the operative part of the judgment, it would also have been possible for him and his counsel to take cognisance of the text of the judgment in abridged form well before the expiry of the fourteen-day time-limit for lodging an appeal, so that they would have had sufficient time to file an appeal. The fact that they failed to do so cannot be imputed to the respondent State ...

47. It is true that the items of evidence on which the actual conviction was based are not enumerated in the judgment. However, the applicant never denied having committed the acts charged and never challenged the evidence against him as such. Moreover, the applicant has not claimed, nor does it appear, that his conviction was based on evidence that was neither contained in the case file nor presented at the hearing of the Regional Court.

48. ... in Netherlands criminal procedure an appeal is not directed against the judgment of the first-instance court but against the charge brought against the accused. An appeal procedure thus involves a completely new establishment of the facts and a reassessment of the applicable law. It follows, in the Court's opinion, that the applicant and his counsel would have been able to make an informed assessment of the possible outcome of any appeal in the light of the judgment in abridged form and of the evidence contained in the case file ...

50. In the circumstances of the present case, therefore, it cannot be said that the applicant's defence rights were unduly affected by the absence of a complete judgment or by the absence from the judgment in abridged form of a detailed enumeration of the items of evidence relied on to ground his conviction.

► ***Husain v. Italy (dec.)*, 18913/03, 24 February 2005**

The committal warrant indicated the date of the conviction, the sentence that had been imposed, the legal classification of the offences of which the applicant had been found guilty and the references of the relevant provisions of the Criminal Code and of the special legislation that was applicable.

In these circumstances, the Court considers that the applicant received sufficient information concerning the charges and his conviction in a language he understood. The applicant was in Italy when the committal warrant was served on him and could have consulted the lawyer who had been assigned to his case, whose name was set out in the committal warrant, or another legal adviser for advice on the procedure for appealing against the Genoa Criminal Court of Appeal's judgment and for preparing his defence to the charges ...

Accordingly, the Court is unable to discern any violation of the right to a fair trial.

► ***Khodorkovskiy and Lebedev v. Russia*, 11082/06, 25 July 2013**

597. The Court thus acknowledges that the defence was in a somewhat disadvantaged position during the appeal proceedings. That "disadvantaged position" need not necessarily be analysed in terms of the equality-of-arms guarantee, primarily because the Court does not know whether the prosecution had any problems with access to and the accuracy of the trial materials. The situation may, however, be assessed alone, in the light of the principle of adversarial proceedings, which means, *inter alia*, that the defence must have a possibility to put arguments on all pertinent points, including "the elements ... which relate to procedure" ...

598. Nevertheless, the Court reiterates that not every disadvantage of the defence leads to a violation of Article 6 § 3 (b) ... The defence must be able to put relevant arguments so as to influence the outcome of the proceedings. In the circumstances

the Court considers that possible inaccuracies in the trial record and the defence's temporary inability to obtain access to part of the trial materials did not make it impossible for the defence to formulate their arguments and did not, therefore, influence the outcome of the appeal proceedings. The applicants' conviction was based on various items of evidence, including a large amount of documentary evidence and statements from dozens of witnesses. Even acknowledging that the trial record may have contained some inaccuracies, the Court is not persuaded that they were such as to render the conviction unsafe. Furthermore, the defence were aware of the procedural decisions that had been taken during the trial and what materials had been added. They had audio recordings of the trial proceedings and could have relied on them in the preparation of their points of appeal.

599. The Court concludes that the difficulties experienced by the defence during the appeal proceedings did not affect the overall fairness of the trial. It follows that there was no violation of Article 6 §§ 1 and 3 (b) on this account.

ADMISSIBILITY OF FRESH EVIDENCE

► *Oyston v. United Kingdom (dec.)*, 42011/98, 22 January 2002

The Court notes that the applicant was granted leave to appeal by the Court of Appeal on the basis that the evidence, though strictly speaking not admissible, could have been used to attack the victim's credibility and that it should be considered whether it rendered the applicant's conviction unsafe. After hearing the applicant's arguments on appeal, the Court of Appeal confirmed the view that under section 2 of the 1976 Act the evidence concerning this relationship would not have been admitted. However, it commented that it would have been reluctant to allow a technical rule to prevail if the evidence had led it to doubt the victim's credibility. It went on to consider that evidence and concluded for reasons, which appear cogent to this Court, that it had no relevance to the question of whether she had been raped by the applicant.

The applicant argues that the question of J's credibility was crucial as the jury had essentially to decide whether J. or L. was lying. In those circumstances, he argued that it was not for the Court of Appeal to attempt to second-guess what effect this additional evidence would have had on the jury's views of the respective credibility of J. and L. ... In addition, he argues that the Court of Appeal paid no attention to the requirement of fairness in its assessment of whether the conviction was rendered unsafe by the new evidence.

... The Court considers that the facts of the present case are more analogous to those pertaining in *Edwards v. the United Kingdom*¹⁶ where, as in this case, the Court of Appeal had reviewed evidence coming to light after the applicant's trial. There the Court found that the rights of the defence were secured by the proceedings before the Court of Appeal, where the applicant's counsel had every opportunity to seek to persuade the court that the conviction should not stand in light of the new

16. See DEFENCE (Disclosure of prosecution evidence, Withholding of evidence in the public interest), p. 306 above.

material, and that the Court of Appeal was able to assess for itself the value of the new evidence and to determine whether the availability of the information at trial would have disturbed the jury's verdict.

The Court sees no reason to reach a different conclusion in this application.

FAILURE TO EXAMINE WITNESSES

► *Vidal v. Belgium*, 12351/86, 22 April 1992

34. The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses.

To be sure, it is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article 6 ... This is all the more the case as the Brussels Court of Appeal increased the sentence which had been passed on 26 October 1984, by substituting four years for three years and not suspending the sentence as the Liège Court of Appeal had done.

35. In short, the rights of the defence were restricted to such an extent in the present case that the applicant did not have a fair trial. There has consequently been a violation of Article 6 ...

► *Destrehem v. France*, 56651/00, 18 May 2004

44. Furthermore, the Court observes that the criminal court considered that most of the evidence in the case file resulting from the police investigation, other than the witness statements, was insufficient to establish with certainty the identity of the author of the acts.

45. It therefore appears from the judgment of 31 March 1999 that the Court of Appeal essentially based the conviction of the applicant on a new interpretation of evidence given by witnesses it had not itself examined, notwithstanding the applicant's requests to that effect. It was as if the Court of Appeal, having doubts about the credibility of the defence witnesses, had "challenged" them without hearing their evidence and relied on that impression in order to overturn the first-instance judgment, which had acquitted the applicant on the basis, in particular, of the statements of these witnesses. There is no doubt that the Court of Appeal should have assessed all the evidence gathered and the relevance of the evidence the applicant wished to be disclosed; it nonetheless remains the case that the applicant was found guilty on the basis of testimony about which the judges on the merits of the charge against the applicant had had sufficient doubts to lead them to acquit him at first instance. In these circumstances, the Appeal Court's refusal to hear these witnesses,

despite the applicant's request to that effect, before finding him guilty, significantly reduced the rights of the defence ...

46. This is all the more the case since the Rheims Court of Appeal imposed a sentence on the applicant that it itself described as "severe".

47. Therefore, in view of the very particular circumstances of the case, the Court finds that the rights of the defence were so restricted that the applicant did not have a fair trial. Consequently, there was a violation of Article 6 § 1 and § 3(d) of the Convention.

► ***Jemeljanovs v. Latvia*, 37364/05, 6 October 2016**

98. With regard to the appellate court's refusal to grant some of the applicant's applications concerning summoning all the witnesses to attend court again ..., the Court reiterates that Article 6 does not require the attendance and examination of every witness: a defendant must support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth ... The applicant did not show what contribution the presence of all the witnesses at the appellate court could have made, or indicate what questions the defence would ask the witnesses. This was especially important in these particular circumstances because, as evidenced by the domestic court's findings, there were no discrepancies in the testimonies of the witnesses ...

EQUALITY OF ARMS

► ***Borgers v. Belgium*, 12005/86, 30 October 1991**

27. ... the hearing on 18 June 1985 before the Court of Cassation concluded with the avocat général's submissions to the effect that Mr Borger's appeal should not be allowed ... At no time could the latter reply to those submissions: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute. Article 1107 of the Judicial Code prohibits even the lodging of written notes following the intervention of the member of the procureur général's department ...

The Court cannot see the justification for such restrictions on the rights of the defence. Once the avocat général had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation's jurisdiction is confined to questions of law makes no difference in this respect ...

► ***Wynen v. Belgium*, 32576/96, 5 November 2002**

32. ... The Court notes ... that Article 420 *bis* of the CCP [Code of Criminal Procedure] requires those appealing to the Court of Cassation to file any pleadings within two months of the date on which the case is placed on the general list, although the respondent party is not subject to a similar time-limit and in this instance took nearly five months to file its own pleadings.

Furthermore, that had the effect of depriving the applicants of the opportunity to reply in writing to the respondent party's pleadings, since their supplementary pleadings were declared inadmissible as being out of time. However, such an opportunity may be essential, since the right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party ...

The Court is sensitive to the need emphasised by the Government to ensure that proceedings are not prolonged unnecessarily by allowing a succession of written replies to any pleadings filed, but the principle of equality of arms does not prevent the achievement of such an objective, provided that one party is not placed at a clear disadvantage. That condition was not satisfied in the instant case. There has therefore been a violation of Article 6 § 1 of the Convention on that account ...

38. The Court notes that State Counsel's submissions were first made orally at the public hearing in the Court of Cassation ... The parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion. Consequently, no breach of the principle of equality of arms has been made out, since the applicants cannot derive from the right to equality of arms a right to have disclosed to them, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench ...

► ***M. S. v. Finland*, 46601/99, 22 March 2005**

31. The Court observes that in the present case the letter of 26 November 1996 was not communicated to either of the parties in the criminal proceedings, namely the applicant and the public prosecutor. No infringement of equality of arms has been established as none of the parties was placed at a disadvantage *vis-à-vis* the opposing party ...

32. However, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision ...

33. ... the content of the letter of 26 November 1996 was directly linked with the question of reliability of a witness which formed a crucial part of the applicant's defence in the Court of Appeal. It is true that the statement of the applicant's ex-wife was not the sole item of evidence with regard to the applicant's opportunity to commit the acts with which he was charged. The letter of 26 November 1996, relating to the previous statements of the applicant's ex-wife, was however significant as it was clearly capable of influencing the Court of Appeal's decision ...

34. ... only the parties could properly decide whether or not the letter of 26 November 1996 called for their comments. What is particularly at stake here is the confidence of the parties of criminal proceedings in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file ...

36. The Court finds that respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be informed that the Court of

Appeal had received the letter of 26 November 1996 from the applicant's ex-wife and that he be given the opportunity to comment on it.

► ***Botmeh and Alami v. United Kingdom*, 15187/03, 7 June 2007**

42. ... before and during the applicants' trial, the United Kingdom Security Service had in their possession evidence from "an agent source" that a terrorist organisation, unconnected to the applicants, was seeking information about the possibility of bombing the Israeli Embassy. Related intelligence received after the bombing indicated that it had not, in fact, been the work of this terrorist organisation. The document containing this information ("the first document") was not shown to the prosecutors with conduct of the trial against the applicants, and it was not, therefore, presented by the prosecution to the trial judge for his ruling as to whether it was necessary to disclose it. One of two other documents from the same source, which did not, however, refer to the information in the first document was placed before the trial judge during the disclosure hearing.

43. The undisclosed material was first considered by the Court of Appeal in an *ex parte* hearing prior to the grant of leave to appeal. At the commencement of the hearing of the substantive appeal, the Court of Appeal, in a different composition, heard *inter partes* submissions on the procedure to be followed in ruling on the Crown's claim for public interest immunity, before deciding to examine the material in an *ex parte* hearing. The applicants were not represented during this hearing, either by their own counsel or by a specially appointed, security-cleared, counsel ... However, following the disclosure hearing and well in advance of the resumed appeal hearing, the Court of Appeal disclosed to the applicants a summary of the information contained in the first document, as well as an account of the events which had resulted in the fact that the undisclosed material had not been placed before the trial judge. In its judgment of 1 November 2001, the Court of Appeal observed that, save for the material which was given to the applicants in summary form, there was nothing of significance before the court which had not been before the trial judge ... The applicants were given a full opportunity to make submissions on the material which had been disclosed in summary form and on its significance to the issues raised by the case. On the basis of the submissions made, the Court of Appeal concluded that no injustice had been done to the applicants by not having access to the undisclosed matter at trial, since the matter added nothing of significance to what was disclosed at trial and since no attempt had been made by the defence at trial to exploit, by adducing it in any form before the jury, the similar material which had been disclosed at trial.

44. Given the extent of the disclosure to the applicants of the withheld material by the Court of Appeal, the fact that the court was able to consider the impact of the new material on the safety of the applicants' conviction in the light of detailed argument from their defence counsel and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the Court considers that ... the failure to place the undisclosed material

before the trial judge was in the particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.¹⁷

LEGAL REPRESENTATION

See also the cases under DEFENCE (Legal representation), p. 312 above

Interests of justice

► ***Boner and Maxwell v. United Kingdom, 18711/91, 28 October 1994***

41. ... The legal issue in this case may not have been particularly complex. Nevertheless, to attack in appeal proceedings a judge's exercise of discretion in the course of a trial ... requires a certain legal skill and experience. That Mr Boner was able to understand the grounds for his appeal and that counsel was not prepared to represent him ... does not alter the fact that without the services of a legal practitioner he was unable competently to address the court on this legal issue and thus to defend himself effectively ...

Moreover, the appeal court, as stated, had wide powers to dispose of his appeal and its decision was final. Of even greater relevance, however, the applicant had been sentenced to eight years' imprisonment. For Mr Boner therefore the issue at stake was an extremely important one.

43. ... The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of Article 6 ...

44. Given the nature of the proceedings, the wide powers of the High Court, the limited capacity of an unrepresented appellant to present a legal argument and, above all, the importance of the issue at stake in view of the severity of the sentence, the Court considers that the interests of justice required that the applicant be granted legal aid for representation at the hearing of his appeal.

► ***Twalib v. Greece, 24294/94, 9 June 1998***

53. An additional factor is the complexity of the cassation procedure. It involved a challenge to the fairness of the trial proceedings which required him to adduce legal arguments which would convince the Court of Cassation that his defence rights had been vitiated. It is to be noted that the complexity of cassation proceedings is confirmed by the requirement that the parties must be represented by counsel at the hearing before the Court of Cassation ... Further, the preparation of a notice of appeal must also be considered to require legal skills and experience and in particular knowledge of the grounds on which an appeal can be brought. It is noteworthy that the applicant, of foreign origin and unfamiliar with the Greek language and legal

17. See also DEFENCE (Disclosure of prosecution evidence, Withholding of evidence in the public interest), p. 306 above.

system, was unable to indicate any grounds of appeal in his written notice of appeal and that this failure resulted in his appeal being declared inadmissible ...

54. In these circumstances, the Court considers that the interests of justice required that the applicant be granted free legal assistance in connection with his intended appeal to the Court of Cassation ...

55. The Court notes at the outset that under Article 513 § 3 of the Code of Criminal Procedure a party appealing on a point of law must be represented by counsel at the hearing before the Court of Cassation ... However, ... the Code of Criminal Procedure does not provide for legal aid in connection with such appeals ... Although the Government have submitted that free legal assistance can be granted by the Bar Council to appellants in cassation proceedings under Article 201 § 6 of the Code of Lawyers ..., they have not provided any concrete examples of how this scheme operates in practice. In any event, there is nothing to suggest that the availability of this facility was brought to the attention of Mr Twalib or that his request of 8 June 1993 would have been forwarded to the Bar Council and would have received a favourable follow-up.

56. In these circumstances the Court must conclude that Greek law made no provision for the grant of legal aid to individuals like the applicant in connection with their appeals on points of law. It is accordingly not of relevance ... that the applicant's request for legal aid was made after the expiry of the time-limit for the appeal: it could not have been complied with ...

57. ... there has been a violation of Article 6 § 1 taken together with paragraph 3 (c) of the Convention.

► ***Volkov and Adamskiy v. Russia*, 7614/09, 26 March 2015**

56. The Court notes at the outset that it is not in dispute that the applicant did not have sufficient means to retain a lawyer of his own choosing for the trial and appeal proceedings.

57. The Court further observes that, as an appellate court, the Moscow City Court had broad powers to review the applicant's case in full ... It could examine evidence and additional materials submitted by the parties directly. It was empowered to dismiss an appeal and uphold a trial court's judgment, quash a judgment and terminate criminal proceedings, quash a judgment and remit a case for a fresh trial, or amend a judgment ... The Court further notes that the charges against the applicant in the present case carried a maximum punishment of two years' imprisonment whereas the actual punishment imposed on him was a suspended sentence of one year and three months' imprisonment with one year's probation ... However, it also considers that given the broad review powers of the appellate court, there remained a possibility that the applicant could have substantially benefited from his lawyer's specialist expertise and assistance. Moreover, under Russian law ... the right to legal representation extends to appeal proceedings if, *inter alia*, the defendant has not waived in writing his right to legal aid counsel; and it is incumbent on the authorities to appoint him one ... In the light of the foregoing, the Court concludes that, unless the applicant waived his right to legal assistance, the interests of justice demanded that he should

have a lawyer to represent him in the appeal hearing of his case, irrespective of the gravity of the charges against him and the length of his sentence.

58. ... A waiver of legal assistance in Russia must be filed in writing and recorded in the official record of the relevant procedural act ... The Court observes that the case materials do not contain any such document written by the applicant and record thereof. Therefore, the Court concludes that the applicant did not unequivocally waive his right to a lawyer for the appeal hearing ... The Court also notes that the applicant did not request in his appeal to have a legal aid lawyer appointed ... It also remains unclear whether or not the applicant asked for the appeal hearing to be adjourned or for replacement counsel to be appointed by the appellate court. However, as the Court has previously held, it does not need to establish whether the applicant made such requests because the applicant's conduct could not of itself relieve the authorities of their obligation to provide him with an effective defence ...

59. The Court further notes that in the absence of a written waiver from the applicant, domestic law required the authorities to appoint a legal aid counsel for him ... Moreover, it was brought to their attention that the applicant had no retainer agreement with his trial lawyer, Ms D., when the representative of the Golovinskiy District Court of Moscow called to inform her of the upcoming appeal hearing ... Thus, in such circumstances it was up to the domestic authorities to intervene and appoint a legal aid counsel for the appeal hearing or to adjourn the hearing until such time as the applicant could be adequately represented ... However, they failed to do so.

60. To sum up, given the wide powers of the appellate court, the requirements of domestic law and the apparent failure of legal aid counsel to continue the applicant's representation on appeal, the authorities should have ensured the applicant's legal representation on appeal but did not comply with their obligation.

61. The Court therefore finds that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

Requirement to use specialist bar

► *Meftah and Others v. France* [GC], 32911/96, 26 July 2002

45. Admittedly, the aim of Mr Adoud and Mr Bosoni is above all to challenge the monopoly enjoyed by members of the Conseil d'Etat and Court of Cassation Bar, a monopoly the Government consider to be justified by the special nature of the proceedings in question.

The Court reiterates that the right for everyone charged with a criminal offence to be defended by counsel of his own choosing ... cannot be considered to be absolute and, consequently the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice ...

Furthermore, account must be taken of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 and to the case-law of the Court of Justice of

the European Communities on that directive, which provides that in order to ensure the smooth operation of the justice system, member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers ...

In any event, like lawyers from the ordinary bar, members of the Conseil d'Etat and Court of Cassation Bar are members of a regulated legal profession who are independent of the courts. Litigants are therefore at liberty to choose their counsel as appropriate from among the members of one or other of those bars.

46. The Court notes in passing that the French system offers litigants a choice: namely whether or not to be represented by a member of the Conseil d'Etat and Court of Cassation Bar. But even in the former case the written submissions crystallise all the arguments against the impugned decision. Oral submissions are optional, under Article 602 of the Code of Criminal Procedure, and, in practice, members of the Conseil d'Etat and Court of Cassation Bar do not attend hearings, save in very rare cases ... It has to be acknowledged that some High Contracting Parties to the Convention operate a similar system, whereas others require appellants to be represented by a lawyer. In the Court's view, such an option is undoubtedly sufficient to justify a difference in procedure, since whether or not the appellant is represented depends not on a rule of automatic application but on the appellant's own choice. Self-evidently, the fact that the appellant has made that choice and, consequently, waived the advantages to be gained from having the assistance of a member of the Conseil d'Etat and Court of Cassation Bar, must be established in an unequivocal manner ... The Court considers that French law affords sufficient guarantees in that connection. In any event, Mr Adoud and Mr Bosoni were assisted by a member of the ordinary bar who was fully competent to inform them of the consequences of their choice which, in the circumstances of the instant case, was therefore freely made and conscious. The same applies to Mr Meftah, who was advised by a citizens advice bureau during the proceedings before the domestic courts.

47. Consequently, in the light of the foregoing, it is clear that the special nature of proceedings before the Court of Cassation, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations ... and that such a reservation does not deny applicants a reasonable opportunity to present their cases under conditions that do not place them at a substantial disadvantage ...

In conclusion, having regard to the Court of Cassation's role and to the proceedings taken as a whole, the Court considers that the fact that the applicants were not given an opportunity to plead their cases orally, either in person or through a member of the ordinary bar, did not infringe their right to a fair trial within the meaning of Article 6.

48. Consequently, there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention on that account.

Ensuring competence

► *Czekalla v. Portugal*, 38830/97, 10 October 2002

68. ... the decisive point is the officially appointed lawyer's failure to comply with a simple and purely formal rule when lodging the appeal on points of law to

the Supreme Court. In the Court's view, that was a "manifest failure" which called for positive measures on the part of the relevant authorities. The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal inadmissible.

70. The Court ... does not see how the independence of the legal profession could be affected by a mere invitation by the court to rectify a formal mistake. Secondly, it considers that it cannot be said *a priori* that such a situation would inevitably infringe the principle of equality of arms, given that it would be more in the nature of a manifestation of the judge's power to direct the proceedings, exercised with a view to the proper administration of justice ... It would appear that, as matters stand in Portugal at present, a decision like the one taken by the Supreme Court on 10 July 1996 would no longer be possible as a result of that recent ruling of the Constitutional Court.

71. The circumstances of the case therefore imposed on the relevant court the positive obligation to ensure practical and effective respect for the applicant's right to due process. As that was not the case, the Court can only find a failure to comply with the requirements of paragraphs 1 and 3 (c) of Article 6 of the Convention, taken together. There has therefore been a violation of those provisions.

► ***Hermi v. Italy* [GC], 18114/02, 18 October 2006**

97. ... the applicant at no point alerted the authorities to any difficulties encountered in preparing his defence. Furthermore, in the Court's view, the shortcomings of the applicant's counsel were not manifest. The domestic authorities were therefore not obliged to intervene or take steps to ensure that the defendant was adequately represented and defended ...

98. In addition, the Court notes that the Rome Court of Appeal interpreted, in substance, the applicant's omission to request his transfer to the hearing room as an unequivocal, albeit implicit, waiver on his part of the right to participate in the appeal hearing ... In the particular circumstances of the present case, the Court considers that that was a reasonable and non-arbitrary conclusion.

► ***Saknovskiy v. Russia* [GC], 21272/03, 2 November 2010**

91. The Court notes that the applicant is a lay person and has no legal training ... He was unaware of Ms A's appointment and eventually refused her services for the very reason that he perceived her participation in the proceedings as a mere formality. He made his position known to the Supreme Court as best he could. The applicant should not be required to suffer the consequences of Ms A's passive attitude when one of the key elements of his complaint is precisely her passivity. Accordingly, the inaction of Ms A. cannot be regarded as a waiver.

92. The Government emphasised that the applicant had refused to accept Ms A's services but had not asked to be assigned somebody else as a lawyer. Neither had he asked for additional time to meet the court-appointed lawyer or to find a lawyer of his own choosing. Again, the Court notes that in that context the applicant could not be expected to take procedural steps which normally require some legal

knowledge and skills. The applicant did what an ordinary person would do in his situation: he expressed his dissatisfaction with the manner in which legal assistance was organised by the Supreme Court. In such circumstances, the applicant's failure to formulate more specific claims cannot count as a waiver either.

93. The Court, like the Chamber ..., finds that the applicant's conduct, as well as the inaction of Ms A., did not absolve the authorities from their obligation to take further steps to guarantee the effectiveness of his defence ...

► ***Vamvakas v. Greece*, 2870/11, 9 April 2015**

42. The Court takes the view that F.K.'s unexplained absence from the hearing held one month and three days after his appointment, no request for an adjournment having been submitted, or even if such a request was lodged unlawfully, as stated by the applicant, amounts to a situation of "manifest defect" requiring positive measures from the competent authorities. The Court of Cassation should thus have adjourned the proceedings in order to clarify the situation, rather than dismissing the appeal as having been abandoned.

43. Whatever the circumstances – lack of any contact or unlawful request – the competent court had the positive obligation to ensure practical and effective respect for the applicant's defence rights. Since that was not the case, the Court can only conclude that the requirements of Article 6 § 1 and 3 (c) of the Convention, taken in conjunction, were flouted. There has accordingly been a violation of those provisions.

Unjustified refusals

► ***Poitrimol v. France*, 14032/88, 23 November 1993**

35. It is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.

The legislature must accordingly be able to discourage unjustified absences. In the instant case, however, it is unnecessary to decide whether it is permissible in principle to punish such absences by ignoring the right to legal assistance, since at all events the suppression of that right was disproportionate in the circumstances. It deprived Mr Poitrimol, who was not entitled to apply to the Court of Appeal to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him ...

37. Under the case-law of the Criminal Division of the Court of Cassation, which was followed in this case, a convicted person who has not surrendered to a judicial warrant for his arrest cannot be represented for the purposes of an appeal on points of law. The applicant could not validly lodge such an appeal without giving himself up at a prison ...

38. The Court considers that the inadmissibility of the appeal on points of law, on grounds connected with the applicant's having absconded, also amounted to a disproportionate sanction, having regard to the signal importance of the rights of the

defence and of the principle of the rule of law in a democratic society. Admittedly, the remedy in question was an extraordinary one relating to the application of the law and not to the merits of the case. Nevertheless, in the French system of criminal procedure, whether an accused who does not appear may have arguments of law and fact presented at second instance in respect of the charge against him depends largely on whether he has provided valid excuses for his absence. It is accordingly essential that there should be an opportunity for review of the legal grounds on which a court of appeal has rejected such excuses.

39. In the light of all these considerations, the Court finds that there was a breach of Article 6 ... both in the Court of Appeal and in the Court of Cassation.

► ***Perlala v. Greece*, 17721/04, 22 February 2007**

27. ...the Court points out that under the Greek Constitution, the Convention is an integral part of the Greek legal system and takes precedence over any contrary provision of domestic law... The Court of Cassation declared inadmissible the applicant's ground of appeal based on a violation of Article 6 of the Convention, on the ground that Article 6 was not directly applicable in the instant case and that, in order for it to be taken into consideration, the applicant would have had to rely on it in conjunction with one of the grounds of appeal listed exhaustively in the Code of Criminal Procedure. The Court finds this interpretation somewhat contrived and that it weakens considerably the protection of the public's right before the highest domestic court. While it acknowledges that the conditions of admissibility of an appeal to the Court of Cassation may be more rigorous than one to the appeal court ... the Court finds that declaring inadmissible a submission based on Article 6 of the Convention on the ground set out above is to take far too formalistic an approach and one that prevented the applicant from having the Court of Cassation consider the conduct of the proceedings from the standpoint of Article 6.

28. Confronted with the refusal of the Court of Cassation to examine the applicant's grounds of appeal relying upon the adducing of evidence in the light of Article 6 of the Convention, the Court can reasonably conclude that the guarantees provided for by this provision were neither taken into account nor applied in the instant case. The Government's observations, which are restricted to an exhaustive analysis of the procedure followed at appeal, contain nothing that suggests the contrary ...

30. These factors are sufficient basis for concluding that the Court of Cassation denied the applicant's right to a fair trial...

PRESENCE OF THE ACCUSED

Necessity

► ***Zhuk v. Ukraine*, 45783/05, 21 October 2010**

29. ... the Court observes that the proceedings against the applicant were of a criminal nature. The applicant, who, had been convicted of drug-dealing and sentenced to four years' imprisonment (taking the reduction of sentence on appeal into

account) ... and who was no longer assisted by a lawyer, challenged his sentence on points of law. Hence, given that his liberty was at stake, the Court considers that the examination of the applicant's appeal on points of law was of considerable importance for him ...

31. The Court further observes that, in compliance with the domestic law ..., the Supreme Court held a preliminary hearing which aimed to decide whether the appeal before it was sufficiently well-founded for its examination in a public hearing in the presence of all necessary parties. Thus, the applicant's chance to be present and, accordingly, to make oral submissions at the hearing depended on whether his appeal passed the sifting-out procedure.

32. The Court has held on several occasions that proceedings concerning leave to appeal and proceedings solely involving questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, even though the appellant was not given an opportunity of being heard in person by the appeal court or court of cassation, provided that a public hearing was held at first instance and that the higher courts did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved ...

33. As the competence of the Supreme Court in the present case was limited to questions of law, the lack of a public hearing before it was not in breach of Article 6 § 1 of the Convention per se ...

34. This is true in so far as the pertinent court ... held a hearing in camera, which is not the case here. By virtue of Article 394 § 2 of the Code, the prosecutor had the advantage of being present at that preliminary hearing, unlike any other party, and to make oral submissions to the three judge panel, such submissions being intended to influence the latter's opinion. These submissions in fact were directed at having the applicant's appeal dismissed and his conviction upheld. The Court considers that procedural fairness required that the applicant should also have been given an opportunity to make oral submissions in reply. The panel, having deliberated, dismissed the applicant's appeal on points of law at the preliminary hearing, thus dispensing with a public hearing to which the applicant would have been summoned and been able to take part. It is also noted that the applicant had requested that the hearing be held in his presence ...

35. In the light of these considerations, the Court finds that the procedure before the Supreme Court of Ukraine did not enable the applicant to participate in the proceedings in conformity with the principle of equality of arms.

There has accordingly been a violation of Article 6 § 1 of the Convention.

► ***Tierce and Others v. San Marino, 24954/94, 25 July 2000***

99. In the proceedings against Mr Tierce, the appellate judge had to consider points of both fact and law.

The first applicant maintained that he could not be held criminally liable. It was therefore the appellate judge's task to make a full assessment of the issue of his guilt or innocence. Admittedly, the judge could not increase the penalty imposed at first

instance, but the main question for him to examine was whether the first applicant was guilty or innocent. He considered the legal classification of the first applicant's conduct and, without directly assessing evidence adduced by the first applicant in person, confirmed that the applicant's conduct had amounted to fraud and not merely to misappropriation, even though the difference between the two offences lay chiefly in the subjective element (that of intention to deceive). Furthermore, at the complainant's request, the judge even considered a further offence allegedly committed by the first applicant and subsequently referred the matter to the *Commissario della Legge*. The issue of the preventive attachment of the first applicant's property was also well to the fore in the appeal proceedings.

100. Accordingly, the applicant should have been heard in person by the appellate judge ...

► ***Sigurþór Arnarsson v. Iceland, 44671/98, 15 July 2003***

31. ... The issue to be determined is whether the Supreme Court's omission to take oral statements from the applicant and witnesses before overturning his acquittal by the District Court, convicting him of the initial charge and sentencing him to 2 years and 3 months' imprisonment, was incompatible with the applicant's right to a fair and public hearing under Article 6 § 1 of the Convention.

32. In this connection, it should be observed that the fact that the Supreme Court was empowered to overturn an acquittal by the District Court without summoning the defendant and witnesses and without hearing them in person did not of its own infringe the fair hearing guarantee in Article 6 § 1. It must be considered, however, whether, in the light of the Supreme Court's role and the nature of the issues to be decided by that court, there has been a violation in the particular circumstances of the case ...

33. In this respect the Court notes that the Supreme Court had full jurisdiction to examine not only questions of law but also questions of fact pertaining both to criminal liability and to sentencing.

The prosecution appeal to the Supreme Court requested that the applicant be convicted of the charges set out in the indictment and sentenced accordingly, thus disputing the District Court's assessment of certain discrepancies between the statements made by the defendant S.T.E. and the witness E.P. regarding the kick to the head of the deceased victim.

34. Consequently the Court observes that, apparently, the issues to be determined by the Icelandic Supreme Court in deciding on the applicant's criminal liability were predominantly factual in nature. It can hardly be argued that those questions were straightforward. This seems to have been recognised even by the majority of the Icelandic Supreme Court, which in its judgment noted that the witness evidence was lacking in clarity. Bearing in mind the nature and the particular circumstances of the criminal act, the large number of witnesses heard at first instance, the contradictions and inconsistencies in their accounts, the forensic examination and the differences in the national courts' assessment of the facts, it can be assumed that the factual issues to be determined by the Supreme Court were complex.

35. Moreover, in deciding on sentence, the Supreme Court did not have the benefit of the prior assessment of the question by the lower court which had heard the applicant directly.

36. Having regard to what was at stake for the applicant, the Court does not consider that the issues to be determined by the Supreme Court when convicting and sentencing him – and, in doing so, overturning his acquittal by the District Court – could, as matter of fair trial properly have been examined without a direct assessment of the evidence given by the applicant in person and by certain witnesses.

In this regard, the Court is not persuaded by the Government's argument that, unlike its Norwegian counter-part in the *Botten* case, the Icelandic Supreme Court had the benefit of having the transcripts of the oral hearing at first instance. That was not a factor relied on by the Court in the *Botten* case which, rather, placed emphasis on "the Supreme Court's role and the nature of the issues to be decided".

37. Finally, the Court considers, in the light of the wording of Article 159 (4) of the Code of Criminal Procedure, that the applicant could reasonably have expected the Supreme Court to summon him and other witnesses to give oral evidence should it be minded to overturn the District Court's acquittal on the basis of a different assessment of the evidence. The judicial practice invoked by the Government, to the effect that the Supreme Court would only do so before reaching a contrary finding to that of the District Court as to a witness' credibility, related only to a single example which in fact post-dated the events of the present case and could not be relied upon by the applicant.

38. Having regard to the entirety of the proceedings before the Icelandic courts, to the role of the Supreme Court and to the nature of the issues adjudicated, the Court finds that there were no special features to justify the fact that the Supreme Court did not summon the applicant and certain witnesses, and hear evidence from them directly, before passing judgment under Article 159 of the Code of Criminal Procedure. The Supreme Court was under a duty to take positive measures to this effect, notwithstanding the fact that the applicant did not attend the hearing, ask for leave to address the court or object, through his counsel, to a new judgment being given by the Supreme Court ...

Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

Waiver

► *Hermi v. Italy* [GC], 18114/02, 18 October 2006

92. It is regrettable that the notice did not indicate that it was for the applicant to request, at least five days before the date of the hearing, that he be brought to the hearing room ... However, the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements. It is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights.

93. In the instant case, the applicant was informed of the date of the appeal hearing on 1 September 2000, that is, more than two months in advance of the hearing. The same was true of the lawyer appointed by the applicant ... During that time, the applicant's lawyers did not deem it necessary to get in touch with their client ... There is nothing in the case file to indicate that the applicant attempted to make contact with them ...

101. It is true that, at the appeal hearing, Mr Marini objected to the proceedings being continued in his client's absence ... However, in the Court's view, that objection, made at a late stage and unsupported by any statement from the defendant himself, could not outweigh the attitude adopted by the applicant.

102. In the light of the above, and taking account in particular of the conduct of the applicant's lawyers, the Court considers that the Italian judicial authorities were entitled to conclude that the applicant had waived, tacitly but unequivocally, his right to appear at the hearing of 3 November 2000 before the Rome Court of Appeal. Moreover, the applicant could have asserted that right without the need for excessive formalities.

► ***Kashlev v. Estonia*, 22574/08, 26 April 2016**

44. The Court notes at the outset that the applicant, assisted by a lawyer, took part in the hearing at first instance. He was heard at the County Court hearing where all relevant witnesses were also examined. It is not in dispute that the defence could and did put questions to the witnesses before the County Court.

45. Furthermore, the Court notes that after the applicant's acquittal by the first-instance court the prosecutor lodged an appeal with the Court of Appeal. A copy of the appeal was served on the applicant and his lawyer and both of them were summoned to the Court of Appeal hearing. However, the applicant informed the court in writing of his wish not to take part and asked for the case to be examined in his absence. The Court notes that it has not been argued that the applicant – who was not in detention – was hindered from seeking legal advice concerning the nature of the proceedings before the Court of Appeal or their possible outcome, including the possibility that the first-instance acquittal judgment would be overturned and the applicant convicted by the Court of Appeal as requested by the prosecutor. The Court further notes that, according to the record of the Court of Appeal hearing, the applicant's lawyer – who was present – submitted that he was aware of the applicant's wish not to take part. The Court thus considers that the applicant unequivocally waived his right to take part in the hearing before the Court of Appeal ...

Through use of videoconference

► ***Marcello Viola v. Italy*, 45106/04, 5 October 2006**

72. ... the Court considers that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with

the “reasonable time” requirement in judicial proceedings. It remains to be considered whether the arrangements for the conduct of the proceedings respected the rights of the defence.

73. The Court observes that ... the applicant was able to take advantage of an audio-visual link with the hearing room, which allowed him to see the persons present and hear what was being said. He could also be seen and heard by the other parties, the judge and the witnesses, and had an opportunity to make statements to the court from his place of detention.

74. Admittedly, it is possible that, on account of technical problems, the link between the hearing room and the place of detention will not be ideal, and thus result in difficulties in transmission of the voice or images. In the present case, however, at no time during the appeal proceedings did the applicant or his defence counsel seek to bring to the attention of the court difficulties in hearing or seeing ...

75. The Court points out, lastly, that the applicant’s defence counsel had the right to be present where his client was situated and to confer with him confidentially. This was also a statutory right of defence counsel present in the hearing room ... There is nothing to suggest that in the present case the applicant’s right to communicate with his lawyer out of the earshot of third parties was infringed.

76. That being so, the Court finds that the applicant’s participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had an opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6.

77. It follows that there has been no violation of Article 6 of the Convention.

See also DEFENCE (Legal representation, Communication, In court), p. 333 above

PUBLIC HEARING

► *Hermi v. Italy* [GC], 18114/02, 18 October 2006

78. ... the fact that the hearings were not held in public was the result of the adoption of the summary procedure, a simplified procedure which the applicant himself had requested of his own volition. The summary procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence ... On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular with reference to the public nature of the hearings and the possibility of requesting the admission of evidence not contained in the file held by the Public Prosecutor’s Office.

79. The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that

the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived ...

80. ... Introduction of the summary procedure by the Italian legislature seems to have been expressly aimed at simplifying and thus expediting criminal proceedings ...

81. In the light of the above considerations, the fact that the hearings at first and second instance were conducted in private, and hence without members of the public being present, cannot be regarded as being in breach of the Convention ...

► ***Hummatov v. Azerbaijan*, 9852/03, 29 November 2007**

142. ... the Court also cannot accept as a fact that, by the time of the examination of the applicant's case on appeal, the requirement of a public hearing had already been satisfied at the first instance. The primary reason for the re-opening of the applicant's case was to remedy the alleged lack of a fair hearing at the first instance, as the applicant had been recognised as a "political prisoner" upon Azerbaijan's accession to the Council of Europe and Azerbaijan had committed itself to give a "re-trial" to all political prisoners including the applicant. Moreover, the Court of Appeal was a judicial body with full jurisdiction, because it had the competence to examine the case on points of fact and law as well as the power to assess the proportionality of the penalty to the misconduct. For these reasons, the Court considers that a public hearing at the Court of Appeal was needed in the present case in order to satisfy the requirements of Article 6 § 1.

143. It is undisputed ... that the general public was not formally excluded from the trial at the Court of Appeal. The mere fact that the trial took place in the precincts of Gobustan Prison does not necessarily lead to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain identity and possibly security checks in itself deprive the hearing of its public nature ...

145. It is true that various hearings of the Court of Appeal were indeed attended by a number of spectators, although it is not clear if this was the case at each hearing. However, this fact by itself does not mean that all the necessary compensatory measures had been taken by the authorities in order to ensure the publicity of the hearings and free access of all potential spectators throughout the entire trial.

146. The Court notes that the appellate proceedings lasted from January 2002 to July 2003 and spanned over more than twenty hearings. As it appears from the trial transcripts, a number of the scheduled hearings were postponed to another date. Although the Government maintained that the public and the media had been duly informed about the time and place of the hearings, they failed to submit any evidence in this regard. The Government failed to elaborate in which manner and by what type and frequency of announcement this information was officially conveyed to the public. Apart from this, there is no indication that the public was ever formally provided with instructions on how to reach Gobustan Prison as well as any explanation of access conditions.

147. ... regardless of the actual distance, it cannot be disputed that the prison was located far from any inhabited area, was not easily accessible by transport and there was no regular public transportation operating in its vicinity ... The Court considers

that the fact that it was necessary to arrange costly means of transport and travel to a remote destination, as opposed to attending the Court of Appeal's regular courtroom in Baku, had a clearly discouraging effect on potential spectators wishing to attend the applicant's trial.

148. The Court also has regard to the applicant's submission as well as the credible reports of observers indicating that, at a number of hearings, spectators and journalists were pre-selected or not granted access to hearings ...

149. In sum, the Court finds that the Court of Appeal failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Gobustan Prison had on its public character. Consequently, the trial did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention.

150. ... The mere fact that, at the time of the examination of his appeal, the applicant was already a prisoner serving a life sentence does not, in itself, automatically imply the necessity of relocation of the appellate proceedings from a normal courtroom to the place of the applicant's imprisonment. ... In the present case, it was not shown that there were any ... security concerns. Moreover, even if there were any, the Court of Appeal apparently did not consider them serious enough either to mention them in its interim decisions ... or to necessitate a formal decision ... excluding the public. In such circumstances, the Court finds no justification for the lack of publicity at the Court of Appeal hearings.

151. The Court also notes that the subsequent hearing of the applicant's cassation appeal by the Supreme Court, even if held in public, was not sufficient to remedy the lack of publicity at the appellate hearings, as the Supreme Court was limited in its competence only to the questions of law and had no jurisdiction to hold a full rehearing of the case ...

152. Accordingly, the Court concludes that there has been a violation of Article 6 § 1 of the Convention due to lack of a public hearing, which is one of the essential features of the right to a fair trial.

ANNOUNCEMENT OF JUDGMENT

► *Pretto and Others v. Italy*, 7984/77, 8 December 1983

27. ... In the opinion of the Court, the object pursued by Article 6 § 1 ... in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – is, at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by a reading in open court of a decision dismissing an appeal or quashing a previous judgment, such reading sometimes being limited to the operative provisions.

28. The absence of public pronouncement of the Court of Cassation's judgment therefore did not contravene the Convention ...

See also PUBLIC HEARING (Announcement of judgment), p. 229 above

NEED FOR PRELIMINARY RULING

► *Ivanciuc v. Romania* (dec.), 18624/03, 8 September 2005

The applicant complained of the fact that the Timiș County Court had dismissed two objections of unconstitutionality which he had requested it to refer to the Constitutional Court. According to the applicant, under the third paragraph of section 23 of Law no. 47/1992, the County Court had been obliged to take action on his first objection concerning Article 346 of the Code of Criminal Procedure, despite the fact that the Constitutional Court had already ruled on the constitutionality of that Article and had found it to be compatible with the Constitution. He further submitted that, in dismissing his second objection on the ground that it had already given a decision, the court had for the second time infringed his right of access to the Constitutional Court, since the second objection referred to a different provision, namely section 23 of Law no. 47/1992.

The Court observes, firstly, that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling.

It further draws attention to its case-law, according to which the right to have a preliminary question referred to a court cannot be absolute either, even where a particular field of law may be interpreted only by a court designated by statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field. It is in accordance with the functioning of such a mechanism for the court to verify whether it is empowered or required to refer a preliminary question, first satisfying itself that the question must be answered before it can determine the case before it. However, it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such refusal appears arbitrary ...

In the Court's view, this does not apply in the instant case. The County Court took into account the applicant's complaint concerning the constitutionality of Article 346 of the Code of Criminal Procedure and of his request to have the objection referred to the Constitutional Court. It subsequently delivered a decision giving sufficient grounds, finding that the Article had already been examined several times by the Constitutional Court, which had declared it on each occasion to be compatible with the Constitution. Further examination of the Article was therefore unlikely to achieve anything.

As regards the second objection raised by the applicant against section 23 of Law no. 47/1992, the Court notes that it did not relate to a provision on which the outcome of the case depended.

Admittedly, the fact that the court dismissed the first objection on the basis of the third paragraph of section 23 of Law no. 47/1992, and the second on the ground that it had already given a decision, could be regarded as an error of law, given that the section in question does not prohibit the referral to the Constitutional Court of objections which have already been examined by that court.

However, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret domestic law and that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention ...

... for the reasons outlined above, the Court cannot regard the decision not to refer as arbitrary and such as to infringe the principle of a fair hearing ...

DELAYED EXAMINATION

► *Shvydka v. Ukraine*, 17888/12, 30 October 2014

46. The applicant ... submitted that the delayed examination of her appeal had, in practical terms, nullified its effect on the outcome of the proceedings brought against her for an administrative offence. She noted that she had already served her sentence in full by the time her appeal was examined and that it had therefore been immaterial to her whether or not the appellate court upheld or quashed the decision of the first-instance court ...

50. ... it appears pertinent to reiterate here the Court's well-established principle on the importance of the right of access to a court, having regard to the prominent place held in a democratic society by the right to a fair trial ... Where the right to a review under Article 2 of Protocol No. 7 exists, it should be effective in the same way.

51. The Court notes that this provision is aimed at providing a possibility to put right any shortcomings at the trial or sentencing stages of proceedings once these have resulted in a conviction ... Indeed, an issue would arise under the Convention if the appellate jurisdiction is deprived of an effective role in reviewing the trial procedures ...

53. ... The Court notes that the applicant's appeal against the judgment of 30 August 2011, lodged on the same day, did not have a suspensive effect, and the imposed sentence was executed immediately. This was done pursuant to the Code of Administrative Offences providing for the immediate enforcement of a sentence only if it concerned deprivation of liberty ... Had the sanction been different, the first-instance court's decision would have become enforceable only in the absence of an appeal within the legally envisaged time-limits or once upheld by the appellate court. In the present case, however, the appellate review took place after the detention sentence imposed on the applicant by the first-instance court had been served in full. The Court finds it inconceivable how that review would have been able to effectively cure the defects of the lower court's decision at that stage.

54. It does not escape the Court's attention that, had the court of appeal quashed the first-instance decision, it would have been open to the applicant to seek compensation in respect of both pecuniary and non-pecuniary damage on that ground ... However, that retrospective and purely compensatory remedy cannot be regarded as a substitute of the right to a review embedded in Article 2 of Protocol No. 7. To hold otherwise would run contrary to the well-established principle of the Court's case-law that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ...

55. In the light of the foregoing considerations the Court concludes that there had been a violation of Article 2 of Protocol No. 7 ...

ADEQUACY OF REASONS

See also JUDGMENT (Conviction), p. 383 above

► ***Van Anraat v. Netherlands (dec.)*, 65389/09, 6 July 2010**

61. As relevant to the case before the Court, the applicant made three submissions to the Supreme Court. Of these, the first two were contained in his statement of grounds of appeal ...

64. The third was based on the premise that the crimes which the applicant had supposedly aided and abetted had been committed by persons covered by foreign sovereign immunity and that, as their accessory, that sovereign immunity protected him also; only the Iraqi Special Tribunal had competence in the matter. The Supreme Court did not address this point in its judgment; the applicant now alleges a violation of Article 6 on that ground.

65. The Court notes that this submission was not contained in the statement of grounds of appeal. The applicant's suggestion to the contrary notwithstanding ..., it considers that this was new and original and cannot reasonably be seen as linked to any point raised in the statement of grounds of appeal.

66. The Court observes, furthermore, that the argument was made for the first time in the applicant's written response to the Procurator General's advisory opinion, at the final stage of the proceedings before the Supreme Court gave judgment.

67. The Court has held it to be a requirement inherent in the element of "adversarial proceedings" contained in Article 6 § 1, as applicable to proceedings of a cassation type, that a defendant in a criminal case should have the opportunity to respond to the advisory opinion of the Procurator General ...

68. It is not, however, a requirement that a defendant be allowed to submit fresh arguments that have no bearing on any point contained in the advisory opinion itself. In the circumstances of the present case, characterised as they were by the applicant's making use of the opportunity offered to submit an entirely novel argument at the latest possible stage of proceedings, Article 6 § 1 did not compel the Supreme Court to provide a reasoned response ...

69. Moreover, although the applicant refers to the Supreme Court's judgment of 8 July 2008 in which it was held that Dutch criminal courts enjoyed universal jurisdiction over the crimes set out in section 8 of the War Crimes Act, the Court observes that the Supreme Court had explained the legal position already in 1997 ... In so far, therefore, as the argument in question is to be understood as an attempt to persuade the Supreme Court to reconsider or refine its case-law, it cannot be said that there was anything to prevent the applicant from submitting it sooner.

70. It follows from the above that this complaint is manifestly ill-founded ...

► ***Kashlev v. Estonia*, 22574/08, 26 April 2016**

48. ... the Court notes that there is nothing in the case file which might lead to the conclusion that the domestic courts acted in an arbitrary or unreasonable manner in assessing the evidence, establishing the facts or interpreting the domestic law. On the contrary, the Court considers that adequate safeguards against arbitrariness were in place in the proceedings against the applicant. The Court notes that the difference in the County Court's and Court of Appeal's assessment of the evidence mainly resulted from the courts' different approach to the coherence or discrepancies within and between the testimony of individual witnesses and their interpretation of the circumstances of the offence as a whole. The Court also notes in this connection that the Court of Appeal, following the Supreme Court's pertinent case-law ..., provided – as required by the Supreme Court – particularly thorough reasoning as to why it had come to a conclusion different from that of the County Court, and indicated what mistakes the latter had made, in the Court of Appeal's view, in assessing the evidence. The Court observes, in particular, that the Court of Appeal disagreed with the County Court's rejection of certain witness statements and identification reports as evidence and, having taken into account that evidence, arrived at a conclusion different from that of the County Court ...

49. The Court further notes that an appeal against the Court of Appeal judgment could be lodged with the Supreme Court. The applicant, through his lawyer, made use of that possibility and the Supreme Court was thus able to verify whether its case-law in that area had been followed by the Court of Appeal. While deciding whether to examine the applicant's appeal, it had in substance a possibility to assess the appellate court's approach. The Court considers that the requirements deriving from the Supreme Court's case-law and its verification in the present case that those requirements had been met constituted further safeguards for the applicant's defence rights.

SCOPE OF RULING

► ***Kremzow v. Austria*, 12350/86, 21 September 1993**

76. The applicant submitted that by imputing guilt of “financial misdeeds” the Supreme Court had in effect found him guilty of fraud in violation of the presumption of innocence. He pointed out that the jury which had heard all the evidence in the case had been unable to establish a motive on the grounds that there were “too many possibilities” ...

77. The Court recalls that the applicant had already been found guilty of murder and that the Supreme Court's remarks related solely to the question of his motive for the offence. Moreover, the reference to “financial misdeeds” cannot be construed as a finding that the applicant was guilty of a specific offence. In such circumstances no question of a violation of the presumption of innocence arises.

Chapter 17

Reopening of proceedings

REQUEST BY PROSECUTION

► *Nikitin v. Russia*, 50178/99, 20 July 2004

54. ... The mere fact that the institution of supervisory review as applied in the present case was compatible with Article 4 of Protocol No. 7 is not, however, sufficient to establish compliance with Article 6 of the Convention.

58. ... in the applicant's case, the Presidium was indeed only deciding the question whether the case was to be reopened or not. Had it quashed the acquittal, this would necessarily have entailed a separate set of adversarial proceedings on the merits before the competent courts. The decision by the Presidium thus marked a procedural step which was no more than a precondition to a new determination of the criminal charge. The Court notes that the Presidium of the Supreme Court dismissed the Procurator General's request, having found that it relied on defects which it had been entirely within the prosecution's control to redress before, not after, the final judgment. The Procurator General's request could itself be criticised as being arbitrary and an abuse of process. However, it had no decisive impact on the fairness of the procedure for reopening as a whole, which was primarily a matter for the Presidium's deliberation ... Accordingly, the arbitrariness of the Procurator General's request for a reopening could not be, and was not, prejudicial for the determination of the criminal charges in the present case.

59. The Court concludes that the authorities conducting the supervisory review ... did not fail to strike a fair balance between the interests of the applicant and the need to ensure the proper administration of justice.

► *Lenskaya v. Russia*, 28730/03, 29 January 2009

40. The Court observes that the errors committed by the District and Regional courts were sufficient in nature and effect to warrant the reopening of the proceedings. Leaving such errors uncorrected would seriously affect the fairness, integrity and public reputation of the judicial proceedings. The Court also attributes particular weight to the fact that those judicial errors could not be neutralised or corrected by any other means, save by the quashing of the judgments of 15 July and 12 September 2002. In such circumstances, the Presidium could not utterly disregard the plight of the innocent victim of the unjust conviction. The quashing of the final judgment was a means of indemnifying the convicted person for mistakes in the administration of the criminal law.

41. The Court is satisfied that the Presidium reopened the proceedings for the purpose of correcting a fundamental judicial error. The considerations of “legal certainty” should not discourage the State from correcting particularly egregious errors committed in the administration of justice and thus, in the circumstances of the present case, should not prevent the Presidium of the Tomsk Regional Court from reviewing the final judgment which was grossly prejudicial to the convicted person, that is the applicant’s former husband.

42. Having established that the interests of justice required the reopening of the proceedings and the quashing of the judgment of 15 July 2002, as amended on 12 September 2002, the Court has now to consider whether the procedural guarantees of Article 6 of the Convention were available in those supervisory review proceedings.

43. The Court finds that there is nothing to indicate that the Presidium’s evaluation of the facts and evidence presented in the case was contrary to Article 6 of the Convention. The Court observes that the applicant was provided with ample opportunities to present her arguments and to challenge the submissions of the adversary in the proceedings. She submitted detailed written arguments in reply to the supervisory review application. Furthermore, she and her representative attended the supervisory review hearing and made oral submissions. The Court considers that the Presidium gave the applicant’s arguments due consideration. In the light of the foregoing consideration, the Court finds that the reasons on which the Presidium based its conclusions are sufficient to exclude any doubt that the way in which it established and assessed the evidence in the applicant’s case was unfair or arbitrary. Therefore the Court considers that the proceedings before the Presidium of the Tomsk Regional Court afforded the applicant all the procedural safeguards of Article 6 § 1 of the Convention.

44. Having regard to the foregoing, the Court is of the opinion that in the circumstances of this particular case the Presidium rightfully balanced the competing interests of finality and justice. The Court finds that the quashing of the judgment of 15 July 2002, as amended on 12 September 2002, by the Presidium of the Tomsk Regional Court did not deprive the applicant of the “right to a court” under Article 6 § 1 of the Convention. There has been accordingly no violation of that Article.

► ***Bujnita v. Moldova*, 36492/02, 16 January 2007**

23. The Court notes that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant’s actions by the lower instances. The Court observes that the latter had examined all the parties’ statements and evidence and their original conclusions do not appear to have been manifestly unreasonable. In the Court’s view, the grounds for the request for annulment given by the Deputy Prosecutor General in the present case were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court, therefore considers, as it has found in similar circumstances ..., that the State authorities failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system.

MOST APPROPRIATE FORM OF REDRESS

► *Sejdovic v. Italy* [GC], 56581/00, 1 March 2006

126. The Court accordingly considers that where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see the principles set forth in Recommendation R(2000)2 of the Committee of Ministers, ...). However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law as cited above ...

127. In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded ... provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence ...

NOT OBLIGATORY FOLLOWING EUROPEAN COURT JUDGMENT

► *Lyons and Others v. United Kingdom* (dec.), 15227/03, 8 July 2003

It notes in this connection that the proceedings which the applicants seek to challenge under Articles 6 and 13 have their origin in earlier proceedings which led to their conviction. In respect of the latter proceedings, the Court found that the applicants did not receive a fair trial on account of the extensive use made by the prosecution at their trial of statements which they were compelled to make to the authorities. For that reason, the Court found that there had been a breach of Article 6 § 1.

The applicants subsequently succeeded in having their convictions referred back to the Court of Appeal in view of the Court's finding ...

For the Court, the applicants' argument that a new breach of Article 6 has been committed rests essentially on their view that by refusing to quash their convictions or to order a re-trial, the domestic courts have failed to give effect to its finding that they did not receive a fair hearing.

However, it points out that the finding in that judgment was essentially declaratory ... It further recalls that by virtue of Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers ... It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also

to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects ...

As regards the applicants' case, the Court has been informed, firstly, that section 434 of the Companies Act 1985 has been amended in order to ensure that the violation found by the Court would not be repeated in future cases and, secondly, that the Government have paid the sums awarded to the applicants in its Article 41 judgment by way of costs and expenses. As to other measures which might be taken to afford *restitutio in integrum*, the Court has further been informed that this is a matter of ongoing discussion between the Committee of Ministers and the respondent Government. It reiterates that, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment ... For its part, the Court cannot assume any role in this dialogue. It notes in particular that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction ... It follows that it cannot find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments.

This is not to say that measures taken by a respondent State in the post-judgment phase to afford redress to an applicant for the violation of violations found fall outside the jurisdiction of the Court ... it may entertain a complaint that a retrial at the domestic level by way of implementation of one of its judgments gives rise to a new breach of the Convention ...

The Court would observe that the above-mentioned considerations are not intended to detract from the importance of ensuring that domestic procedures are in place which allow a case to be re-visited in the light of a finding that Article 6 of the Convention has been violated. On the contrary, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law ...

DESCRIPTION OF PERSON BEING RETRIED

► *Dicle and Sadak v. Turkey*, 48621/07, 16 June 2015

60. The Court emphasises that the fact that the applicants were found guilty and sentenced to seven and a half years' imprisonment could not remove their initial right to be presumed innocent until the legal establishment of their guilt. It again recalls that Article 6 § 2 of the Convention governs the entire criminal proceedings "irrespective of the outcome of the prosecution" ...

61. That is why, after taking into account the relevant circumstances of the case, the Court finds that the use by the competent national courts, in the context of the reopening of the proceedings, of the term "the accused/convicted person" to refer

to the applicants, even before any judgment was delivered on the merits of their case impaired their right to be presumed innocent ...

63. The Court observes that the dispute between the parties concerns whether or not the request to reopen the proceedings should have resulted in the deletion of the applicants' initial criminal convictions from their criminal records. It notes that, contrary to the Government's assertion, according to the Court of Cassation, when proceedings are reopened, the case is to be heard as if it were being adjudicated upon for the first time. In the light of the arguments above, the Court takes the view that the new proceedings were independent of the first.

64. ... It finds that the entry in question, which presented the applicants as guilty, whereas in the context of the reopening of the proceedings they should in principle have been regarded merely as presumed to have committed offences for which the judgment still had to be delivered, raises an issue with regard to the applicants' right to be presumed innocent guaranteed by Article 6 § 2 of the Convention.

65. Consequently, the Government's assertion that the deletion of the applicants' first conviction from their criminal record could take place only after sentencing in the reopened proceedings is questionable ... the Court reiterates that there is a fundamental difference between the fact of saying that someone is merely suspected of committing a criminal offence and an unequivocal declaration, in the absence of a final conviction, that the person has committed the offence as charged ... It considers that, in the present case, the entry on the criminal record had such a declaratory value.

66. Consequently, the Court concludes that there was a violation of Article 6 § 2 of the Convention on this ground.

Chapter 18

Trial within a reasonable time

DETERMINING PERIOD

► ***Schumacher v. Luxembourg*, 63286/00, 25 November 2000**

27. ... the Court considers that the period to be taken into consideration to assess the length of the proceedings in the light of the requirement of a “reasonable time” began on 24 October 1991, when the applicant was charged by the investigating judge.

28. As for the *dies ad quem*, the Court reiterates its consistent case law according to which the period to be taken into consideration when applying Article 6 runs at least until the decision to acquit or convict, even if it was handed down on appeal ... In the instant case, no court decided upon the merits of the case so the applicant was, in the final analysis, neither acquitted nor convicted. It is clear that he was awaiting the outcome of his case until the order declaring the case against him time-barred. Accordingly, the Court finds that the period to be taken into consideration ended with the decision of 17 November 2000.

► ***Hendriks v. Netherlands (dec.)*, 44829/98, 5 March 2002**

The Court recalls that in criminal matters, the “reasonable time” referred to in Article 6 § 1 begins to run as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court, such as the date of arrest. “Charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” ...

As to the question when the applicant became “substantially affected” in respect of the proceedings complained of, the Court finds that this occurred when he was arrested in the Netherlands on 22 October 1996. As to the applicant’s argument that he had already become substantially affected by his arrest in Luxembourg on 2 April 1993, the Court considers that the Netherlands authorities cannot be held responsible for any delays that might have occurred in separate discontinued criminal proceedings taken previously against the applicant on the basis of the same facts in Belgium or Luxembourg in which the Netherlands authorities were not involved.

► ***Stoianova and Nedelcu v. Romania*, 77517/01, 4 August 2005**

20. The Court notes that the criminal proceedings against the applicants comprised two separate phases. The first began on 14 April 1993, when they were arrested and remanded in custody, and ended on 11 November 1997 when the prosecutor N.O. made an order discontinuing the proceedings. The second phase began on 12 May 1999, when the prosecution ordered the proceedings to be reopened, and ended on 21 April 2005 when the prosecution ordered the proceedings to be discontinued.

21. The Court cannot accept the Government's contention that the first phase should not be taken into account for the purposes of Article 6 § 1. It considers that the order discontinuing the proceedings made by the prosecutor N.O. on 11 November 1997 cannot be regarded as having terminated the proceedings against the applicants because it was not a final decision ...

... it was open to the prosecution to reopen the criminal investigation without having to seek leave from any domestic court that would have been obliged to consider the application according to certain criteria, including the fairness of reopening the case and whether an excessive period had passed since the decision discontinuing the investigation ... In that connection the Court cannot disregard the fact that prosecutors in Romania, acting as members of the Procurator-General's Department, did not satisfy the requirement of independence from the executive ... Furthermore, the criminal proceedings were ordered to be reopened on the ground that the initial investigation had been incomplete ... The applicants were not responsible for those shortcomings on the part of the authorities and should not therefore be put at a disadvantage as a result of them.

Lastly, the Government have not in any way shown that resurrecting a charge that had been dropped by an order of the prosecutor was an exceptional step ...

► ***Vayıç v. Turkey*, 18078/02, 20 June 2006**

44. As regards the period to be taken into account, the Court finds that the proceedings commenced on 9 September 1996, the day of the applicant's arrest, and are still pending. They have therefore already lasted more than nine years and eight months for three levels of jurisdiction. However, the Court considers that the applicant cannot rely on the period during which he was a fugitive, when he sought to avoid being brought to justice in his country. The Court is of the opinion that the flight of an accused person has in itself certain repercussions on the scope of the guarantee provided by Article 6 § 1 of the Convention as regards the duration of proceedings. When an accused person flees from a State which respects the principle of the rule of law, it may be assumed that he or she is not entitled to complain of the unreasonable duration of proceedings following that flight, unless sufficient reason can be shown to rebut this assumption ... there is nothing to rebut the assumption in the present case ...

CONSIDERATIONS RELEVANT TO THE FINDING OF A VIOLATION

► ***Yağci and Sargin v. Turkey*, 16419/90, 8 June 1995**

59. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid

down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities ...

63. The Court notes merely that from 22 January 1990 the National Security Court held twenty hearings, sixteen of which were devoted almost entirely to reading out evidence. That process, even allowing for the quantity of documents, cannot be regarded as complex ...

66. The Court reiterates that Article 6 ... does not require a person charged with a criminal offence to co-operate actively with the judicial authorities ... It notes that the conduct of Mr Yagci and Mr Sargin and their counsel at the hearings does not seem to have displayed any determination to be obstructive. At all events, the applicants cannot be blamed for having taken full advantage of the resources afforded by national law in their defence. Even if the large number of counsel present at the hearings and their attitude to the security measures slowed down the proceedings to some extent, they are not factors that, taken alone, can explain the length of time in issue.

69. ... between 22 January 1990 and 9 July 1992 ... [the] court held only twenty hearings in the case at regular intervals (less than thirty days), only one of which lasted for longer than half a day.

Moreover, after the Antiterrorist Act of 12 April 1991, repealing Articles 141-43 of the Criminal Code, had come into force ... the National Security Court ... waited nearly six months before acquitting the applicants on the charges based on those provisions.

70. In conclusion, the length of the criminal proceedings in question contravened Article 6 para. 1 ...

► ***Gelli v. Italy*, 37752/97, 19 October 1999**

43. The Court observes at the outset that ... the proceedings at issue were extremely complex; while it may be true that the investigations did not mainly concern the charge of slander, i.e. the one in relation to which the applicant has lodged this application, the Court underlines that the proceedings in relation to this charge have never been severed from the remainder. Nor is it for the Court to say whether they should have ...

44. The Court has not identified any delay in the proceedings which is attributable to the applicant's conduct, saving for the period of four years and one month during which the applicant absconded from prison, which at any event has not been counted towards the period to be taken into consideration ...

45. As regards the conduct of the State authorities, the Court notes that there appears to have been a very long delay between the decision of 26 March 1985 whereby the Rome District Court was found to be competent to deal with the case, and the judgment of the Judge for the Preliminary Investigations on committals for trial on 18 November 1991. The Government did not provide any explanation for this delay.

46. The Court considers that this delay, which covers more than half of the total length of the period under consideration, is of itself sufficient to conclude that the case was not heard within a "reasonable time".

► ***Vachev v. Bulgaria*, 42987/98, 8 July 2004**

88. The Court agrees that criminal proceedings against the applicant were factually and legally complex. They involved several persons accused of having committed numerous financially related offences during a prolonged period of time ...

91. The Court is not convinced that the applicant's alleged failure to request the disqualification of the two experts in a timely manner was the source of any delay. It was rather incumbent on the authorities to comply from the outset with the rules of criminal procedure and appoint experts whose impartiality would not be open to doubt. Moreover, when the applicant requested the disqualification of the experts, his request was denied twice by the investigation authorities ... It was only when he raised the matter before the Teteven District Prosecutor's Office that the experts were replaced ...

92. As regards the need to replace the applicant's counsel, it does not appear that this was the main reason why the Teteven District Prosecutor's Office decided to refer the case back to the investigation in July 1998. This had become necessary essentially because certain facts had not been fully elucidated, the investigator had erred in the legal qualification of the offences alleged against the applicant and one of the experts who had prepared an expert financial report needed to be replaced ...

93. Finally, concerning the other delays attributable to the applicant, which amounted in total to approximately two weeks ..., the Court considers that they did not have a significant impact on the length of the proceedings as a whole ...

96. The Court notes that during the entire period to be taken into consideration – more than five years and nine months – the proceedings remained at the preliminary investigation stage. Even taking into account the fact that the case was legally and factually complex, such a time-span appears excessive. The Court further notes that there were lengthy periods during which no activity seems to have taken place. Such gaps occurred between 4 November 1998 and 1 June 1999 ..., between 13 June 1999 and 7 January 2000 ..., between 14 February 2000 and 12 May 2000 ... and between 4 August 2000 and 8 June 2001 ...

Finally, the Court notes that there was apparently poor coordination between the various bodies involved in the case, as evidenced by the numerous reformulations of the charges against the applicant ... This, together with the many remittals of the case from the prosecution to the investigation authorities for additional investigation or for the rectification of procedural irregularities ..., was a major factor contributing to the delay ...

97. Having regard to the criteria established in its case-law for assessment of the reasonableness of the length of proceedings, the Court finds that the length of the criminal proceedings against the applicant failed to satisfy the reasonable time requirement of Article 6 § 1 of the Convention.

► ***McFarlane v. Ireland* [GC], 31333/06, 10 September 2010**

145. The proceedings ended on 28 June 2008, with the applicant's acquittal, and thus lasted over 10 years and 6 months.

146. While the criminal investigation would have been sensitive and somewhat complex, the Court does not consider that this explains the overall length of the criminal proceedings against the applicant.

147. As to the applicant's conduct, the Government mainly argued that his prohibition actions caused the delay and, notably, that those actions were ill-conceived and were neither issued nor pursued with diligence by him ...

148. The Court recalls that applicants are entitled to make use of all relevant domestic procedural steps including applying to bring to an end prosecutions on grounds of delay but they should do so with diligence and must bear the consequences when such procedural applications result in delay ... The Court does not therefore agree with the Government that the prohibition actions were so ill-conceived, and their initiation so unreasonably delayed, that the duration of those actions, should be attributed to the applicant ...

150. While the Court therefore considers that the conduct of the applicant contributed somewhat to the delay, that does not explain the overall length of the proceedings against him.

151. As regards the conduct of the relevant authorities, the Court has noted the particular obligation of expedition on the State when criminal proceedings begin a significant period of time after the impugned events ... and the following periods of delay have been assessed in light of that obligation:

(i) While the prosecution requested (on 11 March 2002) the re-entry of the first prohibition action, the first hearing date proposed was March 2003 and, following an adjournment due to the unavailability of a judge, it was not heard by the High Court until 11 July 2003 (16 months)

(ii) An *ex tempore* judgment was delivered by the High Court on 18 July 2003. While the prosecution quickly appealed (August 2003), it could not certify the appeal as ready until the transcript of the judgment was approved by the High Court judge which was done on 17 January 2005 (17 months).

(iii) The appeal was quickly certified as ready (January 2005) but the Supreme Court hearing was not held until 16 February 2006 (13 months). There is no evidence that the applicant's cross-appeal delayed in any way that Supreme Court hearing.

(iv) The High Court refused the second prohibition action in November 2006. The applicant appealed in February 2007 but the Supreme Court did not hear the appeal until January 2008 (11 months).

152. Three of these periods of delay concerned the fixing of hearing dates ... As to this submission of the Government as well as their similar suggestions (not raised as separate remedies) that the applicant should have attempted to expedite the approval of the High Court transcript and the proceedings generally, the Court recalls that, in the Mitchell and Holloway case, the Court found that, even if a system allowed a party to apply to expedite proceedings, this did not exempt the courts from ensuring that the reasonable time requirement of Article 6 was complied with, "as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities". ...

153. In any event, it is not demonstrated that an earlier hearing date before the Supreme Court could have been accorded to a case such as the applicant's, not least given that the above-impugned delays pending a Supreme Court hearing were equal to or less than the average waiting times for such hearings at the time ... As to the delay in approving the transcript by the High Court judge, the Court does not consider it reasonable to suggest that the onus was on the applicant in this instance. While he had carriage of the overall prohibition action, it was the prosecution's appeal which was delayed pending the transcript's approval ... and, furthermore, during the relevant 17-month period he had a High Court order of prohibition in his favour on the basis of a real and serious risk of an unfair trial and it was unrealistic to suggest that he should apply to speed up a prosecution appeal against that order ...

154. In such circumstances, the Court finds that the Government have not provided any or any convincing explanations ... for the above-described delays attributable to the authorities in the prohibition actions, which added to the overall length of the criminal proceedings.

155. As to what was at stake for the applicant, it is noted that the charges against him were serious and that he bore the weight of such charges and of the potential sentences, for approximately 10 years and six months, during which time he had reporting obligations and was frequently required to attend in Dublin before the SCC [Special Criminal Court] ...

156. Having examined all the material and arguments submitted and having regard to its case-law on the subject, the Court considers that ... the overall length of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.

► ***Idalov v. Russia* [GC], 5826/03, 22 May 2012**

187. ... the proceedings against the applicant lasted approximately four years and eleven months, which spanned the investigation stage and consideration of the applicant's case by the courts at two levels of jurisdiction.

188. The Court accepts that the proceedings against the applicant involved a certain degree of complexity. The applicant was charged with abduction, extortion and illegal acquisition and possession of firearms and drugs as part of an organised group. The prosecution was brought against six defendants.

189. As regards the applicant's conduct, the Court notes that out of approximately forty hearings the trial court held, eleven adjournments were attributable to the applicant. On seven occasions either the applicant or his counsel failed to appear in court. In 2003, that is, during the third year of the trial, the applicant's counsel asked for adjournments on three occasions in order to obtain the attendance of additional witnesses. Admittedly, it was in the applicant's best interests to obtain that evidence in order to take full advantage of the resources afforded by national law to ensure his best possible defence in the criminal proceedings. However, the Court is not convinced that the applicant made use of that opportunity with due diligence. There is nothing in the applicant's submissions to explain why he was

unable or unwilling to request the examination of those witnesses at an earlier stage in the proceedings ...

190. As regards the conduct of the authorities, the Court is satisfied that they demonstrated sufficient diligence in handling the proceedings. The investigation stage was completed in one year and eight months. The appeal proceedings lasted approximately six months. The trial hearings were held regularly and the adjournments, owing to the trial judge's conflict of schedule or the witnesses' or other parties' failure to appear, did not have a significantly adverse effect on the length of the proceedings.

191 Making an overall assessment of the complexity of the case, the conduct of the parties and the total length of the proceedings, the Court considers that the latter did not go beyond what may be considered reasonable in this particular case.

192. There has accordingly been no violation of Article 6 § 1 of the Convention.

PROVIDING AN EFFECTIVE REMEDY

► *Kudla v. Poland* [GC], 30210/96, 26 October 2000

156. ... the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time ...

159. The Court notes at the outset that the Government did not claim that there was any specific legal avenue whereby the applicant could complain of the length of the proceedings but submitted that the aggregate of several remedies satisfied the Article 13 requirements. They did not, however, indicate whether and, if so, how the applicant could obtain relief – either preventive or compensatory – by having recourse to those remedies ... It was not suggested that any of the single remedies referred to, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. Nor did the Government supply any example from domestic practice showing that, by using the means in question, it was possible for the applicant to obtain such a relief.

That would in itself demonstrate that the means referred to do not meet the standard of "effectiveness" for the purposes of Article 13 because, as the Court has already said ..., the required remedy must be effective both in law and in practice.

► *Caldas Ramirez de Arrellano v. Spain* (dec.), 68874/01, 28 January 2003

2. ... Having regard to the special nature of the Constitutional Court as the final level of jurisdiction in domestic proceedings, itself the safeguard against possible violations of the fundamental rights laid down in the Constitution, the only possible remedy here is an application for compensation providing the applicant with adequate redress for delays that have already occurred ... In the Government's submission, that remedy is provided for in sections 292 et seq. of the Judicature Act.

... the applicant could, if his application were declared inadmissible by the Court, apply to the Minister of Justice under sections 292 et seq. of the Judicature Act for compensation, with every prospect of success ...

In these circumstances, the Court considers that this part of the application must be dismissed for failure to exhaust domestic remedies ...

► ***Ohlen v. Denmark*, 63214/00, 24 February 2005**

29. In its judgment of 22 May 2003 the High Court stated that upon an overall assessment of the length of the proceedings from [when] the charge was made until passing of the High Court judgment the applicant's right to a trial within a reasonable time pursuant to Article 6 of the Convention had been violated. In addition, taking into account that the City Court completely had exempted the applicant from paying costs, the High Court found that DKK 40,000, in the form of a reduction of the fine constituted an adequate redress for the length of the proceedings, which at that time had lasted almost seven years and nine months ...

30. Since the High Court acknowledged the failure to observe the reasonable time requirement, the applicant's status as a victim depends on whether the redress afforded at domestic level on the basis of the facts about which he complains before the Court was adequate and sufficient having regard to just satisfaction as provided for under Article 41 of the Convention ...

31. Comparing the compensation granted for non-pecuniary damage in the present case with the sums awarded for comparable delays in the Court's case-law, the Court considers that the sum accorded to the applicant cannot be considered as unreasonable ...

33. In these circumstances ... the Court considers that the matter has been resolved within the meaning of Article 37 § 1 (b) ...

► ***Morby v. Luxembourg (dec.)*, 27156/02, 13 November 2002**

According to the Convention institutions' case-law, mitigation of sentence alone does not in principle remedy a failure to comply with the reasonable time requirement contained in Article 6 § 1 of the Convention with regard to criminal proceedings. However, the Convention institutions have accepted that this general rule might be subject to an exception when the national authorities have acknowledged either expressly or in substance, and then afforded redress for, the breach of the Convention ...

... the Court notes that the national judges pointed out that the applicable Article prescribed a penalty of between of eight days and six months' imprisonment and a fine of between 2,600 and 50,000 Luxembourg francs. The applicant having being charged with a plurality of offences, the relevant legislation provided that only the severest penalty could be imposed and that the maximum penalty applicable could even be doubled. After noting that corruption constituted a serious attack on public order, the judges further drew attention to the applicant's persistent criminal intent. They then decided that the sentence to be imposed should be reduced in the light of the failure to comply with the reasonable time requirement. Further, taking into

consideration the fact that the applicant had no criminal record, the judges accordingly imposed a sentence of nine months' imprisonment, suspended in its entirety; given the applicant's financial situation, the fine was set at 2,500 euros. In addition, the court decided that, having regard to the failure to comply with the reasonable time requirement, it was no longer appropriate to punish the applicant's conduct by depriving him of his civil and political rights as provided for in the Criminal Code.

In the light of the above circumstances, the Court is of the opinion that the Luxembourg authorities expressly acknowledged, and then afforded redress for, the violation of Article 6 § 1 of the Convention.

In these circumstances, the applicant can no longer claim to be the victim of a violation of the right to have his case heard within a reasonable time, as guaranteed by Article 6 § 1 of the Convention.

See also CHARGING, PLEA BARGAINING AND DISCONTINUANCE (Discontinuance, A remedy for length of proceedings, p. 195) and DETENTION ON REMAND (Length, Deduction from sentence, p. 126) above.

Chapter 19

Compensation and costs

COMPENSATION

Arrest and detention

Requirement of violation of European Convention

► *N. C. v. Italy* [GC], 24952/94, 18 December 2002

49. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 ...

61. The ... right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions.

No provision

► *Sakik and Others v. Turkey*, 23878/94, 26 November 1997

60. ... the Court notes that there is no example in the case file of any litigant obtaining the compensation referred to in Article 5 § 5 by relying on one of the provisions mentioned by the Government.

With particular reference to section 1 of Law no. 466, the Court notes ... that with the exception of the situation – which did not obtain in the instant case – where a person is not committed for trial, or is acquitted or discharged after standing trial (subsection 6), all the cases in which compensation is payable under the provision concerned require the deprivation of liberty to have been unlawful. But the detention in issue was in accordance with Turkish law, as the Government conceded.

In conclusion, effective enjoyment of the right guaranteed by Article 5 § 5 of the Convention is not ensured with a sufficient degree of certainty ...

► *Caballero v. United Kingdom* [GC], 32819/96, 8 February 2000

18. The applicant ... complained that he did not have an enforceable right to compensation in this respect within the meaning of Article 5 § 5 of the Convention ...

21. The Court accepts the Government's concession that there has been a violation of Article 5 §§ 3 and 5 of the Convention in the present case, with the consequence that it is empowered to make an award of just satisfaction to the applicant under Article 41 ...

Not practicable

► *Chitayev and Chitayev v. Russia*, 59334/00, 18 January 2007

195. The Court considers in this connection that the fact that the judicial system in Chechnya was not functioning until at least November 2000, as acknowledged by the Government, and the fact that, in any event, neither of the decisions ordering the discontinuance of the criminal proceedings against the applicants was final, as well as the fact that the criminal proceedings are still pending, have effectively prevented the applicants from seeking compensation for their detention in the circumstances of the present case.

196. The Court therefore ... finds that there has been a violation of Article 5 § 5 of the Convention as regards the period of the applicants' detention under review.

Refusal based on suspicion

► *Sekanina v. Austria*, 13126/87, 25 August 1993

28. ...The Assize Court sitting at the Linz Regional Court acquitted Mr Sekanina on 30 July 1986 by a judgment which became final ...

29. Notwithstanding this decision, on 10 December 1986 the Linz Regional Court rejected the applicant's claim for compensation, pursuant to section 2(1)(b) of the 1969 Law ... In its view, there remained strong indications of Mr Sekanina's guilt capable of substantiating the suspicions concerning him; it listed them relying on the Assize Court file. The evidence in question could, in its opinion, still constitute an argument for the applicant's guilt. The court inferred from the record of the jury's deliberations that in acquitting the applicant they had given him the benefit of the doubt ...

The Linz Court of Appeal went further in the grounds of its decision of 25 February 1987. It considered that section 2(1)(b) of the 1969 Law, according to which compensation is confined to persons that have been not only acquitted but also cleared of all suspicion, was in conformity with the Austrian Constitution and Article 6 para. 2 ... of the Convention. In this respect it did not regard itself as bound by the Assize Court's acquittal. On the other hand, it referred to its own decision of 30 April 1986 authorising detention on remand for a year ...; it saw this as confirmation of the gravity of the suspicions concerning the applicant. After having drawn up a comprehensive list of items of evidence against Mr Sekanina, in its view not refuted during the trial, and after having carefully examined the statements of various witnesses, it concluded: "The jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of that suspicion's being dispelled" ...

30. Such affirmations – not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations – left open a doubt both as to the applicant's

innocence and as to the correctness of the Assize Court's verdict. Despite the fact that there had been a final decision acquitting Mr Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence.

31. Accordingly, there has been a violation of Article 6 para. 2 ...

► ***Hibbert v. Netherlands (dec.)*, 38087/97, 26 January 1999**

As regards the reasons stated by the Court of Appeal for rejecting the applicant's request under Article 89 of the Code of Criminal Procedure, the Court notes that the Court of Appeal considered that, given the fact that incriminating statements had been made by witnesses as to the applicant's involvement in the punishable facts as charged, his pre-trial detention was fully justified.

The Court is of the opinion that the Court of Appeal's wording can reasonably be interpreted as an indication, as it was required to do in its determination of the applicant's request under Article 89 of the Code of Criminal Procedure for compensation for the time he had spent in pre-trial detention, that there had been reasonable suspicions concerning the applicant. Even if the reference to the findings of the Court of Appeal in the criminal proceedings against the applicant may be regarded as ambiguous or unsatisfactory by the latter, the Court finds that the Court of Appeal confined itself in substance to noting that there had been a "reasonable suspicion" that the applicant had "committed an offence" (Article 5 para. 1 (c) of the Convention).

The Court, therefore, cannot find that the Court of Appeal's decision on the applicant's requests under Article 89 and 591a of the Code of Criminal Procedure respectively offended the presumption of innocence guaranteed to the applicant under Article 6 para. 2 of the Convention.

Requirement to prove innocence

► ***Capeau v. Belgium*, 42914/98, 13 January 2005**

25. The Court notes that the Appeals Board's refusal was based solely on the fact that the applicant had not supported his compensation claim by adducing evidence of his innocence. Although it was founded on section 28(1)(b) of the Law of 13 March 1973, which expressly provides that a person against whom proceedings have been discontinued must establish his innocence by adducing factual evidence or submitting legal argument to that effect, such a requirement, without qualification or reservation, casts doubt on the applicant's innocence. It also allows doubt to attach itself to the correctness of the decisions by the investigating courts, notwithstanding the observation in the Appeals Board's decision that the evidence against the applicant at the time when he appeared before those courts had been judged insufficient to justify committing him for trial. It is true that the voicing of suspicions regarding an

accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation ... and that in Belgian law a discontinuation order does not bar the reopening of a case in the event of new evidence or new developments. However, the burden of proof cannot simply be reversed in compensation proceedings brought following a final decision to discontinue proceedings. Requiring a person to establish his or her innocence, which suggests that the court regards that person as guilty, is unreasonable and discloses an infringement of the presumption of innocence. ...

Requirement to prove non-pecuniary damage

► *Danev v. Bulgaria*, 941/05, 2 September 2010

32. The Court notes that the applicant brought an action against the public prosecutor's office and the investigation service for compensation for the damage sustained as a result of his detention. In the context of these proceedings the applicant obtained an acknowledgment that his detention had been unlawful and an implicit admission of a violation of Article 5 § 1 (c) of the Convention ... Nevertheless, he did not receive any compensation because he had not proved that he had suffered any non-pecuniary damage.

33. The Court observes that this last conclusion of the City of Sofia court seems to be based on two assumptions: firstly, that any non-pecuniary damage, whether the result of a violation of physical integrity or psychological in nature, should be outwardly perceptible; and, secondly, that the adverse effects on a person of unlawful detention end upon release. Since in civil proceedings for damages the burden of proof lies with the plaintiff, the cumulative application of those two principles effectively imposed an obligation on the applicant to prove that his allegations were founded by adducing evidence of outward signs of his physical or psychological suffering during his detention. He obtained the calling and questioning of a witness but that testimony was disregarded because it concerned his condition after his release and was not corroborated by any other evidence.

34. Contrary to the position of the domestic court, the Court considers that such effects on a person's psychological well-being may persist even after his release. The City of Sofia court seems not to have contemplated this possibility. Moreover, it is clear from the grounds of its judgment of 1 September 2004 that the appellate court did not take into consideration the finding of a violation of the applicant's fundamental right to liberty and security or his arguments as to his fragile psychological condition while in detention ... in establishing whether there had been any non-pecuniary damage. The Court considers that the application of a formalistic approach such as that adopted by the domestic court in this case means that the award of any compensation is unlikely in the large number of cases where an unlawful detention lasts a short time and does not result in an objectively perceptible deterioration in the detainee's physical or psychological condition.

35. The Court observes that in its judgment in *Iovchev v. Bulgaria* ... it considered that, as a result of the unduly formalistic approach of the courts in establishing non-pecuniary damage, the action under the State Responsibility for Damage Act

lost much of the remedial efficacy required by Article 13 with respect to the effect on the detainee of the poor conditions of imprisonment. The Court finds that the same approach by the courts deprived the applicant in the present case of the compensation he should have obtained for his unlawful detention ...

37. For these reasons, the Court finds that in the instant case there was a violation of Article 5 § 5 of the Convention.

Refusal without hearing or reasons

► *Göç v. Turkey* [GC], 36590/97, 11 July 2002

50. It notes that the Karşıyaka Assize Court had a discretion as to the amount of compensation to be awarded to the applicant once it had been established that his case came within one of the grounds contained in section 1 of Law no. 466 ... the Karşıyaka Assize Court took note of all the complaints set out in the petition lodged by the applicant's lawyer and had regard to a series of personal factors, namely the financial and social status of the applicant and, in particular, the extent of the emotional suffering which he endured during the period of his detention ...

51. While it is true that the fact of the applicant's detention and the length of that detention as well as his financial and social status could be established on the basis of the report drawn up by the judge rapporteur and without the need to hear the applicant ..., different considerations must apply to assessment of the emotional suffering which the applicant alleged he endured. In the Court's opinion, the applicant should have been afforded an opportunity to explain orally to the Karşıyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety. The essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation, required that he be heard. It cannot be said that these matters are technical in nature and could have been dealt with properly on the basis of the case file alone. On the contrary, the Court considers that the administration of justice and the accountability of the State would have been better served in the applicant's case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public scrutiny. In its view, this factor outweighs the considerations of speed and efficiency on which, according to the Government, Law no. 466 is based.

52. For the above reasons, the Court finds that there were no exceptional circumstances that could justify dispensing with an oral hearing and accordingly Article 6 § 1 of the Convention has been breached.

► *Fedotov v. Russia*, 5140/02, 25 October 2005

86. As the Court established in its decision of 23 November 2004 on the admissibility of the application, the applicant had validly introduced a claim for the damage he incurred as a result of his unlawful detention. However, the domestic courts disregarded it, notwithstanding the oral and written submissions of the applicant and his counsel. What is more, the Basmani District Court made arbitrary findings of fact, stating in its judgment that the applicant "had not actually been taken into custody", despite abundant evidence to the contrary.

87. In these circumstances, the Court finds that the applicant was denied an enforceable right to compensation for unlawful arrest and that there has been a violation of Article 5 § 5 of the Convention.

Assessment

► ***Engel and Others v. Netherlands (Article 50), 5100/71, 23 November 1976***

10. Mr. Engel was deprived of his liberty in conditions at variance with Article 5 para. 1 ... of the Convention and furthermore incompatible, to the extent of between twenty-two and thirty hours ..., with Article 45 of the above-mentioned Act of 27 April 1903. During this period he encountered the disagreeable effects of the regime of strict arrest. He thus suffered moral damage.

In evaluating this damage, the Court cannot overlook the brevity of Mr. Engel's detention. Moreover, he was to a large extent compensated for the damage. In fact, after having been found guilty of the disciplinary offence which had led to his arrest on 20 March 1971, he did not have to serve the two days' strict arrest awarded shortly afterwards for that offence ... On 5 April 1971, his provisional arrest was set off against this penalty by a decision of the complaints officer which the Supreme Military Court confirmed on 23 June 1971 ... Whilst this does not constitute *restitutio in integrum*, it is nevertheless relevant in the context of Article 50 ... Taking these various factors into account, the Court considers that Mr. Engel, in addition to the satisfaction resulting from items 4 and 5 of the operative provisions of the judgment of 8 June 1976, should be afforded a token indemnity of one hundred Dutch guilders (Hfl. 100).

Acquittal/discontinuance

Refusal based on admission of guilt

► ***Aannemersbedrijf Gebroeders Van Leeuwen B.V. v. Netherlands (dec.), 32602/96, 25 January 2000***

1. ... The Court notes at the outset that in itself the refusal to pay compensation for damage caused by public authority in the course of criminal proceedings which are subsequently discontinued does not amount to a penalty or a measure that can be equated with a penalty ... Moreover, neither Article 6 § 2 nor any other provision of the Convention and its Protocols obliges the Contracting States, where a prosecution has been discontinued, to indemnify a person "charged with a criminal offence" for any detriment he may have suffered ...

... the Court notes that the applicant company sued the Netherlands State in tort, claiming compensation for damage caused by measures taken in the course of the criminal proceedings against it. In refusing to award such compensation the Court of Appeal had regard to the unequivocal admission of the use of forged invoices which members of the applicant company's management had made during the criminal investigation. This clear admission of guilt in itself rebutted the presumption of innocence and provides sufficient justification for the Court of Appeal's reliance

on this admission. In the circumstances, therefore, the Court finds no issue under Article 6 § 2 of the Convention.

Refusal based on suspicion

► *O. v. Norway*, 29327/95, 11 February 2003

39. ... It observes that, in its decision of 25 January 1995, the High Court summarised the charges of sexual abuse brought against the applicant in the criminal trial, as well as reiterating the jury's verdict and his acquittal by the judges. Then it went on to examine whether the conditions for awarding compensation under Article 444 were fulfilled. Referring to evidence from the criminal case, the High Court found it probable that the applicant's daughter had been subjected to sexual abuse and, "[c]onsidering the case as a whole, ... [did] not find it shown on the balance of probabilities that [he] did not engage in sexual intercourse with [her]" ... In the view of the Court, the High Court's reasoning clearly amounted to the voicing of suspicion against the applicant regarding the charges of sexual abuse on which he had been acquitted.

40. The Court is mindful of the fact that, in upholding the High Court's decision, the Appeals Leave Committee of the Supreme Court had regard to and quoted its previous interpretation of Article 444 in a 1994 decision, in which it had been held that the refusal of a compensation claim did not undermine or cast doubt on the earlier acquittal ... The Court appreciates that a deliberate effort was made to avoid any conflict with Article 6 § 2 in the interpretation of the statutory provision concerned. However, it is not convinced that, even if presented together with such a cautionary statement, the impugned affirmations were not capable of calling into doubt the correctness of the applicant's acquittal, in a manner incompatible with the presumption of innocence.

41. ... Accordingly, there has been a violation of Article 6 § 2 of the Convention.

► *Puig Panella v. Spain*, 1483/02, 25 April 2006

55. The Court observes that the refusal of the Ministry of Justice was based solely on the lack of evidence of the applicant's non-involvement in the offences of which he had been convicted. It is clear from the grounds of the decision of the Ministry of Justice that the refusal to compensate the applicant was based on his supposed guilt (or lack of "total certainty as to his innocence"). Although it is based on Article 294 § 1 of the LOPJ, which provides that the only persons entitled to compensation are those who have been acquitted or against whom charges have been dropped on the ground that the facts as charged did not exist (objectively and subjectively), such a requirement – applied unreservedly and without qualification – in the circumstances of the case, leaves a lingering doubt as to the applicant's innocence. It is true that the applicant was not required to demonstrate his innocence in the context of his application to the Ministry of Justice or in the subsequent administrative dispute (see *Capeau v. Belgium* ...). However, the decisions of the Ministry and the administrative courts were based on the fact that the Constitutional Court, in its *amparo* judgment, had quashed the convictions because the "presumption of innocence" principle had been violated but did not find that the applicant had not participated in the offences for which he had been prosecuted.

56. ... The Court notes that the applicant, who had not relied upon any specific provision of the said Act in his claim to the Ministry, relied, in his *amparo* appeal, on the impossibility of applying Section 294 as he was complaining of the prison sentence he had served and not of pre-trial detention. It further observes that the Constitutional Court erroneously stated that the applicant's claim had been made under Section 294 of the LOPJ, namely compensation for pre-trial detention. The national authorities appear to have exhibited excessive severity in choosing to apply this Section in view of the fact that the applicant was not complaining of his pre-trial detention and had been neither acquitted nor discharged. It is the application by analogy of this Section, instead of Section 292, which covers more general situations (judicial error or miscarriage of justice), that led the Ministry and the domestic courts to examine whether the applicant's lack of participation had been sufficiently established and, therefore, to reject his application.

57. That reasoning cast doubt on his innocence, despite the judgment of the Constitutional Court allowing his *amparo* appeal and restoring his right to the presumption of innocence. The voicing of suspicions regarding an accused's innocence is conceivable only where the conclusion of criminal proceedings does not result in a decision on the merits of the accusation, but such suspicions may not rightly be relied upon when an acquittal has become final ... This is all the more true in the present case in which the Ministry of Justice based its rejection of the claim for compensation on the lack of total certainty as to the applicant's innocence, despite the judgment of the Constitutional Court restoring his right to the presumption of innocence. In these circumstances, the reasoning of the Ministry of Justice, later upheld by the domestic courts, is incompatible with respect of the presumption of innocence.

58. Moreover, the Court gives weight to the fact that, as the Government acknowledge, the applicant's conviction has remained on his criminal record for more than 13 years, despite having been definitively set aside by the Constitutional Court.

59. Accordingly, there was a violation of Article 6 § 2 of the Convention.

► ***Taliadorou and Stylianou v. Cyprus*, 39627/05, 16 October 2008**

26. The Court notes that the second set of proceedings before the domestic courts was brought by the applicants, who claimed compensation in respect of an annulled administrative decision which had imputed to them responsibility for acts of torture and ordered their dismissal. The administrative decision had been annulled by the Supreme Court because, *inter alia*, it violated the presumption of innocence as guaranteed in the Constitution and Article 6 § 2 of the Convention. Given that the second set of proceedings concerned the claim for compensation as a remedy for an act that ran counter to the guarantee of Article 6 § 2, the Court agrees with the parties that this provision is applicable ... It reiterates in this connection that one of the functions of Article 6 § 2 is to protect an acquitted person's reputation from statements or acts that follow an acquittal which would seem to undermine it.

27. However, the Court notes that the Supreme Court did not make any express or implied indication which undermined the applicants' innocence and acquittal. Although it did reverse the moral damages award made by the District Court, the

Supreme Court did not link that reversal to any suspicion that the applicants had in fact been guilty of the offences of which they had been acquitted, but instead based itself conclusively on the issue of causation ...

28. Accordingly, the Court finds that there has been no violation of Article 6 § 2 of the Convention.

WRONGFUL CONVICTION

► *Barberà, Messegué and Jabardo v. Spain (Article 50), 10588/83, 13 June 1994*

16. ... the applicants were kept in prison as a direct consequence of the trial found by the Court to be in violation of the Convention. Moreover, in the light of the final judgment of the Audiencia Nacional of 30 October 1993 ..., it cannot be assumed that even if the first trial had been conducted in compliance with the Convention the outcome would not have been more favourable to the applicants. In any event, they suffered a real loss of opportunity to defend themselves in accordance with the requirements of Article 6 ... and thereby to secure a more favourable outcome. There was thus, in the opinion of the Court, a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In the nature of things the subsequent release and acquittal of the applicants could not in themselves afford *restitutio in integrum* or complete reparation for damage derived from their detention ...

18. As regards the amounts claimed in respect of loss of earnings and of career prospects, the Court cannot accept the method of calculation put forward by the applicants in 1993 based on allowances claimed in Spain in cases of incapacity for work ..., because such a method has no connection with the circumstances of the case. Despite the lack of supporting documents and the contradictions in the statements made by the applicants regarding their alleged occupations prior to their imprisonment ... the Court considers that it should award them compensation under this head on the basis of the figures submitted by them in 1987.

19. Like the finding of a violation of the Convention by the European Court, the decisions of the Spanish courts subsequent to the principal judgment afforded the applicants a measure of reparation for non-pecuniary damage. They cannot, however, fully redress the damage sustained in this respect.

20. Making an assessment on an equitable basis in accordance with Article 50 ... and having regard to the circumstances referred to above, the Court awards Mr Barberà 8,000,000 pesetas, Mr Messegué 8,000,000 pesetas and Mr Jabardo 4,000,000 pesetas, to cover all the heads of damage claimed.

► *Shilyayev v. Russia, 9647/02, 6 October 2005*

19. The applicant complained that the court award of 20 July 2001 was insufficient. He relied on Article 5 of the Convention and Article 3 of Protocol No. 7 ...

20. The Court recalls that the above provisions provide for a right to compensation of those whose detention was found in breach of one of the paragraphs of Article 5

of the Convention ... and a right to compensation for miscarriages of justice, when an applicant has been convicted of a criminal offence by a final decision and suffered consequential punishment ... These Convention provisions do not however prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach, nor do they actually refer to any specific amounts ...

21. On the facts, the Court observes that the domestic authorities recognised the miscarriage of justice in the applicant's criminal case, quashed his conviction of 24 October 1997, as upheld on appeal on 19 February 1998, as unlawful and granted him damages of RUR 70,000 (~2,740 euros) in this connection. This award does not appear arbitrary or unreasonable as the courts at two instances carefully examined all relevant circumstances of the applicant's personal situation including the nature of the criminal case against him, total length of his detention and personal after-effects and reached reasoned conclusions as to the amount of the award. The applicant was fully able to take part in this procedure and the amount of the award does not appear disproportionate even in the domestic terms.

22. Having regard to the above, the Court considers this part of the application manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

► ***Matveyev v. Russia*, 26601/02, 3 July 2008**

40. ... the applicant was convicted by a final decision of 25 September 1981 and sentenced to two years' imprisonment, which he subsequently served. His conviction was quashed under the supervisory review procedure on 6 October 1999 by the Presidium of the Arkhangelsk Regional Court. Having regard to the Explanatory Report to Article 3 of Protocol No. 7, the Court points out that it is immaterial which procedure was applied by the domestic courts for the purpose of reversing the judgment.

41. The Court further notes that the parties disagreed as to whether the applicant's conviction was reversed on the ground of "a new or newly discovered fact". The applicant argued that Price List no. 125 "Postal Rates and Services", which constituted the basis of the quashing of his conviction by the Presidium of the Arkhangelsk Regional Court on 6 October 1999, had not been available at the time of his conviction either to the parties or to the courts. The Government disagreed and averred that not only had the Price List been available, but it had been expressly referred to in the judgment of the Lomonosovskiy District Court of 11 August 1981.

42. The Court observes that Price List no. 125 "Postal Rates and Services" was referred to by the applicant himself in the proceedings before the Lomonosovskiy District Court. The applicant argued that he could not have used the postal stamp because according to the Price List it had become invalid. The District Court dismissed the applicant's argument, having found that at the time of the theft the applicant had not been aware of the Price List and had had the intent to use the postal stamp unlawfully. It follows that at the time of the proceedings both the District Court and the applicant were aware of the contents of the Price List.

43. The Court further notes that on 6 October 1999 the Presidium of the Arkhangelsk Regional Court quashed the applicant's conviction on the ground that according to the Price List the postal stamp had no longer been valid at the material time and could not have been used to obtain profit unlawfully. Accordingly, the conviction was not quashed with regard to "a new or newly discovered fact", but due to reassessment by the Presidium of the evidence that had been used in the criminal proceedings against the applicant.

44. Having regard to the foregoing and to the Explanatory Report to Article 3 of Protocol No. 7, the Court considers that the conditions of applicability of Article 3 of Protocol No. 7 have not been complied with.

► **Allen v. United Kingdom [GC], 25424/09, 12 July 2013**

105. Having regard to the nature of the Article 6 § 2 guarantee outlined above, the fact that section 133 of the 1988 Act was enacted to comply with the respondent State's obligations under Article 14 § 6 of the ICCPR [International Covenant on Civil and Political Rights], and that it is expressed in terms almost identical to that Article and to Article 3 of Protocol No. 7 to the Convention, does not have the consequence of taking the impugned compensation proceedings outside the scope of applicability of Article 6 § 2, as argued by the Government. The two Articles are concerned with entirely different aspects of the criminal process; there is no suggestion that Article 3 of Protocol No. 7 was intended to extend to a specific situation general guarantees similar to those contained in Article 6 § 2 ... Indeed, Article 7 of Protocol No. 7 clarifies that the provisions of the substantive Articles of the Protocol are to be regarded as additional Articles to the Convention, and that "all the provisions of the Convention shall apply accordingly". Article 3 of Protocol No. 7 cannot therefore be said to constitute a form of *lex specialis* excluding the application of Article 6 § 2 ...

118. The Court observes that the present case does not concern the compliance of the compensation scheme established under section 133 of the 1988 Act with Article 3 of Protocol No. 7, a Protocol which the respondent State has not ratified ...

127. It is relevant to the overall context of the present case that the applicant's conviction was quashed by the CACD [the Court of Appeal Criminal Division] on the ground that it was "unsafe" because new evidence might have affected the jury's decision had it been available at trial ... The CACD did not itself assess all the evidence, in the light of the new evidence, in order to decide whether guilt had been established beyond reasonable doubt. No retrial was ordered as the applicant had already served her sentence of imprisonment by the time her conviction was quashed ... Pursuant to section 2(3) of the Criminal Appeal Act 1968, the quashing of the applicant's conviction resulted in a verdict of acquittal being entered ... However, the applicant's acquittal was not, in the Court's view, an acquittal "on the merits" in a true sense ... In this sense, although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued ...

128. It is also important to draw attention to the fact that section 133 of the 1988 Act required that specified criteria be met before any right to compensation arose. These criteria were, put concisely, that the claimant had previously been convicted;

that she had suffered punishment as a result; that an appeal had been allowed out of time; and that the ground for allowing the appeal was that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice. The criteria reflect, with only minor linguistic changes, the provisions of Article 3 of Protocol No. 7 to the Convention, which must be capable of being read in a manner which is compatible with Article 6 § 2. The Court is accordingly satisfied that there is nothing in these criteria themselves which calls into question the innocence of an acquitted person, and that the legislation itself did not require any assessment of the applicant's criminal guilt.

129. The Court further observes that the possibility for compensation following acquittal in the respondent State is significantly limited by the section 133 criteria. It is clear that an acquittal in the course of an appeal within time would not give rise to any right to compensation under section 133 of the 1998 Act. Similarly, an acquittal on appeal based on inadequate jury directions or the admission of unfair evidence would not satisfy the criteria set out in section 133. It was for the domestic courts to interpret the legislation in order to give effect to the will of the legislature and in doing so they were entitled to conclude that more than an acquittal was required in order for a "miscarriage of justice" to be established, provided always that they did not call into question the applicant's innocence ... What the Court has to assess is whether, having regard to the nature of the task that the domestic courts were required to carry out, and in the context of the judgment quashing the applicant's conviction (see paragraph 127 above), the language they employed was compatible with the presumption of innocence guaranteed by Article 6 § 2.

130. As to the nature of the courts' task, it is clear that the examination of whether the section 133 criteria were satisfied required the domestic courts to refer to the judgment of the CACD quashing the conviction, in order to identify the reasons for the acquittal and the extent to which it could be said that a new fact had shown beyond reasonable doubt that there was a miscarriage of justice. To this extent, the context of the proceedings obliged the High Court and, subsequently, the Court of Appeal to evaluate the judgment of the CACD in the light of the section 133 criteria.

131. Turning to the judgment of the High Court, the Court observes that the judge analysed the findings of the CACD and was of the view that they were not "consistent with the proposition that at the conclusion of a new trial ... a trial judge would have been obliged to direct the jury to acquit the claimant" ... Having examined the previous cases which had come before the courts on the question of section 133 compensation, he considered that it was outwith the language of section 133 to describe a case in which a jury might have reached a different conclusion as showing beyond reasonable doubt that there had been a miscarriage of justice ... In the applicant's case, the medical evidence heard by the CACD and the trial jury demonstrated that there was "powerful evidence" against the applicant, and it would have been for a jury to determine the issue ... He concluded that the CACD had only decided that the new evidence, when taken with the evidence given at trial, "created the possibility" that a jury "might properly acquit" the applicant. This fell well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice in the case ...

132. The Court of Appeal, for its part, also began by referring to the terms of the judgment quashing the conviction. It explained that the CACD had decided that the evidence which was now available “*might*, if it had been heard by the jury, have led to a different result” ... It later said that the decision of the CACD did “not begin to carry the implication” that there was no case for the applicant to answer, and that there was “no basis for saying” on the new evidence that there was no case to go to a jury ...

133. It is true that in discussing whether the facts of the applicant’s case fell within the meaning of “miscarriage of justice”, both the High Court and the Court of Appeal referred to the contrasting interpretations given to that phrase by Lord Bingham and Lord Steyn in the House of Lords in *R (Mullen)*. As Lord Steyn had expressed the view that a miscarriage of justice would only arise where innocence had been established beyond reasonable doubt, there was necessarily some discussion of the matter of innocence and the extent to which a judgment of the CACD quashing a conviction generally demonstrates innocence. Reference was made in this regard to the Explanatory Report to Protocol 7 to the Convention, which explains that the intention of Article 3 of that Protocol was to oblige States to provide compensation only where there was an acknowledgment that the person concerned was “clearly innocent” ... It is wholly understandable that when seeking to identify the meaning of an ambiguous legislative notion such as “miscarriage of justice” that has its origins in provisions figuring in international instruments – in the event, Article 14 § 6 of the ICCPR and Article 3 of Protocol No. 7 to the Convention – national judges should refer to the international case-law on those provisions and to their drafting history setting out the understanding of their drafters. However, the Explanatory Report itself provides that, although intended to facilitate the understanding of the provisions contained in the Protocol, it does not constitute an authoritative interpretation of the text ... Its references to the need to demonstrate innocence must now be considered to have been overtaken by the Court’s intervening case-law on Article 6 § 2. But what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn’s test of demonstrating her innocence. The High Court in particular emphasised that the facts of *R (Mullen)* were far removed from those of the applicant’s case and that the *ratio decidendi* of the decision in *R (Mullen)* did not assist in the resolution of her case ...

134. The Court does not consider that the language used by the domestic courts, when considered in the context of the exercise which they were required to undertake, can be said to have undermined the applicant’s acquittal or to have treated her in a manner inconsistent with her innocence. The courts directed themselves, as they were required to do under section 133 of the 1988 Act, to the need to establish whether there was a “miscarriage of justice”. In assessing whether a “miscarriage of justice” had arisen, the courts did not comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they did not comment on whether the evidence was indicative of the applicant’s guilt or innocence. They merely acknowledged the conclusions of the CACD, which itself was addressing the historical question whether, had the new evidence been available prior to or during the trial, there would nonetheless have been a case for the applicant to answer. They consistently repeated that it would have been for a jury to assess the new evidence had a retrial been ordered ...

135. In this respect, the Court emphasises that pursuant to the law of criminal procedure in England, it is for a jury in a criminal trial on indictment to assess the prosecution evidence and to determine the guilt of the accused. The CACD's role in the applicant's case was to decide whether the conviction was "unsafe", within the meaning of section 2(1)(a) of the Criminal Appeal Act 1968 ...; and not to substitute itself for the jury in deciding whether, on the basis of the evidence now available, the applicant's guilt had been established beyond reasonable doubt. The decision not to order a retrial in the applicant's case spared her the stress and anxiety of undergoing another criminal trial. She did not argue that there ought to have been a retrial. Both the High Court and the Court of Appeal referred extensively to the judgment of the CACD to determine whether a miscarriage of justice had arisen and did not seek to reach any autonomous conclusions on the outcome of the case. They did not question the CACD's conclusion that the conviction was unsafe; nor did they suggest that the CACD had erred in its assessment of the evidence before it. They accepted at face value the findings of the CACD and drew on them, without any modification or re-evaluation, in order to decide whether the section 133 criteria were satisfied.

136. The Court is therefore satisfied that the judgments of the High Court and the Court of Appeal in the applicant's case did not demonstrate a lack of respect for the presumption of innocence which she enjoys in respect of the criminal charge of manslaughter of which she has been acquitted. There has accordingly been no violation of Article 6 § 2 of the Convention.

REIMBURSEMENT OF COSTS

No general right

► *Masson and Van Zon v. Netherlands*, 15346/89, 28 September 1995

49. In view of the status of the Convention within the legal order of the Netherlands, the Court observes firstly that the Convention does not grant to a person "charged with a criminal offence" but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been, or to compensation for lawful restrictions on his liberty. Such a right can be derived neither from Article 6 para. 2 ... nor from any other provision of the Convention or its Protocols. It follows that the question whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law.

Refusal and the presumption of innocence

► *Leutscher v. Netherlands*, 17314/90, 26 March 1996

29. The Court notes that it was common ground that Article 6 para. 2 ... does not confer on a person "charged with a criminal offence" a right to reimbursement of his legal costs where proceedings taken against him are discontinued ...

The Court... would also recall its established case-law to the effect that in itself the refusal to order the reimbursement to the former accused of his necessary costs and expenses following the discontinuation of criminal proceedings against him does not amount to a penalty or a measure that can be equated with a penalty ...

Nevertheless, such a decision may raise an issue under Article 6 para. 2 ... if supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the guilt of the former accused without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence ...

31. Under Article 591a para. 2 CCP [Code of Criminal Procedure] taken together with Article 90 CCP the Court of Appeal was empowered to order that the applicant's costs should be paid out of public funds only if it found that there were "reasons in equity" for such reimbursement. In the exercise of the wide measure of discretion conferred upon it under these provisions, the Court of Appeal was – both under the Convention and under Netherlands law – entitled to take into account the suspicion which still weighed against the applicant as a result of the fact that his conviction had been quashed on appeal only because the prosecution was found to have been time-barred when the case was brought to trial. It made clear that it did so by stating that "neither the file of the criminal investigation nor that relating to the present request [gave] any cause to doubt that this conviction [had been] correct" ...

The Court of Appeal, when applying Article 591a para. 2 CCP, was not called upon to reassess the applicant's guilt or express a view as to whether his conviction would have been upheld on appeal. Nor, when seen in the context of that provision, as it must be, can its decision of 16 March 1990 be construed as a finding to that effect.

32. No violation of Article 6 para. 2 ... can therefore be found on the facts of the present case.

► ***Baars v. Netherlands*, 44320/98, 28 October 2003**

28. The similarity of the present case with the *Lutz* case is that the criminal proceedings in both cases ended without any decision on the merits because the prosecution was time-barred. In the subsequent proceedings in the *Lutz* case concerning reimbursement of costs and expenses, the German first-instance court noted ...:

"that 'as the file [stood], the defendant would most probably have been convicted' ..."

The Court concluded that the German courts thereby meant to indicate, as they were required to do for the purposes of the decision, that there were still strong suspicions concerning the applicant. It added that, even if the terms used might appear ambiguous and unsatisfactory, the national courts had confined themselves in substance to noting the existence of "reasonable suspicion" that the defendant had "committed an offence". On the basis of the evidence, in particular Mr Lutz's earlier statements, the decisions described a "state of suspicion" and did not contain any finding of guilt. In this respect the Court found that there was a contrast with the more substantial, detailed decisions which the Court had considered in the aforementioned *Minelli* case.

29. In the present case, however, the Court of Appeal based its decision not to make any award to the applicant, who had been charged with forgery, on its view that “[the] receipt [had been] forged by the applicant” and enumerated in detail the elements from which this followed.

30. In these circumstances, it cannot be said that the Court of Appeal merely indicated that there were still strong suspicions concerning the applicant.

31. The reasoning of the Court of Appeal amounts in substance to a determination of the applicant’s guilt without the applicant having been “found guilty according to law”. It was based on findings in proceedings against another person, Mr B. The applicant participated in these other proceedings only as a witness, without the protection that Article 6 affords the defence.

32. The Court therefore finds that there has been a violation of Article 6 § 2 of the Convention.

► ***Ashendon and Jones v. United Kingdom, 35730/07,***
13 September 2011

43. The Court also observes that the parties have either relied upon, or sought to distinguish, a number of previous cases against the United Kingdom in which the Court and former Commission considered complaints arising from the refusal to make defendants’ costs orders, applying the provisions of a practice direction in substantially the same terms as that of 2004 ...

49. On the basis of these cases, the Court considers that, in the context of defendants’ costs orders, the Convention organs have consistently applied the following principles. First, it is not the Court’s role to decide whether a defendant’s costs order should have been made in any given case. Second, it is not for the Court to determine whether, in granting or refusing such an order, the trial judge has acted compatibly with the relevant Practice Direction, set out at paragraph 27 above. Third, the Court’s task is to consider whether, in refusing to make an order, the trial judge’s reasons indicate a reliance on suspicions as to the applicant’s innocence after the applicant has been acquitted. Fourth, the Convention organs have found that it is not incompatible with the presumption of innocence for a trial judge to refuse to make an order because he or she considers that the applicant has brought suspicion on himself and misled the prosecution into believing that the case against him or her was stronger than it was in reality. This will also be the case if the applicant brought the prosecution upon himself because he availed himself of the right to silence. Finally, the refusal to make an order does not amount to a penalty for exercising that right ...

50. In applying these principles to Mr Ashendon’s case, the Court agrees with the Government that the trial judge’s reasons were somewhat imprecise. However, their meaning is clear from the context in which they were given. The facts of the case ... clearly show that the trial judge was entitled to find that the first applicant had brought the prosecution on himself. The first applicant had been found half-naked in a state of intoxication with bodily materials of B on him. It was not denied that he had had contact with B or that she had suffered injuries. Nor was it denied that his actions that night were reprehensible. The only issue was whether his actions

amounted to rape or sexual assault. The Court finds nothing in the trial judge's remarks which would indicate a belief that the applicant's actions meant that he was guilty of rape or sexual assault; disapproval by a trial judge of a defendant's conduct does not necessarily mean that the trial judge has formed a view as to whether that conduct amounts to a criminal offence ...

51. Moreover, in this case, the trial judge's remarks must also be seen in the light of his prior exchange with counsel who had conceded that, if the first applicant had been charged with different offences, he would have had to plead guilty. The Court does not understand the trial judge's comments as to B's injuries as reflecting anything other than the concession which had been made by counsel. Finally, the trial judge's reasons for refusing the order must be read alongside his prior direction to the jury that they had to stand back from any feelings of disgust and revulsion and base their verdict on a "proper, logical, objective analysis" of what had happened. This was an entirely fair direction to the jury and, given their decision to acquit the applicant, it must inevitably have carried some weight with them. The direction supports the Court's view that the trial judge, in refusing the defendant's costs order, did not hold lingering suspicions as to the innocence of the applicant.

The Court therefore concludes that there has been no violation of Article 6 § 2 of the Convention in respect of the first applicant ...

52. In Ms Jones' case, the Court notes that the principal issue in the case was the tape recording of a conversation between the applicant and A.R. The second applicant has submitted that she was not to blame for the fact that she could not provide an explanation for that conversation prior to trial and that, as a consequence, she could not be said to have brought the prosecution on herself. However, in the Court's view, the trial judge was the person best placed to evaluate the significance of the tape recording to the prosecution case and whether, on the basis of the evidence led at trial, the applicant had brought the prosecution on herself. He concluded that the tape recording was a "cardinal plank" of the prosecution case and that the second applicant's failure to answer questions allowed the police to believe that the case against her was stronger than it in fact turned out to be. The Court sees no reason to doubt these findings. Moreover, it considers that the trial judge was entitled to treat these issues as distinct from the issue of the applicant's innocence of the offence.

53. In the Court's view, the trial judge's reasons were carefully phrased. He stated that his decision was in no way meant to indicate that she was guilty of the offence. In fact, he went further and stated that she had been rightly acquitted by the jury. Therefore, it cannot be inferred that, in refusing to make the defendant's costs order, the trial judge must have had lingering suspicions as to her guilt.

54. Furthermore, the Court considers that the trial judge was correct to consider that, while the applicant could not be criticised for exercising her right to silence, this was a relevant consideration in deciding whether a defendant's costs order should be made. Despite the applicant's submissions as to the importance of the right to silence, the Court finds no reason to depart from the Commission's findings in *D.F.*, *Byrne* and *Fashanu*, all cited above, that the refusal to make a defendant's costs order does not amount to a penalty for exercising the right to silence. The Court also shares the Commission's view, as expressed in *D.F.*, cited above, that it is inevitable that a

defendant who declines to produce any evidence until trial will incur costs until trial and that those costs will have to be incurred by the defendant.

55. The Court concludes, therefore, that the second applicant's case cannot be distinguished from *D.F., Byrne* and *Fashanu*, all cited above. Accordingly, it finds that there has been no violation of Article 6 § 2 of the Convention in respect of the second applicant.

Refusal where offence contrary to European Convention on Human Rights

► *Wolfmeyer v. Austria*, 5263/03, 26 May 2005

24. The applicant complained about Article 209 of the Criminal Code and about the conduct of criminal proceedings against him under this provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

31. The Court ... observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to being discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention ... and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress ... This is all the more so as the Court itself has awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that the trial during which details of the applicants' most intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives ...

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

Chapter 20

Child-related issues

ARREST AND DETENTION

► *Ichin and Others v. Ukraine*, 28189/04, 21 December 2010

36. The Court notes that the procedure for placement of a minor in a special holding facility is foreseen by Article 7-3 of the Code of Criminal Procedure. From the wording of the said article, as the Government have argued, it appears that the purpose of such detention may correspond to the one described in subparagraph (c) of paragraph 1 of Article 5, namely “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

37. The circumstances of the present case, however, cast doubts as to whether the scope and manner of application of this procedure is sufficiently well-defined so as to avoid arbitrariness. Mr Ichin and Mr Dmitriyev had committed a theft to which they confessed, a few days later, within the framework of the preliminary inquiry. Following this, the investigators instigated criminal proceedings into the crime of theft committed by unknown persons, although the identity of the offenders and their age had been established by that time. Nevertheless, they were summoned to the court as witnesses and the decision to place them in the juvenile holding facility does not appear to be for any of the purposes listed in subparagraph (c) of paragraph 1 of Article 5. The Government suggested that the applicants’ detention had been effected for the purpose of bringing them before the competent legal authority, but it remained without answer which authority had been meant. Furthermore, there were no investigative actions taken in their respect during the detention and the criminal proceedings against them, although the applicants could not be criminally liable ..., were nonetheless introduced twenty days after their release from the holding facility. Therefore, the Court considers that the applicants’ detention did not fall under the permissible exception of Article 5 § 1 (c).

JUDICIAL CONTROL OF ARREST

► *Ipek and Others v. Turkey*, 17019/02, 3 February 2009

36. The Court reiterates that it has held, on many occasions, that the strict time constraint imposed for detention without judicial control is a maximum of four days ... In the instant case the applicants were brought before a judge approximately three days and nine hours after their arrest. As such, the length of the applicants' detention in police custody is, *prima facie*, compatible with the requirements of Article 5 § 3. However, ... the Court considers that the delayed presentation of the applicants to a judge does not appear to have been sufficiently prompt, within the meaning of that provision. Firstly, the Court attaches great importance to the fact that the applicants were minors at the time of their arrest. However, this fact does not appear to have been taken into consideration by the investigative authorities, particularly the prosecutor, who extended the applicants' detention for two additional days. Secondly, these minors were incarcerated for more than three days in the absence of any safeguards – such as access to a lawyer – against possible arbitrary conduct by the State authorities. Finally, during this time, the only investigative measures taken by the police with regard to the applicants appears to have been limited to questioning them on 3 December 2001 – some two days after their arrest and a day before they were brought before a judge. If other investigative measures were undertaken, the Government have failed to indicate them to the Court. In such circumstances, the Court, especially in view of the applicants' young age, finds that none of the arguments put forward, in general terms, by the Government is sufficient to justify their detention in police custody for more than three days, even in the context of terrorist investigations.

37. In these circumstances, the Court finds no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicants before a judge much sooner ...

38. There has therefore been a violation of Article 5 § 3 of the Convention.

DETENTION ON REMAND

► *Assenov v. Bulgaria*, 24760/94, 28 October 1998

155. The Court recalls that on the two occasions when the legality of Mr Assenov's detention was reviewed by a court, his release was refused on the grounds that he was charged with a number of serious crimes and that his criminal activity had been persistent, giving rise to a danger that he would reoffend if released ...

156. ... In these circumstances, the Court considers that the national authorities were not unreasonable in fearing that the applicant might reoffend if released.

157. However, the Court recalls that the applicant was a minor and thus, according to Bulgarian law, should have been detained on remand only in exceptional circumstances ... It was, therefore, more than usually important that the authorities displayed special diligence in ensuring that he was brought to trial within a reasonable time.

The Government have submitted that it took two years for the case to come to trial because it was particularly complex, requiring a lengthy investigation. However, it would appear from the information available to the Court that during one of those years, September 1995 to September 1996, virtually no action was taken in connection with the investigation: no new evidence was collected and Mr Assenov was questioned only once, on 21 March 1996 ... Moreover, given the importance of the right to liberty, and the possibility, for example, of copying the relevant documents rather than sending the original file to the authority concerned on each occasion, the applicant's many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial ...

158. Against this background, the Court finds that Mr Assenov was denied a "trial within a reasonable time", in violation of Article 5 § 3.

► ***Bouamar v. Belgium*, 9106/80, 29 February 1988**

50. ... The Court notes that the confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (d) ... even if it is not in itself such as to provide for the person's "educational supervision". As is apparent from the words "for the purpose of" ("*pour*"), the "detention" referred to in the text is a means of ensuring that the person concerned is placed under "educational supervision", but the placement does not necessarily have to be an immediate one. Just as Article 5 § 1 recognises – in sub-paragraphs (c) and (a) ... – the distinction between pre-trial detention and detention after conviction, so sub-paragraph (d) ... does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.

51. ... the applicant was, as it were, shuttled to and fro between the remand prison at Lantin and his family. In 1980 alone, the juvenile courts ordered his detention nine times and then released him on or before the expiry of the statutory limit of fifteen days; in all, he was thus deprived of his liberty for 119 days during the period of 291 days from 18 January to 4 November 1980 ...

52. ... The Belgian State chose the system of educational supervision with a view to carrying out its policy on juvenile delinquency. Consequently it was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the 1965 Act, in order to be able to satisfy the requirements of Article 5 § 1 (d) ... of the Convention ...

Nothing in the evidence, however, shows that this was the case. At the time of the events in issue, Belgium did not have – at least in the French-speaking region in which the applicant lived – any closed institution able to accommodate highly disturbed juveniles ... The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim ...

53. The Court accordingly concludes that the nine placement orders, taken together, were not compatible with sub-paragraph (d) ... Their fruitless repetition had the

effect of making them less and less “lawful” under sub-paragraph (d) ..., especially as Crown Counsel never instituted criminal proceedings against the applicant in respect of the offences alleged against him.

► ***Nart v. Turkey*, 20817/04, 6 May 2008**

30. ... the Court notes that the period to be taken into consideration began on 28 November 2003 with the applicant’s arrest and ended on 16 January 2004 with his release during the first hearing before the Izmir Juvenile Court. It thus lasted forty eight days.

31. In examining this case, the Court has taken into account the wealth of important international texts referred to above ... and recalls that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.

32. The Court observes that, when the applicant objected to his detention on remand, the Izmir Assize Court rejected his motion on the basis of the contents of the case file, the nature of the offence and the state of evidence ... Although, in general, the expression “the state of evidence” may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it cannot alone justify the length of the detention of which the applicant complains ...

33. It is also noted that, although the applicant’s lawyer brought to the attention of the authorities the fact that the applicant was a minor, it appears that the authorities never took the applicant’s age into consideration when ordering his detention. Furthermore, the case file reveals that, during his detention, the applicant was kept in a prison together with adults ...

34. In the light of the foregoing, and especially having regard to the fact that the applicant was a minor at the time, the Court finds that the length of the applicant’s pre-trial detention contravened Article 5 § 3 of the Convention.

► ***Güveç v. Turkey*, 70337/01, 20 January 2009**

91. ... The applicant was only fifteen years old when he was detained in a prison where he spent the next five years of his life together with adult prisoners. For the first six and a half months of that period he had no access to legal advice. Indeed, as detailed above ..., he did not have adequate legal representation until some five years after he was first detained in prison. These circumstances, coupled with the fact that for a period of eighteen months he was tried for an offence carrying the death penalty, must have created complete uncertainty for the applicant as to his fate.

92. The Court considers that the above-mentioned features of his detention undoubtedly caused the applicant’s psychological problems which, in turn, tragically led to his repeated attempts to take his own life.

93. The Court further considers that the national authorities were not only directly responsible for the applicant’s problems, but also manifestly failed to provide adequate medical care for him. There are no documents in the file to indicate that

the trial court was informed about the applicant's problems and his suicide attempts until the summer of 2000 ... Nor are there any documents in the file to show that the trial court showed any concern for the applicant when he repeatedly failed to turn up for the hearings. In fact, the first time the trial court was informed about the applicant's problems was not by any official responsible for prisoners – such as a prison governor or a prison doctor – all of whom were aware of these problems, but by the applicant's cell-mates ... It was those cell-mates who also forwarded the prison doctor's medical report to the trial court ...

94. According to that report, the prison was not an adequate place for the applicant's treatment; he needed to spend a considerable time in a specialist hospital ... The Court notes with regret that that information provided by the prison doctor did not spur the trial court into action to ensure adequate medical care for the applicant. The only step taken by the trial court was to refer the applicant to a hospital – not for treatment for his medical problems but for a medical examination with a view to establishing whether he had had the necessary criminal capacity (*doli capax*) when he allegedly committed the offence with which he had been charged ...

95. Indeed, as pointed out by the applicant, the trial court not only failed to ensure that he received medical care, but even prevented him and his family from doing so by refusing to release him on bail for an additional period of two and a half months ...

96. At this juncture the Court reiterates that, although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance ... As set out above, the authorities did not acquit themselves of that obligation.

97. It must also be noted that no action appears to have been taken, notwithstanding the applicant's psychological problems and his first suicide attempt, to prevent him from making any further such attempts ...

98. Having regard to the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and, finally, the failure to take steps with a view to preventing his repeated attempts to commit suicide, the Court entertains no doubts that the applicant was subjected to inhuman and degrading treatment. There has accordingly been a violation of Article 3 of the Convention ...

106. The Government argued that there had been a genuine requirement of public interest for the continued detention of the applicant who had been charged with a serious offence. There had also been a high risk of him escaping or destroying the evidence against him ...

108. The Court observes that the Government, beyond arguing that the applicant's detention was justified on account of the offence with which he was charged, did not argue that alternative methods had been considered first and that his detention had been used only as a measure of last resort, in compliance with their obligations under both domestic law and a number of international conventions ... Nor are there any documents in the file to suggest that the trial court, which ordered the

applicant's continued detention on many occasions, at any time displayed concern about the length of the applicant's detention. Indeed, the lack of any such concern by the national authorities in Turkey as regards the detention of minors is evident in the reports of the international organisations cited above ...

109. In at least three judgments concerning Turkey, the Court has expressed its misgivings about the practice of detaining children in pre-trial detention ... and found violations of Article 5 § 3 of the Convention for considerably shorter periods than that spent by the applicant ... In the present case, the applicant was detained from the age of fifteen and was kept in pre-trial detention for a period in excess of four and a half years.

110. In the light of the foregoing, the Court considers that the length of the applicant's detention on remand was excessive and in violation of Article 5 § 3 of the Convention.

INTERROGATION

► *X. v. Federal Republic of Germany (dec.)*, 8819/79, 19 March 1981

... however regrettable and unsuitable the police action in question may have been, it does not in itself amount to inhuman or degrading treatment. Although minors are not criminally responsible before reaching a certain age (usually fourteen), it is justified in the interest of a proper administration of justice and the protection of the rights of others to subject them to investigation measures, such as interrogations by the police, in cases where there is well-founded suspicion of their being involved in activities which would be punishable if they were criminally responsible.

It is of course necessary that interrogations of children be carried out in a manner respecting their age and susceptibility. The present applicant has not alleged any irregularities with regard to the police interrogation. She only complains that she was held for a short time in an unlocked cell. However, there is nothing to show that this particularly affected the applicant. The Commission also takes into account that the applicant was in the company of two fellow pupils ...

... this part of the application is manifestly ill-founded ...

► *Panovits v. Cyprus*, 4268/04, 11 December 2008

84 ... the Court repeats its findings of a violation of the applicant's rights of defence at the pre-trial stage of the proceedings due to the fact that, whilst being a minor, his questioning had taken place in the absence of his guardian and without him being sufficiently informed of his right to receive legal representation or of his right to remain silent. The Court notes that the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's case against him that substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings.

85. The Court notes that in addition to the applicant's confession his conviction was supported by his second statement admitting that he had kicked the victim, a

testimony reporting the applicant's statement that he had been involved in a serious fight with the victim and various testimonies confirming that the applicant had been drinking with the victim on the evening the victim died and that his clothes had been covered in mud in the early hours of the following morning. There was also medical evidence confirming that the cause of the victim's death was multiple and violent blows. While it is not the Court's role to examine whether the evidence in the present case was correctly assessed by the national courts, the Court considers that the conviction was based to a decisive extent on the applicant's confession, corroborated largely by his second statement. It considers that the extent to which the second statement made by the applicant was tainted by the breach of his rights of defence due to the circumstances in which the confession had been taken was not addressed by the trial court and remains unclear. Moreover, the Court observes that having regard to the Assize Court's acceptance of the applicant's first statement, it appears that it would have been futile for him to contest the admissibility of his second statement.

86. In the light of the above considerations, the Court concludes that there has been a violation of Article 6 of the Convention because of the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process and thus irreparably undermined his rights of defence.

► ***Salduz v. Turkey* [GC], 36391/02, 27 November 2008**

See INTERROGATION (Right to assistance of a lawyer), p. 163 and PROOF AND EVIDENCE (Admissibility of evidence, Confessions made without the assistance of a lawyer), p. 283 above

► ***Blokhin v. Russia* [GC], 47152/06, 23 March 2016**

205. The Court observes that it is undisputed that the applicant was taken to the police station without being told why. He also had to wait a certain amount of time before being questioned by a police officer. However, there is no indication that the applicant was in any form or manner informed that he had the right to call his grandfather, a teacher, a lawyer or another person of confidence during this period for them to come and assist him during the questioning. Nor were any steps taken to ensure that legal assistance was provided to him during the questioning. The Government's submission that the applicant's grandfather was present during the questioning remains unsupported by evidence. Moreover, the Court notes that the confession statement signed by the applicant – the probative value of which must be considered to be extremely questionable given his young age and health condition – did not mention the grandfather's presence and was not countersigned by him. The written statement signed by his grandfather on the same day could, as claimed by the applicant, have been signed later, after the applicant had been questioned by the police officer, and thus does not prove his presence during the questioning. In this connection the Court notes that it was marked on the applicant's confession statement that he had been informed of his right not to make self-incriminating statements. However, that document did not mention that the applicant had been informed of his right to have legal counsel or someone else present during the questioning or that any such person had indeed been present.

206. Therefore the Court considers it established that the police did not assist the applicant in obtaining legal representation. Nor was the applicant informed of his right to have a lawyer and his grandfather or a teacher present. This passive approach adopted by the police was clearly not sufficient to fulfil their positive obligation to furnish the applicant, a child, suffering, moreover, from ADHD [attention deficit hyperactivity disorder], with the necessary information enabling him to obtain legal representation ...

207. The fact that the domestic law does not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by the police is not a valid reason for failing to comply with that obligation. The Court has previously found that a systematic restriction on the right of access to legal assistance, on the basis of statutory provisions, is sufficient in itself to constitute a violation of Article 6 (see *Salduz*¹⁸ ...). Moreover, it is contrary to the basic principles set out in international sources according to which a minor should be guaranteed legal, or other appropriate, assistance ...

208. Furthermore, the Court considers that the applicant must have felt intimidated and exposed while being held alone at the police station and questioned in an unfamiliar environment. In fact he retracted the confession immediately when his grandfather came to the police station, and protested his innocence. In this regard, the Court stresses that the confession statement, made in the absence of a lawyer, was not only used against the applicant in the proceedings to place him in the temporary detention centre but actually formed the basis, in combination with the witness statements of S. and his mother, for the domestic courts' finding that his actions contained elements of the criminal offence of extortion, thus providing grounds for his placement in the centre.

209. In view of the above, the Court finds that the absence of legal assistance during the applicant's questioning by the police irretrievably affected his defence rights and undermined the fairness of the proceedings as a whole ...

210. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

RETENTION OF EVIDENCE

See GATHERING EVIDENCE (Retention of evidence after completion of investigation/prosecution), p. 159 above

SECURING A FAIR TRIAL

► *T. v. United Kingdom* [GC], 24724/94, 16 December 1999

86. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance,

18. See INTERROGATION (Right to assistance of a lawyer), p. 163 and PROOF AND EVIDENCE (Admissibility of evidence, Confessions made without the assistance of a lawyer), p. 283 above.

and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence ...

87. ...it is noteworthy that Dr Vizard found in her report of 5 November 1993 that the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had limited his ability to instruct his lawyers and testify adequately in his own defence ... Moreover, the applicant in his memorial states that due to the conditions in which he was put on trial, he was unable to follow the trial or take decisions in his own best interests ...

88. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 § 1 that the applicant was represented by skilled and experienced lawyers. This case is different from that of *Stanford*¹⁹ ..., where the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial, in view of the fact that his counsel, who could hear all that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses. Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.

89. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1.

► ***S. C. v. United Kingdom*, 60958/00, 15 June 2004**

30. ... although the applicant was tried in public ... steps were taken to ensure that the procedure was as informal as possible; for example, the legal professionals did not wear wigs and gowns and the applicant was allowed to sit next to his social worker. In contrast to the situation in *T. ... v. the United Kingdom*, ... the applicant's arrest and trial were not the subject of high levels of public and media interest and animosity and there is no evidence that the atmosphere in the courtroom was particularly tense or intimidating ...

19. See THE TRIAL COURT (The courtroom), p. 222 above.

32. The Court considers it noteworthy, however, that the two experts who assessed the applicant before the hearing formed the view that he had a very low intellectual level for his age ... Dr Brennan ... recommended that the court process should be explained carefully in a manner commensurate with the applicant's learning difficulties.

33. While this appears to have been done, at least by the social worker who was with the applicant in the Crown Court, the former recounts in his statement that "[d]espite my efforts to explain the situation to him [the applicant] did not comprehend the situation he was in" ... Thus, the applicant seems to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, he does not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father.

34. In the light of this evidence, the Court cannot conclude that the applicant was capable of participating effectively in his trial, in the sense set out in paragraph 29 above.

35. The Court considers that, when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.

36. It is true that it was not contended on behalf of the applicant during the domestic proceedings that he was unfit to plead. ... The Court is not, however, convinced, in the circumstances of the present case, that it follows that the applicant was capable of participating effectively in his trial to the extent required by Article 6 § 1 of the Convention.

► **Güveç v. Turkey, 70337/01, 20 January 2009**

125. The applicant ... was arrested on 30 September 1995 and subsequently charged with an offence for which the only punishment foreseen was the death penalty. Despite his very young age, the legislation applicable at the time prevented the applicant from having his trial conducted before a juvenile court ... and from having a lawyer appointed for him by the State ...

126. He was not represented by a lawyer until 18 April 1996, that is some six and a half months after he was arrested. While he remained unrepresented he was questioned by the police, a prosecutor and a duty judge, indicted, and then questioned by the trial court ...

127. Fourteen hearings were held in the course of the first trial and 16 in the retrial. The applicant did not attend at least 14 of those hearings. He claimed that his failure to attend had been due to his health problems. This claim, which is supported by medical evidence ..., was not disputed by the Government. Furthermore, as pointed

out above, the trial court did not entertain any concerns about the applicant's absences from the hearings or take steps to ensure his attendance.

128. In these circumstances the Court cannot consider that the applicant was able to participate effectively in the trial. Furthermore, for the reasons set out below, the Court does not consider that the applicant's inability to participate in his trial was compensated by the fact that he was represented by a lawyer from 18 April 1996 onwards ...

129. The lawyer, who declared during the third hearing, held on 18 April 1996, that she would be representing the applicant from then on, failed to attend 17 of the 25 hearings. In fact, in the course of the retrial this particular lawyer attended only one of the hearings, held on 18 March 1999. During the crucial final stages of the retrial from 18 March 1999 until he was represented by Ms Avcı on 10 October 2002 ...

130. At this juncture the Court reiterates its established case-law according to which the State cannot normally be held responsible for the actions or decisions of an accused person's lawyer ... because the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed ... Nevertheless, in case of a manifest failure by counsel appointed under the legal aid scheme to provide effective representation, Article 6 § 3 (c) of the Convention requires the national authorities to intervene ...

131. In the present case the lawyer representing the applicant was not appointed under the legal aid scheme. Nevertheless, the Court considers that the applicant's young age, the seriousness of the offences with which he was charged, the seemingly contradictory allegations levelled against him by the police and a prosecution witness ..., the manifest failure of his lawyer to represent him properly and, finally, his many absences from the hearings, should have led the trial court to consider that the applicant urgently required adequate legal representation. Indeed, an accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require" ...

132. The Court has had regard to the entirety of the criminal proceedings against the applicant. It considers that the shortcomings highlighted above, including in particular the *de facto* lack of legal assistance for most of the proceedings, exacerbated the consequences of the applicant's inability to participate effectively in his trial and infringed his right to due process.

133. There has, therefore, been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c).

► ***Blokhin v. Russia* [GC], 47152/06, 23 March 2016**

217. The Court has found that the applicant's defence rights were restricted to an extent incompatible with the guarantees provided by Article 6 of the Convention because of the absence of legal assistance during police questioning and the denial of an opportunity to cross-examine the witnesses whose evidence against him had been decisive for the domestic court's decision to place him in the temporary detention centre for juvenile offenders for thirty days.

218. However, the Court considers it important to add, as did the Chamber ..., that the above restrictions were due to the fact that the applicant was under the age of criminal responsibility and therefore fell outside the protection offered by the procedural guarantees provided for by the Code of Criminal Procedure ... Instead, the Minors Act was applicable to the applicant. This Act provided for significantly restricted procedural safeguards ... since it was intended as protective legislation for minors. According to the Court, and as also noted by the League of Human Rights in its submission ..., this is where, as illustrated by [the] present case, the legislature's intention to protect children and ensure their care and treatment comes into conflict with reality and the principles set out in paragraph 196 above, since the child is deprived of his liberty without having the procedural rights to defend himself properly against the imposition of such a harsh measure.

219. In the Court's view, minors, whose cognitive and emotional development in any event requires special consideration, and in particular young children under the age of criminal responsibility, deserve support and assistance to protect their rights when coercive measures are applied in their regard albeit in the guise of educational measures. As is clear from the relevant international materials before the Court ..., this has been established in many international documents. It has also been highlighted by the third party interveners. Thus, the Court is convinced that adequate procedural safeguards must be in place to protect the best interests and well-being of the child, certainly when his or her liberty is at stake. To find otherwise would be to put children at a clear disadvantage compared with adults in the same situation. In this connection, children with disabilities may require additional safeguards to ensure that they are sufficiently protected. The Court would point out that this does not mean, however, that children should be exposed to a fully-fledged criminal trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the Convention on the Rights of the Child.

See also PROOF AND EVIDENCE (Admissibility of evidence, Confessions made without the assistance of a lawyer), p. 283 above

IMPACT OF THE TRIAL PROCESS

► *T. v. United Kingdom* [GC], 24724/94, 16 December 1999

73. The second part of the applicant's complaint under Article 3 concerning the trial relates to the fact that the criminal proceedings took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published ...

76. The Court recognises that the criminal proceedings against the applicant were not motivated by any intention on the part of the State authorities to humiliate him or cause him suffering. Indeed, special measures were taken to modify the Crown Court procedure in order to attenuate the rigours of an adult trial in view of the defendants' young age ...

77. Even if there is evidence that proceedings such as those applied to the applicant could be expected to have a harmful effect on an eleven-year-old child ... the Court

considers that any proceedings or inquiry to determine the circumstances of the acts committed by V. and the applicant, whether such inquiry had been carried out in public or in private, attended by the formality of the Crown Court or informally in the Youth Court, would have provoked in the applicant feelings of guilt, distress, anguish and fear. The evidence of Dr Vizard shows that before the trial commenced T. showed the signs of post-traumatic stress disorder, involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping patterns ... Whilst the public nature of the proceedings may have exacerbated to a certain extent these feelings in the applicant, the Court is not convinced that the particular features of the trial process as applied to him caused, to a significant degree, suffering going beyond that which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following the commission by him of the offence in question ...

78. In conclusion, therefore, the Court does not consider that the applicant's trial gave rise to a violation of Article 3 of the Convention.

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