The right to a fair trial

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

Nuala Mole and Catharina Harby

Human rights handbooks, No. 3

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1. Introduction

This handbook is designed to assist judges of all levels in ensuring that the proceedings over which they preside are conducted in conformity with the obligations under Article 6 of the European Convention on Human Rights.

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

This first section is a general introduction to the principles contained in Article 6, many of which are already reflected in national law and practice, but judges also have the responsibility to ensure that all aspects of the administration of justice are in compliance with Convention standards.

Article 6

Right to a fair trial

1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2 *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3 *Everyone charged with a criminal offence has the following minimum rights:*

a *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusations against him;*

b *to have adequate time and facilities for the preparation of his defence;*

c *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

d *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

e *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

As one can see from the above, Article 6 guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him. The

Court, and previously the Commission, have interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy. In the case of *Delcourt v. Belgium*, the Court stated that

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

The first paragraph of Article 6 applies to both civil and criminal proceedings, but the second and third paragraphs state that they apply only to criminal proceedings. As will be explained later in this handbook, however, they may under certain circumstances apply also to civil proceedings.

As with all articles of the European Convention, Article 6 has been interpreted by the European Court of Human Rights in its case-law.[2] This case-law defines the content of the Convention rights, and the decisions of the Commission and Court will be discussed and analysed in this handbook. A word of warning must however be given about the Article 6 case-law. Since no complaint will be held admissible by the Court unless all domestic remedies have been exhausted,[3] almost all cases alleging violations of Article 6 will have proceeded to the highest national courts before reaching Strasbourg. The Court will frequently find no violation of Article 6 because it considers that the proceedings "*taken as a whole*" were fair, as a higher court was able to rectify the errors of the lower court. Judges sitting in the lower courts may therefore be erroneously persuaded that because a particular procedural defect was not found to be a violation of the Convention by the Strasbourg organs – because it was rectified by a higher court – it complies with Convention standards. Since the judge sitting in the lower court is responsible for ensuring compliance with Article 6 in the proceedings before him, he cannot rely on the possibility that a higher court may rectify the errors.

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

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

3 See Article 35.

2. What is the responsibility of the judge?

The following outline may be helpful for judges presiding over a hearing in order to **ensure that all the guarantees contained in Article 6 are observed**. Every judge should at the outset of the hearing remind himself/herself of the responsibility to ensure that these guarantees are protected, and at the conclusion check that he/she has discharged these duties. Below are some specific examples of the responsibility of the judge, of which details will be provided further on. This issue should, however, be kept in mind during the reading of the complete handbook, since the judge is responsible for all the points raised here.

Particularly in criminal cases, the judge has to **ensure that the defendant is adequately represented**. He/she also has the responsibility of **making proper provision for vulnerable defendants**. The judge may need to **refuse to proceed with the trial** if he/she thinks that legal representation is required but none is available (see further chapter 16).

The judge has the responsibility of **ensuring that the principle of equality of arms is upheld**, which means that all parties must be given a reasonable opportunity to present their case in conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponents. In the case of *Krcmár and others v. the Czech Republic*, the Court stated that

> A *party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance.*[4]

(On the issue of equality of arms, see further chapter 10.)

A further issue is what the judge's responsibility is **if the prosecution does not appear at the hearing**. If the judge rules on the issue based only on the information on the prosecution's file, this is not a direct violation of the Convention, but it is an unsatisfactory practice and could give rise to the following problems:

For example, has the defence had a chance to see all parts of the file? The judge has to make sure that the defendant is informed in detail of the charge against him/her. The judge also has to inform the defence what conclusions he/she is drawing from the prosecution's file.[5] This is particularly so if these are central to the determination in order that there is an opportunity to submit arguments on those inferences. The case of *Pélissier and Sassi v. France*[6] is an example. The applicants in this case had been charged with the offence of "criminal bankruptcy". Argument before the Criminal Court was confined to this offence, and on the prosecu-

4 Krcmár and others v. the Czech Republic, 3 March 2000.

5 See e.g. F. K., T.M. and C.H. v. Austria, Appl. No. 18249/91, where the Commission declared admissible a claim by the applicants under Article 5 (3) that they had not been brought promptly before a judge who was competent to consider their case. The case was later settled. Article 5 (3) reads: *Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

6 Pélissier and Sassi v. France, 25 March 1999.

tor's appeal to the Court of Appeal the applicants were at no stage accused by the judicial authorities of having "aided and abetted" criminal bankruptcy.

The European Court of Human Rights found that the applicants were not aware that the Court of Appeal might return a verdict of aiding and abetting criminal bankruptcy. It further noted that the offence of aiding and abetting criminal bankruptcy differed from the offence of criminal bankruptcy in more than the degree of participation, as the Government had argued. The Court considered that the Court of Appeal, in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, 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.

The Court therefore found a violation of Article 6 (3) *a* and *b* of the Convention (the right to be informed promptly of the accusation and the right to have adequate time and facilities to prepare defence), taken in conjunction with the general right to a fair trial provided by Article 6 (1).

Further issues arise in relation to the question of the responsibility of the judge if the **defendant appears to have been ill-treated whilst in pre-trial detention**. The Court has stated that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other agents of the State, Article 3, read in conjunction with the State's general duty under Article 1 to secure to everyone within their jurisdiction the rights and freedoms in the Convention, requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. If this were not the case, the fundamentally important prohibition of torture would be ineffective in practice and it would be possible for agents of the State to abuse the rights of those within their control with virtual impunity.[7] Further, in *Selmouni v. France*,[8] the Court stated that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. If such explanation is not given, a clear issue arises under Article 3. In connection this issue, one should also bear in mind obligations under other international instruments, such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention states, *inter alia*, that each State shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. This provision allows for no derogation.

The judge has the responsibility to **determine the admissibility of evidence**. The judge must apply the Code of Criminal Procedure on this point in a

7 Assenov and others v. Bulgaria, 28 October 1998, para. 102.

8 Selmouni v. France, 28 July 1999, para. 87.

way which is consistent with Convention case-law. Issues such as the use of police informers or "agents provocateurs" will require particular attention as well as the concealment of information on the ground of state security.

The judge has the responsibility to **ensure that adequate facilities for interpretation are provided** (see further chapter 18).

The judge has a duty to ensure that in order to **maintain the presumption of innocence**, he/she may have to issue the appropriate order to avoid adverse press coverage. However, rather than excluding the press completely, the judge should make clear what the press can and cannot report on (see further on this issue chapter 6).

Finally, the judge may also have a responsibility in relation to **the execution of the judgment**. The state has a responsibility to ensure that judgments are executed. If no other officials of the justice system have been charged with this specific responsibility, it will remain with the judge.

3. At what stage of the proceedings does Article 6 apply?

The guarantees provided for in Article 6 apply not only to the court proceedings, but also to the stages which both **precede** and **follow** them.

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

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

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

Even if Article 6 does not provide for a right of appeal, the Court has stated in its case-law that when a State does provide in its domestic law for such a right of appeal, these proceedings are **covered by the guarantees in Article 6**.[12] The way in which the guarantees apply must, however, depend on the special features of such proceedings. According to the Court's case-law, account must be taken of the entirety of the proceedings conducted in the domestic legal order, the functions in law and practice of the appellate body, and the powers and the manner in which the interests of the parties are presented and protected.[13] Therefore, there is no right as such to any particular kind of appeal or manner of dealing with appeals.

The Court has also stated that Article 6 applies to proceedings before a **constitutional court** if the outcome of these proceedings is directly decisive for a civil right or obligation.[14]

Article 6 also covers post-hearing procedures such as the **execution** of a judgment. The Court held in *Hornsby v. Greece*[15] that the right to court as covered by Article 6 would be illusionary if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.

It is clear that Article 6 covers the proceedings as a whole. The Court has stated that the intervention of the legislature to determine the outcome of the proceedings by passing a law may violate the principle of equality of arms.[16]

9 Imbroscia v. Switzerland, 24 November 1993, para. 36.
10 See below, chapter 5, for an explanation of the term *charge*.
11 See e.g. Johansen v. Norway, 27 June 1996.
12 Delcourt v. Belgium, 17 January 1970, para. 25.
13 Monnell and Morris v. The United Kingdom, 2 March 1987, para. 56.
14 Kraska v. Switzerland, 19 April 1993, para. 26.
15 Hornsby v. Greece, 19 March 1997, para. 40.
16 Stran Greek Refineries v. Greece, 9 December 1994, paras. 46-49. For more about the principle of equality of arms, see further below, chapter 10.

4. What are civil rights and obligations?

Article 6 guarantees everyone a right to a fair hearing in the determination of his/her civil rights and obligations. From the wording of this article, it is clear that it does not cover all proceedings that an individual might be a party to, but is limited to those concerning civil rights and obligations. It is therefore important to establish the meaning of this phrase.

There is substantial case-law by the Court and the Commission as to what is and what is not a civil right or obligation. The interpretation of the phrase by the Convention organs has been progressive. Matters which were once considered outside the scope of Article 6, such as social security, now generally fall within the remit of what are civil rights and obligations.

The Court has made it clear that the concept of civil rights and obligations is autonomous and cannot be interpreted solely by reference to the domestic law of the respondent State.[17] However, the Court has refrained from formulating any abstract definition of the phrase, apart from distinguishing between private and public law. The Court has instead ruled on the particular facts of each case.

There are, though, certain general guidelines that can be drawn from the Court's case-law.

Firstly, in ascertaining whether a case concerns the determination of a civil right, **only the character of the right** at issue is relevant.[18] As the Court stated in the case of Ringeisen v. Austria,

> *The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.*[19]

Accordingly, how the right or obligation is characterised in domestic law is not decisive. This guideline is specifically important for cases involving relations between an individual and the state. In such a situation, the Court has stated that whether the public authority in question had acted as a private person or in its sovereign capacity is not conclusive.[20] The key point in determining whether Article 6 is applicable or not is **whether the outcome of the proceedings is decisive for private law rights and obligations**.[21]

Secondly, any uniform European notion as to the nature of the right should be taken into consideration.[22]

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

17 See e.g. Ringeisen v. Austria, 16 July 1971, para. 94, and König v. the Federal Republic of Germany, 28 June 1978, para. 88.
18 König v. the Federal Republic of Germany, 28 June 1978, para. 90.
19 Ringeisen v. Austria, 16 July 1971, para. 94.
20 König v. the Federal Republic of Germany, 28 June 1978, para. 90.
21 H v. France, 24 October 1989, para. 47.
22 Feldbrugge v. the Netherlands, 29 May 1986, para. 29.

Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned.[23]

The Court stated in the case of *Osman v. the United Kingdom*[24] that where a general right exists in national law, a Contracting State cannot avoid the application of the fair trial guarantees in Article 6 where its courts declined to accord that right in a particular case.

As stated above, the Court has taken the approach to decide each case on its own particular circumstances. Examples of situations which the Court has found involved a civil right or obligation follow.

Civil rights or obligations

- The Court has first and foremost held that the rights and obligations of private persons in their relations *inter se* are in all cases civil rights and obligations. The rights of private persons in their relations between themselves, in for instance contract law,[25] commercial law,[26] the law of tort,[27] family law,[28] employment law[29] and the law of property[30] are always civil.
- As regards the situation where a case involves the relationship between an individual and the State, the area is more problematic. The Court has recognised a number of such rights and obligations as being civil. Property is one area where the Court has held Article 6 to be applicable. In those stages in expropriation, consolidation and planning proceedings, and procedures concerning building permits and other real-estate permits, which have direct consequences for the right of ownership with respect to the property involved,[31] and also more general proceedings where the outcome has an impact of the use or the enjoyment of property,[32] the fair hearing guarantee applies.
- Article 6 also covers the right to engage in commercial activity. Cases in this area have involved the withdrawal of an alcohol licence from a restaurant,[33] the licence to run a medical clinic[34] and to grant permission to run a private school.[35] The right to practise a profession such as medicine or law is also covered by Article 6.[36]
- The Court has further held that in proceedings where rights and obligations concerning family law are at issue, Article 6 applies. Examples in this area are decisions to place children in care,[37] concerning parental access to children,[38] adoption[39] or fostering.[40]
- As mentioned above, in its earlier case-law the Court held that proceedings concerning welfare benefits were not covered by Article 6. However, the Court has now made clear that Article 6 covers proceedings in which a decision is taken

23 König v. the Federal Republic of Germany, 28 June 1978, para. 89.
24 Osman v. the United Kingdom, 28 October 1998.
25 Ringeisen v. Austria, 16 July 1971.
26 Edificaciones March Gallego S.A. v. Spain, 19 February 1998.
27 Axen v. the Federal Republic of Germany, 8 December 1983, and Golder v. the United Kingdom, 21 February 1975.
28 Airey v. Ireland, 9 October 1979, and Rasmussen v. Denmark, 28 November 1984.
29 Buchholz v. the Federal Republic of Germany, 6 May 1981.
30 Pretto v. Italy, 8 December 1983.
31 See e.g. Sporrong and Lönnroth v. Sweden, 23 September 1982, Poiss v. Austria, 23 April 1987, Bodén v. Sweden, 27 October 1987, Håkansson and Sturesson v. Sweden, 21 February 1990, Mats Jacobsson v. Sweden, 28 June 1990, and Ruiz-Mateos v. Spain, 12 September 1993.
32 E.g. Oerlamans v. the

Netherlands, 27 November 1991 and De Geoffre de la Pradelle v. France, 16 December 1992.

33 Tre Traktörer v. Sweden, 7 July 1989.

34 König v. the Federal Republic of Germany, 28 June 1978.

35 Jordebro Foundation v. Sweden, 6 March 1987, Commission Report, 51 DR 148.

36 König v. the Federal Republic of Germany, 28 June 1978, and H v. Belgium, 30 November 1987.

37 Olsson v. Sweden, 24 March 1988.

38 W. v. the United Kingdom, 8 July 1987.

39 Keegan v. Ireland, 26 May 1994.

40 Eriksson v. Sweden, 22 June 1989.

41 Feldbrugge v. the Netherlands, 29 May 1986.

42 Salesi v. Italy, 26 February 1993.

43 Lombardo v. Italy, 26 November 1992.

44 Schuler-Zgraggen v. Switzerland, 24 June 1993, para. 46.

45 Schouten and Meldrum v. the Netherlands, 9 December 1994.

on entitlement, under a social security scheme, to health insurance benefits,[41] to welfare (disability) allowances,[42] and to State pensions.[43] In the case of *Schuler-Zgraggen v. Switzerland*, which concerned invalidity pensions, the Court stated in general that "*... the development in the law... and the principle of equality of treatment warrant taking the view that today the general rule is that* Article 6 (1) *does apply in the field of social insurance, including even welfare assistance*".[44] Article 6 further covers proceedings in which a decision is taken on the obligation to pay contributions under a social security scheme.[45]

- The guarantee in Article 6 applies to proceedings against the public administration concerning contracts,[46] damages in administrative proceedings[47] or in criminal proceedings.[48] It applies to proceedings where a claim is made for compensation for unlawful detention under Article 5 (5) following acquittal in criminal proceedings.[49] The right to recover monies paid in tax is also covered by Article 6.[50]
- Further, an individual's right to respect for his reputation by a private person is considered to be a civil right.[51]
- Finally, the Court has held that where the outcome of constitutional or public law proceedings may be decisive for civil rights and obligations, these proceedings are covered by the fair trial guarantee in Article 6.[52]

Not civil rights and obligations

In accordance with the Commission's and the Court's approach to rule on each case on its particular circumstances, the Strasbourg organs have also declared certain areas of law as **not** falling within the remit of Article 6 (1). This means that claims relating to disputes over a right contained in the Convention will not automatically attract the protection of Article 6. However, Article 13 (the right to an effective remedy) will apply, and this may require a remedy or procedural safeguards akin to those found in Article 6 (1). The following are examples of issues that are **not** regarded as civil rights and obligations.

- General taxation issues and taxation assessments.[53]
- Matters of immigration and nationality.[54]
- Liability for military service.[55]
- Cases concerning the reporting of court proceedings. An example is the case *of Atkinson Crook and the Independent v. the United Kingdom*[56] which concerned three applicants, two journalists and one newspaper who complained that their Article 6 right of "access to court" had been violated because they could not challenge a decision to hold sentencing proceedings in camera in a case which they wanted to report.

The Commission held that there was no indication that the applicants enjoyed a "civil right" under domestic law to report on the sentencing proceedings, and accordingly found that the applicants' complaints did not involve a civil right or obligation within the meaning of Article 6.

- The right to stand for public office.[57]
- The right to state education.[58]
- The refusal to issue a passport.[59]
- Issues concerning legal aid in civil cases.[60]
- The right to State medical treatment.[61]
- The unilateral decision of the State to compensate the victims of a natural disaster.[62]
- Applications for patents.[63]
- Disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law, e.g. the armed forces or the police.[64]

46 Philis v. Greece, 27 August 1991.
47 See e.g. Editions Périscope v. France, 26 March 1992, Barraona v. Portugal, 8 July 1987, and X v. France, 3 March 1992.
48 Moreira de Azevedo v. Portugal, 23 October 1990.
49 Georgiadis v. Greece, 29 May 1997.
50 National & Provincial Building Society and others v. the United Kingdom, 23 October 1997.
51 See e.g. Fayed v. the United Kingdom, 21 September 1994.
52 Ruiz-Mateos v. Spain, 12 September 1993.
53 See e.g. X v. France, Appl. No. 9908/82 (1983), 32 DR 266. See however footnote 32 above.
54 P v. the United Kingdom, Appl. No. 13162/87 (1987), 54 DR 211 and S. v. Switzerland, Appl. No. 13325/87 (1988), 59 DR 256.
55 Nicolussi v. Austria, Appl. No. 11734/85 (1987), 52 DR 266.
56 Atkinson Crook and The Independent v. the United Kingdom, Appl. No.13366/87 (1990), 67 DR 244.
57 Habsburg-Lothringen v. Austria, Appl. No. 15344/89 (1989), 64 DR 210.
58 Simpson v. the United Kingdom, Appl. No. 14688/89 (1989), 64 DR 188.
59 Peltonen v. Finland, Appl. No. 19583/92 (1995), 80-A DR 38.
60 X v. the Federal Republic of Germany, Appl. No. 3925/69 (1974), 32 CD 123.
61 L v. Sweden, Appl. No. 10801/84 (1978), 61 DR 62.
62 Nordh and others v. Sweden, Appl. No. 14225/88 (1990), 69 DR 223.
63 X v. Austria, Appl. No. 7830/77 (1978), 14 DR 200. Disputes over ownership of patents have, however, been held to be civil rights. (British American Tobacco v the Netherlands, Appl. No. 19589/92, 20 November 1995).
64 Pellegrin v. France, 8 December 1999.

5. What is a criminal charge?

Meaning of "charge"

Article 6 also guarantees a fair trial in the determination of a criminal charge against a person. What is then meant by a "criminal charge"?

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

> *the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence,*
>
> or, where
>
> *the situation of the [suspect] has been substantially affected.*[65]

In the above mentioned case, following a report that the applicant had breached certain price regulations, a prosecutor ordered the provisional closure of his shop. Within the meaning of Belgium law, criminal proceedings were not instituted since the applicant accepted a settlement offer. The Court nevertheless considered that the applicant had been under a criminal charge.

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

- When a person's arrest for a criminal offence is ordered.[66]
- When a person is officially informed of the prosecution against him.[67]
- When authorities investigating custom offences require a person to produce evidence and freeze his bank account.[68]
- When a person has appointed a defence lawyer after the opening of a file by the public prosecutor's office following a police report against him.[69]

Meaning of "criminal"

As the Court stated in the case of *Engel and others v. the Netherlands*[70] State parties are free to designate matters in their domestic law as either criminal, disciplinary or administrative, as long as this distinction does not in itself contravene the Convention. The normal exercise of Convention rights, for example freedom of speech or freedom of expression, cannot be a criminal offence.

65 Deweer v. Belgium, 27 February 1980, paras. 42, 44 and 46.
66 Wemhoff v. the Federal Republic of Germany, 27 June 1968.
67 Neumeister v. Austria, 27 June 1986.
68 Funke v. France, 25 February 1993.
69 Angelucci v. Italy, 19 February 1991.
70 Engel and others v. the Netherlands, 8 June 1976, para. 81.

In this case, the Court **established criteria** for deciding whether a charge is "criminal" in the sense of Article 6 or not. These principles have been confirmed in later case-law.

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

Domestic classification

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

> *If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.*[71]

Nature of the offence

There are two subcriteria under this heading: A – the scope of the violated norm and B – the purpose of the penalty.

A – The scope of the violated norm

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

> *Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct. Furthermore, in the great majority of the Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and punishable under a variety of provisions. As persons who above all others are bound by the confidentiality of*

71 Engel and others v. the Netherlands, 8 June 1976, para. 81.

an investigation, judges, lawyers and all those closely associated with the functioning of the courts are liable in such an event, independently of any criminal sanctions, to disciplinary measures on account of their profession. The parties, on the other hand, only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system. As Article 185, however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a "criminal" one for the purposes of the second criterion.[72]

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

Similarly, in the case of *Demicoli v. Malta*,[73] which concerned a journalist who published an article severely criticising two members of parliament, the breach of privilege proceedings against him was not considered a matter of internal parliamentary discipline, since the relevant provision potentially affected the whole population.

However, in the case of *Ravnsborg v. Sweden*,[74] the Court noted that the fines imposed were for statements the applicant had made as a party to court proceedings. It held that measure taken to ensure orderly conduct of court procedures were more akin to disciplinary sanctions than criminal charges. Article 6 was therefore held not to be applicable.

72 Weber v. Switzerland, 22 May 1990, para. 33.
73 Demicoli v. Malta, 27 August 1991.
74 Ravnsborg v. Sweden, 21 February 1994.
75 Öztürk v. the Federal Republic of Germany, 21 February 1984.

B – The purpose of the penalty

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

In the case of *Öztürk v. the Federal Republic of Germany*,[75] the Court considered a case concerning careless driving which was decriminalised in Germany. However, the Court made clear that it was still "criminal" under Article 6. The norm still had the characteristics that were the hallmark of a criminal offence. It was of general application as it applied to all "road users" and not a particular group (see above), and carried out with a sanction (a fine) of a **punitive and deterrent kind**. The Court also noted that the great majority of State Parties treated minor road traffic offences as criminal.

The nature and severity of the penalty

This heading should not be confused with the purpose of the penalty (see above). If the purpose of the penalty does not make Article 6 applicable, the Court will then have to look at the nature and severity which can render the fair trial guarantee applicable.

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

in a society subscribing to the rule of law, there belong to the "criminal" sphere deprivation of liberty liable to be imposed as a punishment, except those which by

their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.[76]

In *Benham v. the United Kingdom*, the Court held that "*where deprivation of liberty is at stake, the interests of justice in principle call for legal representation*".[77]

In *Campbell and Fell v. the United Kingdom*,[78] the Court declared that loss of remission of almost three years, even though in English law this was a privilege rather than a right, was to be taken into account since it had the effect of causing the detention to continue after the point where the prisoner could expect to be released.

As indicated in the quote from *Engel and others v. the Netherlands* above, not every deprivation of liberty makes Article 6 applicable. The Court has held that the duration of a prison sentence of two days was insufficient for it to be regarded as a criminal sentence.

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

When the penalty in question is not imprisonment or threat of imprisonment but **fines**, the Court gives consideration to whether they are intended as pecuniary compensation for damage or essentially as a punishment to deter re-offending. Only in case of the latter will they be considered as belonging to the criminal sphere.[79]

76 Engel and others v. the Netherlands, 8 June 1976, para. 82.
77 Benham v. the United Kingdom, 10 June 1996, para. 61
78 Campbell and Fell v. the United Kingdom, 28 June 1984, para. 72.
79 E.g. Bendenoun v. France, 24 February 1994.

6. What does the right to a public hearing incorporate?

Article 6 guarantees to everyone a public hearing in the determination of his civil rights and obligations or of any criminal charge against him. Article 6 further states that the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

> *The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.*[80]

A public hearing is generally needed to satisfy the requirements of Article 6 (1) before courts of first instance or only instance. However, in technical matters a public hearing may sometimes not be required.[81]

If a public hearing is not held in first instance, this can be **cured** by the holding of a public hearing at a higher instance. However, if the appeal court does not consider the merits of the case or is not competent to deal with all aspects of the matter, there is a violation of Article 6. In the case of *Diennet v. France*,[82] the Court held that where there are had been no public hearing at a disciplinary body, this was not cured by the fact that the medical appeal body held its hearing in public since it was not regarded as a judicial body with full jurisdiction, in particular, it did not have the power to assess whether the penalty in question was proportionate to the misconduct. It will require **exceptional reasons** to justify that no public hearing is held if there has not been one at the first instance.[83]

The right to a public hearing generally includes a right to **an oral hearing**, if there are not any exceptional circumstances.[84]

There is no general requirement for an oral hearing at the appeal court. In e.g. the case of *Axen v. the Federal Republic of Germany*,[85] the Court held that in criminal cases an oral hearing was unnecessary when the appeal court in question dismissed the appeal solely on grounds of law. However, where the

80 Axen v. the Federal Republic of Germany, 8 December 1983, para. 25.
81 Schuler-Zgraggen v. Switzerland, 24 June 1993, para. 58 – the applicant's right to invalidity pension.
82 Diennet v. France, 26 September 1995, para. 34.
83 Stallinger and Kuso v. Austria, 23 April 1997, para. 51.
84 Fischer v. Austria, 26 April 1995, para. 44.
85 Axen v. the Federal Republic of Germany, 8 December 1983, para. 28.

appeal court has to look at facts and law, and decide on the guilt or innocence of the person charged, an oral hearing is necessary.[86] In civil cases, oral hearing at appeal level has been held to be unnecessary. In the case of K *v. Switzerland*,[87] the applicant was involved in lengthy proceedings with a firm he had contracted to do extension work on his house. The first instance court gave judgment against the applicant in favour of the firm, and the Court of Appeal confirmed this decision. The applicant then appealed to the Federal Court, that rejected the appeal without a hearing and without asking for written observations.

The Commission stated that

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

Regarding this issue, see further below chapter 10 under Fair hearing – right to a hearing in the presence of the accused.

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

> *admittedly neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public... However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest.*[88]

In the case of *Deweer v. Belgium*,[89] the applicant had accepted an out of court settlement of a criminal case by payment of a fine. He would otherwise have had to face the closure of his business pending criminal proceedings. The Court held that the waiver of the hearing, i.e. the applicant accepting to pay the fine, had been tainted by constraint and this amounted to a violation of Article 6 (1).

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

The Court has stated that prison disciplinary hearings can be held in private. In the case of *Campbell and Fell v. the United Kingdom*,[90] the Court declared that consideration must be given to the public order and security problems that would be involved if these proceedings were conducted in public. This would impose a disproportionate burden on the authorities of the State.

The Court has held that although a complete ban can not be justified, professional disciplinary proceedings may be held in private depending on the circumstances. Factors that should be taken into account when deciding if a public hearing is necessary are consideration for professional secrecy and the private lives of clients or patients.[91]

In B. *v. the United Kingdom*[92] the Court declared

86 Ekbatani v. Sweden, 26 May 1988, paras. 32-33.
87 See e.g. K v. Switzerland, 41 DR 242.
88 Håkansson and Sturesson v. Sweden, 21 February 1990, para. 66.
89 Deweer v. Belgium, 27 February 1980, paras. 51-54.
90 Campbell and Fell v. the United Kingdom, 28 June 1984, para. 87.
91 Albert and Le Compte v. Belgium, 10 February 1983, para. 34, and H v. Belgium, 30 November 1987, para. 54.
92 B. v. the United Kingdom, decision of 14 September 1999.

admissible a case concerning a rule which provided that all cases involving child custody in some court proceedings, excluded both the press and the public, whereas similar proceedings involving children in other courts admitted both the press and some members of the public such as close family who were not parties. In its judgment, delivered on 24 April 2001, the Court found that there had been no violation.

7. What is meant by "pronounced publicly"?

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

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

> *it considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of* Article 6 (1).[93]

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

Further, the Court held in *Axen v. the Federal Republic of Germany*[94] that public oral delivery of a judgment of the Supreme Court was unnecessary given that the judgments of the lower courts had been pronounced publicly.

Also, in the *Sutter v. Switzerland*[95] case, the Court held that public delivery of a decision of an appeal military court was not necessary, as public access to that decision was ensured by other means, especially the possibility of seeking a copy of the judgment from the court registry and its subsequent publication in an official collection of case-law.

The above mentioned cases all concerned judgments from hearings in higher instances of the judicial system, and the Court held that there was no violation in these cases. However, in the cases of *Werner v. Austria*[96] and *Szucs v. Austria*,[97] where neither was judgment given in public by the courts of first instance and the courts of appeal, nor were the full texts of their judgments openly available to the public in their registries, and access was limited to those with a "legitimate interest", the Court found that there had been a violation of Article 6.

The Court also found a violation in *Campbell and Fell v. the United Kingdom*,[98] where in prison disciplinary hearings the Board of Visitors did not pronounce their judgment publicly and also took no steps to make the decision public.

93 Pretto and others v. Italy, 8 December 1983, para. 26.
94 Axen v. the Federal Republic of Germany, 29 June 1982, para. 32.
95 Sutter v. Switzerland, 22 February 1984, para. 34.
96 Werner v. Austria, 24 November 1997.
97 Szucs v. Austria, 24 November 1997.
98 Campbell and Fell v. the United Kingdom, 28 June 1984, para. 92.

99 Stögmüller v. Austria, 10 November 1969, para. 5.
100 H v. France, 24 October 1989, para. 58.
101 Scopelliti v. Italy, 23 November 1993, para. 18, and Deweer v. Belgium, 27 February 1980, para. 42.
102 See e.g. Scopelliti v. Italy, 23 November 1993, para. 18 and B v. Austria, 28 March 1990, para. 48.
103 Proszak v. Poland, 16 December 1997, paras. 30-31.
104 See e.g. Buchholz v. the Federal Republic of Germany, 6 May 1981, para. 49.
105 See Katte Klitsche de la Grange v. Italy, 27 October 1994, para. 62, where the case would have important repercussions on national case-law and environmental law.
106 Triggiani v. Italy, 19 February 1991, para. 17.
107 Angelucci v. Italy, 19 February 1991, para. 15 and Andreucci v. Italy, 27 February 1992, para. 17.
108 See e.g. Manzoni v. Italy, 19 February 1991, para. 18.
109 Diana v. Italy, 27 February 1992, para. 17.

8. What is the meaning of the reasonable time guarantee?

Article 6 guarantees to everyone a hearing within a reasonable time. The Court has stated that the purpose of this guarantee is to protect "*all parties to court proceedings... against excessive procedural delays*".[99] The guarantee further "*underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility*".[100] The meaning of the reasonable time requirement is therefore to guarantee that within a reasonable time and by means of a judicial decision, an end is put to the insecurity into which a person finds himself/herself as to his/her civil law position or on account of a criminal charge against him/her: this is in the interest of the person in question as well as of legal certainty.

The **time** to be taken into consideration **starts running** with the institution of proceedings in civil cases, and in criminal cases with the charge.[101] Time **ceases to run** when the proceedings have concluded at the highest possible instance, i.e. when the determination becomes final.[102] The Court will examine the length of proceedings from the date on which a Contracting State recognised the right to individual petition but will take into account the state and progress of the case at that date.[103]

The Court has established in its case-law that when assessing whether a length of time can be considered reasonable, the following factors should be taken into account: the complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant.[104]

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

Complexity of the case

All aspects of the case are relevant in assessing whether it is complex. The complexity may concern questions of fact as well as legal issues.[105] The Court has attached importance to e.g. the nature of the facts that are to be established,[106] the number of accused persons and witnesses,[107] international elements,[108] the joinder of the case to other cases,[109] and the intervention of other persons in the procedure.[110]

A case that is very complex may sometimes justify long proceedings. For example, in the case of *Boddaert v. Belgium*,[111] six years and three months was not considered unreasonable by the Court since it

concerned a difficult murder enquiry and the parallel progression of two cases. However, even in very complex cases unreasonable delays can occur. In the case of *Ferantelli and Santangelo v. Italy*[112] the Court held that sixteen years was unreasonable in the case, which concerned a complex, difficult murder trial and which involved sensitive problems of dealing with juveniles.

The conduct of the applicant

If the applicant has caused a delay, this obviously weakens his complaint. However, an applicant can not have it held against him/her that full use has been made of the various procedures available to pursue his/her defence. An applicant is not required to co-operate actively in expediting the proceedings which might lead to his/her own conviction.[113] If applicants try to expedite the proceedings, this will be held in their favour but a failure to apply for the proceedings to be expedited is not necessarily crucial.[114]

The Court stated in *Unión Alimentaria Sanders S.A. v. Spain* that the applicant's duty is only to "*show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings*".[115]

In the case of *Ciricosta and Viola v. Italy,*[116] which concerned an application to suspend works likely to interfere with property rights, because the applicants had requested at least 17 adjournments and not objected to six others requested by other party, the Court held that 15 years was not unreasonable. In *Beaumartin v. France*,[117] however, where the applicants had contributed to the delay by bringing the case in the wrong court and in submitting pleadings four months after lodging their appeal, the Court held that the authorities were more at fault, the domestic court taking over five years to hold the first hearing and the respondent ministry taking 20 months to file its pleadings.

The conduct of the authorities

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

When dealing with cases concerning length of

110 Manieri v. Italy, 27 February 1992, para. 18.
111 Boddaert v. Belgium, 12 October 1992.
112 Ferrantelli and Santangelo v. Italy, 7 August 1996.
113 Eckle v. the Federal Republic of Germany, 15 July1982, para. 82.
114 See e.g. Ceteroni v. Italy, 15 November 1996.
115 Unión Alimentaria Sanders S.A. v. Spain, para. 35.
116 Ciricosta and Viola v. Italy, 4 December 1995.
117 Beaumartin v. France, 24 November 1994.

proceedings, the Court has had regard to the principle of the proper administration of justice, namely, that domestic courts are under a duty to deal properly with the cases before them.[118] Decisions concerning adjourning for particular reasons or the taking of evidence may therefore be of some importance. In *Ewing v. the United Kingdom*,[119] the joining of three cases which delayed the trial was not considered arbitrary or unreasonable or as causing undue delay giving account to the due administration of justice.

The Court has made clear that the efforts of the judicial authorities to expedite the proceedings as much as possible play an important part in ensuring that applicants receive the guarantees contained within Article 6.[120] **A special duty therefore rests upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay.**

Delays that have been held by the Strasbourg organs to be attributable to the State include, in civil cases, the adjournment of proceedings pending the outcome of another case, delay in the conduct of the hearing by the court or in the presentation or production of evidence by the State, or delays by the court registry or other administrative authorities. In criminal cases, they include the transfer of cases between courts, the hearing of cases against two or more accused together, the communication of judgment to the accused and the making and hearing of appeals.[121]

The Court held in the case of *Zimmerman and Steiner v. Switzerland* that States have a duty to "*organise their legal systems so as to allow the courts to comply with the requirements of Article 6 (1) including that of trial within a reasonable time*".[122]

In the above-mentioned case, the Court found that where the reason for a delay was a long-term backlog of work in the State's court system, there was a violation of the reasonable time guarantee in Article 6 as the State had not taken adequate measures to cope with the situation. Adequate measures can include the appointment of additional judges or administrative staff. However, a violation will not normally be found where the backlog is only temporary and exceptional and the State has taken necessary remedial action reasonably promptly. When making this assessment the Court is prepared to take into account the political and social background in the State concerned.[123]

What is at stake for the applicant

Because what is at stake for the applicant is taken into consideration when assessing whether the reasonable time guarantee has been met, criminal proceedings will generally be expected to be pursued more expeditiously than civil, particularly where an accused person is held in pre-trial deten-

118 Boddaert v. Belgium, 12 October 1992, para. 39.
119 Ewing v. the United Kingdom, 56 DR 71.
120 See e.g. Vernillo v. France, 20 February 1991, para. 38.
121 See e.g. Zimmerman and Steiner v. Switzerland, 13 July 1983, Guincho v. Portugal, 10 July 1984 and Buchholz v. the Federal Republic of Germany, 6 May 1981.
122 Zimmerman and Steiner v. Switzerland, 13 July 1983, para. 29.
123 See e.g. Milasi v. Italy, 25 June 1987, para. 19 and Unión Alimentaria Sanders S.A. v. Spain, 7 July 1989, para. 38.

tion. The reasonable time requirement under Article 6 is closely linked to the reasonable time requirement under Article 5 (3).[124] The Court has explained that if the proceedings are unduly prolonged, pre-trial detention will become unlawful. Detention can not be considered as being for the purpose set out in Article 5 (3) if the time framework is no longer **reasonable**. The Court has set out in several cases, most recently in *Jablonski v Poland*,[125] the principles that must be applied by a judge in relation to the authorisation of pre-trial detention in connection with the length of time it takes a case to come to trial. A reasonable suspicion, which must be based on **objectively** verifiable facts, that a person has committed an offence is always a necessary element of detention under Article 5 (1) c and Article 5 (3). It is however not in itself sufficient to justify pre-trial detention, even where a person has been caught in flagrante delicto. This would be a violation of Article 6 (2) (the presumption of innocence, see below). Objectively verifiable grounds to support the deprivation of liberty such as a fear of absconding, or interfering with witnesses or evidence must also be produced. The safeguards of regular review contained in Article 5 (3) require the judge who authorises the prolonged detention to be satisfied **on each occasion** that relevant and sufficient reasons to justify a deprivation of liberty continue to exist. It is **not** sufficient for the judge to be satisfied that they existed at the time of the original detention, that the case is still not ready to come to trial and that the delay is reasonable. It is of course clear that if the judge considers that the delays are not reasonable the detention automatically becomes unlawful and the detainee must be released. In any event in order to justify prolonged detention judges will also need to show that they have satisfied themselves that there is no alternative measure less severe than detention (for example a measure restricting freedom of movement) which could meet any concerns of the prosecutor. In *Jablonski v. Poland* the Court found that, although the applicant's conduct contributed to the prolongation of the proceedings, it did not account for the entire length (over five years) for which the authorities had to bear responsibility. Both Article 5 and Article 6 were violated in this case.

Going back to the reasonable time requirement in Article 6 in relation to civil proceedings, these may also call for expedition on the part of the authorities, especially where the proceedings are critical to the applicant and/or have a particular quality or irreversibility.[126] The following are some examples:

- Child care cases. In *Hokkanen v. Finland* the Court stated that "*... it is essential that custody cases be dealt with speedily*".[127] In *Ignaccolo-Zennide v. Romania*[128] the Court emphasised that decisions about children must not be determined by the mere effluxion of time.

124 Article 5 (3) stipulates in relevant parts that *"Everyone arrested or detained in accordance with the provisions of paragraph 1.c of the Article shall be brought promptly by a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."*

125 Jablonski v. Poland, 21 December 2000.

126 H v. the United Kingdom, 8 July 1988, para. 85.

127 Hokkanen v. Finland, 23 September 1994, para. 72.

128 Ignaccolo-Zenide v. Romania, 25 January 2000.

- Employment disputes. In *Obermeier v. Austria* the Court declared that "*... an employee who considers that he has been wrongly suspended by his employer has an important personal interest in securing the judicial decision on the lawfulness of that measure promptly.*"[129]
- Personal injury cases. In the case of *Silva Pontes v. Portugal*[130] the Court stated there was a need for special diligence where the applicant was claiming compensation for serious injuries in a road traffic accident.
- Other cases where speed is obviously of the essence. In *X v. France*,[131] the applicant contracted HIV from an infected blood transfusion and instituted compensation proceedings against the State. With regards to the applicant's condition and life expectancy, the Court held that the proceedings that lasted for two years were unreasonably long. The domestic courts had failed to use their power to expedite the hearing. In *A and others v. Denmark*, the Court held that "*... the competent administrative and judicial authorities were under a positive obligation under Article 6 (1) to act with the exceptional diligence required by the court's case-law in disputed of this nature*".[132]

129 Obermeier v. Germany, 28 June 1990, para. 72.
130 Silva Pontes v. Portugal, 23 March 1994, para. 39.
131 X v. France, 23 March 1991, paras. 47-49.
132 A and others v. Denmark, 8 February 1996, para. 78.

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

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

Independence

Courts will normally be considered to be independent and national judges will rarely be called upon to decide whether a tribunal is **independent**, except in situations where they are being asked to consider the decisions of non-judicial bodies. Where bodies which are not courts exercise functions which are determinative of civil rights or criminal charges they must comply with the requirements of independence and impartiality.

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

- the manner of appointment of its members,
- the duration of their office,
- the existence of guarantees against outside pressures and
- the question whether the body presents an appearance of independence.[133]

The Court has held that the tribunal must be independent of both the executive and the parties.[134]

Composition and appointment

The Court has held that the presence of judicial or legally-qualified members in a tribunal is a strong indication of its independence.[135]

In the case of *Sramek v. Austria*,[136] the Court found that the tribunal in question (the Regional Real Property Transactions Authority) was not independent. The government was a party to the proceedings, and the representative of the government was the hierarchical supervisor of the rapporteur of the tribunal.

The fact that the members of a tribunal are appointed by the executive, does not in itself violate the Convention.[137] For there to be a violation of Article 6, the applicant would need to show that the practice of appointment as a whole was unsatisfactory or that the establishment of the particular tribunal deciding a case was influenced by motives suggesting an attempt to influence its outcome.[138]

Further, if the members of a tribunal are appointed for fixed terms, this is seen as a guarantee of independence. In the case of *Le Compte v. Belgium*,[139] fixed six-year terms for Appeal Council

133 See e.g. Campbell and Fell v. the United Kingdom, 28 June 1984, para. 78.
134 Ringeisen v. Austria, 16 July 1971, para. 95.
135 Le Compte v. Belgium, 23 June 1981, para. 57.
136 Sramek v. Austria, 22 October 1984.
137 Campbell and Fell v. the United Kingdom, 28 June 1984, para. 79.
138 Zand v. Austria, 15 DR 70, para. 77.
139 Le Compte, Van Leuven, De Meyere v. Belgium, 23 June 1981.

members was found to provide a guarantee of independence. In *Campbell and Fell v. the United Kingdom*[140] Prison Board of Visitors members were appointed for three years. This was considered rather short but it was acknowledged that the posts were unpaid and it was difficult to get volunteers, and it was not considered a violation of Article 6.

Appearances

Suspicions as to the appearance of independence must to some extent be objectively justified. In the case of *Belilos v. Switzerland*,[141] a local "Police Board" which adjudicated certain minor offences consisted of only one member – a policeman acting in his personal capacity. Although he was not subject to orders, took an oath and could not be dismissed, he was later to return to departmental duties and would tend to be seen as a member of the police force subordinate to superiors and loyal to colleagues, and it could therefore undermine the confidence which a tribunal should inspire. There were legitimate doubts as to the independence and organisational impartiality at the Police Board, which did not satisfy the requirements of Article 6 (1).

Subordination to other authorities

The tribunal must have the power to give a binding decision which can not be altered by a non-judicial authority.[142] Courts martial and other military disciplinary bodies have been found to violate Article 6 in this context. The executive may issue guidelines to members about the general performance of their functions, as long as any such guidelines are not in reality instructions as to how cases are to be decided.[143]

Impartiality

The Court held in *Piersack v. Belgium* that

> *whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under* Article 6 (1) *of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*[144]

For **subjective** impartiality to be made out, the Court requires proof of actual bias. Personal impartiality of a duly appointed judge is presumed until there is evidence to the contrary.[145] This is a very strong presumption and in practice it is very difficult to prove personal bias. No such claim has ever been successful in Strasbourg in spite of frequent complaints.

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

140 Campbell and Fell v. the United Kingdom, 28 June 1984, para. 80.
141 Belilos v. Switzerland, 29 April 1988, paras. 66-67.
142 See e.g. Findlay v. the United Kingdom, 25 February 1997, para. 77.
143 Campbell and Fell, 28 June 1984, para. 79.
144 Piersack v. Belgium, 1 October 1982, para. 30.
145 Hauschildt v. Denmark, para. 47.

under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.[146]

The Court has made clear that any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw.[147]

The existence of national procedures for ensuring impartiality are also relevant here. Whilst the Convention does not expressly stipulate that there must be mechanisms whereby parties to proceedings are able to challenge impartiality, violations of Article 6 are more likely to occur if they are absent. **If a defendant raises the issue of impartiality, it must be investigated unless it is "manifestly devoid of merit".**[148]

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

In the case of *Remli v. France*,[149] a statement made by one of the jurors saying "What's more, I'm a racist" was overheard by a third person. The domestic court decided that it was not able to take formal note of events alleged to have occurred out of its presence. The European Court noted that the national court had not made any check to verify the impartiality, thereby depriving the applicant of the opportunity of remedying a situation that was contrary to the requirements of the Convention. The Court therefore found a violation of Article 6.

Where the domestic court has **clearly conducted a proper inquiry into an allegation of bias** and concluded that the trial in question was fair, the European Court will be reluctant to question its conclusion. In the case of *Gregory v. the United Kingdom*[150] a note was passed to the judge from the jury stating "Jury showing racial overtones. 1 member to be excused." The judge showed the note to the prosecution and the defence. He also warned the jury to try the case according to the evidence and put aside any prejudice. The Court held that this was sufficient for Article 6 purposes. It found it significant that the defence counsel had not pressed for discharge of the jury or for asking them in open court whether they were capable of continuing and returning a verdict on the evidence alone. The trial judge had made a clear, detailed and forceful statement instructing the jury to put out of their minds "any thoughts or prejudice of one form or another". The Court further held in comparison

146 Fey v. Austria, 24 February 1993, para. 30.
147 Piersack v. Belgium, para. 30, Nortier para. 33, Hauschildt, para. 48.
148 Remli v. France, 30 March 1996, para. 48.
149 Remli v. France, 30 March 1996.
150 Gregory v. the United Kingdom, 25 February 1997.

to the case of *Remli v. France*, that

> *In that case, the trial judges failed to react to an allegation that an identifiable juror had been overheard to say that he was racist. In the present case, the judge was faced with an allegation of jury racism which, although vague and imprecise, could not be said to be devoid of substance. In the circumstances, he took sufficient steps to check that the court was established as an impartial tribunal within the meaning of Article 6 (1) of the Convention and had offered sufficient guarantees to dispel any doubts in this regard.*[151]

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

> *... the judge should have reacted in a more robust manner than merely seeking vague assurances that jurors could set aside their prejudices and try the case solely on the evidence. By failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court. It follows that the court that condemned the applicant was not impartial from an objective point of view.*[152]

Differing roles of the judge

A lot of the case-law on impartiality concerns situations where a judge plays different procedural roles in the course of the proceedings. In the case of *Piersack v. Belgium*[153] the judge who tried the applicant had previously been a member of the department which had investigated the applicant's case and initiated the prosecution against him. The Court found a violation of Article 6.

In *Hauschildt v. Denmark*,[154] the Court found a violation where the presiding judge had taken decisions on pre-trial detention. This had been subject to a special feature, meaning that on nine occasions in deciding on remand he referred to a "particularly strong suspicion" of the applicant's guilt. The Court held that the difference with the issue to be settled at the trial was tenuous and the applicant's fear objectively justified.

Another example is that of the case of *Ferrantelli and Santangelo v. Italy,*[155] where the Court found a breach of Article 6 when the presiding judge on an appeal court had been involved in convicting co-accused in another judgment. This judgment contained numerous references to the applicants and their respective involvement in the case. Furthermore, the judgment of the appeal court convicting the applicants cited numerous extracts from the previous judgment concerning the applicants' co-accused. The Court found these circumstances sufficient to hold the applicants' fears as to the lack of impartiality of the appeal court to be objectively justified.

Oberschlick No. 1 v. Austria[156] concerned proceedings before the court of appeal, where three judges had participated also in the judgment in the first in-

151 Gregory v. the United Kingdom, 25 February 1997, para. 49.
152 Sander v. the United Kingdom, 9 May 2000.
153 Piersack v. Belgium, 1 October 1982.
154 Hauschildt v. Denmark, 24 May 1984.
155 Ferrantelli and Santangelo v. Italy, 7 August 1996.
156 Oberschlick No. 1 v. Austria, 23 May 1991.

stance court. The European Court found this to be a violation of the right to an impartial tribunal.

In *De Haan v. the Netherlands*[157] the judge presiding over an appeals tribunal was called upon to decide on an objection against a decision for which he was himself responsible. The Court found that the applicant's fears regarding the objective impartiality of the presiding judge were justified, and found a violation of Article 6.

In a recent case against Switzerland,[158] the Court found a violation of Article 6 (1) where the applicant was involved in proceedings in a court which was composed of five judges. Two were part-time judges who had acted as representative of the other party in separate proceedings brought by the same applicant. The Court noted that legislation and practice on part-time judiciary could in general be framed so as to be compatible with Article 6, and what was at stake was solely the manner in which the proceedings were conducted in the case. While there was no material link between the applicant's case and the separate proceedings in which the two lawyers had acted as legal representatives, there was in fact an overlap in time. The applicant could therefore have reason for concern that the judge in question would continue to see him as the opposing party and this situation could have raised legitimate fears that the judge was not approaching the case with the requisite impartiality.

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

Rehearings

If a decision is quashed on appeal and returned to the first instance for a new decision, there is not an automatic violation of Article 6 because the same body, with or without the same membership, decides the matter again.[159] In the case of *Thomann v. Switzerland*,[160] the applicant was re-tried by the court that had convicted him in absentia. The Court did not consider that this disclosed a violation of Article 6 since the judges would be aware that they had reached their first decision on limited evidence and would undertake fresh consideration of the case on the comprehensive, adversarial basis.

Specialist tribunals

The Court recognises that there may be good reasons for holding hearings before special adjudicatory bodies where specialist technical knowledge is required. This may involve appointing tribunal members who are practitioners in the specialist field in question, for example medical disciplinary tribunals. Where there are direct links between members of the tribunal and any of the parties those mem-

157 De Haan v. the Netherlands, 26 August 1997.
158 Wettstein v. Switzerland, 21 December 2000.
159 Ringeisen v. Austria, 16 July 1971, para. 97.
160 Thomann v. Switzerland, 10 June 1996.

bers should stand down. Once a legitimate doubt is raised, it may not be enough to point to the presence of judicial members or a judicial casting vote. The case of *Langborger v. Sweden*[161] concerned a hearing in the Housing and Tenancy Court. This was made up of two professional judges and two lay assessors nominated by property owners and tenant association. The lay assessors had close links with the two associations which sought to maintain a clause the applicant was challenging. Legitimate fear that their interests were contrary to his own, it was not sufficient that the judicial president had the casting vote.

Juries

The above-mentioned principles apply equally to juries.

Waiver

The Court has not put down clear guidelines as to the extent to which an accused may waive his right to an independent and impartial tribunal. The Court has however stated, that to the extent that waiver is possible it must be limited and minimum guarantees must remain that can not depend on the parties alone. **The waiver must be established in an unequivocal manner.** The parties must have been aware of the doubts as to impartiality, have had the opportunity to raise the issue and have declared their satisfaction with the composition of the court. **A mere failure to object will not suffice to establish waiver.** The Court held in *Pfeiffer and Plankl v. Austria*[162] that a failure to object to two court judges who had been investigating judges and disqualified to sit as judges was not sufficient in order to be considered as a waiver. In *Oberschlick* (No. 1) *v. Austria*[163] the presiding judge over an appeal court had participated in previous proceedings and was not supposed to sit under the Criminal Procedure Code. The applicant did not challenge the judge's presence, but he was unaware of the fact that two other judges were similarly disqualified. The Court found that he had not waived his right to an impartial tribunal.

Established by law

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

> *It is the object and purpose of the clause in* Article 6 (1) *requiring that the courts shall be "established by law" that the judicial organisation in a democratic society must not depend on the discretion of the* Executive, *but that it should be regulated by law emanating from* Parliament. *However, this does not mean that delegated*

161 Langborger v. Sweden, 22 June 1989.
162 Pfeiffer and Plankl v. Austria, 25 February 1992.
163 Oberschlick (No. 1) v. Austria, 23 May 1991.

legislation is as such unacceptable in matters concerning the judicial organisation. Article 6 (1) does not require the legislature to regulate each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organisational framework for the judicial organisation.[164]

164 Zand v. Austria, 15 DR 70.

10. What does the notion of "fair hearing" include?

Article 6 states that everyone is entitled to a fair hearing. This expression incorporates many aspects of the due process of the law, such as the right to access to court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasoned judgment.

The judge's duty is to ensure that all parties to a dispute receive the "fair hearing" to which the Convention entitles them.

Access to court

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

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

> *were* Article 6 (1) *to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent of the Government… It would be inconceivable, in the opinion of the Court, that* Article 6 (1) *should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.*[165]

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

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

- if it pursues a legitimate aim

and

- if there is a reasonable relationship of propor-

165 Golder v. the United Kingdom, 21 February 1975, para. 35.

tionality between the means employed and the aim sought to be achieved.[166]

The case of *Golder v. the United Kingdom* concerned a prisoner who had been refused permission to contact his solicitor with a view to bringing a civil action for libel against a prison officer. The Court held that this was a violation of Article 6 – the right of access to court must not only exist, it must also be effective. The Court has also held that the inability of a prisoner to have confidential out of hearing consultations with a lawyer denied him effective access to court.[167]

In some cases access to court is refused because of **the nature of the litigant**. The Court has acknowledged that limitations on access for minors, persons of unsound mind, bankrupts and vexatious litigants do pursue a legitimate aim.[168] In the case of *Canea Catholic Church v. Greece*,[169] a court had ruled that the applicant church did not have legal personality in Greek law. This led to the dismissal of action brought to assert its property rights. The European Court stated however, that this had impaired the substance of the right to a court, and that there had been a violation of Article 6. The Court has also found a violation where legal proceedings could only be taken by another body in spite of the applicants' direct interest in the proceedings. In the case of *Philis v. Greece*,[170] the applicant who was an engineer by profession sought remuneration for work done. This could only be pursued by the Technical Chamber of Greece. The Court held that while this procedure might have provided engineers with the benefit of experienced legal representation for little expense, it was insufficient to justify removing the applicant's capacity to pursue and act in his own claim.

In *Airey v. Ireland*, a wife who was indigent was refused **legal aid** to bring proceedings to separate from her husband. The Court held that

> *Article 6 (1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case*.[171]

The Court found that the applicant in this case did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation.

The right to access to court may sometimes be violated where **an immunity** exists that is effectively preventing an action taking place. In the case of *Osman v. the United Kingdom*,[172] which concerned a public policy immunity from suit in negligence for the police acting in an investigative or preventative capacity, the Court held that the aim of the exclusionary rule might be accepted as legitimate since it was directed to the maintenance of police

166 Ashingdane v. the United Kingdom, 28 May 1985, para. 57.
167 Campbell and Fell v. the United Kingdom, 28 June 1984, paras. 111-113.
168 M v. the United Kingdom, 52 DR 269.
169 Canea Catholic Church v. Greece, 16 December 1997.
170 Philis v. Greece, 27 August 1991.
171 Airey v. Ireland, 9 October 1979, para. 26.
172 Osman v. the United Kingdom, 28 October 1998.

efficiency in the prevention of disorder and crime. Nevertheless, the application of the rule in this case without further inquiry into competing public interest considerations served to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounted to an unjustifiable restriction on an individual's right to have a determination on the merits of a claim in deserving cases. The Court therefore found a violation of Article 6.

However, in *Ashingdane v. the United Kingdom*,[173] which concerned an immunity in statute barring civil actions by mental patients against staff or health authorities without leave on grounds of bad faith or lack of reasonable care, the Court held that the restrictions imposed in the case, in limiting any liability of the responsible authorities, did not impair the very essence of the applicant's right to court or transgress the principle of proportionality. The Court further held in this case that the applicant could nonetheless take proceedings for negligence.

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

In the case of *Bryan v. the United Kingdom*,[174] the issue at stake was enforcement proceedings for breach of planning permission. The Court held that even though the appeal to the High Court was restricted to points of law and therefore its jurisdiction over the facts was limited, this did not amount to a violation of Article 6. The Court stressed the specialised character of planning, which was considered to be typical example of the exercise of discretionary judgment of the authorities in the regulation of citizen's conduct. The scope of review of the High Court was therefore held to be sufficient.

However, in the case of *Vasilescu v. Romania*[175] the Court did find a violation of Article 6, where the domestic courts did not have jurisdiction to examine a claim made for the restitution of property confiscated during the Communist regime. The Court accepted the interpretation of domestic procedural law by the Supreme Court of Justice of Romania, which ruled that no court in fact had jurisdiction to rule on the applicant's claim. The only available procedures were before the Procurator General's Department. The Court in Strasbourg found that Department not to be an independent tribunal within the meaning of Article 6 (1).

173 Ashingdane v. the United Kingdom, 28 May 1985.
174 Bryan v. the United Kingdom, 22 November 1995, para. 45.
175 Vasilescu v. Romania, 22 May 1998.

Presence at proceedings

The Court has held that the accused in criminal proceedings must be present at the trial hearing.[176] The object and purpose of Article 6 (1) and 6 (3) *c-e* presuppose the presence of the accused.

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

A criminal **trial in the absence of the accused or a party** may be allowed in certain exceptional circumstances, if the authorities have acted diligently but not been able to notify the relevant person of the hearing[177] and may be permitted in the interests of the administration of justice in some cases of illness.[178]

A party may waive the right to be present at an oral hearing, but only if the waiver is unequivocal and "attended by minimum safeguards commensurate to its importance".[179] However, if the accused in a criminal case waive their right, they must still be permitted legal representation.[180]

In the case of F.C.B. *v. Italy*,[181] an Italian court held a retrial in the applicant's absence although informed by his counsel that he was detained abroad. The Court stated that the applicant had not expressed the wish to waive attendance and did not accept the argument submitted by the Government that he had used deliberate delaying tactics in not providing the Italian authorities with his address. The Italian authorities were aware that the applicant was subject to proceedings abroad and it was hardly compatible with the diligence required in ensuring defence rights were effectively exercised to continue trial without taking further steps to clarify the position.

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

In the case of *Kremzow v. Austria*,[182] the applicant was excluded from a hearing on points of law, and the Court found that his presence was not required by Article 6 (1) or 6 (3) *c* since his lawyer was able to attend and make points on his behalf. However, the Court found a violation when the applicant was excluded from the hearing of the appeal on sentence, which involved an increase in sentence to life imprisonment and committal to special prison and a

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

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

Freedom from self-incrimination

The Court has held that the right to a fair trial in criminal cases include "*the right of anyone charged with a criminal offence... to remain silent and not to contribute to incriminating himself*".[183]

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

> *the Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention.*
>
> *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*[184]

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

The Court has chosen a different view when it comes to rules permitting the drawing of adverse inferences form the silence of an accused during interrogation or trial. The Court held in the case of *John Murray v. the United Kingdom*[185] that "the right to si-

183 Funke v. France, 25 February 1993, para. 44.
184 Saunders v. the United Kingdom, 17 December 1996, paras. 68-69.
185 John Murray v. the United Kingdom, 8 February 1996.

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

The Court held however in the case of *Condron v. the United Kingdom*[186] that the jury needs to be properly directed by the trial judge when deciding whether or not to draw an adverse inference from an applicant's silence, in order not to constitute a violation of Article 6.

Equality of arms and the right to adversarial proceedings

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

This means that **everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-vis his/her opponent.** A fair balance must be struck between the parties.[187]

The right to a fair hearing also incorporates the right to adversarial proceedings, which means in principle the opportunity for parties to a criminal or civil trial to have **knowledge of and comment on all evidence adduced or observations filed**.[188] In this context particular importance is to be attached to the appearance of the fair administration of justice.[189]

These principles apply to both criminal and civil proceedings.

In criminal cases, they overlap with some of the specific guarantees of Article 6 (3), but are not confined to those aspects of the proceedings. For example, the Court held in the case of *Bönisch v. Austria*[190] that when an expert witness appointed by the

186 Condron v. the United Kingdom, 2 May 2000.
187 See e.g. De Haes and Gijsels v. Belgium, 24 February 1997.
188 Ruiz-Mateos v. Spain, 23 June 1993, para. 63.
189 Borgers v. Belgium, 30 October 1991, para. 24.
190 Bönisch v. Austria, 6 May 1985.

defence is not accorded the same facilities as one appointed by the prosecution or the court, there is a violation of Article 6 (1).

Further, the Commission held in *Jespers v. Belgium*,[191] that the equality of arms principle read together with Article 6 (3) *b* imposes an **obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence.** This principle extends to material which might undermine the credibility of a prosecution witness. In *Foucher v. France*[192] the Court held that where a defendant who wished to represent himself was denied access by the prosecutor to the case file and not permitted copies of documents contained in it and thereby was unable to prepare an adequate defence, this was a violation of the principle of equality of arms read together with Article 6 (3).

The case of *Rowe and Davis v. the United Kingdom*[193] concerned the trial of the two applicants and a third man, who were charged with murder, assault occasioning grievous bodily harm and three counts of robbery. The prosecution relied substantially on evidence given by a small group of people who were living with the applicants, and that of the girlfriend of one of the applicants. The three men were convicted of the charges, and the Court of Appeal upheld the convictions.

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

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

191 Jespers v. Belgium, 27 DR 61.
192 Foucher v. France, 18 March 1997.
193 Rowe and Davis v. the United Kingdom, 16 February 2000.

The Court accordingly found a violation of Article 6 (1).

In civil proceedings, Article 6 will in certain circumstances require that the parties should be entitled to cross-examine witnesses.[194] The principle of equality of arms is also violated when a party is prevented from replying to written submissions to the national court made by counsel for the State.[195] In *Dombo Beheer B.V. v. the Netherlands*[196] the applicant, a limited company, instituted civil proceedings against a bank to prove that there was an oral agreement between it and the bank to extend certain credit facilities. Only two persons had been present at the meeting where the agreement had allegedly been reached, one person representing the applicant and one person representing the bank.

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

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

However, the Court held in *Ankerl v. Switzerland*[197] that there was no violation of Article 6 (1). This case also concerned the calling of witnesses, and the applicant complained that the refusal of a court to allow his spouse to give evidence on oath in support of his claim in civil proceedings was a breach of the principle of equality of arms, in light of the fact that the applicant's opponent was able to produce a witness who gave evidence on oath.

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

The Court has also held that the principle of equality of arms was violated, where the national legislature of the State adopted legislation which was aimed at ensuring the defeat of the applicant's claim which was proceeding through the national courts.[198]

Finally, the case of *Van Orshoven v. Belgium*[199] concerned a medical doctor involved in disciplinary proceedings. The applicant appealed against a decision to strike him off the register, but the court dismissed the appeal.

194 X v. Austria, 42 CD 145.
195 Ruiz-Mateos v. Spain, 23 June 1993.
196 Dombo Beheer B.V. v. the Netherlands, 27 October 1993.
197 Ankerl v. Switzerland, 23 October 1996.
198 Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994.
199 Van Orshoven v. Belgium, 25 June 1997.

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

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

Right to a reasoned judgment

Article 6 requires that the domestic courts give reasons for its judgment in both civil and criminal proceedings. Courts are not obliged to give detailed answers to every question,[200] but **if a submission is fundamental to the outcome of the case the court must then specifically deal with it in its judgment.** In *Hiro Balani v. Spain*[201] the applicant had made a submission to the court which required a specific and express reply. The court failed to give that reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it. This was found to be a violation of Article 6 (1).

One issue that has been considered by the Court is the **lack of reasoned verdicts by juries in criminal cases**. The Commission held in a case against Austria[202] that there was no violation since the jury were given detailed questions to answer, counsel could apply to make modifications and this specificity made up for lack of reasons. In addition to that, the applicant could and did file grounds of nullity on the basis that the judge had misdirected the jury as to the law.

200 Van de Hurk v. the Netherlands, 19 April 1994, para. 61.
201 Hiro Balani v. Spain, 9 December 1994.
202 Appl. No. 25852/94.

11. What special rights apply to juveniles?

The Court has long recognised that the fair trial rights enshrined in the Convention attach to children as well as adults, and in the case of *Nortier v. the Netherlands*,[203] the Commission took the view that any suggestion that children who are tried for criminal offences should not benefit from the fair trial guarantees of Article 6 was unacceptable.

The leading cases of the rights of juveniles are T and V *v. the United Kingdom*,[204] which concerned two boys aged ten, who abducted a two-year-old boy from a shopping mall, battered him to death and left him on a railway line to be run over. The case caused enormous publicity and outrage in the United Kingdom. The boys were charged with murder and, because of the nature of the charge, were tried in an adult court. They were sentenced to an indeterminate period of detention in 1993, at the age of eleven.

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

> *The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation inhibition.*[205]

The Court further stated:

> *The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public.*[206]

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

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

205 V v. the United Kingdom, 16 December 1999, paras 86-87.

206 V v. the United Kingdom, 16 December 1999, para. 88.

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

> *Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.*[207]

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

The Court suggested in the cases of *Singh and Hussain v. the United Kingdom*[208] that a life sentence with no possibility of early release which was imposed on a juvenile, might raise issues under Article 3 (freedom from torture and inhuman and degrading treatment or punishment).

207 V v. the United Kingdom, 16 December 1999, para. 90.

208 Singh and Hussain v. the United Kingdom, 21 February 1996.

12. What is the situation regarding admissibility of evidence?

The European Court has frequently held that it is not its place to substitute its own view as to the admissibility of evidence for that of national courts, although it has examined the way in which the evidence was treated as an important matter in deciding whether or not a trial was fair.[209] The rules of evidence are thus principally the matter for the domestic courts in each Contracting State.

However the Convention has established some important guidelines. Much of what follows is also covered in Chapter 17 on witnesses.

The admission of **unlawfully obtained evidence** does not in itself violate Article 6, but the Court held in *Schenk v. Switzerland*[210] that it **can give rise to unfairness** on the facts of a particular case. In this case, which concerned the use of a recording, illegal in so far as it was not ordered by the investigating judge, the Court held that there was no violation of Article 6 (1) as the defence was able to challenge the use of the recording and there was other evidence supporting the conviction of the accused. In *Khan v. the United Kingdom*[211] the applicant had arrived in the United Kingdom on the same plane as his cousin, who was found to be in possession of heroin. No heroin was found on the applicant. Five months later the applicant visited a friend who was under investigation for dealing in heroin. Without the friend's knowledge a listening device had been installed in his home. The police obtained a tape recording of a conversation between the applicant and his friend, where the former admitted he had been involved in the drug smuggling. He was arrested and charged, and finally convicted of drug offences.

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

209 Van Mechelen and others v. the Netherlands, 18 March 1997, para. 50.
210 Schenk v. Switzerland, 12 July 1988.
211 Khan v. the United Kingdom, 12 May 2000.

corporated in Article 6.

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

The use of "**agents provocateurs**" is a different matter. The case of *Teixeiro de Castro v. Portugal*[212] concerned two undercover police officers who approached an individual suspected of petty drug-trafficking in order to obtain heroin. Through another individual, contact was made with the applicant who agreed to produce the heroin. He obtained this through yet another person. When handing over the drugs to the police officers he was arrested.

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

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

The Court considered that in this case the two police officers did not confine themselves to investigating the applicants' criminal capacity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence. It also noted that in their decisions the domestic courts said that the applicant had been convicted mainly on the basis of the statements of the two police officers.

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

The admission of **hearsay evidence** is not in principle contrary to the fair trial guarantees,[213] but if there is no opportunity to cross-examine this may render the trial unfair if the conviction is based wholly or mainly on such evidence. In the case of *Unterpetinger v. Austria*,[214] the applicant was charged with causing actual bodily harm to his wife and his step-daughter at two different incidents. The applicant pleaded not guilty. The police had prior to the hearing taken statements by the wife and the step-daughter. However, at the hearing, they declared that they wanted to avail themselves of the right to

212 Teixeira de Castro v. Portugal, 9 June 1998.
213 Blastland v. the United Kingdom, 52 DR 273.
214 Unterpetinger v. Austria, 24 November 1986.

refuse to give evidence as close family members.

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

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

The use of evidence obtained from **police informers, undercover agents and victims of crime** may sometimes require measures to protect them from reprisals or identification. In D*oorson v. the* N*etherlands* the Court stated: *"principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."*[215] In this case, in order to take action against drug trafficking in Amsterdam, the police compiled sets of photographs of persons suspected of being drug dealers. The police received information that the applicant was engaged in drug trafficking, and his photograph was shown to a number of drug addicts who stated that they recognised him and that he sold drugs. A number of these remained anonymous. The applicant was arrested and later convicted of having committed drug offences.

The applicant complained that the taking of, hearing of and reliance on evidence from certain witnesses during the criminal proceedings against him infringed the rights of the defence in violation of Article 6. He stressed that during the first instance proceedings two anonymous witnesses had been questioned by the investigating judge in the absence of his lawyer.

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

215 Doorson v. the Netherlands, 20 February 1996, para. 70.

witnesses, and did therefore not find a violation of Article 6.

In *Kostovski v. the Netherlands*[216] the applicant had been identified to the police as having taken part in the robbery of a bank by two persons who wished to remain anonymous. Statements made by these witnesses were read out in court during the trial where the applicant was convicted of armed robbery.

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

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

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

> *owe a general duty of obedience to the State's executive authorities and usually have links to the prosecution... their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties... may involve giving evidence in open court.*[217]

The Commission has held that the evidence of an **accomplice** who has been offered immunity from prosecution may be admitted without violating Article 6, provided the defence and the jury are made fully aware of the circumstances.[218]

Evidence obtained by maltreatment cannot be used as evidence in criminal proceedings. In the case of G *v. the United Kingdom*[219] the Commission noted that early access to a lawyer is an important safeguard as to the reliability of confession evidence. It stated that when a charge is based solely on the confession of the accused, without the benefit of legal advice, a procedure must exist whereby the admissibility of such evidence can be examined.

The Court dealt with **confessions** obtained during incommunicado detention in the case of *Barberá, Messegué and Jabardo v. Spain*.[220] It expressed reservations about the use of such confessions, particularly where the authorities could not clearly demonstrate that the applicants had waived their right to legal assistance.

216 Kostovski v. the Netherlands, 20 November 1989.
217 Van Mechelen and others v. the Netherlands, 18 March 1997, para. 56.
218 X v. the United Kingdom, 7 DR 115.
219 G v. the United Kingdom, 35 DR 75.
220 Barberá, Messegué and Jabardo v. Spain, 6 December 1988. On this case see further below Chapter 13.

13. What actions might contravene the presumption of innocence?

Article 6 (2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. However, it also applies to the kinds of civil cases which the Convention regards as "criminal", such as professional disciplinary proceedings.[221]

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

> … *requires*, inter alia, *that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused*.[222]

However, Article 6 (2) does not prohibit rules which transfer the burden of proof to the accused to establish his/her defence, if the overall burden of establishing guilt remains with the prosecution. In addition, Article 6 (2) does not necessarily prohibit presumptions of law or fact, but any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within "*reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*".[223] In an old case from the United Kingdom, the Commission held acceptable a presumption that a man proved to be living with or controlling a prostitute was living off immoral earnings.[224] In the case of *Salabiaku v. France*[225] the applicant took delivery of a loaded trunk which proved to contain drugs, and was subject to a presumption of responsibility. The Court held however, that since the domestic courts maintained a freedom of assessment and gave attention to the facts of the case, quashing one conviction, there was no violation.

Article 6 (2) applies to criminal proceedings in their entirety, and comments made by judges on the termination of proceedings or when the accused has been acquitted will violate the presumption of innocence. In the case of *Minelli v. Switzerland*[226] the prosecution of the applicant was stayed because of the expiry of a statutory limitation period. However, the domestic court ordered that he should pay part of the prosecution costs as well as compensation to the alleged victim as if it had not been for the time bar, the applicant would probably have been convicted. There had therefore been a violation of Article 6 (2) since the ruling of the domestic court was incompatible with the presumption of innocence.

Not only the courts but also other State organs are bound by the principle of presumption of innocence. In the case of *Allenet de Ribemont v. France*[227] the applicant, while in police custody, was pointed out at a press conference by a senior police officer

221 Albert and Le Compte v. Belgium, 10 February 1983.
222 Barberá, Messegué and Jabardo v. Spain, 6 December 1988, para. 77.
223 Salabiaku v. France, 7 October 1988, para. 28.
224 X v. the United Kingdom, 42 CD 135.
225 Salabiaku v. France, 7 October 1988.
226 Minelli v. Switzerland, 21 February 1983.
227 Allenet de Ribemont v. France, 10 February 1995.

as the instigator of a murder. The Court held that Article 6 (2) applied to other public authorities apart from the courts when an applicant was "charged with a criminal offence". The declaration of guilt was made by the police officer without any qualification or reservation and encouraged the public to believe that the applicant was guilty before the facts had been assessed by a competent court. This was held to be a violation of the principle of the presumption of innocence, and it was not cured by the fact that the applicant was later released by a judge for lack of evidence.

The presumption of innocence must equally be upheld after acquittal as before trial. The Court held in *Sekanina v. Austria*[228] that it is no longer admissible for the domestic courts to rely on suspicions regarding an applicant's guilt once an acquittal has become final.

228 Sekanina v. Austria, 25 June 1993, para. 30.

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

The list of minimum guarantees set out in Article 6 (3) *a-e* is not exhaustive. It represents specific aspects of the right to a fair trial. The Court has held that the relationship between Article 6 (1) and Article 6 (3) "*is that of the general to the particular*". A criminal trial could therefore fail to fulfil the requirements of a fair trial, even if the minimum guarantees in Article 6 (3) are upheld.[229]

Article 6 (3) a states that everyone charged with a criminal offence has the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her. As with Article 6 (2) it also applies to the kinds of civil cases which the Convention regards as "criminal", such as professional disciplinary proceedings.[230]

This provision is aimed at the information **that is required to be given to the accused at the time of the charge**[231] **or the commencement of the proceedings**. As regards the relationship between this provision and Article 5 (2),[232] the latter generally requires less detail and is not as rigorous.

In the case of *De Salvador Torres v. Spain*,[233] the applicant complained that the domestic court had relied on an aggravating circumstance, not mentioned in the charge, to increase his sentence. However, the Court did not find a violation since the circumstance was an intrinsic element to the accusation against the applicant and known by him from the start of the proceedings. In contrast, the Commission found a violation in *Chichlian and Ekindjian v. France*,[234] where the charge had been reclassified in a substantial sense. The applicants had been acquitted of a currency offence charged under one section of the relevant domestic law, but then convicted on appeal of the offence under another section. The Commission held that the material facts had always been known to the applicants but there was no evidence that the applicants had been informed by the relevant authority of the proposal to reclassify the offence before the appeal hearing.

The information about the charge must **be in a language that the accused understands**. In the case of *Brozicek v. Italy*[235] the accused was German, and did clearly express his language difficulties to the domestic court. The European Court held that the Italian authorities should have had the notification translated unless they were in a position to establish that he knew adequate Italian, which was not the case. Similarly, the Court held in *Kamasinski*

229 See e.g. Artico v. Italy, 13 May 1980.
230 See above chapter 9.
231 For what constitutes a charge, see above chapter 5.
232 Article 5 (2) reads *"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him"*.
233 De Salvador Torres v. Spain, 24 October 1996.
234 Chichlian and Ekindjian v. France, Report of the Commission, 16 March 1989, Appl. No. 10959/84.
235 Brozicek v. Italy, 19 December 1989.

v. Austria,[236] that a defendant not conversant with the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands.

It is essential that **the offence of which a person is convicted is the one with which he was charged**. In *Pélissier and Sassi v. France*[237] the accused were charged only with criminal bankruptcy but convicted of conspiracy to commit criminal bankruptcy. The court held that since the element of the two offences differed, this was a violation of the Convention.

236 Kamasinski v. Austria, 19 December 1989.
237 Pélissier and Sassi v. France, 25 March 1999.

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

Article 6 (3) *b* states that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his/her defence. This also applies in some civil cases.[238]

The judge's key role in relation to this provision is to achieve the proper balance between this requirement and the obligation to ensure that trials are concluded within a reasonable time.[239] The provision is also closely related to Article 6 (3) *c*, the right to legal assistance and legal aid.

Complaints on this point in relation to convictions have been declared inadmissible when they have been made by a person who has subsequently been acquitted on appeal in criminal proceedings or by an accused who declares that he/she will not take any further part in the proceedings.[240] The judge's role is nevertheless to ensure that this safeguard is respected in the proceedings before him/her and not to rely on the possibility of the defect being made good on appeal.

The adequacy of the time will depend on all the circumstances of the case, including the complexity and the stage the proceedings have reached.[241]

A fundamental element is that the defence lawyer must be appointed in sufficient time to allow proper preparation to take place.[242]

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

Where the accused, or his lawyers, allege that adequate facilities have not been provided the judge has the responsibility to decide whether or not the trial can go ahead without violating Article 6 (3) *b*. In doing so the judge will bear in mind that the right of the accused to **communicate freely** with his lawyer in the preparation of his defence is regarded as **absolutely central to the concept of a fair trial**.[243]

Certain restrictions may however be justified in

238 See above chapter 14.
239 See above chapter 80.
240 X v. the United Kingdom, 19 DR 223, and X v. the United Kingdom, 21 DR 126.
241 See e.g. Albert and Le Compte v. Belgium, 10 February 1983, and X v. Belgium, 9 DR 169.
242 X and Y v. Austria, 15 DR 160.
243 Campbell and Fell v. the United Kingdom, 28 June 1984.

exceptional circumstances. The admissibility decision in *Kröcher and Möller v. Switzerland*[244] concerned the detention of those classified as exceptionally dangerous prisoners and charged with particularly serious terrorist offences. The judge had ruled that they were unable to receive legal visits for three weeks, and only able to correspond with their lawyers under judicial supervision during that period. Once the legal visits had been authorised they were not monitored. The Commission did not consider that this disclosed a violation of Article 6 (3) *b*. In other cases the Commission found no violation where the applicant was placed in solitary confinement and prevented from communicating with his lawyer for limited periods, since there was adequate opportunity to communicate with the lawyer at other times.[245] In *Kurup v. Denmark*[246] there was no violation when defence counsel was placed under an obligation not to disclose the identity of certain witnesses to his client. This was not a restriction that affected the applicant's right to prepare his defence to such an extent that it could amount to a violation of Article 6 (3) *b* or *d*.

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

The right to communicate with a lawyer also includes the right to correspond via letters. Most of these cases have been examined under Article 8 of the Convention (the right to respect for correspondence) as well as under Article 6 (3) *b*. In the case of *Domenichini v. Italy*[247] the Court held that the monitoring of the applicant's letters to his lawyer by the prison authorities constituted a violation of both Article 8 and Article 6 (3) *b*, especially because of a delay in sending one of his letters to the lawyer.

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

As regards the applicant's right to **access to evidence**, the Commission held in the case of *Jespers v. Belgium*,[248] that

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

244 Kröcher and Möller v. Switzerland, 26 DR 24.
245 See e.g. Bonzi v. Switzerland, 12 DR 185.
246 Kurup v. Denmark, 42 DR 287.
247 Domenichini v. Italy, 15 November 1996.
248 Jespers v. Belgium, 27 DR 61.

exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities.

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

The principle has in practice had a rather narrow interpretation. In the above-mentioned case of *Jespers v. Belgium*, the applicant alleged lack of access to a special folder of the public prosecutor. The Commission, although stressing that refusal of access would breach Article 6 (3) *b* if it contained anything enabling him to exonerate himself or reduce his sentence, found that there was no evidence from the applicant that it contained anything relevant and the Commission was not prepared to presume that the Government had not complied with its obligations.

Further, the Court has held that a state may restrict access to the file to the defendant's lawyer.[249] Limitations on the disclosure of evidence to the applicant have been found acceptable where there is a sound reason in the interests of the administration of justice, even though arguably the evidence was of significance to the defence.[250]

249 Kremzow v. Austria, 21 September 1992.
250 Kurup v. Denmark, 42 DR 287. See also above chapter 12.

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

Article 6 (3) *c* provides for the accused the right to defend himself/herself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The Court has held that the right to represent oneself **in person** is not an absolute right. In the case of *Croissant v. Germany*[251] it held that the requirement that a defendant be assisted by a lawyer at the domestic court proceedings was not incompatible with Article 6 (3) *c*.

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

> *... Article 6 (3) c speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.*[252]

The Court further stated in the case of *Kamasinski v. Austria* that

> *... the competent national authorities are required under Article 6 (3) c to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.*[253]

Where it is clear that the lawyer representing the accused before the domestic court has not had the time and facilities to properly prepare the case, the presiding judge is under a **duty** to take measures of a positive nature to ensure that his/her obligations to the defendant are properly fulfilled. In such circumstances an adjournment would usually be called for.[254]

The Commission has held that the right to **choose** a lawyer arises only where the accused has sufficient means to pay the lawyer. A legally aided accused thus has no right to choose his representative, or to be consulted in the matter.[255] Even so the right to choose is not absolute: the State is entitled to regulate the appearance of lawyers in the courts and in certain circumstances to exclude the qualifications of particular individuals.[256]

251 Croissant v. Germany, 25 September 1992.
252 Artico v. Italy, 30 April 1980, para. 33.
253 Kamasinski v. Austria, 19 December 1989, para. 65.
254 Goddi v. Italy, 9 April 1984, para. 31.
255 M v. the United Kingdom, 36 DR 155.
256 Ensslin et al v. the Federal Republic of Germany, 14 DR 64, and X v. the United Kingdom, 15 DR 242.

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

The second condition is that the interests of justice require legal aid to be granted. A number of factors are relevant here. The Court will have regard to the ability of the defendant to present the case adequately without assistance. In the case *of Hoang v. France*,[257] the Court stated that where there are complex issues involved, and the defendant does not have the legal training necessary to present and develop appropriate arguments and only an experienced lawyer would have the ability to prepare the case, the interests of justice require that a lawyer be officially assigned to the case.

The Court will also have regard to the complexity of the case. Finally, the seriousness of any possible sanction is also relevant to the question whether legal aid should be granted. The Court held in the case of *Benham v. the United Kingdom*,[258] that "*where the deprivation of liberty is at stake, the interests of justice in principle call for legal representation*". The Court however also emphasised that the proceedings were not straightforward.

In *Perks and others v. the United Kingdom*,[259] the Court followed on from its decision in *Benham v. the United Kingdom*. This case concerned a number of applicants who were imprisoned for failure to pay community charge (poll tax). The Court held that having regard to the severity of the penalty risked by the applicants and the complexity of the applicable law, the interests of justice demanded that in order to receive a fair hearing, the applicants ought to have benefited from free legal representation.

Factors relevant to the question of legal aid may alter, and any refusal of legal aid must therefore be reviewed. In *Granger v. the United Kingdom*[260] the degree of complexity involved in one of the issues for determination only really became clear during the appeal hearing. The Court held that it would have been in the interests of justice for legal aid to have been available for that point on, and that in the absence of any review of the original decision there had been a breach of Article 6 (3) *c*.

The Court has emphasised that it is not necessary to prove that the absence of legal assistance had caused actual prejudice in order to establish a violation of Article 6 (3) *c*. If such proof were necessary, this would in large measure deprive the provision of its substance.[261]

The right to legal aid in civil cases is not expressly set out in the Convention but the Court has held that it must be available if the interests of justice so require.[262]

In some jurisdictions of the Council of Europe, e.g. Cyprus, there is no legal aid for civil cases but ex

257 Hoang v. France, 29 August 1992, paras. 40-41.
258 Benham v. the United Kingdom, 10 June 1996.
259 Perks and others v. the United Kingdom, 12 October 1999.
260 Granger v. the United Kingdom, 28 March 1990.
261 Artico v. Italy, 30 April 1980, para. 35.
262 Airey v. Ireland, 9 October 1979.

gratia payment can be made by the state in suitable cases.[263] Whether or not the lack of legal aid leads to a violation of the Convention will depend on the facts of the case.

It is for the judge to assess whether the interests of justice require that an indigent litigant should be provided with legal assistance if he/she does not have the means to pay for it.

263 Andronicou and Constantinou v. Cyprus, 9 October 1997.

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

Article 6 (3) *d* provides that the accused has the right to examine or have examined witnesses against him/her, and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her. Some of what follows here is also covered in chapter 12 on evidence.

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

This provision does not give an accused an **absolute** right to call witnesses or a right to force the domestic courts to hear a particular witness. Domestic law can lay down conditions for the admission of witnesses and the competent authorities can refuse to allow a witness to be called if it appears that the evidence will not be relevant. The applicant must therefore establish that the failure to hear a particular witness prejudiced his/her case.[264] However, the procedure for summonsing and hearing of witnesses must be the same for the prosecution as the defence and equality of arms is required.

In principle, all evidence relied on by the prosecution should be produced in the presence of the accused at a public hearing with a view to adversarial argument.[265] Problems will therefore arise if the prosecution introduces written statements by a person who does not appear as a witness, for example because he/she fears reprisals from the accused or his/her associates.

Only **exceptional circumstances** will permit the prosecution to rely on evidence from a witness that the accused has been unable to cross examine. The determination by the judge of a criminal charge in reliance on the prosecutor's file, **but without the prosecutor being present** to answer any challenge by the accused, is **likely to give rise to the risk of violations** of this provision. The judge of course, cannot defend the prosecutor's case in his absence without compromising his impartiality.

Many Convention States have rules which excuse some witnesses, e.g. family members, from giving evidence. The Court stated in the case of *Unterpertinger v. Austria*[266] that such provisions are manifestly not incompatible with Article 6 (1) and 6 (3) *d*. However, in that case, the Court noted that the domestic court did not treat the statements by the

264 X v. Switzerland, 28 DR 127.

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

266 Unterpertinger v. Austria, 24 November 1986.

applicant's former wife and step-daughter as items of information, but as proof of the truth of the accusations made by the women at the time. The applicant's conviction was based mainly on this evidence, and therefore the rights of the defence had not been sufficiently safeguarded.[267]

Problems will also arise if a witness falls seriously ill or dies. The Court has held that this can justify reliance on hearsay evidence so long as counterbalancing factors preserve the rights of the defence.[268] In regards to poor health issues, the Court will strongly consider the existence of alternatives which avoid recourse to hearsay evidence. In the case of *Bricmont v. Belgium*, the Prince of Belgium had brought charges against the applicants but not given evidence on medical grounds. The Court held that

> *in the circumstances of the case, the exercise of the rights of the defence – an essential part of the right to a fair trial – required in principle that the applicants should have the opportunity to challenge any aspect of the complainant's account during a confrontation or an examination, either in public or, if necessary, at his home*.[269]

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

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

> *The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of everyone charged with a criminal offence*.[270]

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

As a general rule, the fear of reprisals relied upon to justify recourse to hearsay evidence does not have to be linked to any specific threat from the defendant. The Court held in *Doorson v. the Netherlands*[271] that although the two witnesses had never been threatened by the applicant, drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them.

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

> *If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the de-*

267 See also Chapter 12.
268 Ferrantelli and Santangelo v. Italy, 7 August 1996.
269 Bricmont v. Belgium, 7 July 1989, para. 81.
270 Saïdi v. France, 20 September 1993, para. 44.
271 Doorson v. the Netherlands, 20 February 1996, para. 71.

fence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.[272]

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

Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the right of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.[273]

Finally, it is important to note that, even where there are sufficient counterbalancing procedures, a conviction should not be based either solely or to a decisive extent on evidence from anonymous witnesses.[274]

272 Kostovski v. the Netherlands, 20 November 1989, para. 42.
273 Van Mechelen and others v. the Netherlands, 18 March 1997, para. 58.
274 Doorson v. the Netherlands, 20 February 1996, para. 76.

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

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

The Court held in *Luedicke, Belkacem and Koç v. the Federal Republic of Germany* that the provision absolutely prohibits a defendant being ordered to pay the costs of an interpreter since it provides "*neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration*". The Court further stated that this principle covered "*those documents or statements in the proceedings instituted against him which is necessary for him to understand in order to have the benefit of a fair trial*".[275] In *Brozicek v. Italy*, a German national was charged in Italy. The Court held, in relation to Article 6 (3) *a* but which is still relevant here, that documents constituting an accusation should be provided in German "*unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand... the purport of the letter notifying him of the charges brought against him*".[276]

However, in *Kamasinski v. Austria* the Court adopted a more restrictive approach and held that although Article 6 (3) *e* applied to documentary material disclosed before trial, it did not require written translations of all such documentation. The Court noted here, however, that the defence counsel was competent in the applicant's mother tongue. The Court held that the assistance "*should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events*".[277]

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

The right to an interpreter is understood to extend to deaf people where the normal method of communication is for instance by sign language.

In the case of *Öztürk v. the Federal Republic of Germany,*[278] which is dealt with above in relation to what is a criminal charge, the issue of whether the act in question was or was not a criminal charge arose because the German authorities wanted to make the applicant pay for his interpreter.

275 Luedicke, Belkacem and Koç v. the Federal Republic of Germany, 28 November 1978, paras. 40 and 48.
276 Brozicek v. Italy, 19 December 1989, para. 41.
277 Kamasinski v. Austria, 19 December 1989, para. 74.
278 Öztürk v. the Federal Republic of Germany, 21 February 1984.

19. What are the problems in relation to supervisory review?

A common feature of certain States' legal proceedings is the initiating of a "supervisory review" or a "protest" of a judgment that has been delivered by a court and which is not subject to any further right of appeal. This exists, for example, in the Russian Federation. It can also be used where no appeal has been made, regardless of whether the time limit for appealing has expired or not. Requests for supervisory review can also be lodged by chairmen and the chairman of the Supreme Court. They have the same powers and their requests follow the same procedure as the procurator.

The procurator can exercise this right at the request of the parties or any other interested person or *ex proprio motu*.

This is **a right and not a duty**, and is exercised at the discretion of the procurator. The exercise of the right – or the refusal to exercise it – is not subject to judicial review, and can continue to be used indefinitely to re-open a case.

Judges need to be aware of a number of points about this in relation to the European Convention on Human Rights.

The Court has not as yet ruled in any case from the Russian Federation as to whether the use of this procedure is compatible with the Convention. However, a similar procedure in Romania was found to be a violation. In *Brumarescu v. Romania*, the Procurator General had the right to apply at any time to the Supreme Court to have any judicial decision quashed on a number of grounds. The Court found that this was a violation of Article 6 (1) and noted

> *One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires inter alia that where the courts have finally determined an issue, their ruling should not be called into question.*[279]

Once the final judicial decision has been delivered and any available judicial appeals have been made and decided, judges should be very reluctant to accede to a request by the procurator to re-open a case or to initiate supervisory review proceedings themselves, as to do so may be considered a violation of the Convention according to the principle set out in the case of *Brumarescu v. Romania*. The mixing within the Russian Federation judicial system of the role of the judge and that of the procurator in the administration of justice presents serious difficulties in compliance with the Convention.

It is still unclear whether the exercise of the power of supervisory review of a judicial procedure which would otherwise be final will **always** amount to a violation of the Convention, but another related problem presents itself to the judge in this context.

279 Brumarescu v. Romania, 28 October 1999, para. 61.

Individuals who wish to complain to the European Court of Human Rights about some aspect of legal proceedings must first exhaust all effective domestic remedies and then make the complaint within six months.[280]

A procedure of supervisory review is seen by the Strasbourg institutions as akin to the role of an ombudsman in many jurisdictions and is not regarded as an "effective remedy" by the Court.[281] This procedure can be contrasted with the system of judicial review of administrative action in the Anglo-Saxon legal order which has been found by the Court to be an effective remedy.

A request to a procurator or a judge to exercise the right of supervisory review is not considered by the European Court to be an effective remedy for the purposes of Article 35 of the Convention not only because it may in itself constitute a violation of Article 6 but also because it is a discretionary power, and because for a remedy to be effective the person concerned must be able to institute the relevant proceedings himself.[282]

If the procurator seeks a supervisory review in a case where one of the parties to judicial proceedings wishes to make a complaint to the European Court about the proceedings – or might wish to do so if the supervisory review is unsuccessful – the judge should be mindful that seizing himself of the case at the procurator's request may have the effect of putting the aggrieved party outside the six months' time-limit for bringing the case to the European Court. Since both the lawyers and the procurator may be unaware of this, the judge should draw the attention of the parties to the date of the final "effective" decision and to the need to lodge any complaint with the European Court before six months have elapsed from that date.

280 See Article 35.
281 Tumilovich v. the Russian Federation, Admissibility decision by the Court, 22 June 1999.
282 H v. Belgium, 37 DR 5.

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