### I. A reasoned judgment

The requirement of a 'fair' hearing supposes that a court will give reasons for its judgment, in both criminal and non-criminal cases. Whereas national courts are allowed considerable discretion as to the structure and content of their judgments, they must 'indicate with sufficient clarity the grounds on which they base their decision' so as to allow a litigant usefully to exercise any available right of appeal.[575] Further justifications for the need for a reasoned judgment are the duty of the court under Article 6 'to conduct a proper examination of the submissions, arguments and evidence adduced by the parties'[576] and the interest of the public in a democratic society in knowing the reasons for judicial decisions given in its name.[577]

Precisely what is required will depend upon the nature and circumstances of each case.[578] It is not necessary for the court to deal with every point raised in argument.[579] If, however, a submission would, if accepted, be decisive for the outcome of the case, it may require a 'specific and express reply' from the court in its judgment, although an 'implied rejection' may be sufficient if clear.[580] Merely stating that a party has been grossly negligent where such negligence is crucial to the decision without explaining why this is so is unlikely to comply with Article 6.[581] Likewise, giving a reason for a decision that is not a good reason in law [582] or on the facts[583] will not do so. There was inadequate reasoning in breach of Article 6 where a court did not address inconsistencies in witness evidence and the mental condition of a key witness in its judgment.[584] In the absence of exceptional circumstances, the required reasons for the judgment must be given by the trial judge.[585]

In *Taxquet v Belgium*,[586] the Grand Chamber held that a jury does not have to give reasons for its decision. Instead Article 6 will be complied with provided that there are 'sufficient safeguards . . . to avoid any risk of arbitrariness and to enable the accused [and the public] to understand the reasons for his conviction'. The safeguards may include 'directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers'. In addition, the existence of a right of appeal capable of remedying an improper verdict is relevant. In the *Taxquet* case, there was a breach of Article 6 in the absence of sufficient safeguards. Questions were put to the jury by the presiding judge, but the accused had been tried with seven co-defendants and the questions were identical for all of them, so that the applicant was unable to determine

[575] *Hadjianastassiou v Greece* A 252 (1992); 16 EHRR 219. See also *Karakasis v Greece* hudoc (2000); 36 EHRR 507 and *Hirvisaari v Finland* hudoc (2001); 38 EHRR 139. In criminal cases, the Article 6(1) guarantee of a reasoned judgment overlaps with the Article 6(3)(b) 'facilities' guarantee in respect of appeals.

[576] *Van de Hurk v Netherlands* A 288 (1994); 18 EHRR 481 para 59. See also *Quadrelli v Italy* hudoc (2000); 34 EHRR 215; and *Jokela v Finland* 2002-IV; 37 EHRR 581. And see *Carmel Saliba v Malta* hudoc (2016) para 73.

[577] *Tatishvili v Russia* hudoc (2007); 45 EHRR 1246.

[578] *García Ruiz v Spain* 1999-I; 31 EHRR 589 GC.

[579] *Van de Hurk v Netherlands* A 288 (1994); 18 EHRR 481 para 61. But the applicant's 'main arguments' must be addressed: *Buzescu v Romania* hudoc (2005) and *Pronina v Ukraine* hudoc (2006).

[580] *Ruiz Torija v Spain* A 303-A (1994); 19 EHRR 553 para 30. Cf *Hiro Balani v Spain* A 303-B (1994); 19 EHRR 566 para 28; *Elo v Finland No 30742/02* hudoc (2004) DA; and *Kuznetsov v Russia* 2007-XX; 49 EHRR 355.

[581] *Georgiadis v Greece* 1997-III; 24 EHRR 606.

[582] *De Moor v Belgium* A 292-A (1994); 18 EHRR 372.

[583] *Dulaurans v France* hudoc (2000) (appeal rejected solely on mistaken ground that the argument was a new one).

[584] *Ajdarić v Croatia* hudoc (2011).

[585] *Cerovšek and Božičnik v Slovenia* hudoc (2017) (re-hearing required).

[586] 2010-I; 54 EHRR 933 paras 90, 92 GC. See Roberts, 11 HRLR 213 (2011). See also *Agnelet v France; Legillon v France* hudoc (2013) (insufficient indication why accused guilty in *Agnelet*, sufficient in *Legillon*); and *Matis v France No 43699/13* hudoc (2015) DA (new French law: no violation).

why he in particular was found guilty. There was also only a right of appeal on points of law, so that the reasons for the applicant's conviction might not emerge. In *Judge v UK*,[587] there were sufficient safeguards (details in the indictment, directions by the judge, and a right to appeal for a 'miscarriage of justice') for the applicant to understand why he had been convicted so that the failure of the jury to give reasons did not render his trial unfair. Similarly, in *Lhermitte v Belgium*[588] it was held, by ten votes to seven, that although the jury had not indicated why they had found the applicant mentally responsible for the murder of her children when psychiatric experts at the trial had indicated otherwise, the sentencing judgment and other aspects of the proceedings should have made this sufficiently clear to her.

The right to a reasoned judgment applies to appellate, as well as lower court, decisions, although an appellate judgment may not have to be so fully reasoned. It may be sufficient for an appeal court that agrees with the reasoning of the trial or lower appeal court simply to incorporate that reasoning by reference, or otherwise indicate its agreement with it.[589] The essential requirement in such cases is that, in one way or another, the appeal court shows that it 'did in fact address the essential issues' in the appeal, and did not endorse without evaluation the decision of the lower court[590] or allow an appeal without addressing them.[591] Decisions by appeal courts rejecting appeals in very summary terms where there is clearly no merit in the appeal have been found not to be in breach of Article 6.[592] When refusing leave to appeal, there is no obligation to give detailed reasons or, in some cases, to give reasons at all.[593] Where a national court of final jurisdiction is obliged under EU law to obtain a preliminary ruling from the European Court of Justice, its failure to give reasons for not making such a reference, as EU law requires, is a violation of Article 6(1).[594]

### m. The principle of legal certainty

The right to a fair hearing requires that, in accordance with the principle of legal certainty, the judgment by the final court that decides a case is *res judicata* and hence irreversible. In the leading case of *Brumărescu v Romania*,[595] a Court of First Instance held that the nationalization of the applicant's parents' house was invalid. In the absence of any appeal to a higher court, the decision became *res judicata* and the house was returned to the applicant. Later, the Procurator-General of Romania, who was not a party to the case, successfully applied to the Supreme Court of Justice for the decision to be quashed on the ground that the trial court had exceeded its jurisdiction. The Grand Chamber ruled in favour of the applicant on the basis of the principle of legal certainty, compliance with which was required by Article 6 as a fundamental aspect of the rule of law which was included in the Convention Preamble as a 'part of the common heritage of the contracting states'. The

[587] *No 35863/10* hudoc (2011) DA. For pre-*Taxquet* cases, see *Papon v France (No 2) No 54210/00* hudoc (2001) DA; *Saric v Denmark* hudoc (1999) DA; and *Planka v Austria No 25852/94* hudoc (1996) DA.

[588] Hudoc (2016) para 81 GC.

[589] *García Ruiz v Spain* 1999-I; 31 EHRR 589 GC.

[590] *Helle v Finland* 1997-VIII; 26 EHRR 159. See also *Sakkapoulos v Greece* hudoc (2004). More reasoning is required from the appeal court when the lower court has failed to give reasons: *Boldea v Romania* hudoc (2007) paras 32–34. See also *Hansen v Norway* hudoc (2014) para 65.

[591] *Lindner and Hammermayer v Romania* hudoc (2002).

[592] See *X v Germany No 8769/79*, 25 DR 240 (1981). Fines for a vexatious appeal may not require detailed justification: *Les Travaux du Midi v France No 12275/86*, 70 DR 47 (1991) and *GL v Italy No 15384/89*, 77-A DR 5 (1994).

[593] *Sawoniuk v UK* 2001-VI (House of Lords refused leave to appeal without reasons; reasons on the merits in Court of Appeal judgment sufficient) and *Gorou v Greece (No 2)* hudoc (2009) GC.

[594] *Vergauwen and Others v Belgium No 4832/04* hudoc (2012) paras 89–90 DA. See also *Dhahbi v Italy* hudoc (2014) para 31.

[595] 1999-VII; 33 EHRR 862 para 61.

power of the Prosecutor-General in issue in the *Brumărescu* case to initiate 'supervisory review' proceedings was a common feature in former Soviet-style legal systems and was exercisable by a 'range of persons', including judges who were 'chairmen of the courts and their deputies'.[596]

The *Brumărescu* ruling applies to the courts as well as to members of the executive, as the issue is one of legal certainty and not just of interference by the executive.[597] Thus in *Driza v Albania*,[598] it was a violation of the principle of legal certainty for the Supreme Court to allow the President of that Court to quash a final decision of the Supreme Court (Administrative Division). A procedure for quashing a final judgment may, however, be consistent with the principle if it is 'made necessary by circumstances of a substantial and compelling character', which would include the need to correct a miscarriage of justice.[599] There is also no breach where earlier case law is overturned by the courts and applied retrospectively to the applicant's pending case:[600] 'case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement'.[601] Similarly, divergences in the case law of the courts within a legal system are acceptable provided that 'domestic law provides for a mechanism' for overcoming them and that mechanism is applied.[602]

In *Oleksandr Volkov v Ukraine*,[603] the principle of legal certainty was applied to two other situations. In disciplinary proceedings leading to the dismissal of a Supreme Court judge, members of parliament, acting in breach of the parliamentary voting rules, cast votes for themselves and for absent MPs; and the dismissal proceedings had no time limit, requiring the judge to defend himself in respect of events occurring in 'the distant past'. Both situations violated the principle of legal certainty.

Although the *Brumărescu* case was decided by the Grand Chamber on the basis of the residual right to a 'fair hearing' in Article 6(1), in their concurring opinions Judges Rozakis, Bratza, and Zupančič took the view, which has a lot to commend it, that the situation is best considered as concerning the 'right of access to a court'. In their judgments in later cases, Chambers of the Court vary in their reasoning, referring to a 'fair hearing';[604] a 'fair hearing' and a 'right of access';[605] or generally to a 'right to a court'.[606]

### n. Other fair hearing issues

A number of other particular 'fair hearing' issues have been resolved or raised in the jurisprudence of the Court, and formerly the Commission. One point that is clear is that a jury trial in criminal cases is not an element of the right to a 'fair hearing'.[607] Despite being

[596] See, eg, *Tregubenko v Ukraine* hudoc (2004); 43 EHRR 608 para 36 (deputy chairman, Supreme Court). See also *Ryabykh v Russia* 2003-IX; 40 EHRR 615 (regional court president); *Roşca v Moldova* hudoc (2005) (public prosecutor); and *Vardanyan v Armenia* hudoc (2016) para 70. And see *Trapeznikov and Others v Russia* hudoc (2016) (reformed Russian system: no violation).

[597] *Tregubenko v Ukraine*. Cf *Sovtransavto Holding v Ukraine* 2002-VII; 38 EHRR 911.

[598] 2007-V; 49 EHRR 779.

[599] *Pravednaya v Russia* hudoc (2004) para 25. See also *Nikitin v Russia* 2004-VIII and *Lenskaya v Russia* hudoc (2009).

[600] *Unédic v France* hudoc (2008) and *Legrand v France* hudoc (2011).

[601] *Nejdet Şahin and Perihan Şahin v Turkey* hudoc (2011) para 58 GC.

[602] *Lupeni Greek Catholic Parish and Others v Romania* hudoc (2016) para 116 GC and *Nejdet Şahin and Perihan Şahin v Turkey*, *ibid* paras 53–54. See also *Ştefănică and Others v Romania* hudoc (2010) paras 36–38.

[603] Hudoc (2013) paras 139, 145.

[604] *Roşca v Moldova* hudoc (2005).

[605] *Ryabykh v Russia* hudoc (2003) and *Pravednaya v Russia* hudoc (2004).

[606] *Tregubenko v Ukraine* hudoc (2004). Cf *Poltorachenko v Ukraine* hudoc (2005).

[607] *X and Y v Ireland No 8299/78*, 22 DR 51 (1980) and *Callaghan v UK No 14739/89*, 60 DR 296 (1989). Instead states are free to use them: *Taxquet v Belgium* 2010-; 54 EHRR 933 para 84 GC.

highly prized in common law jurisdictions, the jury's lack of general use in European legal systems made this inevitable in view of the consensus approach to the interpretation of the Convention.[608] Where juries are used, in criminal or civil case, they must comply with the requirements of Article 6. This is particularly true of the requirement that a tribunal be 'impartial'.[609]

As to other issues, there is jurisprudence to suggest that the failure by a court to respect an undertaking or indication that it gives to a litigant, and that prejudices the presentation of their case, may render the hearing unfair, although there must be good evidence to show that the undertaking or indication was given.[610] In *CG v UK*,[611] it was implied that interventions or other conduct by the judge during the hearing that interferes with a litigant's freedom to plead his case may render the hearing unfair. In that case, the trial judge's interruptions during the defence's questioning of witnesses was 'excessive and undesirable' but were not, when the hearing was viewed as a whole, such as to render it unfair in breach of Article 6(1).

## III. THE RIGHT TO A PUBLIC HEARING, AN ORAL HEARING, AND THE PUBLIC PRONOUNCEMENT OF JUDGMENT

### a. The right to a public hearing

The Court has explained the purpose of the guarantee of a public hearing as being to 'protect litigants against the administration of justice in secret with no public scrutiny', thereby contributing, through the resulting transparency, to a fair hearing and the maintenance of confidence in the courts by the public.[612] In this connection, the presence of the press, which includes reporters for the electronic media, is particularly important.[613] The right to a public hearing applies in criminal and non-criminal cases. It is linked to the right to an oral hearing. When an oral hearing occurs, whether as required by Article 6 (see later in this section) or as provided by a state in its discretion, it must be a public hearing unless one of the Article 6 grounds for excluding the public applies. Court hearings must be open to the public in fact as well as in law. Accordingly, in *Riepan v Austria*,[614] the Court stated that Article 6 will only be complied with if the public is 'able to obtain information about its date and place and if this place is easily accessible to the public'.

The right to a public hearing has been a particular problem for administrative or disciplinary tribunals or other bodies that are not 'classic' courts within the ordinary court system, but that are competent to adjudicate upon either disciplinary, regulatory, or other offences that qualify as 'criminal' for the purposes of Article 6[615] or upon a person's 'civil

[608] In *Taxquet v Belgium* 2010-; 54 EHRR 933 GC, the Court noted, paras 45–47, that ten states parties, including Belgium, Russia, and the UK, had 'traditional' jury systems, with the presiding judge not participating in the deliberations of a lay jury. Fourteen states, including the Netherlands and Turkey, did not use juries at all; the remainder, including France and Germany, used a 'collaborative' system in which the judge and jury collectively decided the case.

[609] See this chapter, section 3.V.c, p 451. Resort to trial by judge alone for fear of jury tampering is acceptable: *Twomey and Cameron and Guthrie v UK No 67318/09 and No 22226/12* hudoc (2013) DA.

[610] *Pardo v France* A 261-B (1993); 17 EHRR 383 para 28. See also *Colak v Germany* A 147 (1988); 11 EHRR 513.

[611] Hudoc (2001); 34 EHRR 789.

[612] *Malhous v Czech Republic* 2001-XII para 55 GC. Cf *Barberà, Messegué and Jabardo v Spain* A 146 (1988); 11 EHRR 360 para 89 PC, in which the right to a public hearing was breached because much of the evidence against the accused was made a part of the record without being adduced or read in court, and hence not subjected to 'the watchful eye of the public'. On the right to a public hearing, see Cremona, *Wiarda Mélanges*, p 107.

[613] *Axen v Germany*, B 57 (1981) para 77 Com Rep.

[614] 2000-XII para 29. Cf *Hummatov v Azerbaijan* hudoc (2007); 49 EHRR 960 paras 143–152.

[615] See, eg, *Vernes v France* hudoc (2011).

rights and obligations', for example the right to practise a profession.[616] In the case of such a tribunal, its (not uncommon) failure to provide a public hearing may be remedied by an appellate 'classic' court that complies with the public hearing requirement and has full jurisdiction to rule on the facts and the law and re-assess the sentence.[617] In the case of a court 'of the classic kind', this will not be sufficient. 'Given the possible detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a *complete re-hearing* before the appellate court', held in public.[618] Supposing that the trial court does meet the public hearing requirement, any appeal to a higher court that the state provides in its discretion must also comply with that requirement if the higher court has to examine the case 'as to the facts and the law and [in a criminal case] make a full assessment of the issue of guilt or innocence'; however, the 'special features' of the appellate court proceedings, for example, extending only to ruling on points of law, may mean that they are not subject to the public hearing requirement.[619] Clearly, a trial court must meet the public hearing requirement if the state has not provided a right of appeal from it.[620]

Whereas court hearings must generally be in public, the public may be excluded from a hearing on one or more of the grounds listed in Article 6(1).[621] In the interpretation of similar lists of restrictions to the rights guaranteed in Articles 8–11 of the Convention, the Court, and formerly the Commission, requires the restriction to be a proportionate response to a pressing social need.[622] This interpretation is based upon the wording 'necessary in a democratic society' together with the lists of restrictions in those Articles. Although the text of Article 6(1) does not contain this precise formula, such a balancing approach has been used by the Court.[623] However, the Court has not referred in its judgments to a 'margin of appreciation' in this context.

As to the particular grounds on which a hearing *in camera* is permissible, in *B and P v UK*[624] it was stated that civil proceedings in cases concerning the residence of children following the divorce or separation of the parents are 'prime examples' where private court hearings may be justified, in order to 'protect the privacy of the child and parties' and to 'avoid prejudicing the interests of justice'. The exclusion of the public from divorce proceedings is also permissible as being for the 'protection of the private life of the parties',[625] a justification which may also apply in medical disciplinary proceedings.[626] The 'interests of justice' may permit *in camera* hearings in criminal, as well as civil, cases.[627] The exclusion

[616] See, eg, *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 PC and *Hurter v Switzerland* hudoc (2005).

[617] *Riepan v Austria* 2000-XII para 39.

[618] *ibid* para 40. Italics added. A complete re-hearing includes the taking of evidence and the hearing of witnesses.

[619] *Hummatov v Azerbaijan* hudoc (2007) para 141 (criminal case).

[620] *Göç v Turkey* 2002-V GC para 47 (civil case).

[621] In *Olujić v Croatia* hudoc (2009) para 64, the Court rejected on the facts (alleged improper conduct of judge) a claim based on the dignity of the applicant and of the judiciary. It did not mention that these were not grounds listed in Article 6(1).

[622] See Ch 1, section 4.V, p 12.

[623] See, eg, *Nikolova and Vandova v Bulgaria* hudoc (2013) paras 94–95. See n 632.

[624] 2001-III; 34 EHRR 529 para 38. But see *Moser v Austria* hudoc (2006) (child transferred to public care; public hearing required).

[625] *X v UK No 7366/76*, 2 Digest 452 (1977).

[626] *Imberechts v Belgium No 15561/89*, 69 DR 312 (1991) (private lives of patients) and *Diennet v France* hudoc (1995). See also *Guenoun v France No 13562/88*, 66 DR181 (1990) (medical treatment). But see *Osinger v Austria* hudoc (2005) ('private life' claim in succession to property case rejected on the facts).

[627] *Welke and Białek v Poland* hudoc (2011) paras 75–76 (covert police operations). See also *Belashev v Russia* hudoc (2008). As to anonymous witnesses, see this chapter, section 5.V, p 486. Pre-trial criminal investigations in private are permissible in the interests of the privacy of those questioned and of justice: *Ernst and Others v Belgium* hudoc (2003); 37 EHRR 724.

of the public from the trial of an accused for sexual offences against children was held justified without specifying which particular ground of restriction was being applied.[628] In *Campbell and Fell v UK*,[629] the Court relied upon the 'public order' restriction in Article 6(1), interpreting the term as having a wide public interest meaning, thereby including prison security, rather than one limited to public disorder.[630] A trial *in camera* may be justified on grounds of 'national security' in a prosecution for passing state secrets.[631] In *Nikolova and Vandova v Bulgaria*,[632] the Court accepted that the protection of 'public order' and 'national security' were legitimate grounds for hearing the first applicant's appeal against her dismissal from the police *in camera*, but held that such a hearing had not been shown to be 'strictly necessary' on the facts. The Court concluded that the national court had excluded the public solely on the basis that the hearing would examine classified documents, without contemplating whether a measure less than a wholly *in camera* hearing might offer sufficient protection. More generally, the Court has accepted that it is permissible to exclude *a whole class of cases* from a public hearing, subject to the Court deciding that the general exclusion of cases within the class falls within one of the grounds listed in Article 6(1). Thus, in *B and P v UK*,[633] the Court found it acceptable that there was a rebuttable presumption in favour of a private hearing in all proceedings under the Children Act 1989.

Article 6(1) provides an entitlement to a 'public' hearing as an individual right which may be restricted on the initiative of the state on a permitted ground. However, there may be cases in which an accused or other litigant would *prefer* a private hearing. In such a case, the question will be whether insistence on a public hearing by the state would be a violation of the right to privacy in Article 8.

### b. The right to an oral hearing

Although not expressly mentioned in the text of Article 6, an oral hearing 'constitutes a fundamental principle enshrined in Article 6(1)'[634] and is 'necessarily' implied by the right to a public hearing.[635] It follows in criminal cases from the nature of the guarantees in Article 6(3)(c), (d), and (e)[636] and has been held to be required in some non-criminal cases also. The right to an oral hearing applies both when a court sits in public and to hearings *in camera* in circumstances allowed by Article 6(1). If the law provides for an oral hearing (whether required or not), the accused must be informed of the hearing in good time.[637]

The obligation to hold an oral hearing is not absolute. In *Jussila v Finland*,[638] the Grand Chamber accepted that, although the right to an oral hearing 'is particularly important in the criminal context', it may be dispensed with in certain kinds of criminal cases. The

[628] *X v Austria No 1913/63*, 2 Digest 438 (1965). Several grounds, including the 'interests of juveniles', could have applied.

[629] A 80 (1984); 7 EHRR 165 (private hearing because of risk to security if public allowed in prison or prisoners transported to outside courts).

[630] Cf *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 para 59 PC. This public interest meaning is consistent with the French text of Article 6(1) which uses the term '*ordre public*'. Public disorder in the courtroom might be brought within the 'interests of justice' restriction.

[631] *Moiseyev v Russia No 62936/00* hudoc (2004) DA.

[632] Hudoc (2013) para 75. The standard 'strictly necessary' only relates to the 'interests of justice' in the text of Article 6(1), but the Court applies it more generally.

[633] 2001-III; 34 EHRR 529. See also *Osinger v Austria* hudoc (2005) para 47 (succession to property).

[634] *Jussila v Finland* 2006-XIV; 45 EHRR 892 para 40 GC. Cf *Göç v Turkey* 2002-V GC para 46 and *De Tommaso v Italy* hudoc (2017) para 163 GC.

[635] *Yakovlev v Russia* hudoc (2005) para 19.

[636] *Demebukov v Bulgaria* hudoc (2008) para 44.

[637] *Yakovlev v Russia* hudoc (2005) para 21 (right to attend oral appeal hearing in Russian law).

[638] 2006-XIV; 45 EHRR 892 paras 40, 43 GC.

Grand Chamber distinguished between cases that do not carry 'any significant degree of stigma', and others that form a part of the 'hard core of criminal law'. In *Jussila*, the Grand Chamber held that an oral hearing was not required in a case involving the imposition of a tax surcharge. It also referred to cases involving administrative,[639] customs, competition, and other financial offences that fall within Article 6 under the *Engel* case but that do not strictly belong to the 'traditional categories of the criminal law' as being cases in which an oral hearing might not be required.

As to civil cases, in the *Jussila case*[640] the Grand Chamber explained the positon as follows: 'the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided', not their 'frequency', so that Article 6(1) does not 'mean that refusing to hold an oral hearing may be justified only in rare cases'. An oral hearing is not required, 'for example, where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials'.[641] The Grand Chamber accepted 'that the national authorities may have regard to the demands of efficiency and economy' and 'for example, that the systematic holding of hearings could be an obstacle to the particular diligence required in social security cases and could ultimately prevent compliance with the reasonable time requirement in Article 6(1)'.[642] In other cases, the Court has stated that an oral hearing is not required in civil cases involving 'highly technical'[643] issues, or that have concerned exclusively questions of law of 'no particular complexity'.[644] At the same time, the Court has ruled in many cases that an oral hearing may not be dispensed with.[645]

Clearly, where an oral hearing is required, a court of first instance must provide that hearing where there is no right of appeal.[646] In cases in which there has been an oral hearing at first instance, or in which one has been waived at that level,[647] there is no absolute right to an oral hearing in any appeal proceedings that are provided. Instead, whether one is required 'depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein'.[648] Where the proceedings involve an appeal only on points of law, an oral hearing is generally not required.[649] If an appeal court is called upon to decide questions of fact, an oral hearing may or may not be required, depending upon whether

[639] See, eg, *Suhadolc v Slovenia* hudoc (2011) DA (road traffic offences).

[640] 2006-XIV; 45 EHRR 892 paras 41–42 GC. [641] *ibid* para 41. [642] *ibid* para 42.

[643] *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405 para 58. The Court also stressed that there was no issue of 'public importance' involved: *ibid*. As in *Schuler-Zgraggen*, most 'highly technical' cases have concerned social security benefit claims turning upon medical evidence: see, eg, *Miller v Sweden* hudoc (2005); 42 EHRR 1155. See also *Martinie v France* 2006-VI; 45 EHRR 433 GC (judicial audit of accounts) and *Hofbauer v Austria No 68087/01* hudoc (2004) DA (whether door was fire-resistant).

[644] *Valová, Slezák and Slezák v Slovakia* hudoc (2004) para 64. See also *Allan Jacobsson v Sweden (No 2)* 1998-I; 32 EHRR 463 para 45.

[645] See, eg, *Göç v Turkey* hudoc (2002) para 47 GC (compensation for detention); *Eisenstecken v Austria* hudoc (2000) para 35 (real property contract); *Koottummel v Austria* hudoc (2009) para 20 (work permit); and *Selmani and Others v FYRM* hudoc (2017) (constitutional court freedom of expression case). See also *Pönkä v Estonia* hudoc (2016) para 39 (Court concern at automatic application of non-oral, simplified small claims procedure and possible use of video-link for prisoners abroad).

[646] See, eg, *Göç v Turkey* 2002-V para 47 GC. [647] *Döry v Sweden* hudoc (2002).

[648] *Ekbatani v Sweden* A 134 (1988); 13 EHRR 504 para 27 PC. See also *Hermi v Italy* 2006-XII; 46 EHRR 1115 GC.

[649] *Axen v Germany* A 72 (1983); 6 EHRR 195. An oral hearing was not required for leave to appeal proceedings: *Monnell and Morris v UK* A 115 (1987); 10 EHRR 205 para 68.

one is necessary to ensure a fair trial. In *Ekbatani v Sweden*,[650] an oral hearing was required on appeal where there was a dispute as to the facts in a criminal case that involved the accused's credibility: the accused's guilt or innocence 'could not, as a matter of a fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant'. In *Lazu v Moldova*,[651] there was a breach of Article 6(1) when an appeal court that was required to re-hear a case on the facts held an oral hearing with the applicant and his lawyer present but reversed the applicant's acquittal of a road traffic offence without recalling the prosecution witnesses for examination. In contrast, in *Jan-Åke Andersson v Sweden*,[652] an oral hearing was not required in the case of a minor road traffic offence in which the appeal did not raise 'any questions of fact or law which could not adequately be resolved on the basis of the case file'. What is at stake for the applicant is also relevant. Thus, in *Helmers v Sweden*,[653] in a private criminal prosecution for defamation, it was relevant that the applicant's professional reputation and career were at stake.

### c. Waiver of a public or oral hearing

The possibility of waiver applies to both the rights to a public hearing and to an oral hearing.[654] A person may waive his right to either right, so long as the waiver is done of his own free will 'in an unequivocal manner' and there is no 'important public interest' consideration that requires a public hearing.[655] A waiver may be tacit, provided that it is clear from the facts that one is being made.[656] An 'unequivocal' waiver was found to have been made in *Håkansson and Sturesson v Sweden*[657] when the applicant failed to ask for a public hearing before a court, which by law conducted its proceedings in private unless a public hearing was considered by it to be 'necessary'. The judgment can be criticized as requiring the applicant to take the initiative to request the application of an exception to a general rule, when the general rule should itself, consistently with Article 6(1), provide for a public hearing.[658]

### d. The right to the public pronouncement of judgment

In contrast with the right to a public hearing, the right to have judgment 'pronounced publicly' is not subject to any exceptions in the text of Article 6(1). However, the Court has applied the wording 'pronounced publicly' 'with some degree of flexibility'.[659] Whereas this wording appears to require that judgment be delivered orally in full and in open court,[660] the Strasbourg Court has established a number of limitations or exceptions.

First, it may be sufficient that delivery in court is not of the full text of the judgments at all levels of the proceedings. In *Lamanna v Austria*,[661] there was no breach of Article 6(1) when

[650] A 134 (1988); 13 EHRR 504 para 32 PC. See also *Kamasinski v Austria* A 168 (1989); 13 EHRR 36; *Botten v Norway* 1996-I; 32 EHRR 37; *Belziuk v Poland* 1998-II; 30 EHRR 614; *Schlumpf v Switzerland* hudoc (2009); and *Kashlev v Estonia* hudoc (2016). A video-link may be sufficient on security grounds: see *Marcello Viola v Italy* 2006-XI.

[651] Hudoc (2016) paras 40–42.

[652] A 212-B (1991); 15 EHRR 218 para 29.

[653] A 212-A (1991); 15 EHRR 285 PC. See also *Kremzow v Austria* A 268-B (1993); 17 EHRR 322; *Constantinescu v Romania* 2000-VIII; and *Sigurþór Arnarsson v Iceland* hudoc (2003); 39 EHRR 426.

[654] See the *Håkansson and Sturesson* and *Pauger* cases. And see *Guenoun v France No 13562/88*, 66 DR 181 (1990).

[655] *Håkansson and Sturesson v Sweden* A 171-A (1990); 13 EHRR 1 para 66. See also *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405 para 58 and *Pauger v Austria* 1997-III; 25 EHRR 105 para 58.

[656] See *Hermi v Italy* hudoc (2006); 46 EHRR 1115 GC.

[657] A 171-A (1990); 13 EHRR 1. Cf *H v Belgium* A 127-B (1987); 10 EHRR 339 PC. Failure to ask for a hearing by a court that lacks full jurisdiction is not a waiver: *Göç v Turkey* 2002-V GC.

[658] Cf Judge Walsh's dissenting opinion.

[659] *Lamanna v Austria* hudoc (2001) para 31.

[660] The French text—'*rendu publiquement*'—suggests the same: *Pretto and Others v Italy* A 71 (1983); 6 EHRR 182 PC.

[661] Hudoc (2001). See also *Crociani v Italy No 8603/79*, 22 DR 147 (1980).

the Court of Appeal's judgment on a claim for compensation for detention was delivered by it in open court, but only contained a summary of the trial court's judgment. Further, it was not delivered until six years after its adoption, on the order of the Supreme Court after an application on the delay had been declared admissible at Strasbourg.[662] In contrast, in *Ryakib Biryukov v Russia*,[663] it was held not sufficient for a trial court just to read out the operative part of judgment in a civil case, without giving any reasons for the decision.

Second, an exception may be allowed for reasons of security. In *Campbell and Fell v UK*,[664] in the special context of Boards of Visitors in the former English prison disciplinary system, the Court accepted that a Board of Visitors award need not be delivered in the presence of 'press and public' in view of the problem of prison security, but found a breach of the 'pronounced publicly' requirement since no alternative arrangements had been made to publish the text of the award.

Third, noting that the publication of some kinds of judgments by making them available to the public in the court registry is a long-standing tradition in many Council of Europe member states, in *Pretto and Others v Italy*[665] the Strasbourg Court ruled that 'the form of publicity to be given to the "judgment" . . . 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)', with account being taken of the 'entirety of the proceedings', including the function of the court concerned and whether judgments have been pronounced in open court at any level in the case. Thus, in the *Pretto* case, the Court held that Article 6(1) was complied with, even though the judgment of the Italian Court of Cassation rejecting the applicant's appeal in a civil claim was only made available to the public in the court registry without having been delivered orally in open court. The Strasbourg Court noted that the Court of Cassation had jurisdiction to consider only points of law and to reject an appeal or quash a judgment, and that it had given its judgment after a public hearing. Bearing in mind the purpose of the 'pronounced publicly' requirement, which is to contribute to a fair trial through public scrutiny,[666] publication via the registry was consistent with Article 6(1) on these facts.

The Court was less sympathetic in *Werner v Austria*.[667] In that case, the judgments of the trial court and the first court of appeal on the applicant's claim for compensation for detention after criminal proceedings against him had been discontinued were not delivered in open court. They were served on the applicant but were otherwise only available from the registry to third parties who, in the relevant court's opinion, could show a legitimate interest. Since it might be of importance to the person concerned that the public should know that any suspicion against him has been dispelled, the Strasbourg Court held that there was a breach of Article 6(1) because 'no judicial decision was pronounced publicly and . . . publicity was not sufficiently ensured by other appropriate means'.

Fourth, the Court has accepted that the publication of orders or judgments concerning children's and parental rights may be restricted to interested persons, ie not made available to the public at large. Thus, in *B and P v UK*,[668] it was sufficient that anyone who could establish an interest could consult or obtain a copy of the full text of the orders or judgments

[662] But see *Fazliyski v Bulgaria* hudoc (2013) (one-year delay in publishing judgment not justified).

[663] 2008- paras 44–45. The reasoned judgment was served on the applicant later.

[664] A 80 (1984); 7 EHRR 165.

[665] A 71 (1983); 6 EHRR 182 paras 26–27 PC. Cf *Axen v Germany* A 72 (1983); 6 EHRR 195 para 31 PC.

[666] See *Werner v Austria* 1997-VII; 26 EHRR 310 para 54.

[667] *ibid* para 60. Cf *Sutter v Switzerland* A 74 (1984); 6 EHRR 272 PC.

[668] 2001-III; 34 EHRR 529. The Court cited *Sutter v Switzerland* A 74 (1984); 6 EHRR 272 PC, in which there was no breach in military disciplinary proceedings when only a person who could establish an interest could consult or obtain a copy of a judgment from the court registry.

made by the court of first instance in child residence cases. Further, the publication of first instance and appeal court judgments in law reports in such cases sufficiently allowed the general public to study the approach taken by the courts. Interestingly, in the *B and P* case, the Court drew upon the 'interests of juveniles' and the 'administration of justice' exceptions to the requirement of a public hearing in the text of Article 6(1) when reaching this decision on the public pronouncement of judgment.

## IV. THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

The purpose of the 'reasonable time' guarantee, which applies to both criminal and non-criminal cases, is to protect 'all parties to court proceedings . . . against excessive procedural delays'[669] and 'underlines the importance of rendering justice without delays which might jeopardize its effectiveness and credibility'.[670] In criminal cases, it is also 'designed to avoid that a person charged should remain too long in a state of uncertainty about his fate'.[671] In such cases, the effect that being an accused has upon a person's reputation is relevant too.

In criminal cases, the reasonable time guarantee runs from the moment that an accused is subject to a 'charge', by which is meant 'substantially affected' by it.[672] In non-criminal cases, it normally begins to apply from the initiation of court proceedings, but sometimes earlier.[673] In both kinds of case, the guarantee continues to apply until the case is finally determined.[674] If proceedings are still pending in the national courts when an application is under consideration at Strasbourg, the period covered by the reasonable time guarantee runs until the judgment is given in the case by the Court.[675] If the respondent state becomes a party to the Convention after Article 6 has begun to apply to a particular case, the guarantee will only begin to run as of the date of ratification.[676] Nonetheless, in assessing the reasonableness of the time that is taken to determine a case after that date, 'account must be taken of the then state of proceedings'.[677] Thus, a decision as to whether a case has been treated with the necessary expedition after that date will be influenced by the fact that the case has already been pending for a long time.[678]

The obligation to decide cases within a reasonable time extends to constitutional courts, subject to the need to take account of their special role as guardian of the constitution.[679] In particular, they may delay consideration of a case to ensure that sufficient time is taken to rule on a matter of constitutional importance, possibly in combination with other similar cases.

The reasonableness of the length of proceedings in both criminal and non-criminal cases depends on the particular circumstances of the case.[680] There is no absolute time limit. Factors that are always considered are the complexity of the case, the conduct of the applicant, and the conduct of the competent administrative and judicial authorities.[681]

[669] *Stögmüller v Austria* A 9 (1969) p 40; 1 EHRR 155, 191. On the guarantee, see Henzelin and Rordorf, 5 NJ ECL 78 (2014).

[670] *H v France* A 162-A (1989); 12 EHRR 74 para 58.

[671] *Stögmüller v Austria* A 9 (1969) p 40; 1 EHRR 155, 191. Cf *Wemhoff v Germany* A 7 (1968); 1 EHRR 55.

[672] See this chapter, section 2.I.b, p 379.

[673] See this chapter, section 2.I.f, p 396.

[674] See this chapter, sections 2.I.b, p 380 and 2.II.f, p 397. A reasonable time claim subsists despite acquittal: *Lehtinen v Finland* hudoc (2005).

[675] *Neumeister v Austria* A 8 (1968); 1 EHRR 91 and *Nibbio v Italy* A 228-A (1992).

[676] *Foti and Others v Italy* A 56 (1982); 5 EHRR 313.

[677] *ibid* para 53.

[678] *Brigandi v Italy* A 194-B (1991).

[679] *Süssmann v Germany* 1996-IV; 25 EHRR 64 GC. But see *Wimmer v Germany* hudoc (2005) and *Oršuš v Croatia* 2010-; 52 EHRR 300 paras 108–109 GC (four years for a child education case too long).

[680] *König v Germany* A 27 (1978); 2 EHRR 170 PC and *Pedersen and Baadsgaard v Denmark* 2004-XI; 42 EHRR 486 GC.

[681] *König v Germany, ibid.*

The Court also takes into account what is 'at stake' for the applicant.[682] No margin of appreciation doctrine is applied, at least expressly, when determining the reasonableness of the time taken; the European Court simply makes its own assessment.[683] When it does so, it must bear in mind that Article 6 can only require such expedition as is consistent with the proper administration of justice.[684] Occasionally the Court has been willing to take into account other broader considerations. Thus, in *Katte Klitsche De La Grange v Italy*[685] the Court was prepared to tolerate 'abnormal' delays totalling over four years because they concerned 'such a sensitive area as town planning and the protection of the environment' and 'could have and in fact did have important repercussions' for Italian law.

As to the first of the three factors listed above, a case may be complex for many reasons, such as the volume of evidence,[686] the number of defendants or charges,[687] the need to obtain expert evidence[688] or evidence from abroad,[689] or the complexity of the legal issues involved.[690] Although the Court takes into account a case's complexity, there may come a point where it will simply regard the proceedings as too long to be reasonable.[691]

With regard to the second factor, the state is not responsible for delay that is attributable to the conduct of the applicant. While an applicant is entitled to make use of his procedural rights, any consequential lengthening of proceedings cannot be held against the state.[692] In a criminal case, although an accused is not required 'actively to co-operate with the judicial authorities',[693] if delay results, for example, from his refusal to appoint a defence lawyer, this is not the responsibility of the state.[694] But a state is responsible for its negligent delay in discontinuing proceedings against an accused: it cannot claim that the accused should have reminded it.[695] Where an accused flees from the jurisdiction or disappears while subject to a 'charge', the time during which he has absented himself from the proceedings is not to be taken into account in determining the length of proceedings, unless there is a 'sufficient reason' for the flight.[696]

In civil litigation, some national legal systems apply the principle that the parties are responsible for the progress of proceedings.[697] This does not, however, 'absolve the courts from ensuring compliance with the requirements of Article 6 concerning reasonable time'; the state must itself take appropriate steps to ensure that proceedings progress speedily.[698]

[682] *Frydlender v France* 2000-VII; 31 EHRR 1152 GC. What is 'at stake' is sometimes treated as a separate fourth factor: see, eg, *Sürmeli v Germany* 2006-VII; 44 EHRR 438 GC.

[683] See, eg, *Casciaroli v Italy* A 229-C (1992) (Court disagreed with the respondent state's assessment of the complexity of the case), and *Piper v UK* hudoc (2015) para 68 (Court disagreed with the Court of Appeal's assessment of the facts).

[684] *Boddaert v Belgium* A 235-D (1992); 16 EHRR 242 (six years for complicated murder case reasonable). The accused is also entitled to reasonable time to prepare his defence: see Article 6(3)(b), this chapter, section 5.III.a, p 470.

[685] A 293-B (1994); 19 EHRR 368 para 62.

[686] *Eckle v Germany* A 51 (1982); 5 EHRR 1.

[687] *Neumeister v Austria* A 8 (1968); 1 EHRR 91.

[688] *Wemhoff v Germany* A 7 (1968); 1 EHRR 55.

[689] *Neumeister v Austria* A 8 (1968); 1 EHRR 91. The respondent state will not be responsible for another state's delays in supplying evidence: *ibid.*

[690] *ibid.*

[691] See *De Clerck v Belgium* hudoc (2007) para 57 (nearly 17 years and still pending; money laundering and fraud).

[692] See, eg, *König v Germany* A 27 (1978); 2 EHRR 170 PC (changing lawyers, making appeals, calling new evidence).

[693] *Eckle v Germany* A 51 (1982); 5 EHRR 1 para 82.

[694] *Corigliano v Italy* A 57 (1982); 5 EHRR 334. Likewise delay because of accused's ill-health: *Krakolinig v Austria* No 33992/07 hudoc (2012) para 27 DA. The accused has no right to terminate criminal proceedings because of ill-health: *Krakolinig v Austria, ibid.*

[695] *Orchin v UK No 8435/78*, 34 DR 5 (1982) Com Rep; CM Res DH (83) 14.

[696] *Vayiç v Turkey* 2006-VIII, citing *Ventura v Italy No 7438/76*, 23 DR 5 at 91 (1980).

[697] See *Buchholz v Germany* A 42 (1981); 3 EHRR 597 para 50 and *Foley v UK* hudoc (2002) para 40.

[698] *Unión Alimentaria Sanders SA v Spain* A 157 (1989); 12 EHRR 24 para 35. Cf *Sürmeli v Germany* 2006-VII; 44 EHRR 438 GC.

Whether such a principle applies or not, the responsibilities of the applicant in civil cases are 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 proceedings'.[699] Delay caused by the conduct of the applicant's legal aid lawyer in civil proceedings is not attributable to the state: although he is publicly appointed, such a lawyer acts for his client, not the state.[700] Nor is a state responsible for delay that results from the conduct of the defendant against whom the applicant brings a civil claim.[701]

As to the third factor, the state is responsible for delays that are attributable to its administrative or judicial authorities.[702] In criminal cases, breaches of Article 6(1) have been found because of unjustified delays in the conduct of the preliminary investigation in a civil law system,[703] entering a *nolle prosequi*,[704] appointing judges,[705] controlling expert witnesses,[706] communicating the judgment to the applicant,[707] and the commencement of appeals.[708] Whereas it may be sensible to hear cases against two or more accused persons together, this cannot 'justify substantial delay' in the bringing of a case against any one of them.[709] But, in appropriate circumstances, a court may be justified in permitting a delay in order to allow political or other passions to cool.[710] A state will also not be responsible for reasonable delays resulting from obtaining evidence from abroad[711] or the time taken to obtain a preliminary ruling from the European Court of Justice.[712] Nor is it responsible for delays caused by a lawyer's strike.[713]

Where applicable, the same considerations apply in non-criminal cases also. In such cases, states have been held responsible for delays in civil and administrative courts in performing routine registry tasks,[714] in the conduct of the hearing by the court,[715] in the presentation of evidence by the state,[716] for the adjournment of proceedings pending the outcome of another case,[717] and for delays caused by lack of coordination between administrative authorities.[718] As in criminal cases, the period of time to be considered continues until the judgment becomes final.[719]

As indicated above, when assessing the reasonableness of the length of proceedings, the Court takes into account what is 'at stake' for the applicant. The Court has identified a large number of kinds of case in which particular expedition is required on this basis. These include cases concerning the applicant's employment;[720]

[699] *Unión Alimentaria Sanders SA v Spain*, *ibid*. Cf *Deumeland v Germany* A 100 (1986); 8 EHRR 448 para 80 PC. For cases of litigant delay for which the state was not responsible, see *Monnet v France* A 273-A (1993); 18 EHRR 27; *Ciricosta and Viola v Italy* A 337-A; and *Patrianakos v Greece* hudoc (2004).

[700] *H v France* A 162-A (1989); 12 EHRR 74. But in a criminal case there is a duty to provide effective legal aid under Article 6(3)(c).

[701] *Bock v Germany* A 150 (1989); 12 EHRR 247 para 41.

[702] But a private law reporter's delay is not attributable to the state: *Foley v UK* hudoc (2002). *Quaere* whether the UK is responsible for delays by its health authorities: see *Somjee v UK* hudoc (2002); 36 EHRR 228.

[703] *Eckle v Germany* A 51 (1982); 5 EHRR 1.

[704] *Orchin v UK No 8435/78*, 34 DR 5 (1982) Com Rep; CM Res DH (83) 14.

[705] *Georgiadis v Cyprus* hudoc (2002). See also *Foti and Others v Italy* A 56 (1982); 5 EHRR 313 (transferring cases between courts).

[706] *Rawa v Poland* hudoc (2003).

[707] *Eckle v Germany* A 51 (1982); 5 EHRR 1.

[708] *ibid*. The reasonable time guarantee continues to apply until the time limit for an appeal is exhausted: *Ferraro v Italy* A 197-A (1991).

[709] *Hentrich v France* A 296-A (1994); 18 EHRR 440. See also *Rezette v Luxembourg* hudoc (2004).

[710] *Foti and Others v Italy* A 51 (1982); 5 EHRR 313.

[711] *Włoch v Poland* 2000-XI paras 149–150 (evidence taken abroad by letters regatory).

[712] *Pafitis v Greece* 1998-I para 95.

[713] *ibid* para 96 and *Giannangeli v Italy* hudoc (2001).

[714] *Guincho v Portugal* A 81 (1984); 7 EHRR 23.

[715] *König v Germany* A 27 (1978); 2 EHRR 170 PC.

[716] *H v UK* A 120 (1987); 10 EHRR 95 PC.

[717] *König v Germany* A 27 (1978); 2 EHRR 170 PC. See also *Iribarren Pinillos v Spain* hudoc (2009).

[718] *Wiesinger v Austria* A 213 (1991); 16 EHRR 258.

[719] *Maciariello v Italy* A 230-A (1992).

[720] *Buchholz v Germany* A 42 (1981); 3 EHRR 597. Cf *Eastaway v UK* hudoc (2004); 40 EHRR 405 (company director) and *Svetlana Orlova v Russia* hudoc (2009) (pregnant employee).

civil status;[721] custody of children;[722] education;[723] health;[724] reputation;[725] title to land;[726] business interests;[727] and compensation for road accidents.[728] It may be relevant that the applicant has been charged interest on the sum in dispute while the case is pending.[729] In criminal cases, the likelihood of a life sentence or other heavy sentence is relevant.[730]

Criminal cases generally require more urgency than non-criminal ones[731] and a more rigorous standard applies where an accused is in detention.[732] In such cases, the reasonable time guarantee in Article 6(1) overlaps with that in Article 5(3), under which 'special diligence' is also required in the time taken in cases where the accused is in detention.[733] However, since Article 5(3) ceases to apply once an accused is convicted, the reasonable time guarantee in Article 6(1) alone protects a convicted person detained during subsequent appeal or other proceedings.[734]

When applying these factors, the Court has sometimes treated cases differently depending on whether the overall length of proceedings appears on its face to be reasonable or not. Where it appears reasonable, the Court has tolerated some proven, but small, instances of delay. Thus, in *Pretto and Others v Italy*,[735] there were delays of several months before an appeal in a civil case was heard, but, 'although these delays could probably have been avoided, they are not sufficiently serious to warrant the conclusion that the total duration of the proceedings [three years and six months] was excessive'. But, where there are substantial particular delays the Court has found a breach even though the overall length appears reasonable. For example, in *Bunate Bunkate v Netherlands*,[736] there was a breach of the reasonable time guarantee in a criminal case lasting, not unreasonably, two years and ten months over three levels of proceedings because there had been an unexplained delay of 15 months in transferring the appeal from one appeal court to another. In contrast, where the overall length of proceedings appears unreasonable, the Court has on occasion been less tolerant of small instances of unjustified delay.[737] One general indicator that the Court has identified in reviewing cases where the overall length appears unreasonable is the repetition of orders by an appellate court for the re-examination of a case as a result of errors by the lower courts: such a situation 'discloses a serious deficiency in the judicial system' resulting in delays

[721] *Sylvester v Austria No 2* hudoc (2005). See also *Berlin v Luxembourg* hudoc (2003) (family life).

[722] *Hokkanen v Finland* A 299-A (1994); 19 EHRR 139. Cf *H v UK* A 120 (1987); 10 EHRR 95 PC (parental access).

[723] *Oršuš and Others v Croatia* hudoc (2010); 52 EHRR 300 GC.

[724] *Bock v Germany* A 150 (1989); 12 EHRR 247; *RPD v Poland* hudoc (2004); *Gheorghe v Romania* 2007-XX; and *De Clerck v Belgium* hudoc (2007). 'Exceptional diligence' is required in claims of compensation for AIDS: *X v France* A 234-C (1992); 14 EHRR 483 and child access cases: *Paulsen-Medalen and Svensson v Sweden* hudoc (1998) paras 39, 42.

[725] *Pieniążek v Poland* hudoc (2004).

[726] *Poiss v Austria* A 117 (1987); 10 EHRR 231 and *Hentrich v France* A 296-A (1994); 18 EHRR 440.

[727] *De Clerck v Belgium* hudoc (2007).

[728] *Silva Pontes v Portugal* A 286-A (1994); 18 EHRR 156. But see *Sürmeli v Germany* 2006-VII; 44 EHRR 438 GC.

[729] *Schouten and Meldrum v Netherlands* A 304 (1994); 19 EHRR 432.

[730] *Henworth v UK* hudoc (2004); 40 EHRR 810 and *Portington v Greece* 1998-VI.

[731] *Baggetta v Italy* A 119 (1987); 10 EHRR 325. Special diligence is required in a retrial: *Henworth v UK* hudoc (2004); 40 EHRR 810.

[732] *Abdoella v Netherlands* A 248-A (1992); 20 EHRR 585 and *Kalashnikov v Russia* 2002-VI; 36 EHRR 587.

[733] *Frydlender v France* hudoc (2000); 31 EHRR 1152.

[734] See *B v Austria* A 175 (1990); 13 EHRR 87 (two years nine months to draft appeal court judgment when appellant in detention).

[735] A 71 (1983); 6 EHRR 182 para 37 PC. Cf *Biryukov v Russia No 63972/00* hudoc (2004) DA.

[736] A 248-B (1993); 19 EHRR 477. Cf *Kudła v Poland* 2000-XI; 25 EHRR 198 GC.

[737] See, eg, *Guincho v Portugal* A 81 (1984); 7 EHRR 223 para 30; *Deumeland v Germany* A 100 (1986); 8 EHRR 448 para 90 PC; and *Lechner and Hess v Austria* A 118 (1987); 9 EHRR 490 para 39.

for which the state may be held responsible.[738] In some extreme cases the Court would appear to find a breach essentially on the basis of the excessive total length, quite apart from any particular instances of unjustified delay, taking the view that no proceedings that took so long could have been conducted diligently. For example, in *Ferrantelli and Santangelo v Italy*[739] the Court found a violation where a difficult murder trial had taken 16 years. Although, apart from an 'inexplicable period of stagnation of nearly two years during the first investigation', the case had proceeded regularly, such a length of time was just too long to be 'reasonable'.

The discussion so far has supposed that the Court is considering whether the proceedings on the facts of a particular case have been conducted with sufficient expedition. There is, however, another dimension to the 'reasonable time' guarantee. The Convention places a duty on the contracting parties, which applies regardless of cost,[740] 'to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time'.[741] It follows that a state may be held liable not only for any delay in the handling of a particular case in the operation of a generally expeditious system for the administration of justice, but also for a failure to increase resources in response to a backlog of cases and for structural deficiencies in its system of justice that cause delays.

As to a backlog of cases, the Court has drawn a distinction between a situation of 'chronic overload', involving an ongoing problem, for which the state may be liable, and a sudden or 'temporary backlog', for which it will not be liable if it takes 'appropriate remedial action with the requisite promptness'.[742] In *Zimmermann and Steiner v Switzerland*,[743] the respondent state was held liable when administrative appeal proceedings of a straightforward kind, before the Swiss Federal Court, had taken nearly three-and-a-half years, during most of which time the applicants' case had remained stationary. The agreed reason for the delay was that the Court was overworked and had for that reason given priority to urgent or important cases,[744] within neither of which categories the applicants' case fell. The Court's caseload had built up over several years, and adequate steps to increase the number of judges and administrative staff or otherwise reorganize the court system to cope with what had become a permanent problem had not been taken to remedy the situation by the time that the applicants' appeal was heard. A situation of 'chronic overload' under which the German Constitutional Court had 'laboured since the end of the 1970s' was also a factor in finding a breach of the reasonable time guarantee in *Pammel v Germany*.[745]

However, in *Buchholz v Germany*,[746] the state was not liable for a delay that resulted from a backlog of cases that was not reasonably foreseeable where it had taken reasonably prompt remedial action. In that case, the delay in the consideration of the applicant's claim for unfair dismissal was attributable to a backlog of cases that had developed suddenly with the economic recession of the 1970s and because prompt steps had been taken

[738] See, eg, *Vlad and Others v Romania* hudoc (2013) para 133.

[739] 1996-III; 23 EHRR 288 para 42. For other such cases, see, eg, *Comingersoll SA v Portugal* 2000-IV; 31 EHRR 772 GC; *Gümüşten v Turkey* hudoc (2004); *Uoti v Finland No 20388/92* hudoc (2004) para 2 DA; *Obasa v UK* hudoc (2003); *Jordan v UK (No 2)* hudoc (2002); *Ruotolo v Italy* A 230-D (1992).

[740] *Airey v Ireland* A 32 (1979); 2 EHRR 305.

[741] *Süssmann v Germany* 1996-IV; 25 EHRR 64 para 55 GC. See also *Serrano Contreras v Spain* hudoc (2012) para 57.

[742] *Klein v Germany* hudoc (2000); 34 EHRR 415 para 43.

[743] A 66 (1983); 6 EHRR 17. See also *Žiačik v Slovakia* hudoc (2003).

[744] A system of priorities may be permissible as a short-term measure: *Süssmann v Germany* 1996-IV; 25 EHRR 64 para 60 GC (priority for German reunification cases permissible).

[745] 1997-IV; 26 EHRR 100 para 69. Cf *Klein v Germany* hudoc (2000); 34 EHRR 415.

[746] A 42 (1981); 3 EHRR 597.

to increase the number of judges when the problem became apparent. Although these steps did not benefit the applicant, they were all that could reasonably be expected of the respondent state in the circumstances.

More delicate than the problem of delays resulting from a backlog of cases is the question whether a state can be required to restructure its administration of justice system to eliminate delays that are inherent in it. This question arose in *Neumeister v Austria*,[747] in which much of the delay had occurred at the preliminary investigation stage. Under some civil law systems of criminal justice, including that in Austria, a person may spend a considerable length of time waiting for a 'charge' against him in the sense of Article 6 to be fully examined by an investigating judge when much of that examination is a repetition of work already done by the police in its investigation. If such a system, which has advantages in other respects, were altered to eliminate this overlap of time, the period during which an accused had a charge hanging over him would generally be reduced. In the *Neumeister* case, the Court confirmed that preliminary investigation systems of the kind described are not in themselves contrary to Article 6; the requirement is only that they be administered efficiently. It could not have been the intention of the drafting states that such a fundamental change in the legal systems of many of their number would be required.

The same question arose again in *König v Germany*,[748] in the different context of the elaborate system of administrative courts in West Germany. Faced with one set of proceedings that had lasted nearly 11 years and were still pending, the Court first noted that it was not its function to comment on the structure of the courts concerned which, it conceded, was aimed at providing a full set of remedies for the individual's grievances. It added, however, that if efforts to this end 'resulted in a procedural maze, it is for the state alone to draw the conclusions and, if need be, to simplify the system with a view to complying with Article 6(1) of the Convention'. The implication is that if a case takes what is on the face of it an unreasonably long time, a state will not escape liability by providing that it has been dealt with efficiently within the limits of an unduly elaborate court structure.

What emerges generally from the case law of the Court on the reasonable time guarantee is the considerable length of time that both criminal[749] and civil[750] proceedings may take in European jurisdictions and the large number of cases in which the Court has found breaches of Article 6.[751] Either the Court is being too rigorous in its expectations, or—as is the more convincing alternative in the light of the facts of the Strasbourg cases—the 'law's delay' is a serious and pervasive problem in the legal systems of European states generally.[752]

Finally, in an important development by the Court in tackling its own caseload, it should be noted that in *Bottazzi v Italy*,[753] in response to the violations of the 'reasonable

[747] A 8 (1968); 1 EHRR 91. [748] A 27 (1978); 2 EHRR 170 para 100 PC.

[749] See, eg, *Gümüşten v Turkey* hudoc (2004) (17 years) and *Hannak v Austria* hudoc (2004) (15 years). Both cases involved appeals.

[750] See, eg, *Mazzotti v Italy* hudoc (2000) (24 years, for one level of proceedings); *Szarapo v Poland* hudoc (2002) (19 years, with appeals); and *Sürmeli v Germany* 2006-VIII; 44 EHRR 438 GC (16 years, with appeals and still pending).

[751] On the role of the Convention in tackling the probem, see Kuijer, 13 HRLR 777 (2013).

[752] Whereas breaches of the 'reasonable time' guarantee were for a long time a problem mainly in cases coming from civil law jurisdictions, there has been a growing number of such breaches from common law jurisdictions: for UK cases, see, eg, civil cases: *Blake v UK* hudoc (2006) (nearly ten years) and *Foley v UK* hudoc (2003) (14 years); and criminal cases: *Massey v UK* hudoc (2004) (four years) and *Crowther v UK* hudoc (2005) (eight years), all more than one level. See also *Mellors v UK* hudoc (2003) (three years for one appeal level).

[753] 1999-V para 22 GC. See also *Michelioudakis v Greece* hudoc (2012) (over 250 Greek cases pending at Strasbourg: pilot judgment calling for national remedies within one year for cases of unreasonable delay).

time' guarantee found at Strasbourg in many hundreds of cases coming from Italy, the Strasbourg Court noted that the 'frequency with which violations are found shows that there is an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents'. This accumulation, the Court stated, 'accordingly constitutes a practice that is incompatible with the Convention'. The consequence of this ruling has been that later 'reasonable time' cases from Italy have commonly been disposed in groups and after less detailed examination of the facts than would otherwise be the case.[754] In *Scordino v Italy (No 1)*,[755] it was held that while the Italian 'Pinto law', by which a person may claim compensation in an Italian court for breaches of the Article 6 reasonable time guarantee,[756] may constitute a domestic remedy for such a breach, it did not mean that a person who had suffered in that way could not bring a Strasbourg claim as a 'victim' of the breach: Italy still needed to reform its judicial system to prevent such violations.

## V. THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

The right to a fair trial in Article 6(1) requires that cases be heard by an 'independent and impartial tribunal established by law'. The right applies equally to criminal cases and cases concerning 'civil rights and obligations'. There is a close inter-relation between the guarantees of an 'independent' and an 'impartial' tribunal.[757] A tribunal that is not independent of the executive is likely to be in breach of the requirement of impartiality also in cases to which the executive is a party. Likewise, a tribunal member who has links with a private party to the case is likely to be in breach of both requirements. For this reason, the European Court commonly considers the two requirements together, using the same reasoning to decide whether the tribunal is 'independent and impartial'.[758] In respect of both requirements, there is a breach not only where there is proof of actual dependence or bias (subjective test), but also where the facts raise a 'legitimate doubt' that the requirement has been met (objective test).

An important question is whether the right to an independent and impartial tribunal may be waived. Although it is tempting to accept that an applicant should not be allowed at Strasbourg to claim against a state a right which he has earlier unequivocally, and without pressure, waived at the national level, it is arguable that the requirement that a case always be decided by an independent and impartial tribunal is crucial to the operation of the rule of law, and that an Article 6 application should always be available to maintain this value. However, such indications as have been given by the Court—and they are not clear, unequivocal pronouncements—appear to accept that waiver is permitted, subject to the usual conditions ('unequivocal manner', etc).[759]

[754] For criticism of this consequence, see Judge Ferrari Bravo's dissenting opinion in *Angelo Giuseppe Guerrera v Italy* hudoc (2002), pointing out that 133 Italian 'reasonable time' cases had been decided on this basis on one day.

[755] 2006-V; 45 EHRR 207 GC.

[756] 'Pinto' compensation must normally be paid within six months: *Simaldone v Italy* hudoc (2009).

[757] In some cases, the two guarantees are considered jointly: see *Oleksandr Volkov v Ukraine* hudoc (2013) para 107.

[758] See, eg, *Cooper v UK* 2003-XII; 39 EHRR 171 GC.

[759] See *Oberschlick (No 1) v Austria* A 204 (1991); 19 EHRR 389 para 51; *Pfeifer and Plankl v Austria* A 227(1992); 14 EHRR 692 paras 37–39; *Bulut v Austria* 1996-II; 24 EHRR 84 para 34; and *McGonnell v UK* 2000-II; 30 EHRR 289 paras 44–45. On waiver, see this chapter, section 1, p 375.

### a. A tribunal

A 'tribunal' was defined in *Belilos v Switzerland*[760] as follows:

> . . . a 'tribunal' is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law[[761]] and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements—independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure—several of which appear in the text of Article 6(1) itself.

This definition is overly comprehensive insofar as it contains organizational and procedural elements that, as the Court notes, are included or may be subsumed under other guarantees in Article 6(1). As to the functional element, an important feature of a tribunal is that it must be competent to take legally binding decisions: the capacity to make recommendations or give advice (even if normally followed) is not enough.[762] A tribunal's decisions must also not be subject to being set aside by a non-judicial body;[763] and the government must not be empowered by law not to implement them, even though the power is never exercised.[764] The fact that a body has other functions (administrative, legislative, etc) does not in itself prevent it being a tribunal when exercising its judicial function.[765] The requirement of independence and impartiality applies in civil law systems to investigating judges and their equivalents, given the importance of their role.[766]

As to membership, although a tribunal will normally be composed of professional judges, this is not an absolute requirement. Lay assessors are a common feature of ordinary courts in European legal systems,[767] and a bench composed of lay magistrates, advised by a legally trained clerk (as in the English legal system), would appear to comply with Article 6. As to administrative and disciplinary tribunals, these may include persons who are not professional judges or qualified lawyers. Civil servants may be members of administrative tribunals,[768] and members of the armed forces may serve on military tribunals that try members of the armed forces for disciplinary[769] or criminal offences.[770] However, the participation of such members may raise issues under the independence or objective impartiality requirements.

[760] A 132 (1988); 10 EHRR 466 para 64. See also *Cyprus v Turkey* 2001-IV; 35 EHRR 731 para 233 GC and *Mihailov v Bulgaria* hudoc (2005).

[761] Ed: A 'tribunal' requires a set of rules of procedure by which it operates: *H v Belgium* A 127-B (1987); 10 EHRR 339.

[762] *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 PC.

[763] *Cooper v UK* 2003-XII; 39 EHRR 171 GC. See also *British-American Tobacco v Netherlands* A 331-A (1995); 21 EHRR 409; *Beaumartin v France* A 296-B (1994); 19 EHRR 485; and *Sovtransavto Holding v Ukraine* 2002-VII; 38 EHRR 911. As to the related Article 6 requirement of the finality of court judgments, see the *Brumărescu* case, this chapter, section 3.II.m, p 432.

[764] *Van de Hurk v Netherlands* A 288 (1994); 18 EHRR 481 para 45.

[765] *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165; *H v Belgium* A 127-B (1987); 10 EHRR 339; and *Demicoli v Malta* A 210 (1991); 14 EHRR 47. However, it may raise issues of objective independence and impartiality on the facts.

[766] *Vera Fernández-Huidobro v Spain* hudoc (2010).

[767] See, eg, *Langborger v Sweden*, A 155 (1989); 12 EHRR 416 PC.

[768] *Ettl and Others v Austria* A 117 (1987); 10 EHRR 225 and *Stojakovic v Austria* hudoc (2006).

[769] *Engel v Netherlands No 1* A 22 (1976); 1 EHRR 647 PC. Cf *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 PC (medical disciplinary body).

[770] *Cooper v UK* 2003-XII; 39 EHRR 171 GC.

### b. An independent tribunal

By 'independent' is meant 'independent of the executive and also of the parties'.[771] Clearly a government minister is not 'independent' of the executive, so that a decision taken by him does not comply with Article 6(1).[772] A tribunal that is otherwise separate from the executive is not 'independent' where it seeks and accepts as binding Ministry of Foreign Affairs advice on the meaning of a treaty that it has to apply; in such a case it has surrendered its judicial function to the executive.[773] In *Maktouf and Damjanović v Bosnia and Herzegovina*,[774] the Court indicated the considerations it takes into account when assessing independence:

> In determining in previous cases whether a body could be considered to be 'independent'—notably of the executive and of the parties to the case—it has had regard to such factors as the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the 'manner of appointment', 'although the notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law',[775] appointment 'by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.'[776] The arrangements for the selection or substitution of judges for a particular case from amongst the judiciary as a whole can give rise to questions of independence.[777] For a judge's independence to be challenged successfully by reference to his 'manner of appointment', it would have to be shown that the practice of appointment 'as a whole is unsatisfactory' or that 'at least the establishment of the particular court deciding a case was influenced by improper motives',[778] ie motives suggesting an attempt at influencing the outcome of the case.

With regard to the 'duration of their term of office', a short term of office has been accepted as permissible as far as members of administrative or disciplinary tribunals are concerned. In *Campbell and Fell v UK*,[779] appointment for a term of three years as a member of a prison Board of Visitors acting as a disciplinary tribunal was sufficient, the

[771] *Ringeisen v Austria* A 13 (1971) para 95. It also means independence of Parliament: *Crociani v Italy No 8603/79*, 22 DR 147 at 221 (1980).

[772] *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 PC. See also *Gerovska Popcevska v FYRM* hudoc (2016) para 55 (Minister of Justice member of judicial disciplinary body).

[773] *Beaumartin v France* A 296-B (1994); 19 EHRR 485. Cf *Chevrol v France* 2003-III.

[774] Hudoc (2013) para 49 GC. Cf *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165 para 78.

[775] See *Stafford v UK* 2002-IV para 78 GC.

[776] *Maktouf and Damjanović v Bosnia and Herzegovina* hudoc (2013) para 49 GC. See *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165; *Belilos v Switzerland* A 132 (1988); 10 EHRR 466; and *Asadov and Others v Azerbaijan No 138/03* hudoc (2006) DA (appointment by executive), and *Filippini v San Marino No 10526/02* hudoc (2003) DA and *Ninn-Hansen v Denmark* No 28972/95 1999-V; 28 EHRR CD 96 DA (appointment by Parliament).

[777] See *Barberà, Messegué and Jabardo v Spain* A 146 (1988); 11 EHRR 360 paras 53–59 (1988) (an impartiality case).

[778] *Zand v Austria No 7360/76*, 15 DR 70 at 81 (1978) Com Rep; CM Res DH (79) 6 (no violation). As to the appointment of judges for their political views, see *Crociani v Italy No 8603/79*, 22 DR 147 at 222 (1980) (question seen in terms of impartiality).

[779] A 80 (1984); 7 EHRR 165. Cf *Sramek v Austria* A 84 (1984); 7 EHRR 351 (three years) and *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 PC (six years). *Ad hoc* appointment of a military officer as a court-martial member for just one case was sufficient: *Cooper v UK* 2003-XII; 39 EHRR 171 GC. Cf *Dupuis v Belgium No 12717/87*, 57 DR 196 (1988). See also *Mihailov v Bulgaria* hudoc (2005) (no tenure).

Court being influenced by the fact that members were unpaid and that it might be hard to find candidates for any longer period. With regard to ordinary courts, appointment of judges may be for life or a fixed term,[780] but a renewable four-year term has been questioned.[781]

As to 'guarantees against outside pressures', tribunal members must be protected from removal during their term of office, either by law or in practice.[782] The appointment of a judge for a fixed term, so as to prevent dismissal at will, is a relevant factor,[783] although apparently not in itself required. In *Engel v Netherlands*,[784] the military members of the Netherlands Supreme Military Court were removable by Ministers at will. The Court would appear to have considered, without discussion, that their independence was not an issue in fact. In the *Campbell and Fell* case, the Court did not require any 'formal recognition' in law of the irremovability of a prison Board of Visitors member during his term of office; it was sufficient that this was 'recognised in fact and that the other necessary guarantees are present'.[785] In both of the *Engels* and *Campbell and Fell* cases, the possibility of removal by the executive without procedures for judicial review was not questioned.[786] In contrast, in *Henryk Urban and Ryszard Urban v Poland*,[787] the Court held that an assessor lacked the independence required because 'she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister'.

As far as other 'guarantees against outside pressure' are concerned, the Court requires that tribunal members are not subject to instructions from the executive, although here too it may be sufficient that this is the case in practice.[788] In the *Greek* case,[789] the extraordinary courts-martial during the regime of the Colonels were found not to be independent partly because their jurisdiction was to be exercised 'in accordance with decisions of the Minister of National Defence'. The secrecy of a tribunal's deliberations may afford protection against outside pressures.[790] Any authority given to the executive to grant an amnesty or a pardon must not be used so as to undermine the judicial function.[791]

Finally, the 'appearance-of-independence' requirement listed by the Court in the *Campbell and Fell* case relates to the objective test that has been developed by the Court in respect to the requirements of both independence and impartiality. In *Belilos v Switzerland*[792] the municipal Police Board which fined the applicant for taking part in

[780] *Zand v Austria No 7360/76*, 15 DR 70 (1978) Com Rep; CM Res DH (79) 6.

[781] *Incal v Turkey* 1998-IV; 29 EHRR 449 para 68. But see *Yavuz v Turkey No 29870/96* hudoc (2000) DA.

[782] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC. See also *Zand v Austria* No 7360/76, 15 DR 70 at 82 (1978); *Sramek v Austria* A 84 (1984); 7 EHRR 351 para 38; and *Brudnicka v Poland* 2005-II; 51 EHRR 608.

[783] See *Crociani v Italy No 8603/79*, 22 DR 147 at 221 (1980).

[784] A 22 (1976); 1 EHRR 647 PC.

[785] A 80 (1984) 7 EHRR 165 para 80. In practice, the Home Secretary would require the removal of a member 'only in the most exceptional circumstances': *ibid*. See also *Clarke v UK* No 23695/02 2005-X DA (circuit judges). Cf *Fruni v Slovakia* hudoc (2011). But see *Henryk and Ryszard Urban v Poland* hudoc (2010). See also *Cooper v UK* 2003-XII; 39 EHRR 171 GC (sufficient safeguards against outside pressure on military officer court-martial members).

[786] The availability of judicial review was a relevant factor in *Eccles, McPhillips and McShane v Ireland No 12839/87*, 59 DR 212 (1988).

[787] Hudoc (2010) para 53. The post of assessor, or junior judge, has since been abolished.

[788] See *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165. Cf *Schiesser v Switzerland* A 34 (1979); 2 EHRR 417 (an Article 5(3) case).

[789] 12 YB (the *Greek* case) at 148 (1969) Com Rep; CM Res DH (70) 1.

[790] *Sutter v Switzerland No 8209/78*, 16 DR 166 (1979).

[791] 12 YB (the *Greek* case) at 148 (1969) Com Rep; CM Res (70) 1.

[792] A 132 (1988); 10 EHRR 466 paras 66–67. Cf *Mitrinovski v FYRM* hudoc (2015). See also *Sramek v Austria* A 84 (1984); 7 EHRR 351 paras 41–42 (land tribunal not independent because one of its key members was a civil servant who was a subordinate of another civil servant a party to the proceedings).

an unauthorized demonstration consisted of a police officer who was a lawyer appointed from police headquarters. Although he sat in his personal capacity, was not subject to orders, took a different oath from other policemen and could not 'in principle' be dismissed during his four-year term, he was liable to be returned to other police duties and the 'ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues'. In consequence, 'the applicant could 'legitimately have doubts as to the independence and organisational impartiality of the Police Board'.

In the high-profile case of *Oleksandr Volkov v Ukraine*,[793] there were 'serious issues' concerning the High Council of Justice, the body responsible for disciplining judges. The Minister of Justice and the Prosecutor General were *ex officio* members, and the 'vast majority' of the 20 members were 'non-judicial staff appointed directly by the executive and the legislative authorities', with just three judges. In addition, three non-judical members had taken a part in bringing the charges leading to the applicant's dismissal from his post as a judge of the Supreme Court. The Chamber held that there were 'structural deficiencies' in the procedures and issues of personal bias in violation of the requirements of both independence and impartiality.

A breach of the 'appearance of independence' requirement was also found in *Findlay v UK*.[794] There it was held that there were 'fundamental flaws' in the UK court-martial system because of the role of the convening military officer. This officer decided which charges should be brought and was otherwise closely linked with the prosecuting authorities. He also appointed the court-martial members, who were below him in rank and in some cases under his command, and he could dissolve the court-martial. Finally, the convening officer had to confirm the court-martial decision for it to be valid and could vary the sentence. In these circumstances, an outside observer could legitimately doubt the court-martial's structural independence of the executive and its impartiality.[795] Applying *Findlay* in a different context, in *Daktaras v Lithuania*[796] a legitimate doubt about possible outside pressure in breach of Article 6 was found when the President of the Criminal Division of the Supreme Court petitioned for the quashing of a court decision that was in favour of the applicant and then appointed the judges who would hear the petition.

The membership of military judges in ordinary criminal courts has been an issue in some Turkish cases. In *Incal v Turkey*,[797] the applicant was convicted of a criminal offence of inciting racial hatred, by distributing the leaflets of a Kurdish political party, by a National Security Court composed of two civilian judges and a military judge. The Strasbourg Court held the participation of the military judge in a civil (ie non-military) court was in breach of the requirements of independence and impartiality, since the civilian applicant 'could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case'.[798]

[793] Hudoc (2013) paras 109–117.

[794] 1997-I; 24 EHRR 221 para 78. Cf *Hirschhorn v Romania* hudoc (2007) and *Ibrahim Gürkan v Turkey* hudoc (2012). See also *Miroshnik v Ukraine* hudoc (2008) (Ministry of Defence housing for military court judges who were servicemen: breach) and *Mikhno v Ukraine* hudoc (2016) (judges in military court independent).

[795] A similar lack of 'structural independence' was found in internal prison disciplinary proceedings in *Whitfield v UK* hudoc (2005); 41 EHRR 967. As revised by the Armed Forces Act 1996, the UK court-martial system for the army and the RAF complies with Article 6: *Cooper v UK* 2003-XII; 39 EHRR 171 GC. The naval system was amended by the Army Act 2006 to comply with *Grieves v UK* 2003-XII; 39 EHRR 51 GC.

[796] 2000-X. Cf *Moiseyev v Russia* hudoc (2008); 53 EHRR 306.

[797] 1998-IV; 29 EHRR 449 GC.

[798] *ibid* para 68. The Court took into account that the judge was subject to military discipline and appointed only for four years, and that the army took orders from the executive—considerations that outweighed certain guarantees of his independence and impartiality.

In *Öcalan v Turkey*,[799] it was held that the objective requirement had not been satisfied even though, following the *Incal* case, the military member of a State Security Court that tried the applicant had been replaced by a third civilian judge before judgment was given. In a persuasive joint dissenting opinion, President Wildhaber and five other judges took the view that the fact that the verdict and sentence were decided by a wholly civilian court was sufficient: to go further was 'to take the "theory" of appearances very far' and was neither 'realistic' nor 'fair'.[800]

The *Incal* and *Öcalan* cases involved the trial of civilians for criminal offences by civil courts that had a military judge as a member. In *Martin v UK*,[801] the Court held that the prosecution of civilians for criminal offences before *military* courts is a matter of even greater concern under Article 6. Although their jurisdiction over civilians was not 'absolutely' excluded by the Convention, it would be consistent with Article 6 'only in very exceptional circumstances'. In particular, it should not extend to civilians unless there was a 'clear and forseeable legal basis' and there were 'compelling reasons'. Moreover, the existence of such reasons 'must be substantiated in each specific case'; it was 'not sufficient for the law to allocate certain offences to military courts *in abstracto*'. In the *Martin* case, the applicant was a 17-year-old living with his family on a British military base in Germany, where his father was an army corporal. He was convicted in Germany by a British court-martial board of murder there. The Strasbourg Court found a breach of Article 6 on the basis that the court-martial board was not an independent and impartial tribunal under *Findlay*. While it did not find it necessary to decide whether there was also a breach of Article 6 because the applicant had been tried by a military court, it expressed 'considerable doubts' as to whether there were 'compelling reasons' for him to be so tried.

### c. An impartial tribunal

'Impartiality' means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and an objective test.[802] However, 'there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer . . . but may also go to the issue of his or her personal conviction'.[803]

As to the *subjective* test, the question is whether it can be shown on the facts that a member of the court 'acted with personal bias' against the applicant.[804] In this connection, there is a presumption that a judge is impartial, 'until there is proof to the contrary'.[805] Given this presumption and the need to prove actual bias, a breach of the subjective test is difficult to establish.[806] One case in which a breach was found was *Werner v Poland*.[807] There an

[799] 2005-IV; 41 EHRR 985 GC. But see *Ceylan v Turkey No 68953/01* hudoc (2005) DA, in which a military judge's participation in interlocutory proceedings before his replacement by a civilian judge on the merits was not a breach.

[800] The fact that it was a death penalty case may have influenced the Court majority.

[801] Hudoc (2006); 44 EHRR 652 paras 44–45. For reasons for the Court's concern at the trial of civilians by military courts, see *Ergin v Turkey (No 6)* 2006-VI.

[802] *Hauschildt v Denmark* A 154 (1989); 12 EHRR 266 para 46. The test was first formulated in *Piersack v Belgium* A 53 (1982); 5 EHRR 169.

[803] *Morice v France* hudoc (2015) para 75 GC.

[804] *Hauschildt v Denmark* A 154 (1989); 12 EHRR 266 para 47.

[805] *Kyprianou v Cyprus* 2005-XIII; 44 EHRR 565 GC. The presumption extends to jury members: *Sander v UK* 2000-V; 31 EHRR 1003.

[806] Cf *Kyprianou v Cyprus* 2005-XIII; 44 EHRR 565 para 119 GC.

[807] Hudoc (2001); 36 EHRR 491 para 41. See also *Boeckmans v Belgium No 1727/62*, 8 YB 410 (1965) F Sett; *Kyprianou v Cyprus* hudoc (2004); *Svetlana Naumenko v Ukraine* hudoc (2004); *Driza v Albania* 2007-XX; 49 EHRR 779; and *Oleksandr Volkov v Ukraine* hudoc (2013) paras 116–117. On the political sympathies of judges and their impartiality, see *Crociani, Palmiotti, Tanassi, Lefebvre, D'Ovidio v Italy No 8603/79*, 22 DR 147 at 222 (1980).

insolvency judge who requested that the applicant be removed from his post as a judicial liquidator later sat as a member of the court that heard her request. The European Court held that it was 'only reasonable' to conclude that the insolvency judge held a personal conviction that her request was well founded and should be granted.

The *objective* test is comparable to the English law doctrine that 'justice must not only be done: it must also be seen to be done'. In this context, the Court emphasizes the importance of 'appearances'.[808] As the Court has stated, '[w]hat 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'.[809] In applying the objective test, the opinion of the party to the case who is alleging partiality is 'important but not decisive'; what is crucial is whether the doubt as to impartiality can be 'objectively justified'.[810] If there is a 'legitimate doubt' as to a judge's impartiality, they must withdraw from the case.[811] In this connection, the failure to disclose to the parties the identity of the judge/s in the case may raise a 'legitimate doubt'.[812] It also been held in some, but not all, cases that the prosecuting authority must participate in the trial to ensure that impartiality is achieved.[813]

The composition of the deciding body will not be an issue in the case of ordinary courts composed entirely of judges. In the case of tribunals not so composed, the number and role of judges who are members is an indicator. Thus, 'where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality'.[814] There was a 'legitimate doubt' in terms of the membership of the deciding body in *McGonnell v UK*,[815] where the Guernsey Royal Court rejected the applicant's appeal against the refusal of his planning application by a development committee. The presiding judge in the applicant's appeal was the Bailiff of Guernsey, who, as Deputy Bailiff, had earlier presided over the Guernsey legislature (the States of Deliberation) when it adopted the development plan under which the applicant's planning application had been refused and which the Royal Court had to apply. As well as chairing the States of Deliberation, the Deputy Bailiff also had a casting vote in the event of a tie, although he was not called upon to exercise it in this case. The European Court held that the 'mere fact' that the Deputy Bailiff presided over the legislature when the plan was adopted was sufficient to raise a 'legitimate doubt' as to his impartiality when he later served as the sole judge on the law when the applicant's planning appeal was rejected. More generally, the Court stated that 'any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt upon the judicial impartiality of a person subsequently called on to determine a dispute'[816] concerning its or their application. In

[808] *Sramek v Austria* A 84 (1984); 7 EHRR 351 para 42.

[809] *Fey v Austria* A 255-A (1993); 6 EHRR 387 para 30.

[810] *Hauschildt v Denmark* A 154 (1989); 12 EHRR 266 para 48. See also *Vardanyan and Nanushyan v Armenia* hudoc (2016) para 82 (judge's language implied that a refusal to agree to a friendly settlement might affect the outcome of the trial: violation).

[811] *Hauschildt v Denmark, ibid.*

[812] *Vernes v France* hudoc (2011).

[813] See, eg, *Karelin v Russia* hudoc (2016) para 52 (public prosecutor absent: violation). But see *Weh and Weh v Austria No 38544/97* hudoc (2002) DA (no violation) and *Thorgeir Thorgeirson v Iceland* A 239 (1992) paras 48–54 (prosecution absent from just some sessions: no violation).

[814] *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 PC para 58 (medical disciplinary body).

[815] 2000-II; 30 EHRR 289 para 55. Cf *Procola v Luxembourg* A 326 (1995); 22 EHRR 193 (*Conseil d'État* members who had advised on legislation later applied it as judges: not impartial), distinguished in *Kleyn v Netherlands* 2003-VI; 38 EHRR 239 GC. See also *Sacilor-Lormines v France* 2006-XIII; 54 EHRR 1193. A member of parliament is not *per se* disqualified from being a judge: *Pabla Ky v Finland* 2004-V; 42 EHRR 688.

[816] *McGonnell v UK* 2000-II; 30 EHRR 289 para 55. In *Previti v Italy No 45291/06* hudoc (2009) DA, participation in a case by members of the national legal service who had earlier criticized the law to be applied was not a breach.

considering such cases of overlapping roles, the Court has stated that the Convention does not suppose that contracting parties follow any particular constitutional theory concerning the separation of powers: the question is always whether there is a 'legitimate doubt' about impartiality (or independence) on the facts.[817]

Again, in terms of the separation of powers, the objective test will be infringed where the executive intervenes in a case in the courts with a view to influencing the outcome. In *Sovtransavto Holding v Ukraine*,[818] while civil proceedings brought by the applicant Russian company in Ukraine were pending, the President of Ukraine drew the attention of the Supreme Arbitration Tribunal to the need to protect state interests. The Strasbourg Court held that, irrespective of whether it had influenced the outcome of the case, the President's intervention gave rise to a 'legitimate doubt' as to the Tribunal's independence and impartiality. In *Bochan v Ukraine*,[819] the applicant successfully challenged the objective impartiality not of the executive but of the respondent state's Supreme Court, claiming that it had sought to influence the outcome of her case by reassigning it to a different regional court after judgments in her favour.

The Court has applied the objective test in many cases in which the trial judge in a criminal court has previously taken part in the proceedings at the pre-trial stage in a variety of different capacities. The Court has stated that 'the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality . . . . What matters is the extent and nature of those decisions.'[820] The Court has found a 'legitimate doubt' in a number of cases, including some involving long-established national practices. In *Piersack v Belgium*,[821] the presiding trial court judge had earlier been the head of the section of the public prosecutor's department that had investigated the applicant's case and instituted proceedings against him. Although there was no evidence that the judge had actual knowledge of the investigation, the Court held there had been a breach of the objective test. In *De Cubber v Belgium*,[822] the *Piersack* case was extended to the situation where a judge had earlier acted as an investigating judge. The position is normally different where pre-trial decisions are taken by a judge who is not linked to the investigation or prosecution of the case. In *Sainte-Marie v France*,[823] two members of an appeal court that

[817] *Kleyn v Netherlands* 2003-VI; 38 EHRR 239 GC. Cf *Oleksandr Volkov v Ukraine* hudoc (2013).

[818] 2002-VII; 38 EHRR 911. There was also a breach of the principle of legal certainty because all judicial decisions in the case were later quashed by the Supreme Administrative Tribunal following an objection by its President. Cf *Ivanovski v FYRM* hudoc (2016) (prime minister denounced applicant during lustration proceedings: violation). Contrast *Mosteanu and Others v Romania* hudoc (2002) (president's remarks opposing implementation of judgments: no violation).

[819] Hudoc (2007).

[820] *Fey v Austria* A 255-A (1993); 6 EHRR 387 para 30.

[821] A 53 (1982); 5 EHRR 169 para 30. A 'legitimate doubt' may also exist where the judge takes over the role of the prosecution during the trial: see *Thorgeir Thorgeirson v Iceland* A 239 (1992); 14 EHRR 843. See also *Jón Kristinsson v Iceland* A 171-B (1990) Com Rep (F Sett before Court), in which the chief of police was also a criminal court judge. The Commission found a breach, the limited number of qualified persons in a small population being no excuse. See also *D'Haese, Le Compte, Van Leuven and De Meyere v Belgium No 8930/80*, 6 EHRR 114 (1983) and *Mellors v UK No 57836/00* hudoc (2003) DA. And see *Gerovska Popcevska v FYRM* hudoc (2016) (judicial disciplinary tribunal had as a member a judge who had participated in initiating the proceedings).

[822] A 86 (1984); 7 EHRR 236 (violation). Cf *Pfeifer and Plankl v Austria* A 227 (1992); 14 EHRR 692 (breach of Article 6(1)—and national law—for an investigating judge to be the trial judge) and *Ben Yaacoub v Belgium* A 127-A (1987) Com Rep (F Sett before Court). Contrast *Fey v Austria* A 255-A (1993); 6 EHRR 387, in which the trial judge had played a marginal interrogating role at the pre-trial stage (no breach). See also *Adamkiewicz v Poland* hudoc (2010) and *Mitrinovski v FYRM* hudoc (2015). And see *Grande Stevens v Italy* hudoc (2014) paras 136–137.

[823] A 253-A (1992); 16 EHRR 116 para 32. Cf *Padovani v Italy* A 257-B (1993); *Nortier v Netherlands* A 267 (1993); 17 EHRR 273; *Castillo Algar v Spain* 1998-VIII; 30 EHRR 27; and *Jasiński v Poland* hudoc (2005).

sentenced the accused following his conviction on charges of possession of arms had earlier been members of a court that had refused his application for bail in criminal damage proceedings arising out of the same facts. Noting that the judges had played no part in the preparation of the case for trial, the Court stated that in such circumstances the 'mere fact that such a judge has already taken pre-trial decisions in the case, including decisions relating to detention on remand, cannot in itself justify fears as to his impartiality'.[824]

Another question is whether a judge can sit at more than one stage in the hearing of the merits of a case, or in both of two related cases. As to the former situation, in *Ringeisen v Austria*,[825] the Court indicated that 'it cannot be stated as a general rule resulting from the obligation to be impartial' that a case must be re-heard, having been referred back by an appellate court, by a tribunal with a totally different membership from that of the first hearing. In contrast, it has been held that a judge should not take part in two different appellate stages of the same case.[826] There was thus a lack of objective impartiality when most members of a court of cassation had sat in an earlier appeal hearing in the same case on the same facts.[827] Clearly, there is also a breach of the requirement of objective impartiality where a judge is the presiding judge of an appeals tribunal that hears an appeal from his own decision.[828]

As to a judge sitting in two related cases, the Court has sometimes held that a judge may participate in related civil and/or criminal cases concerning the applicant without this in itself raising a legitimate doubt as to his impartiality.[829] However, in other cases, depending on the facts, it has not.[830] In *Ferrantelli and Santangelo v Italy*,[831] there was a 'legitimate doubt' where the President of the Court of Appeal that heard the applicants' appeal from their conviction for murder had earlier been the President of the Court of Appeal following the conviction of others for the same murder, when the Court of Appeal judgment in the earlier case contained passages referring to the applicants' involvement in the murder and the Court of Appeal's judgment in the applicants' case had cited these passages.

The procedures applicable in common law jurisdictions in cases of criminal contempt in the face of the court were in issue in *Kyprianou v Cyprus*.[832] There the applicant was a lawyer who had been convicted of criminal contempt in the face of the court for his offensive personal remarks and other behaviour during an exchange with the judges in a criminal case. After a short break in the proceedings, the same judges convicted him of contempt and sentenced him to five days' imprisonment. Finding a breach of the

[824] There was a breach in the 'special circumstances' of *Hauschildt v Denmark* A 154 (1989); 12 EHRR 266 para 50 PC. See also *Cianetti v Italy* hudoc (2004) and *Cardona Serrat v Spain* hudoc (2010) (breaches).

[825] A 13 (1971); 1 EHRR 455 para 97. See also *Thomann v Switzerland* 1996-III; 24 EHRR 553.

[826] *Oberschlick v Austria (No 1)* A 204 (1991); 19 EHRR 389. See also *Indra v Slovakia* hudoc (2005); 43 EHRR 388 and *Chesne v France* hudoc (2010).

[827] *Mancel and Branquart v France* hudoc (2010). Cf *Peruš v Slovenia* hudoc (2012). The number and proportion of judges who necessarily sit at both stages and their role is relevant: *Fazli Aslaner v Turkey* hudoc (2014) paras 36–42.

[828] *De Haan v Netherlands* 1997-IV; 26 EHRR 417. See also *San Leonard Band Club v Malta* 2004-IX; 42 EHRR 473. And see *Kingsley v UK* 2002-IV; 35 EHRR 177 GC.

[829] *Gillow v UK* A 109 (1986); 11 EHRR 335 and *Khodorkovskiy and Lebedev v Russia* hudoc (2013). See also *Lindon et al v France* 2007-XX; 46 EHRR 761 GC.

[830] See *Fatullayev v Azerbaijan* hudoc (2010); 52 EHRR 58; *Golubović v Croatia* hudoc (2012); and *Lindon-Otchakovsky-Laurens and July v France* hudoc (2007) GC.

[831] 1996-III; 23 EHRR 288. See also *Indra v Slovakia* hudoc (2005); 43 EHRR 388 and *Warsicka v Poland* hudoc (2007). There may also be a breach where a judge has been an opposing party to the applicant in an earlier case: *Chmelíř v Czech Republic* 2005-IV; 44 EHRR 404.

[832] 2005-XIII; 44 EHRR 565 paras 127, 130 GC.

impartiality requirement, the Strasbourg Court stated that the correct course would have been for the court to have referred the matter to the prosecuting authorities with a view to trial before a differently composed court. The Court went on to find a breach of the subjective impartiality test also, on the basis of the statement made by the judges in their decision that they were 'deeply insulted'; their generally 'emphatic language'; the severe penalty imposed; and their statements in the exchanges with the applicant that he was guilty.

In view of the robust remarks sometimes made by English judges in court about defendants in criminal cases, it is noticeable that no English case of this kind has been admitted on the merits. In one such case,[833] in which the judge had indicated very clearly that the accused was guilty and expressed his concern at the cost of the case for the legal aid fund, the application was declared inadmissible, the Commission emphasizing that the trial had to be considered as a whole. In a civil case,[834] in which a judge was alleged by the applicant to have formed a prejudice against him in proceedings concerning his rights to his children, the Court found that although the judge had undoubtedly taken a strongly negative view of the applicant's character, this did not in itself indicate bias and that, in any event, any such defect had been rectified on appeal by the Court of Appeal.

There may also be a breach of the impartiality requirement where a judge makes extra-judicial pronouncements in the press or elsewhere that may raise a legitimate doubt about his impartiality in a case before him. In *Buscemi v Italy*,[835] the applicant had published a letter in the press complaining about the placing of his daughter in a children's home by court order. The president of the court in pending child custody proceedings concerning the child responded with a letter in the press in terms that, in the Strasbourg Court's view, 'implied that he had already formed an unfavourable view of the applicant's case' before deciding it, thereby raising a legitimate doubt as to his impartiality.

Breaches of the objective impartiality test may arise where the judge has acted as a lawyer for the applicant's opponent in other proceedings. In *Wettstein v Switzerland*,[836] there was a breach of the objective test when the part-time judge in the applicant's civil case was at the same time acting as a lawyer for the applicant's opponent in that case, in other pending civil litigation. Although the two cases were unrelated on their facts, the applicant had a 'legitimate fear' that the judge might 'continue to see in him the opposing side'. In contrast, in *Walston v Norway*,[837] there was no such breach where the judge had acted as the lawyer for the applicant's opponent in an earlier case.

The objective test may also be infringed where the judge has a personal interest in the case. A financial interest will disqualify a judge as not being impartial,[838] although there will be no breach of Article 6(1) if the interest is disclosed and the applicant is given an opportunity to object.[839] Non-financial interests are also relevant. Thus, in *Demicoli v Malta*,[840] the Maltese House of Representatives that tried the applicant for breach of parliamentary privilege was not impartial because two of its members who participated in the

[833] *X v UK No 4991/71*, 45 CD 1 (1973). Cf *X v UK No 5574/72*, 3 DR 10 (1975) (accused had 'not a ghost of a chance'). See also *Grant v UK No 12002/86*, 55 DR 218 (1988).

[834] *Ranson v UK No 14180/03* hudoc (2003) DA.

[835] 1999-VI paras 67–68. See also *Lavents v Latvia* hudoc (2002) and *Olujić v Croatia* hudoc (2009); 52 EHRR 839. And see *Morice v France* hudoc (2015) paras 84–91 GC (applicant convicted of defaming a judge; appeal court included a judge who had earlier voiced support for the defamed judge: violation).

[836] 2000-XII para 47. See also *Puolitaival and Pirttiaho v Finland* hudoc (2004); 43 EHRR 153; *Chmelíř v Czech Republic* 2005-IV. 44 EHRR 404; and *Švarc and Kavnik v Slovenia* hudoc (2007).

[837] *No 37272/97* hudoc (2001) DA.

[838] *Pétur Thór Sigurdsson v Iceland* 2003-IV; 40 EHRR 371.

[839] *D v Ireland No 11489/85*, 51 DR 117 (1986) (judge owned shares in defendant company).

[840] A 210 (1991); 14 EHRR 47. See also *Mitrov v FYRM* hudoc (2016) (a judge in a criminal traffic accident case had been clerk to another judge whose daughter was the accident victim: violation).

proceedings were the Members of Parliament who were criticized in the article that was the subject of the alleged offence.

The objective test was not satisfied in *Langborger v Sweden*,[841] which concerned lay assessors who were members of a Housing and Tenancy Court, whose function was to adjudicate upon the continuation of a clause in a tenancy agreement; they were nominated by, and had close links with, organizations that had an interest in the removal of the clause. It did not matter that the tribunal was composed of two judges as well as the two lay assessors, with the presiding judge having the casting vote. The *Langborger* case may be contrasted with the earlier case of *Le Compte, Van Leuven and De Meyere v Belgium*,[842] in which the medical members of a professional tribunal had 'interests very close to' those of one of the doctors being disciplined.[843] This fact was counterbalanced by the presence of an equal number of judges, one of whom had the casting vote, so that there was no breach of Article 6(1).[844]

Personal links between a judge and a party to the case have been an issue in a variety of other particular contexts. In *Micallef v Malta*,[845] there was a lack of objective impartiality when one of the judges hearing an appeal was related (as uncle and brother) to advocates appearing for the applicant's opponent. The fact that a judge is a freemason does not *per se* raise doubts as to his impartiality in a case in which a party to the case or a witness is also a freemason; the position may be different if the judge has personal knowledge of the freemason or his lodge.[846] In contrast, there was a 'legitimate doubt' where the judge was also a professor employed by the university that was the other party to the case,[847] and where a judge had threatened a reprisal after his son had been expelled from the school connected with the case.[848] The fact that a judge in a divorce case had a conversation with the applicant's wife immediately after the hearing did not by itself raise a 'legitimate doubt'.[849] However, in *Belukha v Ukraine*,[850] there was a lack of impartiality when the employer against whom the applicant was claiming supplied the trial court with goods and services.

The requirement of impartiality applies to juries.[851] Whether a jury member's personal link with a party to the case or to a witness raises a 'legitimate doubt' depends in each case on 'whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality'.[852] There was no 'legitimate doubt' in *Simsek v UK*.[853] There a jury member was the sister-in-law of a prison officer, who worked in the house block of 180 prisoners in which the applicant had been detained on remand, but who had not escorted or worked

[841] A 155 (1989); 12 EHRR 416 PC. Cf *Thaler v Austria* hudoc (2005); 41 EHRR 727. Contrast *AB Kurt Kellermann v Sweden* hudoc (2004) and *Timperi v Finland No 60963/00* hudoc (2004) DA (no breaches).

[842] A 43 (1981); 4 EHRR 1 para 58 PC.

[843] Report of the Commission in *Le Compte, Van Leuven and De Meyers v Belgium*, *ibid* para 78.

[844] In contrast, see *Gautrin and Others v France* 1998-III; 28 EHRR 196 and *Harabin v Slovakia* hudoc (2012). See also *Thaler v Austria* hudoc (2005); 41 EHRR 727.

[845] 2009-; 50 EHRR 920 GC.

[846] *Salaman v UK No 43505/98* hudoc (2000) DA. For other cases in which personal links were not a breach, see *Steiner v Austria No 16445/90* hudoc (1993) DA; *Academy Trading Ltd and Others v Greece* hudoc (2000); 33 EHRR 1081; *Lawrence v UK No 74660/01* hudoc (2002) DA; and *Parlov-Tkalčić v Croatia* hudoc (2009).

[847] *Pescador Valero v Spain* 2003-VII. See also *Timperi v Finland No 60963/00* hudoc (2004) DA.

[848] *Tocono et al v Moldova* hudoc (2007). See also *Podoreški v Croatia* hudoc (2007) (F Sett) (judge close relative of plaintiffs).

[849] *X v Austria No 556/59*, 4 CD 1 (1960).

[850] Hudoc (2006).

[851] So does the independence requirement, but impartiality will usually be most relevant: see *Pullar v UK* 1996-III; 22 EHRR 391.

[852] *ibid* para 83.

[853] *No 43471/98* hudoc (2002) DA. Cf *Pullar v UK*, *ibid*, in which a juror was employed by a key prosecution witness's firm but had no personal connection with the case: no 'legitimate doubt', taking into account the safeguards in place: *inter alia* that the jurors swore an oath—reinforced by the judge's directions—requiring impartiality. And see *Procedo Capital Corporation v Norway* hudoc (2009).

with him. In contrast, in *Holm v Sweden*,[854] a breach of Article 6(1) was found because of the links between members of a jury and the defendants in an unsuccessful private prosecution brought by the applicant for libel in a book commenting on right-wing political parties. A majority of the jury were active members of a political party that owned the first defendant (the publisher) and that had been advised by the second defendant (the author), thereby giving rise to a 'legitimate doubt' as to the jury members' independence and impartiality. A violation was also found in *Hanif and Khan v UK*,[855] when a police officer was a jury member in a case in which the applicant's defence depended to a significant extent upon challenging police evidence, including that of a police officer with which the police officer jury member had worked. In contrast, there was no breach of the requirement of impartiality in *Szypusz v UK*,[856] when a police officer joined the jury to operate a video machine; although the police officer had been involved in the investigation of the case, the judge had made it clear that he should not talk with the jury, just show the video.

The question of impartiality has also arisen in cases alleging racial discrimination within juries. In *Remli v France*,[857] a certified statement by a third party was presented by the defence to a criminal court that was trying the applicant and another accused, who were both of North African origin. The statement indicated that the author had overheard one of the jurors saying on entering the courtroom before the trial, 'What's more, I'm a racist.' Without considering its merits, the court refused a defence application that it should take formal note of the statement because it had no jurisdiction to take note of events occurring out of its presence. The trial proceeded, and the applicant and his co-defendant were convicted of homicide. The Strasbourg Court held, by five votes to four, that the decision of the court to refuse the application without considering its substance raised a 'legitimate doubt' as to the court's impartiality.

In contrast, no breach was found in *Gregory v UK*,[858] in which the applicant, who was black, was convicted of robbery by a jury, by ten votes to two, and sentenced to six years' imprisonment. While the jury was deliberating, a note was passed by the jury to the judge stating: 'Jury showing racial overtones. One member to be excused.' After consulting with both counsel, the judge gave a 'firmly worded' and 'forceful' redirection to the jury instructing them to put out of their minds 'any thoughts of prejudice of one form or another'. The Strasbourg Court held, by eight votes to one, that, in doing so, the judge had taken sufficient steps to 'dispel any objectively held fears or misgivings about the impartiality of the jury'.

The *Gregory* case was distinguished in *Sander v UK*,[859] in which the applicant, who was Asian, was convicted by a jury of conspiracy to defraud and sentenced to five years' imprisonment. During the hearing, a jury member passed a note to an usher stating that at least two jury members had been making 'openly racist remarks and jokes' and that

[854] A 279-A (1993); 18 EHRR 79. See also *Fahri v France* 2007-XX (*ministère public* private talk with jury: breach) and *Hardiman v UK* No 25935/94 hudoc (1996) DA (juryman invited barrister for a drink: no breach).

[855] Hudoc (2011); 55 EHRR 424. See Ashworth, Crim L R 295 (2012) and Hunderford-Welch, Crim L R 320 (2012). Contrast *Peter Armstrong v UK* hudoc (2014) (two police officer jury members did not know any police officers giving evidence and no defence objection: no violation).

[856] Hudoc (2010). See also *Bodet v Belgium* hudoc (2017) (post-trial statement to press by jury member did not indicate jury partiality) and *Ekeberg and Others v Norway* (witness statement by jury member to police: no violation).

[857] 1996-II; 22 EHRR 253. On jury secrecy and Article 10, see *Seckerson and Times Newspapers Ltd v UK Nos 33844/10 and 33510/10* hudoc (2012) DA.

[858] 1997-I; 25 EHRR 577 paras 47–48. See also *Elias v UK No 48905/99* hudoc (2001) DA (racial comment by prosecuting counsel: no violation on the facts).

[859] 2000-V; 31 EHRR 1003.

he feared that they were going to convict the applicant because he was Asian. Rejecting defence counsel's application to dismiss the jury on grounds of bias, the judge told the jury of the note, reminded them of their oath, and asked them to consider overnight whether they could decide the case without prejudice. The following morning the judge was given a note signed by all of the jurors refuting the allegation and stating that they would reach a verdict according to the evidence and without prejudice. A second letter from a juror stated that, although he might have made racist jokes, he apologized for any offence and was not racially biased. The Strasbourg Court held, by four votes to three, that there had been a breach of the requirement of objective impartiality.[860] The majority distinguished the *Gregory* case on the basis that in that case there had been no admission by a juror of racist comments; the complaint was vague and imprecise and its author unknown; and defence counsel had insisted throughout that the jury should be dismissed.[861] On the facts in *Sander*, the judge should, in the majority's view, have reacted in a 'more robust manner than merely seeking vague assurances', probably by dismissing the jury. Judge Bratza, in a dissenting opinion joined by Judges Costa and Fuhrmann, questioned the weight of the points of distinction between *Gregory* and *Sander* on their facts and considered that the judgment of an experienced judge as to what was necessary to dispel the perceived doubts as to racial bias should have been respected.

It has also been held that Article 6 does not require that the parties to a case be allowed to participate in the selection of the jury.[862]

### d. A tribunal established by law

Article 6(1) requires that the tribunal is 'established by law', a requirement that 'reflects the principle of the rule of law'.[863] The intention is that, with a view to ensuring its independence, 'the judicial organisation in a democratic society must not depend on the discretion of the Executive, but . . . should be regulated by law emanating from Parliament'.[864] This does not mean that every detail of the court system must be spelt out in legislation: provided that the basic rules concerning its organization and jurisdiction are set out by legislation, particular matters may be left to the executive acting by way of delegated legislation and subject to judicial review to prevent illegal or arbitrary action.[865] The absence of any basis in law for a practice by which lay judges sat as court members meant that the court was not established by law.[866] Article 6(1) does not prohibit the establishment of special courts if they have a basis in legislation.[867]

But it is for the constitution and the legislature, not the judiciary, to provide for the organization of the judicial system and the jurisdiction of the courts. In *Coëme and Others v*

[860] There was no breach of the subjective impartiality requirement, the judge not being in a position to inquire into the precise nature and context of the comments made in the jury room.

[861] There was some uncertainty in *Gregory* whether defence counsel had called for the jury to be dismissed.

[862] *Kremzow v Austria No 12350/86* (1990) DA. See also *Zarouali v Belgium No 20664/92* (1994) DA (denial of request for inquiry into political, religious, and moral beliefs of prospective jurors not a violation).

[863] *DMD Group v Slovakia* hudoc (2010) para 58.

[864] *Zand v Austria No 7360/76*, 15 DR 70 at 80 (1978) Com Rep; CM Res DH (79) 6.

[865] *ibid.* Cf *Crociani v Italy No 8603/79*, 22 DR 147 at 219 (1980) and *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165.

[866] *Pandjikidzé and Others v Georgia* hudoc (2009). Cf *Oleksandr Volkov v Ukraine* hudoc (2013) and *Gurov v Moldova* hudoc (2006).

[867] See *X and Y v Ireland No 8299/78*, 22 DR 51 (1980) (special criminal court to deal with terrorist offences). See also the extraordinary courts-martial in the *Greek* case, 12 YB (the *Greek* case) at 148 (1969) Com Rep; CM Res (70) 1.

*Belgium*,[868] the constitution gave the Court of Cassation, not the ordinary criminal courts, jurisdiction to try government ministers for certain criminal offences. When prosecutions were brought against both ministers and non-ministers for offences of fraud, the Court of Cassation decided to try all of the accused together because of the connection between the offences, even though it had no legislative authority to try the non-ministers. The Strasbourg Court held that because the 'connection rule' that the Court of Cassation applied to join the cases was its own rule, not one provided by legislation, the Court of Cassation was not 'established by law' *vis-à-vis* the applicant non-ministers. Similarly, there was a violation in *Sokurenko and Strygun v Ukraine*,[869] when the Supreme Court upheld a lower court decision when it had no authority in law to do so.

'Established by law' also means 'established in accordance with law', so that the requirement is infringed if a tribunal does not function in accordance with delegated legislation rules that govern it.[870] Thus there was a violation of the requirement when the internal rules for the appointment of judges were not complied with.[871]

The courts in the Turkish Republic of Northern Cyprus were 'established by law' even though the laws which provided for them were not those of an internationally recognized state.[872]

## VI. THE APPLICATION OF ARTICLE 6(1) TO APPEAL PROCEEDINGS

Article 6(1) does not guarantee a right of appeal from a decision by a court complying with Article 6 in either criminal or 'civil rights and obligations' cases.[873] If, however, a state in its discretion provides a right of appeal, proceedings before the appellate court are governed by Article 6(1).[874] The extent to which Article 6(1) applies to appeal proceedings, however, depends upon the nature of the particular proceedings, including the function of the appeal court and the relationship of proceedings before it with those earlier in the case. For example, the requirement of a public hearing may not apply fully where the court hears an appeal on points of law only and where a public hearing has taken place on the merits in the trial court. The exercise of a right of appeal may be subjected to reasonable time limits.[875]

Where the initial determination of 'civil rights' within the meaning of Article 6 is made by an administrative or disciplinary tribunal or other body which does not comply with it, Article 6 is satisfied so long as its proceedings 'are subject to review by a judicial body that has full jurisdiction', on the law and the facts, that does comply with it.[876] This dispensation is a proper recognition of the 'demands of flexibility and efficiency'[877] that permit the use of such bodies.

[868] 2000-VII. The Strasbourg Court will not question the national courts' interpretation of national law on these matters in the absence of a 'flagrant violation': *Jorgic v Germany* 2007-XX; 47 EHRR 207.

[869] Hudoc (2006).

[870] *Zand v Austria No 7360/76*, 15 DR 70 at 80 (1978) Com Rep; CM Res DH (79) 6.

[871] *Posokhov v Russia* 2003-V; 39 EHRR 441 and *Fedotova v Russia* hudoc (2006). See also *Lavents v Latvia* hudoc (2002) and *DMD Group v Slovakia* hudoc (2010). But waiver is permitted: *Bulut v Austria* 1996-II; 24 EHRR 84.

[872] *Cyprus v Turkey* 2001-IV; 35 EHRR 731 GC. For criticism, see Loucaides, 15 Leiden JIL 225 at 235 (2002).

[873] A right of appeal in criminal cases is provided by Article 2, Seventh Protocol. The interpretation of the Article 6 guarantee concerning appeal courts is not to be influenced by the content (particularly the limitations) of the guarantee in the Seventh Protocol: *Ekbatani v Sweden* A 134 (1988); 13 EHRR 504 PC.

[874] *Delcourt v Belgium* A 11 (1970); 1 EHRR 355.

[875] *Bricmont v Belgium No 10857/84*, 48 DR 106 (1986).

[876] *Riepan v Austria* 2000-XII para 39.

[877] *Le Compte, Van Leuven and De Meyer v Belgium* A 43 (1981); 4 EHRR 1 PC para 51.

As the Court established in *De Cubber v Belgium*,[878] the same is not true in respect of 'courts of the classic kind', ie courts that are 'integrated within the standard judicial machinery of the country'. In the case of such courts, Article 6 must be fully complied with both at the trial court stage and on any appeal. The fact that allowance may be made for special professional or disciplinary bodies 'cannot justify reducing the requirements of Article 6(1) in its traditional and natural sphere of application'. There is, however, a limit to this properly stringent rule. In a case in which the breach of Article 6 concerns the conduct of a first-instance court, it may be that the appeal court can 'make reparation' for the breach, in which case Article 6 will be complied with. For example, in *Adolf v Austria*,[879] there was no breach of Article 6 when the appeal court corrected the impression given by the trial court that the accused was considered by it to be guilty, in breach of the presumption of innocence. Likewise, in *Edwards v UK*,[880] there was no breach of Article 6 when the implications of the police's failure to disclose relevant information to the defence at the trial were examined by the Court of Appeal, which was competent to overturn the conviction on the basis of the evidence of non-disclosure. However, where the earlier defect is or cannot be remedied on appeal, the position is different. This is particularly likely to be true where the defect concerns the organization of the trial court, rather than its conduct of the trial. Thus, in *Findlay v UK*,[881] the role of the convening officer in military court-martial proceedings meant that the proceedings were neither independent nor impartial, which was a defect that could not be corrected by later review proceedings: as the Court stated, the applicant was entitled 'to a first instance tribunal which fully met the requirements of Article 6(1)'.

## 4. ARTICLE 6(2): THE RIGHT TO BE PRESUMED INNOCENT IN CRIMINAL CASES

Article 6(2) provides that a person 'charged with a criminal offence shall be presumed innocent until proved guilty according to law'. It guarantees a right that is fundamental to both common law and, despite legend in the UK to the contrary,[882] civil law systems of criminal justice. Article 6(2) means, in common law terms, that the general burden of proof must lie with the prosecution,[883] or, in terms more appropriate for civil law systems, that the court, in its inquiry into the facts, must find for the accused in a case of doubt.[884] The obligation in Article 6(2) is independent of those in other Article 6 guarantees, so that there may be a breach of it even though the rest of Article 6 is respected.[885]

Article 6(2) extends only to persons who are or have been subject to a 'criminal charge'.[886] Hence it does not benefit a person who is under suspicion of having committed an offence,

[878] A 86 (1984) para 32; 7 EHRR 236. Cf *Riepan v Austria* 2000-XII.

[879] A 49 (1982); 4 EHRR 313.

[880] A 247-B (1992); 15 EHRR 417. Cf *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405.

[881] 1997-I; 24 EHRR 221 para 79. Cf the *De Cubber* case, in which the trial court was not impartial because the judge had taken part in an earlier stage of the case. See also *Holm v Sweden* A 279-A (1993); 15 EHRR 79 para 33 (defect stemming from jury system could not be cured by appeal court because it was bound by the jury's verdict) and *Riepan v Austria* 2000-XII para 39 (absence of public hearing could not be rectified).

[882] See Allen, *Legal Duties*, 1931, p 253.

[883] *Barberà, Messegué and Jabardo v Spain* A 146 (1988); 11 EHRR 360 para 77 PC. See also *Austria v Italy* 6 YB 740 at 782–4 (1963) Com Rep; CM Res DH (63) 3.

[884] As to whether Article 6(2) incorporates the civil law principle *in dubio pro reo*, see *Lingens and Leitgeb v Austria No 8803/79*, 26 DR 171 (1981).

[885] *I and C v Switzerland No 10107/82*, 48 DR 35 (1985) Com Rep; CM Res DH (86) 11.

[886] 'Criminal charge' has the same autonomous meaning as elsewhere in Article 6: see this chapter, section 2.I.a, p 377.

but is not yet subject to a criminal charge.[887] However, in *Mulosmani v Albania*,[888] a prejudicial public statement in the media immediately following a murder but a year before the applicant was charged was, exceptionally, considered to be within Article 6(2) because of its 'continued impact'. Prejudicial statements at the pre-trial stage about an accused who is subject to a criminal charge are controlled by Article 6(2).[889] Although extradition decisions do not involve the determination of a criminal charge, they 'may raise an issue under Article 6 § 2 if supporting reasoning [for the decision to extradite] which cannot be dissociated from the operative provisions amounts in substance to the determination of the person's guilt' and are such that they could prejudice the assessment of the facts by the courts in the receiving state.[890]

In accordance with the general approach in the legal systems of contracting parties, Article 6 has been held not to apply to practices in the course of a criminal investigation such as the conduct of breath, blood, or urine tests,[891] or medical examinations,[892] or an order to produce documents.[893] By analogy, Article 6(2) also does not apply to fingerprinting and searches of the person or of property.[894] Restrictions on pre-trial detention (eg, as to clothing and correspondence[895] or cell conditions[896]) do not raise an issue under Article 6(2). Nor does it extend to the closure of a shop as a provisional measure or the offer of an 'out-of-court' fine.[897] However, a conviction for an offence of failing to provide information is in some contexts considered to be in breach of the presumption of innocence, as well as freedom from self-incrimination.[898]

Article 6(2) continues to apply to the end of any appeal proceedings against conviction, so that, where an appeal against conviction is pending, remarks that may influence the appeal hearing are subject to it.[899] It does not apply to the consideration of a convicted person's character and conduct during his sentencing, as that person is then no longer subject to a 'charge'.[900] However, Article 6(2) does apply to accusations about a convicted person that are made during sentencing proceedings if they are of such a nature and degree as to amount to the bringing of a new 'criminal charge'.[901] Article 6(2) was held to apply and to have been infringed when a court revoked the suspension of the applicant's sentence for an earlier offence, because of the court's stated 'certainty' that the applicant was guilty of another offence for which he had not been convicted.[902] Article 6(2) has been held to

[887] See *Adolf v Austria* A 49 (1982); 4 EHRR 313 paras 30, 34.

[888] Hudoc (2013) para 139: see later in this section, p 466. See also *Mustafa (Abu Hamza) v UK No 31411/07* hudoc (2011) DA (pre-charge ministerial statement.

[889] *Krause v Switzerland No 7986/77*, 13 DR 73 (1978).

[890] *Ismoilov and Others v Russia* hudoc (2008); 49 EHRR 1128 paras 167–168.

[891] *Tirado Ortiz and Lozano Martin v Spain No 43486/98* hudoc (1999) DA.

[892] *X v Germany No 986/61*, 5 YB 192 (1962).

[893] *Funke v France* A 256-A (1993); 16 EHRR 297 para 69 Com Rep.

[894] *X v Austria No 4338/69*, 36 CD 79 (1970) (seizure as security for costs).

[895] *Skoogström v Sweden No 8582/72*, 5 EHRR 278 (1982). Cf *Englert v Germany* A 123 (1987); 13 EHRR 392 para 47 Com Rep.

[896] *Peers v Greece* 2001-III; 33 EHRR 1192. Articles 5(1)(c) and 5(3) apply instead.

[897] *Deweer v Belgium* B 33 (1980) para 64 Com Rep.

[898] See *Heaney and McGuiness v Ireland* 2000-XII; 33 EHRR 264.

[899] *Konstas v Greece* hudoc (2011) para 37. *See also Nölkenbockhoff v Germany* A 123 (1987); 10 EHRR 163 para 46 PC.

[900] *Phillips v UK* 2001-VII para 35. But the presumption of innocence is also a part of the general fair hearing requirement in Article 6(1), which does apply to the sentencing stage: *ibid*.

[901] *Geerings v Netherlands* 2007-XX; 46 EHRR 1212 para 43.

[902] *Böhmer v Germany* hudoc (2002); 38 EHRR 410. Contrast *Muller v Germany* hudoc (2014) para 54 ('court's language refusing probation 'unfortunate', but not statement of guilt). See also *El Kaada v Germany* hudoc (2015) para 61.

apply to proceedings concerning the discontinuance of a case against an accused[903] or the award of costs or compensation following discontinuance[904] or acquittal:[905] the test is whether they can be seen as sufficiently closely linked with the determination of the criminal charge. Similarly, statements in separate court proceedings related to an acquittal are subject to Article 6(2).[906] However, Article 6(2) does not apply to an application by a convicted person for a re-trial.[907]

The close link between the presumption of innocence and freedom from self-incrimination has been demonstrated in several cases. In *Murray (John) v UK*,[908] the accused's right to remain silent was limited to the extent that inferences could be (and were) drawn by the trial court from the accused's failure to explain his presence at the scene of the crime and to give evidence in court. The Strasbourg Court held that the drawing of such inferences did not on the facts have 'the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence'. In contrast, there was such a shifting of the burden of proof in breach of Article 6(2) in *Telfner v Austria*,[909] when the accused, who refused to give evidence to the police or at the trial, was convicted of a road traffic accident offence on the basis that he was the driver of the car involved, when there was no direct evidence to show that he was. The conviction was based on the facts that, although registered in his mother's name, the accused was the main user of the car and that he had not been home that night, which facts required him, the national court determined, to show that he was not the driver. The Strasbourg Court distinguished the *Murray* case concerning Article 6(2) because in the *Telfner* case there was no *prima facie* case against the accused that justified the drawing of 'common-sense' inferences in the absence of an explanation by the accused.

Although the burden of proof must generally fall upon the prosecution, it may be transferred to the accused when he is seeking to establish a defence.[910] Similarly, Article 6(2) does not prohibit presumptions of fact or of law that may operate against the accused. However, it does require that states confine such presumptions 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'. This was stated in the leading case of *Salabiaku v France*,[911] in which the applicant had been convicted of the strict liability customs offence of smuggling prohibited goods. The applicant had collected and taken through the 'green' customs exit at Paris airport a trunk that contained prohibited drugs, of which he claimed to have no knowledge. Under

[903] *Adolf v Austria* A 49 (1982); 4 EHRR 313. See also *Teodor v Romania* hudoc (2013).

[904] *Minelli v Switzerland* A 62 (1983); 5 EHRR 554.

[905] *Sekanina v Austria* A 266-A (1993); 17 EHRR 221; *Lamanna v Austria* hudoc (2001); *Hammern v Norway* hudoc (2003); *Bok v Netherlands* hudoc (2011). Article 6(2) does not apply to miscarriage of justice cases referred for judicial review: *Callaghan v UK No 14739/89*, 60 DR 296 (1989).

[906] *Vassilios Stavropoulos v Greece* hudoc (2007) (administrative court proceedings related to allegations of fraud of which applicant had been acquitted). But see *Moullet v France No 27521/04* hudoc (2007) DA. See also *Diamentiders v Greece* hudoc (2012).

[907] *X v Germany No 914/60*, 4 YB 372 (1961).

[908] A 300-A (1996); 22 EHRR 29 para 54 GC. For the facts, see this chapter, section 3.II.h, p 425. Contrast *Heaney and McGuiness v Ireland* this chapter, section 3.II.h, p 427.

[909] Hudoc (2001); 34 EHRR 207. But see now the approach to road traffic offences in *O'Hallaran and Francis v UK* 2007-III; 46 EHRR 397 para 62 GC.

[910] *Lingens and Leitgeb v Austria No 8803/79*, 26 DR 171 (1983) (burden of proof on defence in criminal defamation proceedings to show that statement is true; no breach of Article 6(2)).

[911] A 141-A (1988); 13 EHRR 379 para 28. Cf *Pham Hoang v France* A 243 (1992) and *Janosevic v Sweden* 2002-VII; 38 EHRR 473. See also *AP, MP and TP v Switzerland* 1997-V; 26 EHRR 541; *Falk v Netherlands No 66273/01* hudoc (2004) DA; *Phillips v UK* 2001-VII (Article 6(1) case: see this chapter, section 3.II.f, p 422); *G v UK No 372204/08* (2011) DA; and *Willcox and Hurford v UK Nos 43759/10 and 43771/12* hudoc (2013) para 97 DA.

French law, a person who was in possession of prohibited goods in these circumstances was presumed to be guilty of smuggling them. Thus, the case was not a straightforward one of strict liability for an act that the prosecution had proved that the accused had committed. Instead it was one in which the *actus reus* of smuggling had been presumed from the proven fact of possession. The Court found that, as applied to the applicant's case, this presumption of fact was not contrary to Article 6(2). Under French law, the applicant had a defence of *force majeure*, by which it was open to him to prove that it was impossible for him to have known of the contents of the trunk. This he failed to prove to the satisfaction of the trial court. The Court held that, having regard to the availability of the *force majeure* defence, the Customs Code was not applied by the courts in an unreasonable manner which conflicted with Article 6(2), despite what was 'at stake' (imprisonment and a substantial fine) for the applicant. In other cases, it has been held that rebuttable presumptions, including that an accused was living knowingly off the earnings of a prostitute who was proved to be living with him or under his control,[912] that a company director was guilty of an offence committed by the company,[913] and that a dog was of a dangerous breed,[914] were not inconsistent with Article 6(2). However, a statutory presumption that a ruling in a criminal case in which the applicant had been the complainant that there was no case to answer *automatically* meant that in later criminal proceedings against the complainant for malicious prosecution the allegations should be treated as false was contrary to the presumption of innocence.[915]

As the *Salabiaku* case also decided, Article 6(2) does not prohibit offences of strict liability, which are a common feature of the criminal law of the Convention parties. An offence may thus be committed, consistently with Article 6(2), on the basis that a certain act has been committed, without it being necessary to prove *mens rea*. Provided a state respects the rights protected by the Convention, it is free to punish any kind of activity as criminal and to establish the elements of the offence in its discretion, including any requirement of *mens rea*.

Various claims that the presumption of innocence has been infringed in the conduct of the trial other than in respect of the operation of the rules of evidence have been considered. Having the accused appear handcuffed in front of the jury was consistent with Article 6(2) as a necessary security measure.[916] But requiring convicted persons to wear their prison uniform when appearing in court on appeal was a breach of Article 6(2) as reinforcing the public impression of their guilt.[917] The arrest of a witness in the courtroom for perjury immediately after giving evidence for the accused was permissible,[918] as were the retrial of the accused before a court that had earlier considered his application for bail[919] and the detention of a convicted person pending his appeal.[920] A procedure by which a person may plead guilty to an offence, with the proceedings being limited to sentencing, is not in breach of Article 6(2), provided that pressure has not been brought improperly to bear upon the accused to obtain the guilty plea.[921] However, a requirement

912 *X v UK No 5124/71*, 42 CD 135 (1972).

913 *G v Malta No 16641/90* hudoc (1991) DA. Cf *Radio France and Others v France* 2004-II; 40 EHRR 706.

914 *Bullock v UK No 29102/95* hudoc (1996); 21 EHRR CD 85.

915 *Klouvi v France* hudoc (2011) (allegation of rape).

916 *X v Austria No 2291/64*, 24 CD 20 (1967).

917 *Samoilă and Cionca v Romania* hudoc (2008)

918 *X v Germany No 8744/79*, 5 EHRR 499 (1983).

919 *X v Germany No 2646/65*, 9 YB 484 (1966). Cf *Sainte Marie v France*, this chapter, section 3.V.c, p 453.

920 *Cuvillers and Da Luz v France No 55052/00* hudoc (2003) DA.

921 *X v UK No 5076/71*, 40 CD 69 (1972). See also *Duhs v Sweden No 12995/87*, 67 DR 204 (out-of-court car-parking fines). See also *Panarisi v Italy* hudoc (2007).

that a tax surcharge be paid pending an appeal against its imposition may be in breach of Article 6(2) if it is not kept 'within reasonable limits that strike a fair balance between the interests involved', which include the financial consequences for the taxpayer and any effect upon the rights of the defence.[922]

The Court's jurisprudence considered above has concerned the presumption of innocence as a procedural guarantee that applies in the course of a criminal prosecution. It also has a second dimension, which is to protect individuals who have been acquitted of a criminal charge, or against whom criminal proceedings have been discontinued, from being treated by courts or public officials 'as though they are in fact guilty of the offence charged'. This second dimension counters the risk that the fair trial guarantees in Article 6 may be 'theoretical and illusory' only and serves to protect the individual's reputation.[923] The Court first spelt out this second dimension in *Minelli v Switzerland*.[924] In that case, a private prosecution against the applicant was discontinued because it had become statute-barred. A Swiss court thereupon ordered the applicant to pay part of the private prosecutor's and court costs on the basis that the applicant would 'very probably' have been convicted had the case gone to trial. The European Court held that Article 6(2) had been infringed. Although there was no formal decision as to guilt, the court's judgment as to costs 'showed that it was satisfied' that the accused was guilty, and this was sufficient.[925]

Following the *Minelli* case, the Court has applied this second dimension of the presumption of innocence to several other kinds of cases. These include cases in which remarks have been made about individuals who have been acquitted or against whom criminal proceedings have been discontinued where such individuals (i) have claimed defence costs[926] or claimed compensation for their detention on remand,[927] or for wrongful prosecution[928] or as victims of crime;[929] or (ii) have been the subject of disciplinary proceedings,[930] have had a punishment order suspended,[931] or have been prosecuted for an administrative offence having been acquitted by a criminal offence on the same facts.[932]

In all of these cases, the Court has drawn a distinction between statements by courts indicating guilt and statements by them that merely voice suspicion of guilt. The latter have been held permissible where no final decision in the accused's trial has been taken. Thus, the voicing just of suspicion by a court when ruling on claims for compensation for detention on remand and/or costs in cases in which the prosecution has been discontinued,[933] or when ruling on claims for provisional measures,[934] is not a breach of Article 6(2). The position is different in some cases following acquittal. Court statements voicing continuing suspicion (and *a fortiori* guilt)[935] after the accused has been acquitted have been held to be contrary to Article 6(2).[936] But statements of suspicion by a court following acquittal in proceedings

[922] *Janosevic v Sweden* 2002-VII; 38 EHRR 473 para 106.
[923] *Allen v UK* hudoc 2013- para 94 GC.
[924] A 62 (1983); 5 EHRR 554 para 38. See also *Adolf v Austria* A 49 (1982); 4 EHRR 313.
[925] Cf *Yassar Hussain v UK* hudoc (2006) and *Ashendon and Jones v UK* hudoc (2011). See also *Poncelet v Belgium* hudoc (2010).
[926] See, eg, *Lutz v Germany* A 123 (1987); 10 EHRR 182 PC.
[927] See, eg, *Sekanina v Austria* A 266-A (1993); 17 EHRR 221.
[928] See, eg, *Grabchuk v Ukraine* No 8599/02 hudoc (2006) DA.
[929] See, eg, *Lagardère v France* hudoc (2012).
[930] See, eg, *Šikić v Croatia* hudoc (2010).
[931] *El Kaada v Germany* above, n 902.
[932] *Kapetanios v Greece* hudoc (2016). See also *Dicle and Sadak v Turkey* hudoc (2015).
[933] See, eg, *Lutz v Germany* A 123 (1987); 10 EHRR 182 PC.
[934] *Gökçeli v Turkey* hudoc (2003).
[935] *Del Latte v Netherlands* hudoc (2004); 41 EHRR 176 and *Geerings v Netherlands* hudoc (2007); 46 EHRR 1212.
[936] *Sekanina v Austria* A 266-A (1993); 17 EHRR 221 and *Rushiti v Austria* hudoc (2000); 33 EHRR 1331. Adverse comments on the acquitted person's conduct leading to their prosecution or during the proceedings, but not on their guilt, are not a breach: *Ashendon and Jones v UK* hudoc (2011) paras 51, 54 and *Fashanu v UK No 38440/97* hudoc (1998); 26 EHRR Cd 217 DA.

for compensation for detention on remand when there was reasonable suspicion at the time of the arrest have not.[937]

The cases just discussed concern statements made following an acquittal or discontinuance of the case in judicial decisions that directly concern the applicant. Article 6(2) may also be infringed in criminal proceedings against another person when the court refers in its judgment to the involvement of the applicant in the same offence.[938] In addition, although civil proceedings are not directly subject to it,[939] Article 6(2) requires that a civil court act in accordance with an acquittal of an accused who is later party to the proceeding before it arising out of the same facts.[940] But the mere suspension of civil proceedings pending the outcome of a criminal case is not a breach.[941]

The rule in the *Minelli* case concerns statements made in judicial decisions. Article 6(2) has also been applied to statements made by judges while a case is pending, whether in or outside of court proceedings. Thus, in *Kyprianou v Cyprus*,[942] the trial court stated in the course of exchanges with defence counsel during a court hearing that his conduct in court amounted to criminal contempt. After a short adjournment, the court sentenced counsel to five days' imprisonment without giving him an opportunity to defend himself on the charge of contempt. The Strasbourg Court held that the statements made by the court were, *inter alia*, a breach of the presumption of innocence. As to statements made outside of court proceedings, in *Lavents v Latvia*[943] there was a breach of both Article 6(1) (partial tribunal) and Article 6(2) when the trial judge stated in press interviews which she gave during the trial that she was not sure whether to convict the accused on all or only some counts and expressed her astonishment that he totally denied his guilt. As well as statements by judges, prejudicial comment by counsel or witnesses may raise a question under Article 6(2) if the court's failure to control it shows judicial bias.[944] With regard to these cases, although it is possible to see a presumption of innocence element in them, it might be simpler and more natural to treat them just under the 'impartial tribunal' requirement in Article 6(1).[945]

The approach in the *Minelli* case applies not only to judicial statements, but also to statements by public officials. Thus, a breach of Article 6(2) was found in *Butkevičius v Lithuania*[946] when statements by the Chairman of the Lithuanian Parliament were made to the press shortly after the applicant, who was the Lithuanian Minister of Defence, had been apprehended in a hotel lobby accepting an envelope full of US dollars. The Chairman said that he 'had no doubt' that the applicant, who was later

[937] *Hibbert v Netherlands No 38087/97* hudoc (1999) DA. See also *Allen v UK* 2013- GC (statements as to whether there has been a 'miscarriage of justice' but not guilt not a violation).

[938] *Vulakh and Others v Russia* hudoc (2012) (proceeding discontinued against the other person on his death). See also *Karaman v Germany* hudoc (2014) (no violation).

[939] *X v Germany No 6062/73*, 2 DR 54 (1974).

[940] *X v Austria No 9295/81*, 30 DR 227 (1982) and *Diamantides v Greece (No 2)* hudoc (2005). But civil liability may be found on the same facts using a lower standard of proof, provided that the civil court does not question the acquittal in so doing: see *Ringvold v Norway* 2003-II and *Y v Norway* 2003-II; 41 EHRR 87.

[941] *Farragut v France No 10103/82*, 39 DR 186 (1984).

[942] 2005-XIII; 44 EHRR 565 GC. There was also a lack of impartialty: see this chapter, section 3.V.c, p 454.

[943] Hudoc (2002).

[944] See *Austria v Italy* 6 YB 740 Com Rep; CM Res DH (63) 3; *Nielsen v Denmark No 343/57*, 2 YB 412; *X, Y, Z v Austria No 7950/77*, 4 EHRR 270 at 274 (1980). In determining whether proceedings have been allowed to get out of hand to the prejudice of the accused, allowance may be made for different national temperaments and legal traditions: *Austria v Italy, ibid.*

[945] As in *Buscemi v Italy*, this chapter, section 3.V.c, p 455.

[946] 2002-II. Cf *Allenet de Ribemont v France* A 308 (1995); 20 EHRR 557 paras 37, 41 (police press conference statement of guilt); *Fatullayev v Azerbaijan* hudoc (2010); 52 EHRR 58 para 162; and *GCP v Romania* hudoc (2011).

convicted of attempting to obtain property by deception, had accepted a bribe and that he was a 'bribe-taker'. In contrast, in *Daktaras v Lithuania*,[947] the Court found no breach of Article 6(2) when a prosecutor indicated that the applicant's 'guilt had been proven' in connection with his decision to refuse an application for discontinuance of the prosecution. The Strasbourg Court stated that whether a statement by a public official violated the presumption of innocence depended on the 'context' in which it was made. It drew a distinction between public statements made in a context, such as a press conference,[948] that was separate from the court proceedings concerning the applicant, and statements, such as that by a prosecutor, that were a part of those proceedings and noted that in this case the prosecutor could be taken to have meant only that there was sufficient evidence to go to trial. In *Rywin v Poland*,[949] the terms of reference and findings of a parliamentary committee inquiry into public corruption allegations that received much media attention and referred to the applicant as an 'agent' of those involved (without stating that he was guilty) were held, by four votes to three, not to violate the applicant's presumption of innocence in respect of his pending prosecution for fraud. In a different kind of case, the dismissal of a customs officer from his employment in the civil service because he was in pre-trial detention, but not yet convicted, was not in itself (no statements) a violation of the presumption of innocence.[950] As the meaning of public official in this context, it was given a broad meaning in *Kouzmin v Russia*[951] in which Article 6(2) was held to be applicable when the applicant was said on television to be guilty of rape by a leading politician during his campaign for election as a governor of a republic. In contrast, in *Mulosmani v Albania*,[952] a public statement made by a chairman of an opposition political party accusing the applicant of the murder of an MP was held to be from a private person who held no public office.

The Court has recognized that, as well as statements by judges or other public officials, a 'virulent media campaign' may raise issues under Article 6(2), so that the state must take steps to control it.[953] Although some Strasbourg jurisprudence might be read as suggesting that prejudicial publicity in the press or other media may be a breach of Article 6 even in trials before judges alone,[954] it is obviously less likely to be so than in cases in which juries (or lay assessors) are involved.[955] This was confirmed in *Craxi v Italy*,[956] in which the Court, when finding that the trial of a former First Minister, which attracted a great deal of media coverage, was not a breach of the presumption of innocence, emphasized that the case was decided entirely by professional judges. However, several limits to possible breaches of Article 6 on a 'virulent campaign' basis have been set, which together help to explain why, despite the great publicity that sometimes attends trials, no case of a violation of Article 6 has yet been found on this ground. Thus the Court has stressed that, in accordance with freedom of expression, some press comment on a trial involving a matter of public interest must

[947] 2000-X; 34 EHRR 1466. See also *Virabyan v Armenia* hudoc (2012) paras 188–192. And see *Natsvlishvili and Togonidze v Georgia* hudoc (2014) para 104 (governor's tv interview) and *Mustafa (Abu Hamza) v UK No 31411/07* DA hudoc (2011) para 41 DA (minister's withdrawal of applicant's citizenship): not sufficiently closely linked with prosecutions.

[948] See the *Lavents* case earlier in this section, p 465. [949] Hudoc (2016).

[950] *Tripon v Romania* hudoc (2012). [951] Hudoc (2010). [952] Hudoc (2013).

[953] See, eg, *Natsvlishvili and Togonidze v Georgia* hudoc (2014) para 105 (TV filming of arrest). See also *Shuvalov v Estonia* hudoc (2012) para 82 and *Ninn-Hansen v Denmark No 28972/95*, 1999-V DA.

[954] See, eg, *Anguelov v Bulgaria, No 45963/99* hudoc (2004) DA.

[955] See, eg, *Priebke v Italy No 48799/99* hudoc (2001) DA.

[956] Hudoc (2002). Cf *GCP v Romania* hudoc (2011) and *Priebke v Italy No 48799/99* hudoc (2001) DA.

be expected,[957] and that its impact is likely to be limited where the trial takes place a considerable time later.[958] In addition, the test is not 'the subjective apprehensions' of the suspect as to the impact of the comment, but whether 'his fears can be held to be objectively justified'.[959] Moreover, in a jury case, the effect of prejudicial comment may be countered by the judge's direction to the jury to discount it.[960] There are also statements suggesting that state involvement in the generation of the publicity is necessary for the state to be responsible for any resulting prejudice,[961] although in the theory of the Convention, the simple failure of the court, a state organ, to counter the possible prejudicial effect should be sufficient to engage responsibility under the Convention.

A violation of the presumption of innocence by a lower court may be made good by a higher court on appeal.[962] It may be, however, that 'the failure of the lower court to observe the principle of presumption of innocence has so distorted the general course of proceedings' that this is not possible.[963]

## 5. ARTICLE 6(3): FURTHER GUARANTEES IN CRIMINAL CASES

### I. ARTICLE 6(3): GENERALLY

Article 6(3) guarantees certain rights that are necessary to the preparation and conduct of the defence and to ensure that the accused is able to defend himself on equal terms with the prosecution. The rights listed are 'minimum rights'. They are elements of the wider concept of the right to a fair trial in Article 6(1). Because of this, the Court commonly decides cases on the basis of Article 6(1) *and* the relevant specific right in Article 6(3) or even on the basis of Article 6 as a whole.[964]

The rights in Article 6(3) are guaranteed only to persons 'charged with a criminal offence'. This wording has the same autonomous Convention meaning as it has elsewhere in Article 6.[965] Accordingly, a person is charged with a criminal offence for the purposes of Article 6(3) from the moment that he is 'substantially affected' by the steps taken against him as a suspect. Whether Article 6(3) applies to the pre-trial stage of criminal proceedings was formerly a matter of dispute, with a number of civil law contracting parties questioning whether it did. This argument was expressly rejected by the Court in *Imbrioscia v Switzerland*.[966] Article 6(3) applies to appeal proceedings, although its requirements at

[957] See, eg, *Papon v France (No 2) No 54210/00* hudoc (2001) DA and *Natsvlishvili and Togonidze v Georgia* hudoc (2014) para 105. See also *Sunday Times v UK (No 1)* A 30 (1979); 2 EHRR 245, in which a conviction for criminal contempt for comment on pending civil litigation was contrary to the guarantee of freedom of speech in Article 10.

[958] *GCP v Romania* hudoc (2011). Cf *Beggs v UK No 15499/10* hudoc (2012) DA.

[959] *GCP v Romania, ibid* para 46. Cf *Abdulla Ali v UK* hudoc (2015).

[960] *Noye v UK No 4491/02* hudoc (2003); 36 EHRR CD 231 DA. Cf *Pullicino v Malta No 45441/99* hudoc (2000) DA; *Beggs v UK No 15499/10* hudoc (2012) DA; and *Mustafa (Abu Hamza) v UK No 31411/07* hudoc (2011) DA.

[961] See *Ensslin, Baader and Raspe v Germany Nos 7572/76, 7586/76 and 7587/76*, 14 DR 64 at 112 (1978) and *Włoch v Poland No 27785/95* hudoc (2000).

[962] *Adolf v Austria* A 49 (1982); 4 EHRR 313 and *Arrigo and Vella v Malta No 6569/04* hudoc (2005) DA.

[963] *Austria v Italy* 6 YB 740 at 784 (1063) Com Rep; CM Res DH (63) 3.

[964] For an Article 6 as a whole case, see *Vidal v Belgium* A 235-B (1992) para 35. Cf *Navalnyy and Ofitserov v Russia* hudoc (2016) para 120 (separate trials prejudiced those tried later and prosecution of a prominent politican possibly politically motivated).

[965] See *Adolf v Austria* A 49 (1982); 4 EHRR 313. For its meaning, see this chapter, section 2.I.a and b, pp 377–81.

[966] A 275 (1993); 17 EHRR 441 para 36. Cf *Öcalan v Turkey* 2005-VI para 131; 41 EHRR 985 GC.

this stage are shaped by the function of the appellate court concerned and its place in the proceedings as a whole.[967]

## II. ARTICLE 6(3)(A): THE RIGHT TO BE INFORMED OF THE ACCUSATION

Article 6(3)(a) requires that a person charged with a criminal offence 'be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'. It overlaps with Article 5(2), which provides a similarly worded guarantee for persons detained pending trial.[968] Although both provisions respond to the legitimate claim of an individual to know why the state has acted against him, the purpose of the two guarantees is essentially different. Whereas Article 5(2) seeks to assist the arrested person in challenging his detention, Article 6(3)(a) is intended to give the accused person the information he needs to answer the accusation against him. For this reason, the information required by Article 6(3)(a) is to be understood in the light of the accused's right to prepare his defence that is guaranteed in Article 6(3)(b).[969]

The requirement in Article 6(3)(a) that persons 'charged with a criminal offence' be given the necessary information 'promptly' has not been strictly interpreted. In *Kamasinski v Austria*,[970] it was met when the information was given, in the civil law system concerned, at the time of the indictment hearing, some 11 days after the accused's arrest. In other cases, no breach has been found where the accused has had sufficient time to prepare his defence despite the delay in informing him of the investigation against him.[971] 'Promptly' has been interpreted more strictly than this in Article 5(2).

The accused must be informed of the 'nature and cause of the accusation against him'. The 'nature' of the accusation is the offence with which the accused is charged. This may be altered as the case proceeds provided that the accused is given the opportunity to prepare his defence to the new charge in 'a practical and effective manner and, in particular, in good time'.[972] Article 6(3)(a) was infringed when a court of appeal convicted the applicants of a new offence of which they only learnt when that court's judgment was delivered.[973] There was no breach, however, where the accused could reasonably have anticipated that an aggravating factor which was present on the facts, but not argued, would be taken into account in sentencing.[974] Nor was there a breach where the accused had sufficient opportunity to respond at the appeal stage to a reformulated charge on the basis of which he had been convicted at first instance.[975]

[967] See, eg, *Artico v Italy* A 37 (1980); 7 EHRR 528 and *Kremzow v Austria* A 268-B (1993); 17 EHRR 322 para 58.

[968] But, unlike Article 5(2), Article 6(3)(a) may apply to unarrested persons concerning whom a preliminary investigation has commenced, provided they are 'substantially affected': see *Brozicek v Italy* A 167 (1989); 12 EHRR 371 PC. For cases in which Article 6(3)(a) claims did not meet this requirement, see *C v Italy No 10889/84*, 56 DR 40 (1988) and *Padin Gestoso v Spain No 39519/98* 1999-II DA.

[969] *Péllisier and Sassi v France* 1999-II; 30 EHRR 715 para 54 GC. Compliance with Article 6(3)(a) is a condition of compliance with Article 6(3)(b): *Ofner v Austria No 524/59*, 3 YB 322 at 344 (1960).

[970] A 168 (1989); 13 EHRR 36. A delay of almost ten years was an extreme breach: *Casse v Luxembourg* hudoc (2006).

[971] See *Padin Gestoso v Spain No 39519/98* 1999-II DA.

[972] *Péllisier and Sassi v France* 1999-II; 30 EHRR 715 para 62 GC. See also *Mattoccia v Italy* 2000-IX; 36 EHRR 825; *Varela Geis v Spain* hudoc (2013); and *Niculescu v Romania* hudoc (2013) para 119.

[973] *Péllisier and Sassi v France* 1999-II; 30 EHRR 715 GC. See also *Mattoccia v Italy* 2000-IX 89; 36 EHRR 825; *Sipavičius v Lithuania* hudoc (2002); and *Sadak and Others v Turkey (No 1)*, n 1006.

[974] *Gea Catalán v Spain* A 309 (1995); 20 EHRR 266 and *De Salvador Torres v Spain* 1996-V; 23 EHRR 601.

[975] *Dallos v Hungary* 2001-II; 37 EHRR 524.

The 'cause' of an accusation consists of the 'acts he is alleged to have committed and on which the accusation is based'.[976] What needs to be communicated to the accused will depend upon what he can be taken to know from the questioning he has undergone and from the other circumstances of the case.[977] The accused must take advantage of what opportunities exist to learn of the accusation against him; if a prisoner fails to attend a hearing at which he could have obtained further information, this will count against his claim of a breach of Article 6(3)(a).[978]

The words 'in detail' clearly suggest that the information to which an accused is entitled under Article 6(3)(a) is 'more specific and more detailed' than that which an accused must receive under Article 5(2).[979] In *Mattoccia v Italy*,[980] the Court stated that the accused must be told of the 'material facts' that form the basis of the accusation against him. The level of detail may vary with the circumstances, but the accused 'must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence'. There was clearly a breach of Article 6(3)(a) in *Kyprianou v Cyprus*,[981] where a lawyer was held guilty of contempt in the face of the court following a ten-minute recess after an outburst by him in court. The transcript of the proceedings indicated that the court had already decided on his guilt before informing the accused of the nature and cause of the accusation against him and the lawyer only learnt of the 'material facts' on which the charge was based when a sentence of five days' imprisonment was imposed following his conviction.

Article 6(3)(a) does not impose any special formal requirement as to the manner in which the information is to be given.[982] Although the importance of the required information is such that it should normally be given in writing, this is not essential in all cases: depending on the facts, the accused may be given the information orally or he may have waived his right to a written communication. In *Kamasinski v Austria*,[983] sufficient information was given orally to the applicant during the questioning sessions following his arrest. Where the information is sent in writing by post, proof of delivery is generally required.[984] Where a person has mental difficulties, appropriate action must be taken to make sure that he is aware of the nature and cause of the accusation against him.[985]

The information must be given to the accused in a 'language which he understands'. Unless the authorities can prove or have reasonable grounds to believe that the accused has a sufficient command of the language in which the information is given to him, they must provide him with an appropriate translation if he requests it.[986] Since the right is that of the defence as a whole, Article 6(3)(a) is complied with if the required information is given in a language that the accused *or* his lawyer understands.[987] The cost of any translation must be met by the state under Article 6(3)(e).

[976] *Péllisier and Sassi v France* 1999-II; 30 EHRR 715 para 51 GC.
[977] *Kamasinski v Austria* A 168 (1989); 13 EHRR 36. [978] *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165.
[979] *Nielsen v Denmark No 343/57*, 2 YB 412 at 462 (1959).
[980] 2000-IX; 36 EHRR 825 paras 59–60. See also *Brozicek v Italy* A 167 (1989); 12 EHRR 371.
[981] Hudoc (2004). Chamber decision. The Grand Chamber did not consider Article 6(3)(a).
[982] *DMT and DKI v Bulgaria* hudoc (2012) para 75. [983] A 168 (1989); 13 EHRR 36.
[984] *C v Italy No 10889/84*, 56 DR 40 (1988). But the accused may be shown to have avoided delivery of a warrant with the required information: *Erdogan v Turkey No 14723/89*, 73 DR 81.
[985] *Vaudelle v France* 2001-I; 37 EHRR 397.
[986] *Brozicek v Italy* A 167 (1989); 12 EHRR 371 PC. The case for a written translation of a key document such as an indictment is particularly strong: *Kamasinski v Austria* A 168 (1989); 13 EHRR 36. And see *Hermi v Italy* 2006-XII; 46 EHRR 1115 GC.
[987] *X v Austria No 6185/73*, 2 DR 68 (1975). The question was not ruled on in *Kamasinski v Austria* A 168 (1989); 13 EHRR 36, the applicant having requested that the indictment be sent to his lawyer. For the view that the information should be given in a language that the accused understands so that he can control his defence, see Stavros, p 174.

## III. ARTICLE 6(3)(B): THE RIGHT TO ADEQUATE TIME AND FACILITIES

Article 6(3)(b) guarantees a person charged with a criminal offence 'adequate time and facilities for the preparation of his defence'. This right was explained by the Commission in *Can v Austria*[988] as requiring that the accused must have 'the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the proceedings'.

### a. Adequate time

The guarantee in Article 6(3)(b) of 'adequate time' to prepare a defence, which protects the accused against a 'hasty trial',[989] is the counterpoise to that in Article 6(1) by which an accused must be tried within a reasonable time. Generally, the adequacy of the time allowed will depend upon the particular facts of the case.[990] Relevant considerations are the complexity of the case,[991] the stage of proceedings,[992] the fact that the accused is defending himself in person,[993] and the accused's lawyer's workload.[994] A legal aid lawyer must be appointed,[995] or the accused allowed to appoint his own lawyer,[996] in good time before the hearing.[997] If a lawyer is replaced for good reason, additional time must be allowed for the new lawyer to prepare the case.[998] Any breach of Article 6(3)(b) that results from the brevity of the time allowed for a lawyer to prepare a case may be rectified in appeal proceedings.[999]

As to what is 'adequate time', in cases at the trial stage two weeks for the accused's lawyers to examine a case file of 17,000 pages were insufficient,[1000] as were, in a different kind of case, just a few hours for an accused who was defending himself in person in a minor public order case 'to enable him to familiarise himself properly with and to assess adequately the charge and evidence against him, and to develop a viable legal strategy for his defence'.[1001] In contrast, a period of 17 days' notice of the hearing before a criminal court in a 'fairly complicated' case of misappropriation was 'adequate',[1002] as was five days' notice of a prison disciplinary hearing.[1003] An accused who considers that the time allowed is inadequate should, as a matter of local remedies, seek an adjournment or postponement

[988] A 96 (1985); 8 EHRR 14 Com Rep para 53 (F Sett before Court). Cf *Galstyan v Armenia* hudoc (2007); 50 EHRR 618.

[989] *Kröcher and Möller v Switzerland No 8463/78*, 26 DR 24 at 53 (1981).

[990] *Mattick v Germany No 62116/00* hudoc (2005) DA.

[991] *Albert and Le Compte v Belgium* A 58 (1983) PC and *OAO Neftyanaya Kompaniya Yukos v Russia* hudoc (2011); 54 EHRR 599.

[992] *Huber v Austria No 5523/72*, 17 YB 314 (1974); 46 CD 99 (1974).

[993] *X v Austria No 2370/64*, 22 CD 96 (1967).

[994] *X and Y v Austria No 7909/77*, 15 DR 160 (1978) and *Berliński v Poland* hudoc (2002).

[995] *X and Y v Austria, ibid* and *Galstyan v Armenia* hudoc (2007).

[996] *Pérez Mahia v Spain No 11022/84*, 9 EHRR 145 (1985).

[997] An accused cannot complain if they are responsible for the delay: *X v Austria No 8251/78*, 17 DR 166 (1979).

[998] See *Goddi v Italy* A 76 (1984) (Article 6(3)(c) decision) and *Samer v Germany No 4319/69*, 14 YB 322 (1971).

[999] *Twalib v Greece* 1998-IV; 33 EHRR 584.

[1000] *Öcalan v Turkey* 2005 IV; 41 EHRR 985 GC. Cf *Kremzow v Austria* A 268-B; 17 EHRR 322 (twenty-one days to examine forty-nine-page document sufficient). See also *GB v France* 2001-X; 35 EHRR 1233; *Khodorkovskiy and Lebedev v Russia* hudoc (2013) paras 575–586; and *Adorisio and Others v Netherlands Nos 4731/13 et al* hudoc (2015) DA.

[1001] *Galstyan v Armenia* hudoc (2007). Cf *Vyerentsov v Ukraine* hudoc (2013) para 76. Fast-track procedures are permissible if the defence is not prejudiced: *Galstyan v Armenia, ibid.* Cf *Borisova v Bulgaria* hudoc (2006).

[1002] *X and Y v Austria No 7909/77*, 15 DR 160 (1978).

[1003] *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165. Cf *Albert and Le Compte v Belgium* A 58 (1983); 5 EHRR 533 PC.

of the hearing,[1004] but there may be exceptional circumstances which make this unnecessary.[1005] The reclassification on the final day of a trial of the offence with which the accused was charged gave him inadequate time to consult with his lawyer to prepare his defence and was a breach of both Article 6(3)(a) and (b).[1006] Generally, less time will be needed to prepare for an appeal than for a trial.[1007]

In *Artico v Italy*,[1008] the Court recognized that proof of actual prejudice caused by the absence of a lawyer—which might be 'impossible' to show—was not required to establish a breach of Article 6(3(c), and this, it is submitted, should apply also to the failure to appoint a lawyer in sufficient time in breach of Article 6(3)(b).[1009]

### b. Adequate facilities

Adequate facilities include the accused's right of access to a lawyer at the pre-trial stage and later to the extent necessary to prepare their defence.[1010] There is an overlap here between Article 6(3)(b) and the right to legal assistance in Article 6(3)(c).[1011] The following paragraphs are based on the jurisprudence of the Court and the Commission under Article 6(3)(b).[1012]

The right of access to a lawyer has particular significance for persons in detention on remand pending the hearing. A prisoner must be allowed to receive a visit from his lawyer out of the hearing of prison officers or other officials in order to convey instructions or to pass or receive confidential information relating to the preparation of his defence.[1013] Restrictions upon visits by lawyers may be imposed if they can be justified in the public interest (eg to prevent escape or the obstruction of justice).[1014] A restriction by which a lawyer may not discuss certain evidence with his client may be permissible to protect the identity of an informer.[1015] In early decisions, the Commission held that a refusal to allow a prisoner to take his notes and annotated documents to an interview with his lawyer,[1016] and that an accused's lack of opportunity to discuss his appeal with his legal aid lawyer in person because the lawyer lived too far away,[1017] were not a breach of the Convention. It is for the accused who appoints his own lawyer to ensure that the lawyer speaks a language that the accused understands or to arrange for an interpreter; the state is under no obligation to provide an interpreter in such circumstances.[1018] The right to communicate

[1004] *Campbell and Fell v UK* A 80 (1984) 7 EHRR 165. In *Murphy v UK No 4681/70*, 43 CD 1 (1972), in which a legal aid barrister was allocated to the accused just minutes before a hearing, the Strasbourg application was refused because an adjournment would have been granted if requested. See also *Craxi v Italy* hudoc (2002) and *Bäckström and Andersson v Sweden No 67830/01* hudoc (2006) DA.

[1005] *Goddi v Italy* A 76 (1984). Cf *Mattei v France* hudoc (2006).

[1006] *Sadak and Others v Turkey (No 1)* 2001-VIII; 36 EHRR 431.

[1007] *Huber v Austria No 5523/72*, 17 YB 314 (1974); 46 CD 99 (1974).

[1008] A 37 (1980); 3 EHRR 1, discussed in this chapter, section 5.IV.d, p 480.

[1009] Cf *Korellis v Cyprus* hudoc (2003).

[1010] *Campbell and Fell v UK* A 80 (1984) 7 EHRR 165 and *Goddi v Italy* A 76 (1984).

[1011] See *Goddi v Italy* A 76 (1984) para 31.

[1012] The right of access to a lawyer is now usually dealt with by the Court under Article 6(3)(c), not under Article 6(3)(b): see, eg, *Öcalan v Turkey* 2005-IV; 41 EHRR 985 GC.

[1013] *Can v Austria* A 96 (1985); 8 EHRR 14 paras 51–52 Com Rep (F Sett before Court); *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165 para 113; and *Öcalan v Turkey* 2005-IV; 41 EHRR 985 GC. The restrictions permitted in the pre-*Can* case of *Kröcher and Möller v Switzerland No 8463/78*, 34 DR 25 (1982) Com Rep CM Res DH (83) 15, would not now be accepted, even in a terrorist context.

[1014] See *Can v Austria* A 96 (1985); 8 EHRR 14 and *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165.

[1015] *Kurup v Denmark No 11219/84*, 42 DR 287 (1985).

[1016] *Köplinger v Austria No 1850/63*, 12 YB 438 (1968). See also *Moiseyev v Russia* hudoc (2008); 53 EHRR 306.

[1017] *X v Austria No 1135/61*, 6 YB 194 (1963) (correspondence was possible).

[1018] *X v Austria No 6185/73*, 2 DR 68 (1975).

with one's lawyer extends to written as well as oral communication. In practice, questions concerning prison correspondence, in respect of which most problems of correspondence between accused persons and their lawyers concerning criminal proceedings[1019] are likely to arise, have generally been considered under Article 8 (the right to respect for correspondence).[1020]

Apart from access to a lawyer, Article 6(3)(b) 'recognises the right of the accused to have at his disposal, for the purpose of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the authorities', including any document that 'concerns acts of which the defendant is accused, the credibility of testimony, etc'.[1021] In any criminal case, the prosecution will have at its disposal the results of the police investigation or, in a civil law system, the case file prepared during the preliminary investigation.[1022] This will include both documents and other evidence obtained by questioning or searches backed by the power of the state or by the use of forensic resources which the defence may well lack.[1023] The Court has held that Article 6(3)(b) requires that the applicant have 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents'.[1024] In this context, the primary purpose of Article 6(3)(b) is to achieve 'equality of arms' between the prosecution and the defence by requiring that the accused be allowed 'the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings'.[1025] Article 6(1) requires that the prosecution disclose to the defence all material evidence in its possession for or against the accused, and this obligation must apply also under Article 6(3)(b).[1026] Access to documents may, however, be restricted for national security reasons.[1027] As well as access to documents, an accused in pre-trial detention requires conditions of detention that allow him to concentrate on preparing his defence.[1028]

Article 6(3)(b) also extends to 'facilities' that the defence requires at the trial in order to plead its case. For example, defence counsel must be allowed sufficient time to present the defence,[1029] to call expert witnesses,[1030] to be allowed an adjournment,[1031] and to communicate with the accused.[1032] But Article 6(3)(b) does not imply a right to attend a pre-trial

[1019] As to prisoners' correspondence in civil proceedings, see this chapter, section 3.I.a, p 400.

[1020] See, eg, *Schönenberger and Durmaz v Switzerland* A 137 (1988). See also *McComb v UK No 10621/83*, 50 DR 81 (1986) (Article 6(3)(c)). Article 6(3)(c) may be infringed by delays caused by monitoring correspondence with a lawyer: *Domenichini v Italy* 1996-V; 32 EHRR 68.

[1021] *Jespers v Belgium No 8403/78*, 27 DR 61 at 88 (1981) Com Rep; CM Res DH (82) 3. Cf *Khodorkovskiy and Lebedev v Russia* hudoc (2013). See also *CGP v Netherlands No 29835/96* hudoc (1997) DA.

[1022] As to access in a civil law system to the complete case-file, see Stavros, pp 181–3. See also *Foucher v France* 1997-II; 25 EHRR 234. Article 6(3)(b) requires that the accused be given sufficient personal access to the documents in the case file to allow his defence to be prepared properly: *Öcalan v Turkey* 2005-IV; 41 EHRR 985 GC. See also *Kremzow v Austria* A 268-B (1993); 17 EHRR 322. In some circumstances it may be sufficient that the accused's lawyer has access: *Kamasinksi v Austria* A 168 (1989); 13 EHRR 36 para 88.

[1023] Under the 'equality of arms' requirement, the defence must have access to relevant evidence to conduct a forensic examination.

[1024] *Beraru v Romania* hudoc (2014) para 70.

[1025] *Jespers v Belgium No 8403/78*, 27 DR 61 at 87 (1981) Com Rep; CM Res DH (82) 3. See also *Öcalan v Turkey* 2005-IV; 41 EHRR 985 para 140 GC.

[1026] *Edwards v UK* A 247-B (1992); 15 EHRR 417. Claims of non-disclosure of evidence to the defence are now generally dealt with not under Article 6(3), but the 'fair hearing' guarantee in Article 6(1). On the late introduction of prosecution witnesses, see *X v UK No 5327/71*, 43 CD 85 (1972).

[1027] *Moiseyev v Russia* hudoc (2008); 53 EHRR 306.

[1028] *ibid*.

[1029] *X v Germany No 7085/75*, 2 Digest 809 (1976) (no breach).

[1030] *GB v France* 2001-X; 35 EHRR 123.

[1031] *X v UK No 6404/73*, 2 Digest 895 (1975) (no breach). See also *Henri Rivière v France* hudoc (2013) (court of appeal failure to give reasons for adjournment: violation) of Article 6 (1)(3)).

[1032] *Yaroslav Belousov v Russia* hudoc (2016) paras 152–153.

hearing by an investigating judge of witnesses abroad who may give evidence later at the trial.[1033]

If there is a right of appeal against the trial court decision, Article 6(3)(b) requires that the applicant be allowed sufficient facilities to prepare his appeal. Thus, the applicant must be informed of the reasons for the decision against them[1034] and given a copy of the pleadings[1035] in good time.[1036] If the applicant is detained, the prison authorities must take reasonable steps to supply them with the legal and other materials needed to prepare an appeal.[1037]

It would appear from *Korellis v Cyprus*[1038] that the accused does not have to show 'actual prejudice' to the defence resulting from the state's failure to allow access to documents or other 'facilities': the test instead is one of 'relevance' to the preparation of the defence.

## IV. ARTICLE 6(3)(C): THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH LEGAL ASSISTANCE

The purpose of this guarantee is to ensure that proceedings against an accused 'will not take place without an adequate representation of the case for the defence'.[1039] The accused's lawyer may also serve as the 'watchdog of procedural regularity',[1040] both in the public interest and for his client.

Article 6(3)(c) protects any person subject to a 'criminal charge'. It applies to all stages of the criminal process, including the pre-trial phase. As stated in *Dayanan v Turkey*,[1041]

> [A]n accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned. Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questionning, support of an accused in distress and checking the conditions of detention.

The right to legal assistance thus applies from the moment of arrest, not only from the time that the accused is interrogated or otherwise subjected to any investigative act following arrest.[1042] In *Öcalan v Turkey*,[1043] the applicant was interrogated by the security forces, a public prosecutor, and a judge over a period of almost seven days after his forced return

[1033] *X v Germany No 6566/74*, 1 DR 84 (1974). See also *Crociani v Italy No 8603/79*, 22 DR 147 (1980).

[1034] *Hadjianastassiou v Greece* A 252 (1992). An abridged (not a full) copy of the trial court judgment will be sufficient if the applicant's defence rights are not 'unduly affected': *Zoon v Netherlands* 2000-XII; 36 EHRR 380.

[1035] *Kremzow v Austria* A 268-B (1993).

[1036] As to the need to give notice of the date of the hearing, see *Goddi v Italy*, A 76 (1984) and *Vacher v France* 1996-V; 24 EHRR 482.

[1037] *Ross v UK No 11396/85*, 50 DR 179 (1986).

[1038] Hudoc (2003) para 35 (access to evidence for forensic examination; decided under Article 6(1), but relevant to Article 6(3)(b)).

[1039] *Pakelli v Germany* A 64 (1983); 6 EHRR 1 para 84 Com Rep.

[1040] *Ensslin, Baader and Raspe v Germany Nos 7572/76, 7586/76 and 7587/76*, 14 DR 64 at 114 (1978).

[1041] Hudoc (2009) para 32. Cf *AT v Luxembourg* hudoc (2015) para 67. See also the concurring opinions of Judge Bratza and Judges Zagrebelsky, Casadevall, and Türmen in *Salduz v Turkey* 2008-; 49 EHRR 421 para 55 GC.

[1042] *Simeonovi v Bulgaria* hudoc (2017) para 114 GC. See also the concurring opinions of Judge Bratza and Judges Zagrebelsky, Casadevall, and Türmen in *Salduz v Turkey* 2008-; 49 EHRR 421 para 55 GC. The accused's right to consult with his lawyer before interrogation must be 'guaranteed by law': *AT v Luxembourg* hudoc (2015) para 87.

[1043] 2005-IV; 41 EHRR 985 para 131 GC. See also *Imbrioscia v Switzerland* A 275 (193); 17 EHRR 441; *Quaranta v Switzerland* A 205 (1991); *Berliński v Poland* hudoc (2002); and *Salduz v Turkey* 2008-; 49 EHRR 421 para 55 GC. The right of access to a lawyer did not apply to police questioning at a road check prior to arrest: *Aleksandr Zaichenko v Russia* hudoc (2010) para 48. As to access to a lawyer for juveniles, see *Adamkiewicz v Poland* hudoc (2010).

to Turkey, during which time his lawyer was refused permission to visit him. Under interrogation, the applicant made incriminating statements that proved to be a 'major contributing factor in his conviction'. The Court held that 'to deny access to a lawyer over such a long period and in a situation in which the rights of the defence might well be irretrievably prejudiced' was a breach of Article 6(3)(c).

However, access to a lawyer at the pre-trial stage may, in rare cases, be delayed in accordance with a two-part test, which was set out in *Salduz v Turkey*[1044] and further developed in *Ibrahim and Others v UK*.[1045] First, there must be 'compelling reasons' for the delay. There are 'compelling reasons' when (i) there are 'exceptional circumstances'; and (ii) the restriction upon access is of 'a temporary nature' and is 'based on an individual assessment of the particular circumstances'.[1046] Also relevant to the first part of the test is whether the restriction has a legal basis and is 'sufficiently circumscribed by law as to guide operational decision-making'.[1047] There were 'compelling reasons' in the *Ibrahim* case, in which bombs on the London underground had been detonated but failed to explode just two weeks after terrorist bombs had killed 52 persons on the underground and on a bus. Three of the four applicants were arrested and immediately questioned in 'safety interviews' for several hours, during which time they were not allowed access to legal advice. The Grand Chamber held that there were 'exceptional circumstances' in the case, viz the 'urgent need to avert serious adverse consequences for life, liberty or physical integrity'[1048] and that the permissible delay in access to legal advice was temporary (up to 48 hours). The other requirements of the first part of the test were met because the decisions to refuse access in each case were taken by a senior police officer within a detailed legal framework governing refusal of access. The second part of the *Salduz/Ibrahim* test is that the trial as a whole must be shown to have been fair. This is so even though the 'compelling reasons' required by the first part of the test are present. In the *Ibrahim* case, the Grand Chamber held that the second part of the test was satisfied in the case of the first three applicants, with, *inter alia*, sufficient account having been taken (eg, in the judge's summing up) of the fact that statements made during police questioning without legal advice were admitted in evidence. In the *Ibrahim* case, neither part of the test was complied with in respect of the fourth applicant. Having initially interviewed him as a witness,[1049] the police continued to interview him without access to legal advice after he had made incriminating statements, at which point he had become 'substantially affected' by the police interviews and hence subject to a 'criminal charge'. The Court held that, although the same 'exceptional circumstances' existed, there was not an adequate legal framework regulating refusal of access to advice in the situation of a person, such as the fourth applicant, who has moved from the position of witness to being a suspect. Consequently, in the case of the fourth applicant the first ('compelling reasons') part of the *Salduz/Ibrahim* test was not satisfied. In this situation, there is not automatically a violation of Article 6(3)(c), but the Court will 'apply a very strict scrutiny to its fairness assessment' in the second part of the test, with the onus being upon the respondent state to 'demonstrate convincingly why, exceptionally, and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction'.[1050] Applying this 'very

[1044] 2008-; 49 EHRR 421 paras 54–55 GC. See also *Murray (John) v UK* 1996-I; 22 EHRR 29 GC.
[1045] Hudoc (2016) GC. [1046] *ibid* para 258. [1047] *ibid*.
[1048] *ibid* para 259. A 'non-specific claim of a risk of leaks cannot constitute compelling reasons': *ibid*.
[1049] Cf *Bandaletov v Ukraine* hudoc (2013) paras 62–72 (no violation on the facts).
[1050] *ibid* para 265. For a list of factors to be taken into account when assessing the overall fairness of proceedings, see *Ibrahim v UK* hudoc (2016) para 274 GC.

strict scrutiny', the Court found a violation of Article 6(1) and 6 (3)(c) in the case of the fourth applicant.

The right to access to legal assistance includes a right to the presence and advice of a lawyer during pre-trial questioning.[1051] In this connection, the mere passive presence of a lawyer without their possibility of intervening to ensure the accused's rights is not sufficient.[1052] On a related matter, in *Brennan v UK*[1053] the Court agreed that video or taped recordings of police interviews were safeguards against police misconduct but was 'not persuaded that these were an indispensable precondition of fairness'; the facts of each case had to be considered as a whole.

As far as other stages of proceedings are concerned, Article 6(3)(c) applies to the trial and to any appeal proceedings following the accused's conviction, although when assessing its requirements at the appellate level, regard must be had to the special features of the appeal proceedings concerned and the part they play in the case as a whole.[1054] Thus the appointment of a legal aid lawyer for the hearing of an appeal will not remedy the absence of a lawyer at the trial stage where the appeal court lacks jurisdiction to consider the case again fully on the law and the facts.[1055]

### a. Defence in person

Article 6(3)(c) guarantees the right of the accused to defend himself in person. However, this is not an absolute right. The law of a number of Convention parties provides that in certain kinds of cases the accused must be represented by a lawyer at the trial stage[1056] or on appeal[1057] in the interests of justice. In *Correia de Matos v Portugal*,[1058] the Court confirmed that this approach was consistent with Article 6(3)(c), the interests of justice being a 'relevant and sufficient' reason for insisting upon legal representation. A 'margin of appreciation' applies, as the contracting states are 'better placed than the [Strasbourg] Court' to decide whether the interests of justice require that the defence be conducted by a legal representative, rather than the accused, in a particular case or kind of case.[1059]

Where the accused does defend himself, his manner of conducting his defence may bear upon a state's liability under Article 6(3)(c). In *Melin v France*,[1060] the Court held that there will be no breach of Article 6 by the state because of a deficiency in the proceedings that results from a lack of diligence that may reasonably be expected of the accused. In contrast, a state may be in breach of Article 6(3)(c) if it impedes the exercise of the accused's legal right to defend himself. In *Brandstetter v Austria*,[1061] the accused had been convicted of defamation on the basis of allegedly false statements made by him when defending himself

[1051] *Navone v Monaco* hudoc (2013) para 78 and *AT v Luxembourg* hudoc (2015) paras 65, 71–72. But see *Brennan v UK* 2001-X; 34 EHRR 507 para 53. See also *Blaj v Romania* hudoc (2014) para 96 (replies to factual questions when 'caught in the act' in the absence of a lawyer used as evidence: no violation). As to questioning of juveniles, see *Panovits v Cyprus* hudoc (2008) para 67 and *Blokhin v Russia* hudoc (2016) paras 205–209 GC. European states do not all guarantee the presence of a lawyer during questioning, but there is movement in that direction: see Giannoulopoulos, 16 HRLR 103 (2016).

[1052] *Aras (No 2) v Turkey* hudoc (2014) para 40.

[1053] 2001-X; 34 EHRR 507 para 53.

[1054] *Meftah and Others v France* 2002-VII para 41 GC. See also *Granger v UK* A 174 (1990); 12 EHRR 469.

[1055] *Quaranta v Switzerland* A 205 (1991).

[1056] See *Croissant v Germany* A 237-B (1992); 16 EHRR 135.

[1057] See *Philis v Greece No 16598/90*, 66 DR 260 (1990) and *Meftah v France* 2002-VII GC.

[1058] *No 48188/99* hudoc (2001) DA (lawyer denied the right to defend himself on a charge of insulting the court: no breach). Confirmed in the second case of *Correia de Matos* v Portugal (2018) GC. But see the contrary ruling by the UN Human Rights Committee in *Correia de Matos v Portugal (1123/02)*, 13 IHRR 38 (2006). See O'Boyle, in Breitenmoser *et al*, eds, *Human Rights, Democracy and the Rule of Law: Liber Amicorum Lucius Wildhaber*, 2007, p 329 and Treschel, *Human Rights in Criminal Proceedings*, 2005, p 263.

[1059] *Correia de Matos v Portugal, ibid.*

[1060] A 261-A (1993); 17 EHRR 1.

[1061] A 211 (1991); 15 EHRR 378 paras 51, 53.

at an earlier trial for another offence. While finding no breach of Article 6(3)(c) on the facts, the Court accepted that the 'position might be different if it were established that, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising' his rights of defence, including defending himself in person.

### b. Legal assistance

Article 6(3)(c) provides that an accused who does not defend himself in person is entitled to have legal assistance from his own lawyer or, subject to certain limitations, by means of free legal assistance provided by the state. The state thus cannot require an accused to defend himself in person. 'Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial'.[1062]

Where an accused is represented by a lawyer, Article 6(3)(c) guarantees the accused's right to be present at the trial as well.[1063] However, the right to legal representation is not dependent upon the accused's presence.[1064] Thus in *Campbell and Fell v UK*,[1065] the Court held that Article 6(3)(c) had been infringed by the UK because a prisoner, who had refused to attend in person, was denied legal representation at a Board of Visitors hearing of a disciplinary charge against him. Other cases in which the Court has also found a breach have concerned an accused who absconds, in which context the purpose of the refusal to allow the proceedings to continue with the absent accused being represented by his lawyer is to deter or punish.[1066] Such a penalty is in breach of Article 6(3)(c); although a state must be able to impose sanctions to discourage the unjustified absence of an accused from appearing in court, it is 'disproportionate' to deny the accused the legal representation needed for their defence.

Article 6(3)(c) guarantees an accused the right to legal assistance 'of his own choosing', ie assistance by a lawyer whom the accused appoints and pays for. As a general rule, the accused's choice of lawyer should be respected.[1067] However, the state may refuse to recognize it for 'relevant and sufficient' reasons.[1068] When assessing whether such reasons exist, the Court will determine 'whether the rights of the defence have been 'adversely affected' to such an extent as to undermine their overall fairness'.[1069] Rules limiting the accused's choice of lawyer to members of a specialist bar when appealing to a Court of Cassation or other appeal court are permissible.[1070] Regulations governing the qualifications and conduct of lawyers authorized to practise law in a state's legal system are obviously permissible, as are regulations concerning the practice in its courts of lawyers qualified in another legal system. A lawyer may be excluded for failure to comply with professional ethics,[1071]

[1062] *Poitrimol v France* A 277-A (1993); 18 EHRR 130 para 34. See also *Yaremenko v Ukraine* hudoc (2008).

[1063] *FCB v Italy* A 208-B (1991); 14 EHRR 909 paras 29, 35.

[1064] *Poitrimol v France* A 277-A (1993); 18 EHRR 130.

[1065] A 80 (1984); 7 EHRR 165. See further *Ezeh and Connors v UK* 2003-X; 39 EHRR 1 GC.

[1066] *Van Geyseghem v Belgium* 1999-I; 32 EHRR 554. There is a breach even though the accused violates a legal obligation by not attending (*Poitrimol v France* A 277-A (1993); 18 EHRR 130) and a conviction *in absentia* may be set aside in later proceedings (*Van Geyseghem* case). The decision in the *Poitrimol* case contradicted long-established Court of Cassation practice. See also *Lala v Netherlands* A 297-A (1994); 18 EHRR 586 and *Pietiläinen v Finland* hudoc (2009).

[1067] *Goddi v Italy* B 61 (1982) p 5.

[1068] See *Croissant v Germany* A 237-B (1992); 16 EHRR 135 para 30.

[1069] *Dvorski v Croatia* hudoc (2015) para 81 GC.

[1070] *Meftah and Others v France* 2002-VII GC.

[1071] *Ensslin, Baader and Raspe v Germany Nos 7572/76, 7586/76 and 7587/76*, 14 DR 64 (1978).

for refusal to wear robes,[1072] for showing disrespect to the court,[1073] or because they are appearing as a witness for the defence[1074] or have a personal interest in the case.[1075] A restriction upon the number of lawyers appointed by the accused is permissible, so long as the defence is able to present its case adequately and on an equal footing with the prosecution.[1076] A state is not liable if an accused is unable to find a lawyer who will act for him, provided that this failure is not the result of 'pressure or manoeuvres' by the state.[1077] Although the state thus has a general regulatory power, the Strasbourg Court retains the capacity to intervene if it is used improperly, for example by excluding a lawyer simply because of his willingness to represent an 'unpopular accused' or his opposition to the government.

Article 6(3)(c) refers to 'legal' assistance. This can be taken to allow assistance by a person chosen by the accused who is not a qualified lawyer,[1078] although the state must have a regulatory power to control representation by such persons too. The drafting history[1079] and the object and purpose of Article 6(3)(c) suggest that professional qualifications are not necessary so long as the legal assistance provided is 'effective' in fact.[1080]

A person subject to a criminal charge must be informed immediately of their right to legal assistance.[1081] However, the right to legal assistance may be waived. As stated in *Pishchalnikov v Russia*,[1082] a waiver of the right must be established in 'an unequivocal manner and be attended by minimum safeguards commensurate with its importance'. It must 'not only be voluntary but must also constitute a knowing and intelligent relinquishment' of the right. An accused may waive the right expressly or implicitly, but in the case of a waiver implied from conduct, it must be 'shown that he could reasonably have foreseen what the consequences of his conduct would be'.[1083] A valid waiver occurred when an accused signed a form in which he was informed of his right to a lawyer and did not respond by requesting one.[1084] However, waiver could not be inferred from the fact that the accused answered police questions in the absence of his lawyer after earlier invoking his right to be assisted by a lawyer during interrogation.[1085]

### c. Legal aid

In practice, most accused persons are indigent so that the guarantee of legal aid in Article 6(3)(c) is of particular importance. Although an assessment of whether legal aid is required is in the first instance for the national authorities to make and a 'margin of appreciation'

[1072] *X and Y v Germany Nos 5217/71 and 5367/72*, 42 CD 139 (1972).
[1073] *X v UK No 6298/73*, 2 Digest 831 (1975). [1074] *K v Denmark No 19524/92* hudoc (1993) DA.
[1075] *X v UK No 8295/78*, 15 DR 242 (1978) (prosecution of barrister's father).
[1076] *Ensslin, Baader and Raspe v Germany Nos 7572/76, 7586/76 and 7587/76*, 14 DR 64 (1978).
[1077] *X and Y v Belgium No 1420/62 et al*, 6 YB 590 at 628 (1963).
[1078] See *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC and *Morris v UK* 2002-I; 34 EHRR 1253 (representation by non-lawyers in army disciplinary proceedings).
[1079] In the drafting of Article 14, ICCPR, upon which Article 6 is based, the words 'qualified representative' were replaced by 'legal assistance' so that they 'did not necessarily mean a lawyer, but merely assistance in the legal conduct of a case': UN Doc E/CN.4/SR 107, p 6.
[1080] See *X v Germany No 509/59*, 3 YB 174 (1960) (probationary lawyer).
[1081] *Simeonovi v Bulgaria* hudoc (2017) para 115 GC.
[1082] Hudoc (2009) para 77. See also *Simeonovi v Bulgaria* hudoc (2017) para 115 GC. For the rules on waiver of Article 6 rights generally, see this chapter, section 1, p 375.
[1083] See *Şaman v Turkey* hudoc (2011) (poor command of Turkish impeded understanding of consequences).
[1084] *Yoldas v Turkey* hudoc (2010). Cf *Salduz v Turkey* hudoc (2008) (no waiver on facts).
[1085] *Pishchalnikov v Russia* hudoc (2009).

may apply,[1086] the Strasbourg Court is competent to review and disagree with their assessment, applying the terms of Article 6(3)(c).

The right to legal aid in Article 6(3)(c) is subject to two conditions. First, the accused must lack 'sufficient means' to pay for legal assistance. The Convention contains no definition of 'sufficient means' and there is no case law indicating the level or kind of private means that may be taken into account when deciding whether to award legal aid. Although the onus is on the accused to show that he lacks 'sufficient means', they need not, however, do so 'beyond all doubt'; it is sufficient that there are 'some indications' that this is so. This test was formulated and satisfied on the facts in *Pakelli v Germany*,[1087] on the basis that the applicant had spent two years in custody shortly before the case, had presented a statement of means to the Commission that led it to award him legal aid in bringing his Strasbourg application, and had offered to prove lack of means to the West German Federal Court.

Second, legal aid need only be provided 'where the interests of justice so require'. This is to be judged by reference to the facts of each case, including those that may materialize after the competent national authority has taken its decision. Thus, in *Granger v UK*,[1088] the refusal of legal aid should have been reviewed when it was proved during the appeal proceedings that the case was more complicated than appeared earlier. The state has a 'margin of appreciation' when deciding what the 'interests of justice' require[1089] A number of criteria have been identified by the Court as being relevant. First, what is 'at stake' for the applicant in terms of the seriousness of the offence and hence the possible sentence that could result is of great importance.[1090] In *Benham v UK*,[1091] it was stated that where any 'deprivation of liberty is at stake, the interests of justice in principle call for legal representation'. In *Quaranta v Switzerland*,[1092] the 'mere fact' that the possible sentence that could be imposed upon the accused for drugs offences was three years' imprisonment meant that legal aid should have been provided.[1093] In contrast, in *Gutfreund v France*,[1094] the 'interests of justice' did not require legal aid where the maximum possible sentence on a minor assault charge was not imprisonment but a modest fine (FF5,000) and where the procedure was 'simple'. Second, the more complicated the case on the law or the facts, the more likely that legal assistance is required.[1095] Third, regard must be had to the contribution that the accused would be able to make if he defended himself; in this connection, the test is the capacity of the particular accused to present his case.[1096] Legal representation

[1086] *Correia de Matos v Portugal* Hudoc (2018) para 123 GC.

[1087] A 64 (1983); 6 EHRR 1 para 34. The fact that the accused has been granted legal aid at another stage in the proceedings is relevant: *Twalib v Greece* 1998-IV; 33 EHRR 584 para 50 and *RD v Poland* hudoc (2001); 39 EHRR 240. See also *Morris v UK* 2002-I; 34 EHRR 1253.

[1088] A 174 (1990); 12 EHRR 469.

[1089] See *Correia de Matos v Portugal* hudoc (2018) para 123 GC.

[1090] See, eg, *Twalib v Greece* 1998-IV; 33 EHRR 584. See also *Mikhaylova v Russia* hudoc (2015) (applicant's Convention rights at stake).

[1091] 1996-III; 22 EHRR 293 para 61 GC (possible three months' imprisonment for non-payment of community charge).

[1092] A 205 (1991) para 33.

[1093] The Court emphasized the possible, rather than the likely, penalty. Cf *Pham Hoang v France* A 243 (1992). In appeal proceedings the actual sentence imposed takes over: see, eg, *Boner v UK* A 300-B para 41 and *Maxwell v UK* A 300-C para 38 (1994), although any possibility of the sentence being increased must be relevant.

[1094] 2003-VII; 42 EHRR 1076 para 39. Cf *Barsom and Varli v Sweden* hudoc (2008). In contrast, a heavy fine without imprisonment is a relevant factor: *Pham Hoang v France* A 243 (1992). In *Mikhaylova v Russia* hudoc (2015) paras 96–102 a modest maximum fine (€28) was outweighed by other considerations.

[1095] See, eg, *Mikhaylova v Russia* hudoc (2015) para 79. See also *Granger v UK* A 174 (1990); 12 EHRR 469; *Quaranta v Switzerland* A 205 (1991); and *Pham Hoang v France* A 243 (1992).

[1096] See the *Granger* and *Quaranta* cases discussed earlier; *Twalib v Greece* 1998-IV; 33 EHRR 584 (foreigner with no knowledge of the language or legal system); and *Vaudelle v France* 2001-I; 37 EHRR 397 (mental state).

may be required 'in the interests of justice' when the applicant's hearing is impaired so that he cannot follow the proceedings.[1097]

In appeal cases, it does not matter that the accused's chances of success are negligible.[1098] To the extent that the accused is granted a right of appeal by national law, he must be provided with legal aid if this is required for him to exercise it effectively. Thus, in *Boner v UK*,[1099] the applicant was refused legal aid on the statutory ground that he did not have 'substantial grounds for making the appeal'. In holding that there had been a breach of Article 6(3)(c), the European Court focused on the fact that the accused would need the services of a lawyer in order to argue the point he wished to raise, as well as the importance of what was at stake for him (an eight-year sentence).

When applying the 'interests justice' requirement, the test is not whether the absence of legal aid has caused 'actual prejudice' to the presentation of the defence. In *Artico v Italy*,[1100] the Court stated that the test is a less stringent one, *viz* whether 'it appears plausible in the particular circumstances' that the lawyer would be of assistance, as was true on the facts of that case. There the Court noted that a lawyer would have been more likely than the applicant to have emphasized a statute-of-limitations argument in the applicant's favour before the Court of Cassation and that only a lawyer was competent to request a hearing at which the defence could have replied to the Public Prosecutor's arguments against the appeal. On this basis, legal aid comes close to being generally required, because a lawyer will nearly always, by virtue of his professional expertise, be able to add to the accused's defence.[1101]

Although the wishes of the accused must be taken into account, the choice of a legal aid lawyer is ultimately for the state. In *Lagerblom v Sweden*,[1102] the accused, whose mother tongue was Finnish and who was required by Swedish law to be legally represented in connection with assault and road traffic offences, wanted the lawyer chosen for him by the court to be replaced by a Finnish-speaking lawyer. The Strasbourg Court held that there had been no breach of Article 6(3)(c) because the appointed lawyer had already done a lot of work on the case and the accused had both sufficient knowledge of Swedish and an interpreter.

The funding of legal aid is an expensive item for states. In the context of legal aid in civil proceedings, it has been held that, when required, it must be provided in accordance with Article 6(1) irrespective of the economic cost.[1103] The same approach must apply to criminal cases under Article 6(3)(c), so that budgetary considerations should not prevent effective legal assistance for accused persons who otherwise qualify under Article 6(3)(c).[1104]

### d. Practical and effective legal assistance

The right in Article 6(3)(c) is to 'practical and effective' legal assistance.[1105] But a state is not responsible for every shortcoming of a lawyer acting for the defence. As stated in

1097 *Timergaliyev v Russia* hudoc (2008).

1098 The same must apply to the chances of acquittal at the trial stage.

1099 A 300-B (1994); 19 EHRR 246 paras 41–44. Cf *Maxwell v UK* A 300-C (1994); 19 EHRR 97 paras 38–41.

1100 A 37 (1980); 3 EHRR 1 para 35. Cf *Alimena v Italy* A 195-D (1991) and *Biondo v Italy No 8821/79*, 64 DR 5 (1983) Com Rep; CM Res DH (89) 30.

1101 But for a case in which the 'interests of justice' did not require legal aid in respect of written appeal proceedings, see *X v Germany No 599/59*, 8 CD 12 (1961). See also *M v UK No 9728/82* 36 DR 155 (1983).

1102 Hudoc (2003) para 54. See also *Croissant v Germany* A 237-B (1993); 16 EHRR 135.

1103 See *Airey v Ireland* A 32 (1979); 2 EHRR 305.

1104 But see *M v UK No 9728/82*, 36 DR 155 at 158 (1983) (number of consultations may be limited for reasons of cost).

1105 *Artico v Italy* A 37 (1980); 3 EHRR 1 para 33.

*Kamasinski v Austria*,[1106] it 'follows from the independence of the legal profession of the state that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed'. Because of the state's lack of power to supervise or control their conduct, a lawyer, even though appointed by the state, is not an 'organ' of the state who can engage its direct responsibility under the Convention by their acts, in the way, for example, that a policeman or soldier may.[1107] Instead, the 'competent national authorities', who may be the courts or other state actors, 'are required by 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'.[1108] The state must also intervene 'in the interests of justice' in a case of the 'manifest failure' of a private lawyer, at least where the accused is a juvenile and the offence is serious: arguably in other cases too.[1109]

There may be liability on the *Kamasinsk*i basis where a lawyer simply fails to act for the accused. Thus, in the leading case of *Artico v Italy*,[1110] the applicant was granted free legal aid under Italian law for his appeal to the Italian Court of Cassation. Unfortunately, the appointed lawyer never acted for the applicant, claiming other legal commitments and ill-health. Despite constant requests by the applicant, the Court of Cassation refused to appoint another lawyer to replace him. As a result, the applicant was forced to plead the case himself in circumstances in which legal assistance would have been likely to have been of value. Noting that the right in Article 6(3)(c) was to 'assistance', not 'nomination', the European Court rejected an Italian argument that by appointing a lawyer for the accused the Court of Cassation had done sufficient to comply with Article 6(3)(c).[1111]

There may also be liability on the *Kamasinski* basis where the lawyer fails to comply with a 'formal' but crucial procedural requirement. Thus, in *Czekalla v Portugal*,[1112] the applicant's appeal to the Supreme Court had been dismissed because his legal aid lawyer had failed to include submissions in her pleadings. This failure to comply with a 'simple and purely formal rule' was a 'manifest failure' which 'called for positive measures on the part of the relevant authorities'. Whether an error of this kind which is not waived by the court will give rise to a violation of Article 6(3)(c) will depend on the facts. In the *Czekalla* case, the Strasbourg Court noted that the accused faced a lengthy prison sentence and—as a foreigner who did not know the language used in court—was utterly dependent on his lawyer.

To be distinguished from a 'formal' or procedural error such as that in the *Czekalla* case, is 'an injudicious line of defence or a mere defect in argumentation'[1113] or any other professional error[1114] in presenting the accused's defence. In such cases, the state is unlikely to

[1106] A 168 (1989); 13 EHRR 36 para 65. Cf *Daud v Portugal* 1998-II; 30 EHRR 400 para 38. See also *Vamvakas v Greece (No 2)* hudoc (2015) para 42 (lawyer did not appear: appeal court should have adjourned proceedings).

[1107] *Alvarez Sánchez v Spain No 50720/99* hudoc (2001) DA. Cf *Rutkowski v Poland No 45995/99* hudoc (2000) DA. The state may have a positive obligation to ensure that the legal profession properly regulates itself. It might also be directly responsible if the lawyer were a 'public defender' in the employ of the state.

[1108] *Kamasinski v Austria* A 168 (1980); 13 EHRR 36 para 65. Cf *Pavlenko v Russia* hudoc (2010) para 99. The obligation to intervene arises where the lawyer's failure has rendered the defence ineffective, 'taking the proceedings as a whole': *Rutkowski v Poland No 44995/99* hudoc (2000) para 3 DA. Cf *Sannino v Italy* 2006-VI.

[1109] *Güveç v Turkey* hudoc (2009). But see *Tripodi v Italy* A 281-B (1994); 18 EHRR 295.

[1110] A 37 (1980); 3 EHRR 1.

[1111] Cf *Daud v Portugal* 1998-II; 30 EHRR 400.

[1112] 2002-VIII para 68. Contrast *Alvarez Sánchez v Spain No 50720/99* 2001-XI DA (no violation).

[1113] *Czekalla v Portugal* 2002-VIII para 60.

[1114] See *Tripodi v Italy* A 281-B (1994); 18 EHRR 295 (failure to ask for adjournment) and *Stanford v UK* A 282-A (1994) (failure to raise accused's hearing problem).

be liable for the lawyer's conduct of the case, whatever is 'at stake' for the accused and even though the lawyer is state appointed.[1115]

The right to effective legal assistance in Article 6(3)(c) includes a right of private access to a lawyer, both at the pre-trial stage and later. In *S v Switzerland*,[1116] Article 6(3)(c) was infringed when the accused, who was in detention on remand, was not allowed to consult with his lawyer out of the hearing of a prison officer. It may also be a breach of Article 6(3)(c) to tap the telephone conversations between an accused and his lawyer[1117] or to search a lawyer's office without 'compelling reason'.[1118] The guarantee of access to a lawyer may be subject to restrictions in the public interest, but surveillance of 'the contacts of a detainee with his defence counsel is a serious interference with an accused's defence rights' so that 'very weighty reasons should be given for its justification'.[1119] The fear of collusion between the accused and the lawyer, resulting in the influencing of witnesses or the removal of documents, was insufficient to justify an investigating judge's order authorizing such surveillance in *Lanz v Austria*.[1120] In contrast, the need for confidentiality to catch other members of the accused's criminal gang was enough to justify surveillance in *Kempers v Austria*.[1121]

For access to be effective, the number and length of lawyers' visits to the accused must be sufficient. Thus, in *Öcalan v Turkey*,[1122] after the first two visits, the accused was allowed only two one-hour visits a week from his lawyers. This was insufficient given the highly complex charges against the accused and the voluminous case file that they had generated. In *Sakhnovskiy v Russia*,[1123] the fact that the applicant's legal aid lawyer on appeal was appointed at the last minute, combined with the fact that they had been given only 15 minutes to communicate by video link (which presented concerns about privacy), meant that the applicant's access to a lawyer was not effective.

In guaranteeing a right of access to a lawyer, Article 6(3)(c) overlaps with Article 6(3)(b) which guarantees the accused 'adequate facilities' to prepare his defence, a phrase that has been interpreted to include the right of access. But Article 6(3)(c) is wider than Article 6(3)(b) since it 'is not especially tied to considerations relating to the preparation of the trial but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings'.[1124]

The requirement that assistance be 'effective' has been considered in a variety of other contexts. A state will be in breach of it if it negligently fails to notify the accused's lawyer of the hearing with the result that the accused is not represented at it.[1125] To be 'effective' a lawyer appointed to defend an accused must be qualified to appear at the particular

[1115] But see *Rutkowski v Poland No 45995/99* hudoc (2000) para 2 DA, in which the Court checked whether a legal aid lawyer was 'negligent or superficial' in deciding whether there were grounds for appeal.

[1116] A 220 (1991); 14 EHRR 670 para 48. See also *Brennan v UK* 2001-X; 34 EHRR 507; *Öcalan v Turkey* 2005-IV; 41 EHRR 985 GC; and *Khodorkovskiy and Lebedev v Russia* hudoc (2013).

[1117] *Zagaria v Italy* hudoc (2007) (breach). Cf *KD v Austria No 16410/90* hudoc (1992). The right of access also includes access by correspondence, although such cases are most commonly dealt with under Article 8: see eg, *Campbell v UK* A 233 (1992); 15 EHRR 137. For an Article 6 case on correspondence with a lawyer in criminal proceedings, see *McComb v UK No 10621/83*, 50 DR 81 (1986) (F Sett).

[1118] *Khodorkovskiy and Lebedev v Russia* hudoc (2013) para 634.

[1119] *Lanz v Austria* hudoc (2002) para 52. See also *Can v Austria* A 96 (1985); 8 EHRR 14 para 52 Com Rep (F Sett before Court); *Egue v France No 11256/84*, 57 DR 47 (1988); and *Castravet v Moldova* hudoc (2007).

[1120] Hudoc (2002).

[1121] *No 21842/93* hudoc (1997) DA. The limited period of surveillance was relevant.

[1122] 2005-IV; 41 EHRR 985 para 135 GC.

[1123] Hudoc (2010) GC. Cf *Bogumil v Portugal* hudoc (2008).

[1124] *Can v Austria* A 96 (1985); 8 EHRR 14 para 54 Com Rep (F Sett before Court).

[1125] *Goddi v Italy* A 76 (1984).

stage of proceedings for which his assistance is sought.[1126] Frequent changes of lawyers appointed for the defence may raise a problem of effectiveness,[1127] as may the allowance of inadequate time for a defendant's lawyer, whether a legal aid lawyer or not, to prepare his case.[1128] However, it is permissible to limit the role of the accused's lawyer, at least in army disciplinary proceedings, to the legal, as opposed to the factual, issues in the case where the facts are simple.[1129]

## V. ARTICLE 6(3)(D): THE RIGHT TO CALL AND CROSS-EXAMINE WITNESSES

Article 6(3)(d) guarantees a person charged with a criminal offence the right:

> 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.

Article 6(3)(d) 'enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.'[1130] The right applies to the trial and any appeal proceedings. It does not generally apply at the pre-trial stage.[1131] Thus, Article 6(3)(d) does not require that the accused be allowed to question a witness being interrogated by the police[1132] or by an investigating judge,[1133] although if the accused is permitted to cross-examine prosecution witnesses at the investigation stage this may satisfy the requirements of Article 6(3)(d) when the witness is justifiably excused from giving evidence at the trial. The refusal by an investigating judge to hear a defence witness who later gives evidence at the trial is not a breach of Article 6(3)(d).[1134]

With regard to trial proceedings, neither the accused's right to cross-examine witnesses against him in court nor his right to call defence witnesses is absolute or unlimited.[1135] However, any limitations must be consistent with the principle of 'equality of arms', the full realization of which is the 'essential aim' of Article 6(3)(d).[1136] There was a breach of Article 6(3)(d) when the accused was not allowed to examine or cross-examine any witnesses, either at the trial or on appeal.[1137] The right supposes that the examination of witnesses occurs before the judge who decides the case, so that if a judge is replaced after a witness is heard, generally the witness must be recalled.[1138]

[1126] See *Biondo v Italy No 8821/79*, 64 DR 5 (1983) Com Rep; CM Res DH (89) 30. See also *Franquesa Freixas v Spain No 53590/99* 2000-XI DA (labour, not criminal, lawyer appointed; no breach on the facts).

[1127] See *Köplinger v Austria No 1850/63*, 9 YB 240 (1966).

[1128] Such cases have been considered under both Articles 6(3)(b) and 6(3)(c): see eg, *X v UK No 4042/69*, 32 CD 76 (1970): *Murphy v UK No 4681/70*, 43 CD 1 (1972).

[1129] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC.

[1130] *Al-Khawaja and Tahery v UK* 2011-; 54 EHRR 807 para 118 GC.

[1131] See *Can v Austria* A 96 (1985) para 47 Com Rep (F Sett before Court) and *Adolf v Austria* B 43 (1980) para 64 Com Rep.

[1132] *X v Germany No 8414/78*, 17 DR 231 (1979).

[1133] *Ferraro Bravo v Italy No 9627/81*, 37 DR 15 (1984).

[1134] *Schertenleib v Switzerland No 8339/78*, 17 DR 180 (1979).

[1135] *Gani v Spain* hudoc (2013).

[1136] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 para 91 PC and *Bönisch v Austria* A 92 (1985); 9 EHRR 191 para 32. And see *Oyston v UK No 42011/98* hudoc (2002) DA (restrictions on questions to rape victim; no breach). But Article 6(3)(d) is not limited to 'equality of arms': *Vidal v Belgium* A 235-B (1992) para 33.

[1137] *Vaturi v France* hudoc (2006). On the forfeiture of the right to cross-examine witnesses by opting for an accelerated procedure leading to a reduced sentence, see *Panarisi v Italy* hudoc (2007).

[1138] *Graviano v Italy* hudoc (2005). See also the principle of immediacy discussed in this chapter, section 3.II.g, p 423.

The term 'witness' in Article 6(3)(d) has an autonomous Convention meaning. It is not limited to persons who give evidence at the trial; a person whose statements are introduced as evidence but who does not give oral evidence is also a 'witness'.[1139] A co-accused is a witness, so that depositions made by him during the investigation stage[1140] and statements made at his own separate trial[1141] that are introduced as evidence at the accused's trial are subject to Article 6(3)(d). The Court has considered the position of 'experts' who give evidence when called by the parties or appointed by the court under the rights to adversarial proceedings and equality of arms in Article 6(1), but 'having due regard to the guarantees of paragraph (3)'.[1142]

The right to call or cross-examine witnesses may be waived, but waiver must be established, expressly or tacitly, in an unequivocal manner and not run counter to any important public interest.[1143] There was no waiver of the right when the defence failed to challenge the admission of written statements by witnesses whom it had not been able to cross-examine when such a challenge was unlikely to succeed.[1144]

*The right of the accused to 'examine . . . witnesses against him'* 'enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.'[1145] An important issue in the Court's case law has been the admissibility of the evidence of absent witnesses. The leading case is the Grand Chamber judgment in *Al-Khawaja and Tahery v UK*,[1146] which spells out the '*Al-Khawaja* test'. This consists of three steps, involving the following questions: (i) was there a good reason for the non-attendance of the witness; (ii) was that witness's evidence 'the sole or decisive basis' for the conviction; and (iii) were there sufficient counterbalancing factors to compensate for the handicaps caused to the defence by the admission of the evidence? The relationship between these three questions was clarified in *Schatschaschwili v Germany*.[1147] There the Grand Chamber stated first that the lack of a good reason for non-attendance is not conclusive as to the fairness of a trial, although it will be 'a very important factor to be weighed in the balance . . . which may tip the balance in favour of finding a breach of Article 6(1) and 3(d)'.[1148] The Grand Chamber then noted that in *Al-Khawaja* it had similarly rejected the absolute rule that a Chamber of the Court had adopted in *Doorson v Netherlands*,[1149] by which the admission of 'sole or decisive' evidence automatically and without exception was a breach of Article 6(3)(d): instead, it is necessary in cases in which such evidence is admitted, as well as others, to conduct the balancing exercise of the third step of the *Al-Kharaja* test. In *Schatschaschwili*, the Grand Chamber held that the Strasbourg Court must conduct the balancing exercise in (iii) above 'not only in 'sole or decisive' evidence cases, but also 'where, following its assessment of the

[1139] *Kostovski v Netherlands* A 166 (1989); 12 EHRR 434 PC. Such statements have included statements to the police and depositions.

[1140] *Lucà v Italy* 2001-II; 36 EHRR 807.

[1141] *Cardot v France* A 200 (1991); 13 EHRR 853 para 51 Com Rep. See also *X v UK No 10083/82*, 6 EHRR 142 (1983).

[1142] *Constantinides v Greece* hudoc (2016) para 37.

[1143] *Scoppola v Italy (No 2)* hudoc (2009) para 135 GC. See also *Rudnichenko v Ukraine* hudoc (2013).

[1144] *Craxi v Italy* hudoc (2002).

[1145] *Al-Khawaja and Tahery v UK* 2011-; 54 EHRR 807, para 118 GC.

[1146] 2011-; 54 EHRR 807 GC.

[1147] Hudoc (2015) paras 110–118 GC. 'As a rule', the three questions should be considered in the order indicated, but deviation from it may be appropriate, particularly where the answer to the second question is conclusive: *ibid* para 118.

[1148] *ibid* para 113.

[1149] 1996-II; 22 EHRR 330. In *R v Horncastle and Others* 2009 UKSC 14 (SC), the UK Supreme Court did not follow *Doorson* in a hearsay case. After the ruling in *Al-Khawaja* reversing *Doorson*, in *Horncastle v UK* hudoc (2014) a Strasbourg Court Chamber found no violation of Article 6(1) and (3) on the facts of that case.

domestic courts' evaluation of the weight of the evidence . . . , it finds it unclear' whether this is so but it is 'nevertheless satisfied it carried significant weight and that its admission may have handicapped the defence.'[1150]

The Court has a considerable body of case law relevant to the different steps in the *Al Khawaja* test.[1151] As to the first step in that test, in the *Schatschaschwili* case[1152] the Grand Chamber gave three examples of circumstances that might justify a witness's absence: 'death or fear'; ill-health; and 'unreachability'. As to the last of these the Court stressed that the state must make 'all reasonable efforts' to secure attendance.[1153] In similar but more extensive terms, in *Gani v Spain*,[1154] a Court Chamber identified three main contexts in which the Court had found there to be a good reason for a witness not giving evidence at the trial. These are (i) cases of 'anonymous witnesses', in which 'the identity of a witness is concealed in order, for instance, to protect him or her from intimidation or threats of reprisals';[1155] (ii) cases of 'absent witnesses', by whom the Court meant witnesses who have died[1156] or are ill,[1157] or cannot be traced,[1158] or, although not anonymous, refuse to appear out of fear or for some other acceptable reason;[1159] and (iii) cases of witnesses who invoke their privilege against self-incrimination.[1160] As to cases where a witness fears reprisals (against himself or his family), the Court has drawn a distinction between fear generated by acts of the accused or a person acting for him and 'a more general fear of what will happen' if the witness gives evidence.[1161] In the former case, the accused can be taken to have waived his right to question the witness, so that there can be no breach of Article 6(3)(d). In the latter case, the *Al-Khawaja* requirements apply. However, 'any subjective fear' of the witness will not suffice; the court must enquire whether there are 'objective grounds' for the fear, supported by evidence.[1162] Moreover, where the reason is fear of reprisals, 'the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable'.[1163] The Court has also emphasized in respect of all of the grounds that may be relied upon that 'when a witness has not been examined at any stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort'.[1164]

As to the question whether the untested evidence in issue is the 'sole or decisive' evidence on which the conviction is based, in *Al-Khawaja*, the Grand Chamber confirmed that 'solely'

[1150] *Schatschaschwili v Germany* hudoc (2015) para 116 GC.

[1151] See Jackson and Summers, *The Internationalisation of Criminal Evidence*, 2012, pp 334ff and Maffei, *The Right to Confrontation in Europe*, 2nd edn, 2012, Ch 4.

[1152] Hudoc (2015) paras 119–122 GC.

[1153] See, eg, *Calabrò v Italy and Germany No 59895/00* hudoc (2002) DA. The fact that a witness resides abroad is not a good reason: *Paić v Croatia* hudoc (2016) para 38. The absence of a power in law to summon a witness whose whereabouts are known is also not an excuse: *Mild and Virtanen v Finland* hudoc (2005). See also *Haas v Germany No 73047/01* hudoc (2005) DA and *Klimentyev v Russia* hudoc (2006); 49 EHRR 336. On statements by witnesses abroad, see *X v Germany No 11853/85*, 53 DR 182 (1987); 10 EHRR 521. On evidence from foreign court proceedings, see *S v Germany No 8945/80*, 39 DR 43 (1983).

[1154] Hudoc (2013) para 40.

[1155] *Van Mechelen v Netherlands* 1997-III; 25 EHRR 647; *Doorson v Netherlands* 1996-II; 22 EHRR 330; and *Lüdi v Switzerland* A 238 (1992); 15 EHRR 173.

[1156] *Horncastle and Others v UK* hudoc (2014) para 133.

[1157] *Bricmont v Belgium* A 158 (1989); 12 EHRR 217; *Kennedy v UK No 36428/97* hudoc (1998); 27 EHRR CD 266; *Gani v Spain* hudoc (2013); and *Matytsina v Russia* hudoc (2014) para 165.

[1158] *Isgrò v Italy* A 194 (1991) and *Verdam v Netherlands No 35253/97* hudoc (1999); 28 EHRR CD 161.

[1159] *SN v Sweden* hudoc 2002-V; 39 EHRR 304 (victim of sexual offence confronting offender); *Unterpertinger v Austria* A 110 (1986); 13 EHRR 175 (family member); *Asch v Austria* A 203 (1991); 15 EHRR 597 (unmarried partner); and *Lucà v Italy* 2001-II; 36 EHRR 807 (co-accused).

[1160] *Vidgen v Netherlands* hudoc (2012).

[1161] *Al-Khawaja and Tahery v UK* 2011-; 54 EHRR 807 para 122 GC.

[1162] *ibid* para 124. Cf *Visser v Netherlands* hudoc (2002).

[1163] *ibid* para 125.

[1164] *ibid*.

refers to the situation where that evidence is the 'only' evidence.[1165] As to 'decisive', this term 'should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case', taking into account the strength of other accompanying evidence.[1166]

As to whether there are sufficient counterbalancing factors, in *Al-Khawaja* the Grand Chamber stated that the proceedings must be subjected 'to the most searching scrutiny' to establish that these are present, 'including the existence of strong procedural safeguards'.[1167] In *Schatschaschwili*,[1168] the Grand Chamber added more detail, stating, *inter alia*, that the domestic courts must approach the untested evidence of an absent witness 'with caution', being aware that it must carry 'less weight', and must provide reasons for considering it reliable. It noted that further safeguards are the availability of corroborative evidence and, of particular importance, where the legal system and other circumstances allow, the availability of an adequate opportunity for the defence to cross-examine the witness at the pre-trial investigation stage.[1169]

Applying this approach to the facts of *Al-Khawaja and Tahery v UK*,[1170] the Grand Chamber held that the admission of hearsay evidence in English criminal proceedings, by which, in certain exceptional cases, the evidence of persons who do not give evidence in court may be admitted, 'will not automatically result in a breach of Article 6(1)'. Applying its 'most searching scrutiny' requirement to the first applicant's case, the Court found that there was no breach of Article 6(3)(d). In his case, the applicant had been convicted on two charges of indecent assault of female patients. One of the patients had died before the trial, but, as permitted by the hearsay rule, her witness statement was read out in court. Her statement, which was the decisive evidence, was corroborated by two friends in whom she had confided who were cross-examined at the trial, and the other patient victim gave a similar account. In addition, the judge had directed the jury that the witness statement should be given less weight in the absence of cross-examination. The Grand Chamber held that in these circumstances there were 'sufficient counterbalancing factors'. In contrast, there was a breach of Article 6 in the case of the second applicant. In that case, the applicant was convicted of a stabbing for which the decisive evidence was that of the only person who claimed to have seen the stabbing, who was a man whose written statement was read to the court but who was allowed under the hearsay rule not to appear as a witness for fear of reprisals. Although the applicant could cross-examine other persons present when the stabbing occurred but who did not claim to have seen the stabbing, he could not cross-examine the only eye witness, and the judge's direction to the jury on untested evidence could not overcome this.

On other matters, the Grand Chamber stated that its judgment concerned only absent witnesses whose statements are admitted in evidence at the trial, not 'testimony that is

[1165] *ibid* para 131. [1166] *ibid.*

[1167] *ibid* para 147. See *Paić v Croatia* hudoc (2016) (inadequate procedures).

[1168] *Schatschaschwili v Germany* hudoc (2015) paras 126–131 GC.

[1169] See, eg, the pre-*Al-Khawaja* cases of *Kostovski v Netherlands* A 166 (1989); 12 EHRR 434 PC, *Van Mechelen v Netherlands* 1997-III; 25 EHRR 647 (inadequate procedures), and *Kok v Netherlands No 43149/98* hudoc (2000) DA (adequate procedure). See also *Birutis and Others v Lithuania* hudoc (2002); *Sapunarescu v Germany No 22007/03* hudoc (2006) DA; and *Balta and Demir v Turkey* hudoc (2015). Cross-examination of witnesses by the defence at the investigative stage does not occur in common law systems.

[1170] On the *Al-Khawaja* case, see De Wilde, 17 IJ Evidence and Proof 157 (2013); Doak and Huxley-Binns, 73 J Crim L 508 (2009); Wallace, EHRLR 408 (2010). On the admission of exculpatory hearsay evidence, see *Blastland v UK No 12045/86*, 52 DR 273 (1987) and *Thomas v UK No 19354/02* hudoc (2005).

given at trial by witnesses whose identity is concealed from the accused (anonymous testimony)'.[1171] The Grand Chamber added, however, that although the problems present by absent and anonymous witnesses differ—with the lack of identity of the latter preventing the accused from challenging their probity and credibility and the absence of the former preventing questioning altogether—the two situations were subject to the same principle, *viz* that the accused should have 'an effective opportunity' to challenge the evidence against him. It would seem, therefore, that the *Al-Khwaja* requirements apply to anonymous witnesses as well as absent ones but taking into account the differences between them.

The Court's judgment in *Al-Khawaja* applies to both civil law and common law jurisdictions. However, the Court noted that, when applying Article 6(3)(d), it must not ignore the 'specificities of the particular legal system concerned, and in particular its rules of evidence'. 'To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.'[1172]

In the pre-*Al-Khawaja* case of *SN v Sweden*,[1173] the Court accepted that special arrangements for the confrontation of a witness at the trial that would not normally comply with Article 6(3)(d) may suffice in cases involving sexual offences. In that case, the Court held that Article 6(3)(d) had to be interpreted as making some allowance for the 'special features' of criminal proceedings concerning such offences, because giving oral evidence at the trial in open court in such cases, particularly in cases involving children, may be an ordeal for the victim and may raise issues of respect for private life. In the *SN* case, the evidence of a 10-year-old child who had been sexually abused by his school teacher was 'virtually the sole evidence' on the basis of which the teacher was convicted. The child did not give evidence as a witness at the trial, but the videotape of his first police interview was shown during both the trial and appeal hearings, and the record of the second interview was read out at the trial and the audiotape played back at the appeal hearing. What was crucial for the Court was that the applicant's lawyer had been present during the police hearing (by a specially trained unit) and had been able to suggest lines of questioning. The Court considered that this was sufficient to enable the applicant to challenge the child's statements and his credibility. The Court also took into account that the 'necessary care' was taken by the national court in its evaluation of the child's statements.[1174] It seems likely that the same outcome would result post-*Al-Khawaja*, with there being both 'good reason' for the child's absence from the trial and 'sufficient counterbalancing factors'.

As to the calling of *witnesses for the defence*, it is for the national courts, 'as a general rule, to assess whether it is appropriate to call witnesses'.[1175] Although the national court's decision is subject to review under Article 6(3)(d), it will only be in exceptional circumstances that the Strasbourg Court will question a national court's exercise of its discretion

[1171] *Al-Khawaja and Tahery v UK* 2011-; 54 EHRR 807 para 127 GC.
[1172] *ibid* para 146.
[1173] 2002-V; 39 EHRR 304 para 46. For other sex offences cases, see *Baegen v Netherlands* A 327-B (1995) Com Rep (defence failure to use alternative options; no breach); *MK v Austria No 28867/95* hudoc (1997); 24 EHRR CD 59 (expert report sufficient; no breach); *PS v Germany* hudoc (2001) 36 EHRR 1139 (no special arrangements; breach); *VD v Romania* hudoc (2010) (accused of rape; not allowed a DNA test or opportunity to challenge the victim's statement); and *Mika v Sweden No 31243/06* hudoc (2009) DA. See also *Mayali v France* hudoc (2005) and *Bocos-Cuesta v Netherlands* hudoc (2005) (breaches).
[1174] Cf *Doorson v Netherlands* 1996-II; 22 EHRR 330 para 76.
[1175] *Vidal v Belgium* A 235-B (1992) para 33. Cf *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC; *Doorson v Netherlands* 1996-II; 22 EHRR 330; and *Perna v Italy* 2003-V; 39 EHRR 563 GC.

in the assessment of the relevance of the proposed evidence.[1176] This 'hands-off' approach may be justified on the ground that the text of Article 6(3)(d) refers to the calling of witnesses by the accused 'on his behalf' and not 'at his request'. It is also in accord with the 'fourth-instance' doctrine,[1177] which the Strasbourg authorities generally apply when reviewing the decision of national courts. An exceptional case in which the Court did intervene was *Vidal v Belgium*.[1178] There the Court found a breach of Article 6 as a whole when the national court to which the accused's case had been remitted refused—without giving reasons—to hear the four witnesses requested by the accused and replaced a three-year suspended sentence by a four-year sentence that was not suspended, without any new evidence.

A state is not liable under Article 6(3)(d) for the failure of defence counsel to call a particular witness,[1179] but where witnesses are properly called by the defence, a court is under a positive obligation to take appropriate steps to ensure their appearance.[1180] There is no breach of Article 6(3)(d), however, if a defence witness fails to appear for reasons beyond the court's control[1181] or just because the witness is called by the court at a time other than that requested by the accused, unless this affects the presentation of the defence.[1182]

Article 6(3)(d) recognizes that at the trial court hearing it is 'in principle' essential that an accused is allowed to be present when witnesses are being heard in a case against him.[1183] Exceptionally, however, the interests of justice may permit the exclusion of the accused consistent with Article 6(3)(d) to ensure that a witness gives an unreserved statement, provided that the accused's lawyer is allowed to remain and conduct any cross-examination.[1184]

In *Luedicke, Belkacem and Koç v Germany*,[1185] the Court left open the question whether it would be a breach of Article 6(3)(d) for a state to require an accused to pay the costs associated with compliance with Article 6(3)(d) (eg, interpreters' costs in questioning witnesses) if convicted.

## VI. ARTICLE 6(3)(E): THE RIGHT TO AN INTERPRETER

Article 6(3)(e) guarantees the right of a person charged with a criminal offence 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. As in the case of other Article 6(3) rights, the guarantee protects persons from the moment they are 'charged with a criminal offence'. In *Kamasinski v Austria*,[1186] the Court

1176 See *L v Switzerland No 12609/86*, 68 DR 108 (1991) (F Sett) and *Wiechert v Germany* 7 YB 104 (1964). National courts are also permitted considerable discretion in controlling the accused's questioning of such defence witnesses as are called: see, eg, *Kok v Netherlands No 43149/98* hudoc (2000); 30 EHRR CD DA 273.

1177 The Commission also referred to the 'margin-of-appreciation' doctrine: see, eg, *Payot and Petit v Switzerland No 16596/90* hudoc (1991) DA.

1178 A 235-B (1992). See also *Popov v Russia* hudoc (2006). The refusal to order a psychological report requested by the applicant in a case of parental access to a child contributed to a breach of Article 6(1) in *Elsholz v Germany* 2000-VIII; 34 EHRR 1412 GC. Cf *Balsytė-Lideikienė v Lithuania* hudoc (2008) (refusal to call experts). Contrast *Sommerfeld v Germany* 2003-VIII; 38 EHRR 756 GC.

1179 *F v UK No 18123/91* hudoc (1992) 15 EHRR CD 32.

1180 *Sadak and Others v Turkey (No 1)* 2001-VIII; 36 EHRR 431.

1181 *Ubach Mortes v Andorra No 46253/99*, 2000-V DA (ill-health).

1182 *X v UK No 5506/72*, 45 CD 59 (1973).

1183 *Kurup v Denmark No 11219/84*, 42 DR 287 (1985) DA. Cf *X v Denmark No 8395/78*, 27 DR 50 (1981).

1184 *Kurup v Denmark*, *ibid*. Cf *X v UK No 20657/92* hudoc (1992); 15 EHRR CD 113 (screening of witness from accused, but not his lawyer, permissible).

1185 A 29 (1978); 2 EHRR 149.

1186 A 168 (1989); 13 EHRR 36 para 74. See also *Şaman v Turkey* hudoc (2011).

indicated that the right applies to persons charged with an offence 'during the investigating stage unless it is demonstrated in the light of the particular circumstances . . . that there are compelling reasons to restrict' it. Thus, in *Kamasinski*, an interpreter was required during police questioning following the accused's arrest and in the course of the civil law preliminary investigation in the case.[1187] The right applies during the trial and to any appeal proceedings. The right to an interpreter may be waived,[1188] but it must be a decision of the accused, not his lawyer.[1189]

The obligation to provide 'free' assistance is unqualified. It does not depend upon the accused's means; the services of an interpreter for the accused are instead a part of the facilities required of a state in organizing its system of criminal justice.[1190] Nor can an accused be ordered to pay for the costs of interpretation if he is convicted, as was required by West German law in *Luedicke, Belkacem and Koç v Germany*.[1191] The language of Article 6(3)(e) indicates 'neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration'. Any contrary interpretation would also be inconsistent with the object and purpose of Article 6, which is to ensure a fair trial for all accused persons, whether subsequently convicted or not, since an accused might forgo his right to an interpreter for fear of the financial consequences.[1192]

The 'assistance' required by Article 6(3)(e) applies to the translation of documents as well as the interpretation of oral statements; in both respects the obligation is to provide such assistance as is necessary to ensure a fair trial.[1193] Article 6(3)(e) does not require that every word of the oral proceedings is interpreted or that all documents are translated; the test is whether enough is done to allow the accused fully to understand and answer the case against him, 'notably by being able to put before the court his version of the events'.[1194] Thus a written translation of the indictment may be unnecessary if sufficient oral information as to its contents is given to the accused, and it may be enough for an interpreter to summarize parts of the oral proceedings.[1195]

It is arguable that the state's obligation should extend to informing an accused who appears in need of assistance to his right to an interpreter.[1196] As to whether there is such a need, in *Cuscani v UK*[1197] the Court stated that the onus was on the judge to reassure himself, following consultation with the applicant, that the latter was not prejudiced by the absence of an interpreter. In that case, the Court held that Article 6(3)(e) had been infringed when, although aware of the applicant's difficulty in following the proceedings and that his legal aid barrister had had problems in communicating with the applicant, the judge was persuaded by the barrister, without consulting the applicant, that it would be possible to 'make do and mend' with the assistance of the 'untested language skills' of the applicant's brother in a sentencing hearing that led to a four-year prison sentence and ten-year disqualification as a company director.

[1187] Article 6(3)(e) also applies to pre-trial appearances before a judge, remand hearings, and the translation of the indictment: *Luedicke, Belkacem and Koç v Germany* A 29 (1978); 2 EHRR 149.

[1188] See *Kamasinski v Austria* A 168 (1989); 13 EHRR 36 para 80.

[1189] *Cuscani v UK* hudoc (2002); 36 EHRR 11 and *Sardinas Albo v Italy No 56271/00* hudoc (2004) DA.

[1190] See *Isyar v Bulgaria* hudoc (2008). But an accused may be charged for an interpreter provided for him at a hearing that he fails to attend: *Fedele v Germany No 11311/84* hudoc (1987) DA.

[1191] A 29 (1978); 2 EHRR 149 para 40.

[1192] *Luedicke, Belkacem and Koç v Germany*, para 42.

[1193] *Kamasinski v Austria* A 168 (1989); 13 EHRR 36 para 74. Although the text refers to an 'interpreter', Article 6(3) extends to translation of documents: *Diallo v Sweden No 13205/07* hudoc (2010) para 23 DA. See also *Hermi v Italy* 2006-XII; 46 EHRR 1115 GC.

[1194] *Kamasinski v Austria*, *ibid* para 74.

[1195] *ibid* paras 81, 83. An oral summary of the judgment may suffice to permit an appeal: *ibid*. See also *Hayward v Sweden No 14106/88* hudoc (1991) DA.

[1196] Cf Stavros, p 257.

[1197] Hudoc (2002); 36 EHRR 11 para 38.

Article 6(3)(e) only extends to the language used in court: an accused who understands that language cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, including a language of an ethnic minority of which he is a member.[1198]

Where, as is usually the case, the accused does not defend himself in person but is represented by a lawyer, it will generally not be sufficient that the accused's lawyer (but not the accused) knows the language used in court. Interpretation of the proceedings is required, as the right to a fair trial, which includes the right to participate in the hearing, requires that the accused be able to understand the proceedings and to inform his lawyer of any point that should be made in his defence.[1199] A related question is whether the accused must be provided with an interpreter, where necessary, in order to communicate with his lawyer. In a legal aid case, the responsibility should lie with the state under Article 6(3)(c) to appoint a lawyer who can communicate with his client or to provide an interpreter.[1200] Where the accused appoints his own lawyer, it must be for him to appoint a lawyer who can communicate with him, if one is available.[1201]

Clearly, the interpreter who is provided must be competent. In this connection, the Court has stated that in order for the right guaranteed by Article 6(3)(e) to be 'practical and effective', the 'obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided'.[1202] Although there is no formal requirement that an interpreter be impartial or independent of the police or other authorities, the assistance provided must be 'effective' and 'not of such a nature as to impinge on the fairness of the proceedings'.[1203]

## 6. CONCLUSION

Although Article 6 cases do not generally catch the headlines as much as cases under some other Articles of the Convention, they are the staple diet of the Convention system. As noted, the majority of cases decided at Strasbourg raise issues under Article 6, probably because it is in the administration of justice that the state is most likely to take decisions affecting individuals in the areas of conduct covered by the Convention.

Article 6 has been given an unexpectedly but commendably wide field of application. Although it does not yet extend to every situation in which an individual would benefit from a 'right to a court', Article 6 has acquired an extensive reach. It controls appellate as well as trial proceedings and some pre-trial proceedings. And it applies to certain disciplinary and other proceedings before special tribunals. While this is good for the individual, it presents problems for the uniform interpretation of a text that was devised with the classical court of law in mind. Article 6 also requires states to provide judicial review of, or

[1198] *K v France No 10210/82*, 35 DR 203 (1983) and *Bideault v France No 11261/84*, 48 DR 232 (1986). See also *Lagerblom v Sweden* hudoc (2003).

[1199] *Kamasinski v Austria* A 168 (1991); 13 EHRR 36 para 74 and *Cuscani v UK* hudoc (2002); 36 EHRR 11 para 38.

[1200] But in *X v Austria No 6185/73*, 2 DR 68 (1975), the Commission ruled that Article 6(3)(e) ('language used in court') does not extend to communications between the accused and his lawyer.

[1201] *X v Germany No 1022/82*, 6 EHRR 353 (1983).

[1202] *Kamasinski v Austria* A 168 (1989) 13 EHRR 36 para 74. See also *Baytar v Turkey* hudoc (2014) para 57 (competence not checked) and *Ucak v UK No 44234/98* hudoc (2002) DA (failure of applicant to complain counted against him).

[1203] *Ucak v UK No 44234/98* hudoc (2002) DA.

a right of appeal from, administrative decisions that are directly decisive for the applicant's 'civil rights and obligations'. Should the Court's jurisprudence in this last regard appear confusing and in need of a coherent statement of principle, the result is still an extension of the rule of law into areas of administrative justice where it was sometimes lacking.

As to the meaning of a 'fair trial', Article 6 has been imaginatively and widely interpreted. A right of access to a court has been read into the text, and understood to extend to the execution of judgments, as well of their attainment. The emphasis upon 'objective justice' has given more bite to the guarantees of an 'independent and impartial tribunal' and 'equality of arms', leading in some cases to changes in long-standing national practices.[1204] Issues of *res judicata* and the reversal of judgments and delays in their execution have been particular problems for post-Soviet states. The residual right to a 'fair hearing' has proved fertile ground for the addition of further nominate rights and has served as a means of dealing with cases on a flexible 'facts-as-a-whole' basis. But the most striking feature of Article 6 cases has been the long line of decisions involving violations of the right to trial 'within a reasonable time'. If one feature of the administration of justice in European states has been highlighted above by the Court's jurisprudence, it is the delay that may occur before justice is delivered. Proceedings in some cases have lasted an almost unbelievable number of years.

As to the mechanics of the trial process, the Court has been far less intrusive. Given the great diversity of practice in European criminal justice systems—concerning, for example, the rules of evidence—the Court has allowed considerable discretion as to means of delivery, requiring only that the outcome of the procedure followed is a fair trial. But in doing so the Court has by no means surrendered its necessary monitoring role. Whereas Article 6, like its counterparts in the US Constitution, should not be seen as a 'uniform code of criminal procedure federally imposed',[1205] there inevitably are areas in which corrective action may properly be taken to improve the administration of justice in the interests of human rights, as the Court's now extenstive jurisprudence impressively demonstrates.

[1204] See *Piersack v Belgium* A 53 (1982); 5 EHRR 161 and *Kress v France* 2001-VI GC.
[1205] Frankfurter, *Law and Politics*, 1939, pp 192–3.