| Chapter 8 |

Right to a Fair Trial

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ABSTRACT

The chapter focuses on one of the fundamental rights enshrined in the Convention, the right to a fair trial. Attention is paid both to clarifying the nature of this right and to the basic concepts underlying its application, which must be interpreted in an autonomous manner. The individual rights which, in their totality, constitute and fulfil the right to a fair trial as a concept inseparable from any democratic state governed by the rule of law, are analysed in detail. Interpreting this right requires in particular a close examination of the ECtHR's broad case law, which concretises and illuminates the right in its sub-aspects and levels.

KEYWORDS

right to a fair trial, civil rights and obligations, criminal charges, fair and public proceedings, reasonable time, Article 6 of the Convention, European Court of Human Rights

1. Introduction

The right to a fair trial is one of the key rights in law, and is regulated by the Convention, by other European and international documents, and by national legal orders. Although this right is provided for in the relatively extensive provisions of Article 6 of the Convention, its interpretation and application in practice is very challenging. Article 6 contains a number of key concepts that are not defined in detail and that, moreover, must be interpreted in an autonomous manner, i.e. without regard to the terminology of the Contracting States to the Convention and their national laws and concepts. The ECtHR and its case law therefore both play a very important role in the interpretation of Article 6, the latter gradually interpreting and clarifying individual concepts and thereby facilitating their comprehension in the context of application in practice.

This chapter begins by defining the right to a fair trial and its meaning and functions. It then focuses its interpretation on two key concepts that constitute the *ratione materiae* of Article 6 – the notion of criminal charges and civil rights and obligations. This is because the right to a fair trial and the requirements associated with it do not

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apply to all legal proceedings, but only to proceedings in which criminal charges or civil rights and obligations are decided.

The right to a fair trial is essentially a set of several rights (and sub-rights) which, in their totality, fulfil this key concept, typical of any democratic state governed by the rule of law. Therefore, attention is then focused on a detailed analysis of the individual attributes of the right to a fair trial, which are regulated in para. 1 of Article 6.[1] This is a very broad subject which cannot be easily covered within the limited scope offered here. The main purpose is therefore to shed light on the nature and meaning of these rights and, above all, on how they should be understood and applied in practice, with the help of the ECtHR's extensive, illuminating, but sometimes contradictory case law.

2. Concept and Content of the Right to a Fair Trial

The right to a fair trial is undoubtedly one of the institutions that underpins every democratic society and every state governed by the rule of law.[2] It is enshrined in Article 6 of the Convention and is also in national legal systems. Anchoring this right and the institutions that guarantee it is, of course, one aspect, but it is even more important that this right be actually reflected and implemented in practice. As stated by the ECtHR,

> 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,[3] (...) this is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'.[4]

The right to a fair trial is a fundamental principle of the rule of law in a democratic society. However, it is very difficult to define this right precisely and unambiguously. Indeed, the Convention itself, in Article 6, describes it through individual attributes and individual rights. Both legal scholarship and case law have therefore attempted to define it. For example, Svoboda sees in it the possibility for every individual to claim rights or fulfil obligations in a process where the individual can make use of all the legal institutions and guarantees that the legal order offers or should offer, as they are an essential part of a democratic state governed by the rule of law. A fair trial must not put one party at a fundamental disadvantage *vis-à-vis* the other, but must on the

1 Paras. 2 and 3 of this Article also deal with this issue, but only in relation to the proceedings on criminal charges.

2 '...the guarantee of a fair hearing, which is the aim of Article 6 (art. 6), is one of the fundamental principles of any democratic society'. *Campbell and Fell v. the United Kingdom*, Application nos. 7819/77 and 7878/77, Judgment 28 June 1984.

3 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

4 *Airey v. Ireland*, Application no. 6289/73, Judgment 9 October 1979.

contrary prevent any arbitrariness that would make a fair process impossible or weak. The author considers this right to be one of the most important human rights.[5] Přidal very succinctly defines this right as an independent subjective public right against the state to obtain legal protection in a process that maximally guarantees a fair outcome (which may not necessarily correspond to the subjective view of the participant).[6] A fair trial is conducted under conditions of 'equality of arms' and this right covers the whole of the proceedings, including any enforcement of the decision.

The high courts in each country have defined the right to a fair trial in similar ways. For example, the Constitutional Court of the Czech Republic states that the right to a fair trial does not mean that an individual is guaranteed directly and immediately the right to a decision corresponding to his or her opinion, but that he or she is guaranteed the right to a fair trial in which all the principles of correct judicial decision-making are applied in accordance with the law and in accordance with the relevant constitutional principles.[7] In another of its decisions, that same court elaborates its reasoning, stating that it is a structured right, comprising several separate subjective fundamental rights, formulated both specifically (e.g. publicity and speed of proceedings or an independent and impartial court) and generally (in particular 'the right to a fair hearing').[8] According to the Constitutional Court, the right to a fair trial is a vague, open-ended and not precisely limited concept. It includes both guarantees expressly enshrined in the law and those derived from case law (for example, the principles of equality of arms and adversarial proceedings).[9] It may be added that Article 6 of the Convention constitutes only a minimum standard of procedural protection which the Contracting States must guarantee to all those subject to their jurisdiction, and does not preclude the provision of a higher standard of procedural protection at the national level.[10]

Generalising from the above, we can conclude that the basis of Article 6 of the Convention is the requirement that the quality of the proceedings correspond to certain rights and obligations, which are discussed below, regardless of the branch of law governing the decision, and regardless of the jurisdiction of the authorities and parties. This guarantee is determined by the importance of the rights to be decided or which may be affected by the decision.[11] Should that right conflict with another right or protected public interest, it is necessary to resolve any such conflict by applying the traditional principle of proportionality.

The subject of the right to a fair trial can be both natural and legal persons.[12] Can these persons waive the right to a fair trial? In *Deweer v Belgium,* the ECtHR held that

5 Svoboda, 2007, pp. 101–103.
6 Přidal, 2010, pp. 731–736.
7 Judgment of the Constitutional Court of the Czech Republic, 14 August 2007, no. IV ÚS 687/06.
8 Judgment of the Constitutional Court of the Czech Republic, 22 January 2008, no. Pl. ÚS 54/05.
9 Judgment of the Constitutional Court of the Czech Republic, 22 January 2008, no. Pl. ÚS 54/05.
10 Kmec et al., 2012, pp. 572–573.
11 Hendrych, 2016, pp. 287–291.
12 *Fortum Oil And Gas Oy v. Finland,* Application no. 32559/96, Judgment 12 November 2002.

the Convention does not in principle preclude the person concerned from waiving his right to a trial. One of the conditions that must always be met is the absence of coercion.[13] In subsequent case law, the conditions for waiving the right to a fair trial have been refined so that, although such a decision must be freely made, it may be done either expressly or tacitly (*Le Compte, Van Leuven and De Meyere v. Belgium*[14]), must always be unequivocal and must not affect an important public interest (*Håkansson and Sturesson v. Sweden*[15]).[16]

As regards the content of the right to a fair trial, it has already emerged from the above that it consists of a catalogue of (partial) fundamental rights and principles. Article 6, which regulates this right, is one of the most extensive provisions of the Convention. In terms of its structure, paragraph 1 contains general requirements that apply both to the adjudication of civil rights and obligations and to the adjudication of criminal charges. Paragraphs 2 and 3 then guarantee certain additional rights which, however, can only be invoked by a person facing a criminal charge within the meaning of paragraph 1.

Interpretation of the substantive scope of Article 6 of the Convention is quite a complex process. The right to a fair trial and its guarantees apply only to two types of proceedings: proceedings concerning civil rights and obligations and proceedings concerning criminal charges. As the Convention states, 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled...'. Of course, the possibility that both civil rights and obligations and criminal charges may be at issue in the same proceeding is not excluded. However, it is always important to be clear in a particular case on what basis the right to a fair trial is claimed. The point is that the requirements for proceedings in criminal cases are further specified in paragraphs 2 and 3, which do not apply to civil cases. The notions of 'civil rights and obligations', as well as that of a 'criminal charge', are to be interpreted autonomously, with the case law of the ECtHR as a key guide to their interpretation.

2.1. The Term 'Criminal Charges'

The concept of criminal charges is one of those that must be interpreted autonomously in order to fulfil the meaning of Article 6 of the Convention. Why? Because one cannot rely on the meaning and content of this concept in the legal systems of individual Contracting States. The ECtHR made a very pertinent point in the now seminal case of *Engel and Others v. the Netherlands*.[17] In that case, it was disputed whether the provisions of Article 6 could also be applied to proceedings concerning offences that are described in national law as disciplinary offences rather than criminal offences. The

13 *Deweer v. Belgium,* Application no. 6903/75, Judgment 27 February 1980.
14 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.
15 *Håkansson and Sturesson v. Sweden*, Application no. 11855/85, Judgment 21 February 1990.
16 Kmec et al., 2012, pp. 607–609.
17 *Engel and Others v. the Netherlands,* Application no. 5100/71, Judgment 8 June 1976.

ECtHR has clearly and correctly stated that the Convention allows Contracting States to declare criminal any conduct which is not an exercise of the human rights and fundamental freedoms protected by the Convention. However, the opposite choice is already subject to stricter rules. Indeed, if Contracting States were free to classify certain offences as disciplinary rather than criminal, the scope of application of the Convention would become dependent on their sovereign will, which could lead to results incompatible with the object and purpose of the Convention.[18] Therefore, it is always necessary to assess, on the basis of certain criteria, whether or not a given charge is criminal in nature, regardless of how it is labelled in national law.

In the same decision, the ECtHR developed criteria, dubbed the 'Engel criteria', for assessing the nature of a charge.[19] The first criterion is the classification of the offence in national law: if the offence is described as a criminal offence in national law, Article 6 of the Convention is applicable. However, this is only a formal and relative criterion; if the act is not described as criminal in the national law, the ECtHR applies two other criteria, which are the nature of the offence and the type and severity of the sanction.[20]

The second criterion is the nature of the offence (the charge). Here we examine the extent to which the offence is typically 'criminal' in nature. This criterion usually combines the answers to two questions: first, whether the protected interest is general or particular, or, more precisely, whether the legal norm in question is addressed to everyone or only to a certain group of people with a specific status, e.g. soldiers (as was the case in *Engel and others*);[21] and second, whether the purpose of the sanction imposed for such an offence is (at least partly) preventive-repressive or whether it is (purely) reparative.[22] The first question is therefore whether the offence in question arises from a breach of a legal norm addressed to everyone in general or a norm affecting only a certain group of persons with a special status (the aforementioned soldiers or, for example, civil servants,[23] judges,[24] lawyers,[25] prisoners[26] and others). The second question is whether the purpose of the sanction imposed for such an offence is preventive-repressive (even if only partly) or purely reparative in nature. 'Preventive' is meant in the sense of deterring future offending, i.e. that the sanction has been imposed as a punishment with the aim of deterring further commission of such acts, rather than with the aim of immediately preventing the offender from continuing his criminal activity.[27]

18 *Engel and Others v. the Netherlands,* Application no. 5100/71, Judgment 8 June 1976.
19 Hendrych, 2016, p. 530.
20 *Engel and Others v. the Netherlands,* Application no. 5100/71, Judgment 8 June 1976.
21 Kmec et al., 2012, pp. 573–583.
22 Husseini et al., 2021, pp. 1035–1036.
23 *Kremzow v. Austria*, Application no. 16417/90, Judgment 7 November 1990.
24 *Kremzow v. Austria*, Application no. 16417/90, Judgment 7 November 1990.
25 *Brown v. the United Kingdom,* Application no. 38644/97, Judgment 24 November 1998.
26 *Ezeh and Connors v. the United Kingdom*, nos. 39665/98 and 40086/98, Judgment 15 July 2002.
27 Kmec et al., 2012, pp. 573–583.

The third and final 'Engel' criterion is the type and degree of severity of the sanction – not the sanction actually imposed, but the sanction which could be imposed in the particular case for the particular offence.[28] These threatened sanctions must be of sufficient severity, for example, imprisonment or a high fine. The second and third criteria are in principle alternative, not cumulative.[29]

The application of Article 6 in relation to administrative offences, especially misdemeanours, is a particularly difficult issue. Its applicability to misdemeanours has been dealt with by the ECtHR in a number of its decisions, the best known and most cited being its judgments in *Lauko v. Slovakia* and *Kadubec v. Slovakia*.[30] Mr Lauko was guilty of a public order offence, fined CZK 300 and ordered to pay legal costs of CZK 150. Mr Kadubec was found guilty of an offence against public order, fined CZK 1 000 and ordered to pay legal costs of CZK 150. Under the first criterion, the ECtHR found that the applicant's offences were not criminal offences in Slovak law, but this was not in itself decisive for a conclusion that they did not constitute 'criminal charges' within the meaning of Article 6(1) ECHR. As regards the second criterion, the Court stated that the relevant provision (legal norm) is of a general nature, since it is addressed to all natural persons in the country concerned. The penalties provided for therein were also intended as a punishment with a view to deterring further commission of such acts. The ECtHR thus concluded that Article 6 of the Convention was applicable, notwithstanding the relatively low severity of the sanction imposed (very low fine).[31] Thus, as far as misdemeanours are concerned, they should generally fall under Article 6, but this cannot be generalised to all legal systems.

As far as offenses resulting from a breach of procedural obligations are concerned, these may also fall within the concept of criminal charges within the meaning of Article 6 of the Convention, but the ECtHR's case law is not clear on this issue and contradictory decisions can be found. As regards whether the parties to the proceedings can be regarded as a specific group of persons with a special status, the ECtHR gives both negative[32] and affirmative responses (for example, *Žugić*[33]).[34] Similarly, inconsis-

28 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.
29 Husseini et al., 2021, pp. 1035–1036.
30 *Lauko vs. Slovakia*, Application no. 26138/95, Judgment 2 September 1998; and *Kadubec vs. Slovakia*, Application no. 27061/95, Judgment 2 September 1998.
31 *Lauko vs. Slovakia*, Application no. 26138/95, Judgment 2 September 1998; and *Kadubec vs. Slovakia*, Application no. 27061/95, Judgment 2 September 1998.
32 *Zaicevs v. Latvia*, Application no. 65022/01, Judgment 31 July 2007.
33 Judgment of the ECtHR in *Žugić v. Croatia*, Application no. 3699/08, Judgment 31 May 2011.
34 Kmec et al., 2012, pp. 573–583.

tencies can be found in the assessment of the severity of the sanction.[35] In the Czech Republic, for example, this issue was clearly resolved by the Czech Constitutional Court, which in its 2004 decision stated that any decision to impose a fine must be considered as a decision on a criminal charge within the meaning of Article 6(1) of the Convention. The Constitutional Court stated:[36]

> 'Fines are a sanction for tortious conduct. They are provided for by law and are intended as both a preventive and punitive measure by the public authorities. They may be issued on a discretionary basis, so that the discriminatory effect of their imposition on different subjects is not excluded. (...) It must be inferred from the foregoing that a person subjected to a fine must have the constitutional procedural guarantees provided for in Article 6(1) of the Convention'.[37]

This is a very good solution, as it specifically does not exclude the possibility that the State and its authorities may decide to provide broader protection than that guaranteed by Article 6 of the Convention (i.e. the Czech approach means that Article 6 applies to all disorderly offences without further consideration).

2.2. Civil Rights and Obligations

As with the concept of criminal charges, the interpretation of the concept of 'civil rights and obligations' is also challenging and dependent on supporting criteria again set out within ECtHR case law. This concept must also be interpreted autonomously. Here, too, the tendency is towards a broader interpretation and, as with criminal charges, reliance cannot be placed on the terminology of national legal systems.

35 In *T. v. Austria*, Application no. 27783/95, Judgment 14 November 2000, the ECtHR found that the imposition of a civil fine of 30,000 Austrian shillings, subsequently converted into ten days' imprisonment, was – even if only the fine and its amount were taken into consideration – a decision on a criminal charge. By contrast, in *Jurík v. Slovakia,* Application no. 50237/99, Judgment 18 March 2003, the ECtHR did not consider the imposition of a fine of SKK 10,000 on the basis of section 66 of the (former Czechoslovak) Criminal Procedure Code to be a decision on a criminal charge. In this connection, it took into account, in particular, that: the applicant's act is not considered a criminal offence in domestic law (unlike the offence of contempt of court under section 169b of the Criminal Code); the maximum amount of the fine is considerably lower than the maximum amount of the fine provided for in the Criminal Code; and the fine cannot be converted into a custodial sentence. See *T. v. Austria*, Application no. 27783/95, Judgment 14 November 2000 and *Jurík v. Slovakia,* Application no. 50237/99, Judgment 18 March 2003.

36 Judgment of the Constitutional Court of the Czech Republic, 30 November 2004, no. Pl. ÚS 15/04.

37 Judgment of the Constitutional Court of the Czech Republic, 30 November 2004, no. Pl. ÚS 15/04.

As stated by Kmec, based on ECtHR case law,[38] three basic categories of questions can be formulated, which in the end answer the question of the applicability of Article 6 ECHR in its civil part: is there a dispute over a right or obligation which is genuine and serious and the determination of which has a direct bearing on the existence, extent or manner of enforcement of that right or obligation?; does this right or obligation have a basis in national law?; is the right or obligation at issue in the case civil in nature?[39]

The first criterion contains several sub-criteria. First, there must be a dispute. Thus, the civil branch of Article 6(1) does not apply to uncontested or 'unilateral' proceedings.[40] In certain respects, the meaning of the words 'contestations' (disputes) over 'civil rights and obligations' has been clarified, for example in the *Ringeisen vs. Austria* judgment of 16 July 1971. According to the judgment, the phrase in question covers 'all proceedings the result of which is decisive for private rights and obligations', even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character 'of the legislation which governs how the matter is to be determined' and of the 'authority' which is invested with jurisdiction in the matter are of little consequence.[41] The *Golder vs. the United Kingdom* judgment is also very important.[42] The Court concluded that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. One consequence of this is that Article 6 para. 1 is not applicable solely to proceedings which are already in progress:[43] it may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the opportunity to submit that claim to a tribunal meeting the requirements of Article 6 para. 1.[44]

Furthermore, the dispute must be 'genuine and serious'. In other words, it must be a matter the outcome of which has an impact on the person's legal sphere and must

38 *Krosta v. Poland*, Application no. 36137/04, Judgment 2 February 2010, § 50: 'The Court reiterates that, according to the principles laid down in its caselaw –, it must first ascertain whether there was a 'dispute' ('contestation') over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether this 'right' is also protected under the Convention (see, inter alia, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153–A). The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question (see, among other authorities, *Athanassoglou and Others v. Switzerland [GC],* no. 27644/95, § 43, ECHR 2000–IV*; Mennitto v. Italy [GC],* no. 33804/96, § 23, *ECHR 2000-X, and Markovic and Others v. Italy [GC],* no. 1398/03, § 93, *ECHR 2006*–...). Lastly, the right must be a 'civil' right'.

39 Kmec et al., 2012, pp. 584–594. See also, in more detail, Hendrych, 2016, pp. 529–530.

40 *Alaverdyan v. Armenia*, Application no. 4523/04, Judgment 24 August 2010; Husseini et al., 2021, pp. 1037–1039.

41 *Ringeisen vs. Austria*, Application no. 2614/65, Judgment 16 July 1971.

42 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

43 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

44 See also very important *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

be of fundamental importance to that person. It is more of an ancillary criterion, which in essence functions more as a kind of corrective to a potentially overly broad interpretation of other criteria.[45] It is thus of less importance compared to the other criteria. In principle, there should be a presumption of the 'genuineness and seriousness' of the dispute unless there are clear indications to the contrary.[46] Finally, the dispute must be one whose decision has a direct bearing on the existence, scope or manner of enforcement of the right or obligation in question. As the ECtHR stated in *Le Compte, Van Leuven and De Meyere v. Belgium:*

> 'As regards the question whether the dispute related to the above-mentioned right, the Court considers that a tenuous connection or remote consequences do not suffice for Article 6 par. 1 (art. 6–1), in either of its official versions ('contestation sur', 'determination of'): civil rights and obligations must be the object – or one of the objects – of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right'.[47]

Disputes regarding the meaning of Article 6 ECHR are relevant to the very existence of civil rights and obligations, and also to their scope or the conditions for their enforcement. They may concern questions of fact as well as questions of law.[48]

The second criterion is that the right or obligation has its basis in national law. Article 6 applies in its 'civil part' where there is a dispute over a right or obligation which it can – at least defensibly – be argued is recognised by domestic law, irrespective of whether it is also protected by the Convention.[49] The ECtHR cannot therefore, by interpreting Article 6, create a new private law claim which has no legal basis in the relevant legislation.[50] Nor is Article 6 logically applicable in cases where the applicant seeks to invoke an existing right, but claims it to a greater extent than that guaranteed to him by domestic law.[51]

The last criterion requires that the right or obligation in question be civil in nature. Typically, it will be a dispute between private parties. However, we can also include disputes which are understood by national law to be of a public law nature but which at the same time have an impact on civil rights and obligations.[52] The ECtHR

45 Kmec et al., 2012, pp. 584–594.
46 See *Rolf Gustafson v. Sweden*, Application no. 23196/94, Judgment 1 July 1997.
47 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.
48 Kmec et al., 2012, pp. 584–594.
49 *J.S. and A.S. v. Poland*, Application no. 40732/98, Judgment 24 May 2005.
50 *Fayed v. the United Kingdom*, Application no. 17101/90, Judgment 21 September 1990.
51 *Varvarovsky v. Czech Republic*, Application no. 29086/05, Judgment 5 February 2007.
52 For example, proceedings for the granting of a building permit (*Sporrong and Lönnroth v. Sweden*, Application nos. 7151/75, 7152/75, Judgment 23 September 1972), the granting of a permit to operate a private clinic (*König v. Germany*, Application no. 6232/73, Judgment 28 June 1978), or disciplinary proceedings before the statutory bodies in which the right to continue to practise is at stake (*Ringeisen vs. Austria*, Application no. 2614/65, Judgment 16 July 1971).

has traditionally held that rights of a proprietary nature are generally also of a civil nature within the meaning of Article 6 of the Convention (e.g. *König v Germany*[53]).[54] The ECtHR summed up this criterion very nicely in its decision in *Ringeisen v Austria*:

> 'For Article 6, para. (1) (Article 6–1), to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, para. (1) (Article 6–1), is far wider; the French expression 'contestations sur (des) droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text 'determination of ... civil rights and obligations', confirms this interpretation. (...) The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence'.[55]

The conditions for the application of Article 6(1) ECHR in its civil branch are cumulative: all of them must be fulfilled simultaneously.[56]

3. Attributes of the Right to a Fair Trial Within the Meaning of Article 6(1) of the Convention

3.1. Right to a Trial Before an Independent and Impartial Tribunal Established by Law

According to Article 6(1), '...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The first attribute of the right to a fair trial is therefore the right to a trial before a tribunal that is independent, impartial and established by law. How is this requirement to be interpreted and what is its content?

In *Golder v. United Kingdom*, the ECtHR solved this important question:

> 'Is Article 6 para. 1 limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?'.[57]

53 *König v. Germany,* Application no. 6232/73, Judgment 28 June 1978.
54 Tax matters, on the other hand, do not fall within the dictates of Article 6 of the Convention. *Ferrazzini v. Italy,* Application no. 44759/98, 12 July 2001.
55 *Ringeisen vs. Austria,* Application no. 2614/65, Judgment 16 July 1971.
56 Husseini et al., 2021, pp. 1037–1039.
57 *Golder v. the United Kingdom,* Application no. 4451/70, Judgment 21 February 1975.

The ECtHR stated that the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles. A different interpretation could risk arbitrariness: If Article 6(1) were understood to refer exclusively to the conduct of proceedings already brought before a court, a Contracting State could, without acting inconsistently with the text, abolish its courts or withdraw from them the power to adjudicate certain categories of civil actions and confer it on bodies dependent on the government.[58]

The Court thus reaches the conclusion that Article 6 para. 1 ensures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (tribunal). In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 as regards both the organisation and composition of the court and the conduct of the proceedings. The whole makes up the right to a fair hearing.[59] To summarise, the right to a fair trial and its guarantees apply not only to proceedings already initiated and pending, but also include the right of everyone to bring before a court or tribunal any claim relating to their civil rights and obligations (right of access to justice).

The right of access to the court also exists in the case of criminal charges, but here it is not exercised by the accused bringing the case to court, but (mostly, though not exclusively) by an indictment brought by the competent state authority. However, if the adjudication of certain less serious offences is entrusted in the first instance not to the courts but to administrative authorities, then even in criminal cases the right of access to the courts may be realised by the accused bringing the case before the court by way of an appeal against the decision of the administrative authority on the validity of the criminal charge within the meaning of Article 6(1).[60]

The term 'tribunal' itself is not defined in the Convention, but only the requirements it should fulfil: independent, impartial and established by law. These attributes are therefore again specified in more detail by the ECtHR in its decision-making. As it stated in *De Wilde, Ooms and Versyp ('Vagrancy Cases') v. Belgium*:

> 'It is true that the Convention uses the word 'court' (French 'tribunal') in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question. (...) In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see Neumeister Judgment of 27th June

58 Husseini et al., 2021, pp. 1068–1073.
59 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.
60 *Štefanec v. Czech Republic*, Application no. 75615/01, Judgment 18 July 2006.

> 1968, Series A, p. 44, para. 24), but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place."[61]

In *Sramek v. Austria* the ECtHR added that for the purposes of Article 6, however, it comes within the concept of a 'tribunal' in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.[62] A tribunal within the meaning of Article 6 should also have full jurisdiction, that is, it should have the power to examine all individual questions (both of law and fact) that are relevant to the decision of the case.[63]

While Article 6(1) guarantees the right of access to a court in terms of the above requirements, this does not mean that all cases concerning civil rights and obligations or criminal charges must be decided primarily and in the first instance by such authorities. In a number of Contracting States, the adjudication of such cases is also entrusted to other authorities, such as various public administrative authorities. This may be due to tradition and historical development, but also to the requirement of expertise or the exercise of the right to self-government, among others. Such bodies do not, as a rule, fulfil all the requirements, such as independence. Nevertheless, such legislation is not contrary to Article 6 of the Convention if the decisions of administrative (or other) authorities are reviewable by a court with full review powers (i.e. capable of dealing with questions of both fact and law) and meeting the other requirements of Article 6 of the Convention.[64] It is important that at least one national authority and the proceedings before it meet all the requirements for a court and the proceedings before it.

A court within the meaning of Article 6 of the Convention must be independent and impartial. The ECtHR has traditionally stated that 'independence' means, in particular, independence from the executive and from the parties to the dispute.[65] This is not an entirely precise concept, since independence from the parties to the proceedings is more likely to be linked to the aspect of impartiality, but the two aspects

61 *De Wilde, Ooms and Versyp ('Vagrancy Cases') v. Belgium*, Application no. 2832/66; 2835/66;2899/66, Judgment 10 March 1972.
62 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.
63 *Kilián v. Czech Republic*, Application no. 48309/99, Judgment 7 December 2004. For more details on this, see Husseini et al., 2021, p. 1070.
64 *Albert and Le Compte v. Belgium*, nos. 7299/75 and 7496/76, Judgment 10 February 1983 or *Štefanec v. Czech Republic*, Application no. 75615/01, Judgment 18 July 2006.
65 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.

are nevertheless closely related.[66] The judiciary must be as independent of the other powers as possible. Judicial independence refers to the courts (and the judiciary as a whole) as institutions and requires independence, particularly in terms of budgetary matters or the internal organisation of the court (for example, in the selection of the presidents of the chamber, the selection of new judges or the running of the court).[67] A judge's independence is already individual in nature and is linked to the freedom of his decision-making.[68]

As a rule, independence ensures, through a combination of institutional and personal guarantees of various kinds, a legal and *de facto* status of judges such that, although they are in a sense 'employees' of the State, they can disregard any interests that the State may have in the outcome of the proceedings and decide exclusively according to the law and their own best knowledge and conscience.[69] However, the independence of the courts may also be threatened by other entities that are not themselves holders of public power, such as the media or political parties.[70] The pressure on a particular judge may come not only from outside the judiciary, but also from within. Judges must also not be subject to pressure from their colleagues or from persons exercising the administration of the courts, e.g. court presidents. There must also be sufficient safeguards in the legal order against such pressures.[71] The ECtHR further adds that, in order to determine whether a court can be considered 'independent', it is necessary to take into account, *inter alia*, the manner in which its members are appointed and their term of office, the existence of safeguards against external pressures and whether the institution gives the appearance of independence.[72]

In addition to independence, the court must also be impartial. In very general terms, impartiality is the absence of a relationship between a particular decision-maker (judge) and one of the parties to the proceedings (or their representatives), as well as to the case itself.[73] It therefore relates above all to the specific person representing the relevant public authority, his moral qualities and his responsibility. In layman's terms, it is a matter of ensuring that the personal attitudes, feelings and relations of that person to the parties or the case under consideration do not manifest themselves in the decision-making process, or that his decision-making is not influenced by any other interests or considerations[74] (e.g. political, financial, personal) except those arising from the legal order.[75] The judge must not have a specifically

66 Frumarová, 2019, pp. 17–25.
67 Husseini et al., 2021, p. 1074.
68 Molek, 2012, p.150.
69 Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic, 20 November 2012, no. 1 As 89/2010–119.
70 *Viorel Burzo v. Romania*, nos. 75109/01 and 12639/02, Judgment 30 June 2009.
71 *Khrykin v. Russia*, Application no. 33186/08, Judgment 19 April 2011.
72 See, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.
73 Frumarová, 2023, pp. 41–56.
74 Svoboda, 2007, p. 284.
75 Frumarová, 2023, pp. 97–108.

definable interest in the outcome of the proceedings.[76] Indeed, already in Roman times, the principle of *nemo iudex in causa sua* applied. A lack of impartiality is typically dealt with by disqualifying a judge or other official for bias.

The conclusion of a conflict of interest and the possible exclusion of a person from hearing and deciding a case cannot be made without the existence of factual grounds giving rise to a reasonable presumption of bias.[77] This is because, in a state governed by the rule of law, any action under the law must be based on objective criteria and on rational reasons grounded in reality, and not on the purely subjective, non-factual will of the person exercising the power.[78] Doubt as to lack of bias is therefore established where there are reasonable grounds, based on reality, for believing that there may be an undesirable relationship which could 'influence' the attitude of the official towards the exercise of the power conferred on him.

The Constitutional Court of the Czech Republic has very aptly commented on this issue. It stated[79] that impartiality is primarily a subjective psychological category, expressing the judge's internal psychological state towards the case at hand in a broader sense (when it includes the relationship to the subject of the proceedings, the parties and their representatives), which only the judge himself is able to report relatively accurately. However, such a narrowly defined category of impartiality would be difficult to apply in practice due to the difficulty of objective review, and impartiality must therefore be perceived more broadly, i.e. also in objective terms. In other words, there must be not only a subjective conviction of bias on the part of the judge or official or the parties, but, in particular, there must be clearly established objective circumstances which justify that conclusion.[80] The case law of the European Court of Human Rights is also based on a twofold test of the judge's impartiality.[81]

The subjective test of impartiality is based on a rebuttable presumption of the judge's impartiality.[82] According to this test, a judge is presumed to be impartial as long as there are no subjective grounds of bias relating to his person (see *Morice v. France*).[83] A more stringent, individual assessment is required to prove the judge's lack of impartiality, and concrete and tangible evidence of the judge's bias must be produced. The mere perception of a judge as biased by the party concerned does not stand alone.[84] As regards the objective assessment of impartiality, the judge's bias or legitimate doubts as to his impartiality must be sufficient from the point of view of an

76 Bartoň et al., 2016 p. 526.
77 Frumarová, 2023, pp. 97–108.
78 Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic, 27 November 2012, no. 1 As 19/2010-106.
79 Judgment of the Constitutional Court of the Czech Republic, 7 March 2007, no. I. ÚS 722/05.
80 Judgment of the Constitutional Court of the Czech Republic, 3 July 2001, no. II ÚS 105/01.
81 See, e.g. Judgment of the ECtHR in *Saraiva de Carvalho v. Portugal*, Application no. 15651/89, Judgment 22 April 1994 and *Gautrin and Others v. France*, Application no. 38/1997/822/1025–1028, Judgment 20 May 1998.
82 Husseini et al., 2021, p. 1086.
83 *Morice v. France*, Application no. 29369/10, Judgment 23 April 2015.
84 Molek, 2012, p. 173.

ordinary and reasonable observer.[85] We must ask whether an informed and reasonable person would have perceived the judge in question as impartial (see *Kyprianou v. Cyprus*[86]). According to the case law of the ECtHR, the opposite principle to the subjective test as to the presumption of impartiality also applies here. A reasoned objection of objective partiality creates a rebuttable presumption of bias on the part of the judge. The public authority must then rebut it and show that there are sufficient procedural safeguards to exclude any legitimate doubt of impartiality (*Salov v. Ukraine*).[87] In deciding whether there is a legitimate reason to fear that a particular judge is not impartial in a given case, the subjective perception of the litigant is important, but not decisive. What is determinative is whether the concern can be considered objectively justified (*Piersack v. Belgium*).[88]

Finally, the last requirement is that it must be a court established by law. This attribute is undoubtedly intended to specifically strengthen the independence of the court and the objectivity and transparency of its decisions. Both the court's organisational matters and its decision-making activities must be regulated by law. The term 'law' here has essentially the same meaning as elsewhere in the Convention, and thus sources of law other than acts of the legislature may be regarded as law (in the material sense) under certain conditions.[89] However, it follows from the nature of the law in question that certain matters can only be regulated by the legislature (by means of a law in the formal sense); they must not be left to the discretion of the executive. This is undoubtedly true of the establishment of the court itself, but it also applies to fundamental questions relating to the jurisdiction, competence and organisation of the court.

3.2. Right to a Fair and Public Hearing

3.2.1. Right to a Fair Hearing

The requirement of a fair[90] hearing (or fairness of the proceedings) is understood as a kind of 'residual clause' from which the ECtHR can (and does) infer anything else that it considers should be part of the right to a fair trial and that the drafters of the Convention did not explicitly include in Article 6. It has become a space for creative interpretation of Article 6, which is understandable given that the notion of a 'fair hearing' is itself virtually ungraspable.[91] The ECtHR had to elaborate its meaning and was undoubtedly inspired in this respect by the legal systems of the individual Contracting States to the Convention and their understanding of this concept. Thus, the ECtHR derived from the requirement of a fair hearing the principles of equality

85 Husseini et al., 2021, p. 1086.
86 *Kyprianou v Cyprus*, Application no. 73797/01, Judgment 15 December 2005.
87 *Salov v. Ukraine*, Application no. 65518/01, Judgment 6 September 2005.
88 *Piersack v. Belgium*, Application no. 8692/79, Judgment 1 October 1982.
89 Kmec et al., 2012, pp. 685–686.
90 Čeladník, 2009, pp. 847–849.
91 Čeladník, 2009, pp. 847–849.

of arms and adversarial proceedings, the right to be present at the trial, the right not to incriminate oneself, the right to know the reasons for the court decision and some other rights.[92]

The ECtHR states that, according to the principle of equality of arms, as one of the features of the broader concept of a fair trial, each party must be given a reasonable opportunity to present its case under conditions that do not disadvantage it compared to the opposing party.[93] The aim of the principle is to achieve a 'fair balance' between the parties to the dispute.[94]

Furthermore, a key principle of due process is the principle of adversarial proceedings[95]: each party must in principle have the opportunity not only to make known any evidence needed for its claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[96] What is essential is that the parties should be able to participate properly in the proceedings before the 'tribunal' (see *Kerojärvi v. Finland*).[97] Given that the purpose of Article 6(1) is primarily to protect the interests of the parties and of the proper administration of justice, the ECtHR has noted that what is at stake here is the confidence of the parties in the functioning of the judicial system, and that this confidence is based, *inter alia*, on the certainty of the person concerned that he has had the opportunity to comment on all the documents in the file.[98] The fact that a piece of evidence requested by the court and on which it based its decision was not communicated to either party to the dispute does not constitute a breach of the principle of equality of arms, but it may constitute a breach of the principle of the adversarial system.[99] A relatively large category in ECtHR case law includes cases where the principle of the adversarial procedure has been infringed as a result of the fact that the national court did not give the applicant the opportunity to comment on the position taken in the proceedings by the public authority (lower court or administrative authority) whose decision was challenged by the applicant in the proceedings before that court.[100]

Another of the rights recognised is the right to be present in court. This is a crucial right, and is especially so in criminal cases. In this context, the ECtHR states that the

92 Other principles that the ECtHR has reached in its jurisprudence and the right to a fair trial include the principle of legal certainty. This is linked by the Court, in particular, to respect for the principle of legal authority, i.e. the finality of judicial decisions, which must be respected – see *Brumărescu v Romania*, Application no. 28342/95, Judgment 28 October 1999.; Kmec et al., 2012, pp. 735–736.

93 Judgment of the ECtHR in *Bulut v. Austria*, 22 February 1996, No. 20807/92, or Judgment of the ECtHR in *Foucher v. France*, 18 March 1997, no. 22209/93.

94 Judgment of the ECtHR in *Dombo Beheer B. V. v. the Netherlands*, 27 October 1993, no. 14448/88.

95 Stoykova, 2023.

96 Judgment of the ECtHR in *Mantovanelli v. France*, 18 March 1997, no. 21497/93.

97 Judgment of the ECtHR in *Kerojärvi v. Finland*, 19 July 1995, no. 17506/90.

98 Judgment of the ECtHR in *Ziegler v. Switzerland*, 21 February 2002, no. 33499/96.

99 Kmec et al., 2012, pp. 740–750.

100 Judgment of the ECtHR in *Mantovanelli v. France*, 18 March 1997, no. 21497/93.

presence of the accused in court is of fundamental importance for the fairness of the proceedings and the obligation to guarantee the accused the right to be present in the courtroom is one of the essential components of Article 6(1) of the Convention.

> 'It may thus be considered that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges – ranks as one of the essential requirements of Article 6 and is deeply entrenched in that provision. Therefore, criminal proceedings which have been held in absentia and whose reopening has been subsequently refused, without any indication that the accused has waived his or her right to be present during the trial, may fairly be described as 'manifestly contrary to the provisions of Article 6 or the principles embodied therein".[101]

A person charged with a crime should have the right to be present at the trial, though the personal appearance of the accused at a hearing of the Court of Appeal is not necessarily of the same crucial importance as in the case of the proceedings before the trial court.[102] The right in question may be waived, but the accused must do so voluntarily, unequivocally, seriously and without prejudice to any important public interest. As regards civil matters, this right is understood to be a more general right to defend one's case effectively before the court and the right to equality of arms in relation to the opposing party.[103]

Another sub-right mentioned by the ECtHR is the right to a statement of reasons.[104] This right fulfils several key functions. First, it is a means of ensuring the transparency of proceedings, a certain element of control over judicial decision-making. It is also a prerequisite for a party to be able to defend a decision with which it disagrees or, on the contrary, to be convinced of the correctness of the decision in its case (by having the court deal with all the relevant submissions, arguments, evidence and other background to the decision).[105]

The application of this right in practice has been further elaborated by the ECtHR in its case law. First, it has established that this is by no means an absolute right: if Article 6(1) imposes an obligation on courts to give reasons for their decisions, this cannot be understood as requiring a detailed response to every argument.[106] It is appropriate to take into account whether an argument which the court has not answered in the grounds of its decision is relevant to the case and whether it may have influenced the outcome of the proceedings.[107] The extent of that obligation may vary

101 Judgment of the ECtHR in *Stoichkov v. Bulgaria*, 24 March 2005, no. 9808/02.
102 Judgment of the ECtHR in *Kamasinski v. Austria*, 19 December 1989, no. 9783/82.
103 Kmec et al., 2012, pp. 751–756.
104 Dymitruk, 2019, pp. 21–44.
105 Skulová, 2016, č. 10, pp. 895–912.
106 *Van de Hurk v. the Netherlands*, Application no. 16034/90, Judgment 19 April 1994.
107 *Luka v. Romania*, Application no. 34197/02, Judgment 21 July 2009.

according to the nature of the decision. In addition, particular account must be taken of the variety of legal means available before the court and the differences between Contracting States as regards statutory provisions, customs, doctrinal concepts and the presentation and drafting of decisions. Accordingly, the question whether the court has failed to fulfil its obligation to state reasons under Article 6 cannot be assessed other than on the basis of the particular circumstances of the case.[108]

As far as the admissibility of evidence is concerned, Article 6 does not address this issue and, according to the ECtHR, the matter is therefore primarily a matter of national law.[109] In this connection, the ECtHR adds that, in principle, it is therefore not for the ECtHR itself to comment on the admissibility of certain types of evidence, such as evidence gathered illegally under national law, or on the guilt of the applicant. However, it must consider whether the proceedings, including the manner in which the evidence was gathered, were fair as a whole.[110]

It is also worth mentioning the right not to incriminate oneself. Although they are not explicitly mentioned in Article 6, there can be no doubt that the right to remain silent and the right not to self-incriminate are generally accepted international standards that fulfil the notion of a fair trial under Article 6.[111] In *Saunders v. the United Kingdom*, the ECtHR stated that the right not to self-incriminate presupposes, in particular, that the prosecution in a criminal case seeks to prove guilt without resorting to evidence obtained through coercion or duress; in this sense, this right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.[112] The Court added, however, that the right not to contribute to incriminate oneself relates primarily to respect for the accused's will to remain silent.[113]

3.2.2. Right to a Public Hearing

The public character of the proceedings and their main purpose and function is very well captured by the ECtHR in its decision *Malhaus v. Czech Republic*,[114] where it stated:

> 'The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in para, 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial,

108 Kmec et al., 2012, pp. 757–761.
109 *Schenk v. Switzerland*, Application no. 10862/84, Judgment 12 July 1988.
110 *P.G. and J.H. v. the United Kingdom*, Application no. 44787/98, Judgment 25 December 2001.
111 *John Murray v. the United Kingdom*, Application no. 18731/91, Judgment 8 February 1996.
112 *Saunders v. the United Kingdom*, Application no. 19187/91, Judgment 17 December 1996.
113 Kmec et al., 2012, p. 765.
114 *Malhaus v. Czech Republic*, Application no. 33071/96, Judgment 12 July 2001.

> the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention'.[115]

It is further apparent from the case law that Article 6 requires a party to be heard in public at least once, unless there are special circumstances that would justify not holding a public hearing.[116]

Kmec point out[117] that the ECtHR sometimes confuses two things in its case law, namely the right to a *public* trial and the right to an oral trial. It is important to note that each of these rights pursues a different objective: the principle of public hearings is intended to ensure control of the administration of justice, while the principle of orality is intended to ensure that a party to proceedings has the opportunity to be heard directly before the court beyond written submissions. While the exceptions to the principle of publicity are directly set out in the second sentence of Article 6(1) ECHR, the exceptions that the ECtHR has drawn in its case law relate more to the aspect of orality. The question is therefore whether the right to an oral hearing is a right distinct from the right to a public hearing, a right that is not expressly enshrined in Article 6 but (like other rights) only implicitly so. [118]

As regards the permissible exceptions to the principle of publicity of proceedings, they are set out directly in Article 6(1), which states that

> 'the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

Therefore, it is not contrary to the Convention if national legal orders provide for certain types of proceedings where the public is excluded, for the reasons set out above.

While the public nature of court proceedings is one of the essential attributes of the right to a fair trial, the ECtHR adds that neither the letter nor the spirit of this provision prevents a person from expressly or tacitly waiving the right to a public hearing of his case of his or her own volition.[119] However, the waiver must be made in an unequivocal manner and must not be contrary to any important public interest.[120]

115 Similarly *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.
116 Paduch, 2021, p. 11. See also *Schlumpf v. Switzerland*, Application no. 29002/06, Judgment 8 January 2009.
117 Kmec et al., 2012, p. 687.
118 Kmec et al., 2012, p. 687.
119 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.
120 *Håkansson and Sturesson v. Sweden*, Application no. 11855/85, Judgment 21 February 1990.

A certain 'sub-right' of the right to a public hearing, which is also expressly provided for in Article 6(1) of the Convention, is the right to public pronouncement of the judgment.[121] This concept (judgment and its pronouncement) must be interpreted in a material sense, regardless of national terminology.[122]

3.3. Right to a Hearing Within a Reasonable Time

The right to a hearing within a reasonable time constitutes the last attribute of the right to a fair trial within the meaning of Article 6(1) of the Convention. It is a manifestation of the principle of the expeditiousness of proceedings, which is one of the universal principles typical of all judicial and administrative proceedings.[123] The main problem in the application of that right is to determine and interpret what a reasonable period is, when it begins and ends and how long it should be in a particular case. In this respect, ECtHR case law is again a key guide.

As a general rule, a reasonable period of time relating to decision-making may start to run from the moment the proceedings are initiated. It should not be difficult to determine that time, since it is normally fixed directly by law. The end of the reasonable period can then be determined at the moment when the uncertainty as to the legal position of the person concerned is brought to an end.[124] This is typically the case only when the decision becomes final. For example, in *Wemhoff v. Germany*[125] the ECtHR held that there is no reason for the protection of individuals against delays in proceedings to end at the first oral hearing, as it is reasonable to fear unjustified delays or adjournments.

The basic criterion for determining the length of a reasonable period of time is that the specific circumstances of each individual case must always be taken into account, and it is not possible to proceed on the basis of some abstract, predetermined (in type) length of time for issuing certain types of decisions. The judicial authority must therefore take into account, in each individual case, the two (often conflicting) components of the right to a fair trial, namely the right of the person concerned to have his or her case heard and determined within a reasonable time, and the general requirement to comply with the law and to ensure fair protection for all concerned.[126]

According to the settled case law of the European Court of Human Rights,[127] the reasonableness of the time limit for the proceedings is assessed comprehensively

121 On the various forms of fulfilment of this right – see, for example, *Pretto and others v. Italy,* Application no. 7984/77, Judgment 8 December 1983.
122 *Axen v. Germany,* Application no. 8273/78, Judgment 8 December 1983.
123 Frumarová, 2021, pp. 109–120.
124 Čapek, 1994, pp. 362; *Wemhoff v. Germany,* Application no. 2122/64, Judgment 27 June 1968.
125 *Wemhoff v. Germany,* Application no. 2122/64, Judgment 27 June 1968.
126 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.
127 *Guillemin v. France*, Application No. 19632/92, Judgment 21 February 1997; *Stamoulakatos v. Greece*, Application no.164/1996/783/984, Judgment 26 November 1997; *Apicella v. Italy,* Application no. 64890/01, Judgment 29 March 2006.

according to the circumstances of each individual case, taking into account in particular the complexity of the case and the conduct of the parties and the authorities concerned. In doing so, it is also important to take into account what is at stake for the person concerned in the context of the proceedings. The determination of a reasonable period of time, or its length, must therefore always be based on the circumstances of each individual case, using (though of course not only) the supporting criteria developed by case law.[128]

The first subsidiary criterion is the complexity of the case. This is a criterion of an objective nature, where both the procedural complications and the factual or substantive complexity of the case must be taken into account. The complexity of the proceedings from the point of view of the ECtHR includes in its specification both the number of instances in which the case has been heard[129] and the complexity of the case itself.[130] The complexity of the case comprises three elements: its factual complexity (the extent of the facts alleged by the parties and the resulting scope of the evidence, and the variety of means of proof used – interviews with many witnesses, expert reports, etc.); the complexity of the case[131] in terms of the complexity of the legal assessment from the point of view of application and interpretation – depending in particular on the frequency of similar proceedings, the existing case law and its consistency[132] or whether the case has an international element;[133] and last but not least, its procedural complexity (the procedural activity of the parties, the frequency and clarity of their submissions and procedural motions,[134] etc.).[135] In this respect, each competent authority has a special duty to ensure that everyone with a role in the proceedings does everything possible to avoid unnecessary delays.[136]

Another criterion for assessing whether the time limit is reasonable is the conduct of the parties to the proceedings. This is a subjective criterion which can have both a negative and a positive effect on the length of proceedings. On the one hand, a party

128 The European Court's rather extensive case law on the violation of Article 6(1) of the Convention can be found, for example, in the Council of Europe publication 'The administration and you', Council of Europe Publishing, 1996 (see *König v. Germany*, Application no. 6232/73, Judgment 28 June 1978.; *Obermeier v. Austria*, Application no. 11761/85, Judgment 28 June 1990).
129 It shall apply that the total period of time to be justified shall in principle be extended by the period of the proceedings before the next instance. On this issue, cf. also Barinka, 2002, p. 439.
130 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.
131 Cf. e.g. *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997; *Milasi v. Italy*, Application no. 14/1986/112/160, Judgment 25 June 1987; *Bořánková v. Czech Republic*, Application no. 41486/98, Judgment 7 January 2003; *Schmidtová v. Czech Republic*, Application no. 48568/99, 22 July 2003.
132 *Tímár v. Hungary*, Application no. 36186/97, Judgment 25 February 2003.
133 *Neumeister v. Austria*, Application no. 1936/63, Judgment 27 June 1968 or Barinka, 2002, p. 440.
134 *Monnet v. France*, Application no. 30955/12, Judgment 27 October 1993.
135 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.
136 *Monnet v. France*, Application no. 30955/12, Judgment 27 October 1993.

to the proceedings may contribute to increasing the length of proceedings through inactivity (e.g. by failing to respond to the competent authority's requests) or through activity of a purely obstructive nature (e.g. repeatedly making unclear submissions, proposing the taking of numerous redundant pieces of evidence, numerous amendments to the application), both intentionally and negligently. On the other hand, however, parties may take action, at least in theory, to reduce the length of the proceedings, which may include the use of all available means capable of eliminating delays in the proceedings. However, it is not the duty of the parties to induce the public authorities to give a decision earlier, so the failure to make use of those means cannot be attributed to the parties. On the contrary, it is the general duty of those authorities to give a decision within a reasonable time, and that duty is to be discharged whether or not the parties avail themselves of those means.[137]

Any attitude or behaviour of the person concerned which leads to delays in the proceedings weakens his complaint or other form of protection against delays. Such conduct is, according to the ECtHR, hardly compatible with the requirement of urgency with which a party to proceedings must act.[138] Thus, only delays attributable to the State can lead to a finding that a reasonable time has not been observed.[139]

However, the fact that a party exercises its procedural rights under the law (e.g. filing appeals, objections, etc.) cannot be held against it.[140] On the contrary, the reasonableness of the remedies lodged may indicate maladministration on the part of the competent authority. On the other hand, the competent authority cannot be held liable for the prolongation of the length of the proceedings as a result of the need to respond to the parties' applications, appeals or objections,[141] particularly if they are unfounded.[142] There is, however, a certain exception in this respect in cases of a criminal nature. In most cases, the person whose guilt and sentence are being decided (in criminal or quasi-criminal proceedings) cannot be expected to cooperate actively (especially in those cases which are clearly aimed at proving his guilt).[143]

The conduct or procedure of the authorities concerned is also important in assessing whether the time limit was reasonable. The conduct of the competent authority during the proceedings may be categorised as timely and expeditious (while, of

137 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic, 13 April 2011, no. Cpjn 206/2010.

138 In *Deumeland v. Germany* the European Court held that parties are obliged to exercise due diligence in the exercise of their procedural rights, to not use delaying tactics and to use all the means provided by domestic law to bring the proceedings to a timely and orderly conclusion. Cf. also the judgment in *Proszaková v. Poland* of 16.12.1997 (where the applicant refused to undergo an expert examination, which significantly delayed the proceedings). In such cases, the ECtHR cannot even find a violation of Article 6(1) of the Convention. *Deumeland v. Germany,* Application no. 9384/81, Judgment 29 May 1986.

139 *Ciricosta and Viola v. Italy*, Application no. 19753/92, Judgment 4 December 1995.

140 *Patta v. Czech Republic*, Application no.12605/02, Judgment 18 April 2006.

141 *Dostál v. Czech Republic*, Application no. 52859/99, Judgment 25 May 2004.

142 Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 1328/2009.

143 Čapek, 1994, p. 363. See also *Lammi v. Finland*, Application no. 53835/00, Judgment 15 November 2005.

course, respecting the legal principles and procedural procedures) or as unjustified inaction, arbitrariness or incompetence leading to unnecessary delays or absolute inaction. A breach of a reasonable time limit may thus consist, for example, of long delays between meetings, delays in the transmission of files between authorities, or failure to comply with other procedural rules. There are also cases where the decision of a lower authority is annulled simply because it did not respect a binding legal opinion of a higher authority.[144]

The most common reason to justify inaction or delays is overload of the competent authority. However, congestion is generally not recognised as a sufficient excuse for excessive length of proceedings. In such cases, the ECtHR has held that Article 6 of the Convention obliges Contracting States to organise their judicial systems in such a way that they are able to comply with each of the requirements of that Article, in particular as regards the reasonableness of the length of the proceedings.[145] The obligation to act with urgency in the interests of the proper administration of justice belongs to the competent authorities in the first place (*Philis v Greece)*.[146]

However, the ECtHR allows exceptions to this principle. In fact, in some of its judgments it has held that a temporary backlog of cases may justify a certain extension if the competent authorities do everything possible to overcome this obstacle as soon as possible (*Unión Alimentaria Sanders S.A. v Spain*[147]). If, however, the situation threatens to become more widespread, measures must be taken to prevent a permanent breach of the Convention (*Martins Moreira v. Portugal*[148]). These measures must be assessed in terms of their effectiveness and timeliness. Delayed measures cannot obliterate the fact that the reasonable period has been exceeded,[149] nor can chronic congestion of the competent authority justify an excessive time limit for proceedings.[150]

In determining and assessing the reasonableness of the time limit, ECtHR case law states that account must also be taken of the special interests of the person concerned in the proceedings, what is at stake for them and the importance the proceedings hold for them.151 The importance of the proceedings is determined by type, in the sense that certain types of proceedings are more important to the parties than others. These are primarily matters pertaining to criminality, custody, employment, personal status, social security or health and life.[152] In addition, the importance of

144 Frumarova, 2012.
145 See, for example, *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997.
146 *Philis v Greece*, Application nos. 12750/87; 13780/88; 14003/88, Judgment 27 August 1991.
147 *Unión Alimentaria Sanders S.A. v Spain*, Application no. 11681/85, Judgment 7 July 1989. Similarly, the European Court also ruled in *Buchholz v Germany*, Application no. 7759/77, Judgment 6 May 1981.
148 *Martins Moreira v. Portugal*, 26 October 1988, Application no. 11371/85, Judgment.
149 For example, Judgment of the ECtHR in *Baggetta v. Italy*, Application no. 13/1986/111/159, Judgment 25 June 1987 or *Milasi v. Italy*, Application no. 14/1986/112/160, Judgment 25 June 1987.
150 *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997.
151 For example, *Stamoulakos v. Greece*, Application no. 32857/96, Judgment 26 November 1997.
152 For more details see the Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 4761/2009.

the subject-matter of the proceedings for a particular person is determined by the circumstances of the particular dispute, in particular the age or state of health of the party, where the competent authorities should take greater care in proceedings involving seriously ill or elderly persons.[153] In simple terms, these are situations where delays or inaction may have irreversible or difficult-to-remedy consequences and may fundamentally affect the rights and freedoms of individuals.

All of the above criteria must be taken into account, both individually and collectively, considering the circumstances of the case as a whole. It is clear that the individual criteria do not, as a rule, occur in isolation, without dependence on the other criteria. Moreover, the criteria mentioned are not, of course, the only possible ones, but they will normally be the basic guideposts for determining what constitutes a reasonable period.[154]

4. Specific Requirements of the Right to a Fair Trial in Relation to Proceedings on Criminal Charges - Article 6(2) and (3) of the Convention

Paras. 2 and 3 of Article 6 are specific applications of the general principle set out in paragraph 1. The presumption of innocence enshrined in para. 2 and the various rights, a non-exhaustive list of which appears in paragraph 3, form – together with others – components of the concept of a fair trial in criminal matters.[155] The specific safeguards set out in Article 6(3) ECHR characterise the concept of a fair trial with regard to the typical procedural situations that arise in criminal proceedings. Their purpose is to always ensure, or at least contribute to, the fairness of the criminal proceedings as a whole.[156]

4.1. Principle of Presumption of Innocence

Article 6(2) of the Convention enshrines the principle of presumption of innocence, that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This is a principle recognised by all democratic legal systems in criminal or similar proceedings (e.g. administrative offences).[157] As stated by the Constitutional Court of the Czech Republic in this context,

153 For more details see the Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 4761/2009.

154 Frumarova, 2012.

155 *Deweer v. Belgium,* Application no. 6903/75, Judgment 27 February 1980: 'The Court further points out that these two paras. (Article 6–2, Article 6–3) represent specific applications of the general principle stated in para. 1 of the Article (Article 6-1). The presumption of innocence embodied in para. 2 (Article 6–2) and the various rights of which a non-exhaustive list appears in para. 3 (Article 6–3) ('minimum rights', 'notamment1) are constituent elements, amongst others, of the notion of a fair trial in criminal proceedings (see, for example, the Commission's report in the case of *Nielsen v. Denmark*, 15 March 1961*,* Yearbook of the Convention, vol. 4, pp. 548–550)'.

156 Kmec et al., 2012, p. 787.

157 Stoykova, 2023.

> 'the principles of a fair trial include the principle of presumption of innocence, according to which anyone against whom criminal proceedings are brought is presumed innocent unless he has been found guilty by a final judgment of conviction (Article 40(2) of the Charter and Article 6(2) of the Convention). The legal significance of the presumption of innocence lies, first and foremost, in the obligation of the criminal prosecution authorities to regard the person against whom criminal proceedings are brought as innocent, and this obligation continues until a final conviction has been handed down. It is one of the most important constitutional guarantees of a fair trial in criminal proceedings.'[158]

An important part of the principle of presumption of innocence is the principle of *in dubio pro reo*. The essence of this principle is that if, after the evidence has been adduced, reasonable doubts persist as to the existence of relevant factual circumstances (e.g. the act, the person of the perpetrator or the culpability) which cannot be removed even by the taking of further evidence, the prosecuting authorities are obliged to decide in favour of the accused.[159] The application of the above principle is particularly appropriate where multiple versions of the facts can reasonably be arrived at or where no one body of conflicting evidence can be clearly admitted.[160] However high the degree of suspicion, this cannot in itself provide a lawful basis for a conviction.[161] In the light of the above, the general courts are required in criminal proceedings to reach the highest degree of certainty that human knowledge can achieve, at least to the level of proof of the offence beyond reasonable doubt.

The ECtHR summarises this by saying that the principles of the presumption of innocence and that of *in dubio pro reo*, which follows from it, require judges

> 'not to proceed on the basis of a preconceived notion that the accused has committed the act of which he is accused, that the burden of proof rests with the prosecution and that any doubts are used to the advantage of the accused'.[162]

It follows from the case law of the ECtHR that the presumption of innocence is violated when a court decision or a public official's statement concerning a person accused of a crime reflects the view that the person is guilty before his or her guilt has been established by law. Even if guilt is not formally established, the existence of some reasoning indicating that the court or public official in question views the accused as

158 Judgment of the Constitutional Court of the Czech Republic, 5 January 2021, no. III. ÚS 928/20.
159 Judgment of the Constitutional Court of the Czech Republic, 5 March 2010, no. III ÚS 1624/09; Judgment of the Constitutional Court of the Czech Republic no. II ÚS 1975/08; Judgment of the Constitutional Court of the Czech Republic, 24 February 2004, no. I ÚS 733/01.
160 Judgment of the Constitutional Court of the Czech Republic, 22 March 2006, no. IV ÚS 137/05.
161 Judgment of the Constitutional Court of the Czech Republic, 13 May 1998, no. IV ÚS 36/98.
162 *Melich and Beck v. Czech Republic*, Application no. 35450/04, Judgment 24 July 2008.

guilty is sufficient.[163] There is a fundamental distinction to be made between stating that someone is merely suspected of committing an offence and a clear statement that the person has committed the offence in question without having been convicted. The ECtHR has consistently stressed the importance of the words public officials choose to use in their statements before the person concerned is tried and found guilty of a particular crime.[164] It is relatively common in the case law of the ECtHR for courts in proceedings that do not directly address the issue of guilt and punishment to choose language that more or less clearly establishes the guilt of the accused. In the light of the principle of the presumption of innocence, these formulations are problematic, either in a situation where criminal proceedings are still ongoing and the guilt of the applicant has not yet been decided, or once the criminal proceedings have been concluded by a verdict that exonerates the applicant[165] (acquittal, discontinuance of the criminal prosecution).[166] In *Allenet de Ribemont v France*[167] the ECtHR extended the protection afforded by Article 6(2) ECHR to sentences pronounced by organs of the State other than the courts. The case in question concerned specifically the Minister of the Interior and two police officers who, at a press conference, had identified the applicant, Mr Patrick Allenet de Ribemont, as the instigator of the murder of a Member of Parliament and a former minister. However, journalists or the media in general may also violate this principle.[168]

4.2. Rights under Article 6(3) of the Convention

Other rights associated with criminal proceedings arise from Article 6(3) of the Convention, which provides that everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4.2.1. Right to Be Informed of the Charges

According to the ECtHR, the scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article

163 Kmec et al., 2012, pp. 787–793.
164 *Khuzhin and Others v. Russia*, Application no. 13470/02, Judgment 23 October 2008.
165 For details see Kmec et al., 2012, pp. 787–793.
166 *Khuzhin and Others v. Russia*, Application no. 13470/02, Judgment 23 October 2008.
167 *Allenet de Ribemont v. France*, Application no. 15175/89, Judgment 10 February 1995.
168 *Tourancheau and July v. France*, Application no. 53886/00, Judgment 24 December 2005.

6(1) of the Convention.[169] The Court considers that in criminal matters, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.[170] This right is closely related and complementary to the other rights listed in para. 3.

As regards the time requirements, the court should do so without delay, particularly to allow the accused to properly prepare his defence. The communication of the charge is such an important act that it must always be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge of the existence of the charge is not sufficient.[171] However, the Convention does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (*Kamasinski v Austria*[172]). At the same time, the information in question must be communicated in a language which the person understands.[173]

The person must be informed of the nature and grounds of the charge in detail. As the ECtHR has aptly stated,

> '6(3)(a) refers to the need to pay particular attention to the notification of the 'charge' to the accused; the particulars of the offence play a crucial role in criminal proceedings, since from the moment they are served the suspect is formally informed of the factual and legal basis of the charge against him (*Kamasinski v Austria*[174]). The accused must be informed 'promptly' and 'in detail' of the grounds of the charge, i.e. the essential facts of which he is accused and which form the basis of the charge, and of the nature of the charge, i.e. the legal classification of those essential facts. The Court considers that in criminal cases the provision of full and detailed information concerning the charges against the accused is an essential prerequisite for ensuring a fair trial.'[175]

Although the extent of the 'detailed' information referred to in this provision varies according to the circumstances of each case, the accused must in all circumstances be provided with sufficient information to enable him to fully understand the scope of the charges against him in order to prepare an adequate defence. In this respect, the adequacy of the information must be assessed in relation to Article 6(3)(b), which

169 See *Deweer v. Belgium,* Application no. 6903/75, Judgment 27 February 1980 or *Artico v. Italy,* Application no. 6694/74, Judgment 13 May 1980.
170 *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment 25 March 1999.
171 *T. v. Italy*, Application no. 14104/88, Judgment 12 October 1992.
172 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989.
173 *Brozicek v. Italy,* Application no. 10964/84, Judgment 19 December 1989.
174 *Kamasinski v. Austria,* Application no. 9783/82, Judgment 19 December 1989.
175 *Mattoccia v. Italy,* Application no. 23969/94, Judgment 25 July 2000.

grants everyone the right to adequate time and resources to prepare his defence, and in the light of the more general right to a fair trial enshrined in Article 6(1) (*Pélissier and Sassi v. France*[176]).

With regard to any changes in the charge, including changes in the 'cause' of the charge, the accused must be properly and fully informed of them, and given reasonable time and opportunity to respond to them and to organise his defence on the basis of any new information or allegations.[177] In principle, the ECtHR examines whether the change in the nature and cause of the charge could have been foreseeable to the applicant.[178] The accused is entitled to be informed even if the definition of the offence has remained the same and only the legal characterisation has changed.[179]

4.2.2. Right to Have Adequate Time and Facilities for the Preparation of the Defence

As mentioned above, this right is closely related to the above-mentioned right to be informed of the nature and grounds of the charges, since this aspect is, among other things, a prerequisite for the preparation of a good defence. The rights of the defence, which are not exhaustive in Article 6(3)(b) ECHR, were established primarily with a view to establishing, as far as possible, equality between the prosecution and the defence. The opportunities which must be given to the accused are limited to those that assist or may assist him in the preparation of his defence.[180] As with all the other rights guaranteed in paragraph three, Article 6(3)(b) must be interpreted in the light of the general requirement of a fair trial within the meaning of Article 6(1) ECHR.

It is clear that in assessing whether the accused had adequate time and opportunity to prepare his defence, the particular circumstances of each case must consistently be taken into account. It is not surprising, therefore, that the ECtHR has not formulated too many general principles for the application of Article 6(3)(b) ECHR to rely on. However, it has at least stated that the accused must be given the opportunity to arrange his defence in a convenient manner and without limiting his ability to put forward all the arguments in his defence before the court and thus influence the outcome of the proceedings. The opportunities that anyone charged with a criminal offence could avail themselves of include the opportunity to learn the results of the investigation to date in order to prepare their defence.[181] Lack of time or opportunity to prepare a defence at one stage of the proceedings can be remedied if the defence is given such an opportunity at a later stage (*Serves v. France*[182]).[183]

176 *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment 25 March 1999.
177 *Mattoccia v. Italy*, Application no. 23969/94, Judgment 25 July 2000.
178 *Sadak and Others v. Turkey (Application No. 1)*, Application no. 29900/96, Judgment 17 July 2001.
179 Kmec et al., 2012, pp. 795–797.
180 *Mayzit v. Russia*, Application no. 63378/00, Judgment 20 January 2005.
181 *Galstyan v. Armenia*, Application no. 26986/03, Judgment 15 November 2007.
182 *Serves v. France*, Application no. 20225/92, Judgment 20 October 1997.
183 For more details see Kmec et al., 2012, pp. 803–810.

4.2.3. Right to Defend in Person or Through Legal Assistance

As the ECtHR states, while it confers on everyone charged with a criminal offence the right to 'defend himself in person or through legal assistance …', Article 6 para. 3 (c) does not specify the manner of exercising this right.[184] It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.[185] In this respect, it must be remembered that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.[186]

Article 6(3)(c) essentially guarantees a person accused of a criminal offence three rights:[187] to defend himself in person, to defend himself through legal aid of his own choosing or, under certain conditions, to be granted legal aid free of charge.[188] It is up to the accused to decide whether to avail himself of the possibility of having a lawyer or to defend himself. However, if the accused does not wish to use the assistance of a lawyer and voluntarily decides to defend himself, he must also take proper care of his rights himself.[189] The ECtHR remarks:

> 'However, the decision to allow an accused to defend himself or herself in person or to assign him or her a lawyer does still fall within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.'[190]

If the accused defends himself, the Convention does not give the accused an unlimited right to use any arguments in his defence.[191] It would be beyond the concept of the rights of the accused to hold that they cannot be prosecuted if, in the exercise of those rights, they deliberately make false accusations of criminal conduct against witnesses or other persons involved in the criminal proceedings.[192]

The accused has the right to choose a defence counsel only if he has the means to pay for one.[193] It is also important that the accused cannot, in principle, be deprived of the right to defend himself with the assistance of a lawyer on the sole ground that he is

184 *Imbrioscia v. Switzerland*, Application no. 13972/88, Judgment 24 November 1993.
185 *Quaranta v. Switzerland*, Application no. 12744/87, Judgment 24 May 1991.
186 *Artico v. Italy,* Application no. 6694/74, Judgment 13 May 1980.
187 Kmec et al., 2012, pp. 803–810.
188 *Pakelli v. Germany*, Application no. 8398/78, Judgment 25 April 1983. Goss is very critical of the current case law of the ECtHR – see Goss, 2023.
189 *Melin v. France*, Application no. 12914/87, Judgment 22 June 1993.
190 *Correia de Matos v. Portugal*, Application no. 48188/99, Judgment 15 November 2001.
191 Kmec et al., 2012, pp. 803–810.
192 *Brandstetter v. Austria*, Application no. 11170/84, Judgment 28 August 1991.
193 Kmec et al., 2012, pp. 803–810.

unwilling to attend criminal proceedings.[194] With regard to free legal aid, the ECtHR states that an accused who does not wish to defend himself must be able to obtain legal aid of his own choosing; if he does not have sufficient means to pay for such aid (the accused's indigence), he is entitled under the Convention to have it provided free of charge if the interests of justice so require.[195] Whether the interests of justice so require is a question to be assessed in the light of the particular circumstances of each individual case. Among the criteria to be taken into account, the ECtHR has included, in particular, the gravity of the offence allegedly committed by the accused and the sanction he faces for its commission; the ability of the accused to defend himself, having regard to his individual circumstances and the nature of the proceedings in question; and the complexity of the case and the issues involved.[196] The competent authorities should duly inform the accused of the possibility of applying for free legal aid and the conditions (material and formal) for its granting.[197] An important part of the right is the right of the accused to communicate with his lawyer without the presence of third parties.[198]

As regards the possibility of waiving this right, the Court considers that neither the letter nor the spirit of Article 6 of the Convention prevents a person from expressly or tacitly waiving his right to the guarantees of a fair trial. However, such a waiver must be unequivocal and must be accompanied by minimum guarantees appropriate to its meaning.[199] Any vulnerability of the accused person must also be taken into account.[200]

4.2.3. Right to Question Witnesses

Article 6(3)(d) of the Convention provides that everyone charged with a criminal offence has 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. The term 'witness' has an autonomous meaning in the case law of the ECtHR, which may differ from the meaning it has in the legal systems of the Contracting Parties.[201] The right to examine a witness is not strictly understood by the ECtHR to mean that the accused should be able to conduct the examination of the witness himself, as seen in the adversarial process of the *common law* system; it is fully sufficient if the accused is given the opportunity to comment on the witness's statement and is given the opportunity to ask questions of the witness.[202] This is, in principle, also allowed by procedural rules based on the inquisitorial

194 *Krombach v. France*, Application no. 29731/96, Judgment 13 February 2001.
195 *Pakelli v. Germany*, Application no. 8398/78, Judgment 25 April 1983.
196 *Gutfreund v. France*, Application no. 45681/99, Judgment 25 April 2002.
197 *Raykov v. Bulgaria*, Application no. 35185/03, Judgment 22 October 2009.
198 *S. v. Switzerland*, nos. 12629/89 and 13965/88, Judgment 28 November 1991.
199 Kmec et al., 2012, pp. 803–810.
200 *Borotyuk v. Ukraine*, Application no. 33579/04, Judgment 16 December 2010.
201 Kmec et al., 2012, pp. 811–814.
202 Kmec et al., 2012, pp. 811–814.

principle. However, Article 6(3)(c) ECHR does not give the accused an unfettered right to ask any question of the witness; national courts are entitled to exercise some control in this regard.[203]

Article 6(3)(d) ECHR contains two fundamental rights. First, the right to 'examine or have examined witnesses against oneself', and second, the right to 'obtain the attendance and examination of witnesses in one's favour'. The principles governing the interpretation and application of these rights are different; while the refusal of a defence application to examine a witness is not usually a ground for finding a violation of Article 6(3)(d) ECHR, the fact that a conviction is based on the testimony of a witness whom the defence has not had the opportunity to examine is usually found to be in breach of the Convention.[204]

The ECtHR recognises that it is primarily for national courts to decide whether it is necessary or appropriate to call a witness.[205] Article 6(3)(d) ECHR does not require the summoning and examination of every witness on behalf of the accused.[206] If the court decides not to grant the accused's request to examine a witness or witnesses, it should also give proper reasons for its refusal. The accused must always properly request the examination of witnesses and explain why it is important that these witnesses be examined (their examination must be necessary to establish the objective truth).[207]

With regard to the right to question witnesses against oneself, the ECtHR has traditionally held that limiting the rights of the defence in a manner incompatible with Art. 6 occurs in particular where a conviction is based 'solely or to a decisive extent'.[208] on the testimony of a witness whom the accused had no opportunity to interview or have interviewed at the investigation stage or at the trial.[209] The ECtHR certainly does not follow a formalistic approach and does not consider any lack of opportunity to question a witness whose testimony has been adduced as evidence in court proceedings to be a violation of the right to examine a witness. Rather, it looks at the matter in a practical manner in that it always examines the relevance of the evidence at issue to the conviction of the accused.[210]

Where an anonymous witness is part of the proceedings, the ECtHR examines whether the use of anonymous testimony has respected the requirements of Article 6(1) in conjunction with Article 6(3)(d) ECHR, in particular in the light of the following criteria: the reasons for concealing the identity of the witness; the relevance of the

203 *Judge v. the United Kingdom*, Application no. 35863/10, Judgment 8 February 2011.
204 Kmec et al., 2012, pp. 811–820.
205 *Vidal v. Belgium*, Application no. 12351/86, Judgment 22 April 1992.
206 *Tarău v. Romania*, Application no. 3584/02, Judgment 24 February 2009.
207 *Perna v. Italy*, Application no. 48898/99, Judgment 6 May 2003.
208 For an interpretation of this concept, see *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, Judgment 15 December 2011.
209 *Balšán v. Czech Republic,* Application no. 1993/02, Judgment 18 October 2006.
210 Kmec et al., 2012, pp. 811–820.

evidence to the conviction; and compensation for the difficulties of the defence.[211] The ECtHR generally applies these criteria cumulatively.[212]

4.2.4. Right to the Assistance of an Interpreter

The last of the rights provided for in Article 6(3) is the right to the free assistance of an interpreter if the accused does not understand or speak the language used in court. Given that the aim of Article 6(3)(e) of the Convention is to prevent any inequality between an accused who does not speak and understand the language used in the proceedings before the court and an accused who does speak and understand that language, this provision constitutes a special rule in relation to the general prohibition of discrimination in the exercise of the right to a fair trial within the meaning of Article 14 read in conjunction with Article 6(1).[213]

The ECtHR very succinctly defined the nature and scope of this right, for example, in its decision *Kamasinski v Austria*:

> 'The right, stated in para. 3 (e) of Article 6, to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Para. 3 (e) signifies that a person 'charged with a criminal offence' who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial'.[214]

It further added that para. 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.[215]

211 *Krasniki v. Czech Republic*, Application no. 51277/99, Judgment 28 February 2006.
212 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989 and Kmec et al., 2012, pp. 824–828.
213 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989 and Kmec et al., 2012, pp. 824–828.
214 See also *Luedicke, Belkacem and Koç v Germany,* Application nos. 6210/73; 6877/75; 7132/75, Judgment 28 November 1978.
215 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989.

5. Conclusion

The right to a fair trial is undoubtedly one of the key rights and concepts associated with a democratic rule of law and a society based on respect for and the protection of rights and freedoms. As is clear from the above, the interpretation and application of this right is not straightforward. A number of concepts have to be interpreted autonomously, regardless of their designation and regulation in national legal systems. This is the only way to guarantee the equal application of this right in all Contracting States without distinction and the same guarantee of protection of this right. The application of the right to a fair trial is also made more difficult by the fact that it is made up of several sub-rights, some of which are more general in nature, others more specific, some of which are expressly enshrined, others of which have been established by case law. This 'open' concept and conception of this right is undoubtedly to be welcomed, as it allows it to be applied appropriately and to reflect changes in society.

As has been shown above, the ECtHR is of key importance in both the interpretation and enforcement of this right in the practice of the Contracting States. Its jurisprudence in this respect has been developing for decades, although of course it has not escaped problematic aspects, contradictions and also, of course, a certain evolution over time and in response to societal change. In conclusion, it should be stressed that what is important is not only the fact that a given right is legally established and recognised, but above all the fact that it is actually implemented in practice and its observance (and enforcement) guaranteed. Only then does it fulfil its function.

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