

# Human rights and criminal procedure

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The case law of the European Court of Human Rights

*Jeremy McBride*



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# **Human rights and criminal procedure**

**The case law of the European Court of Human Rights**

**Jeremy McBride**

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*About the author:* Barrister, Monckton Chambers, London; Visiting Professor, Central European University; member of the Scientific Committee of the European Union's Fundamental Rights Agency; co-founder and Chair of INTERRIGHTS (the International Centre for the Legal Protection of Human Rights); and Editor, Butterworths Human Rights Cases

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## Introduction

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

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

The relevance of the European Convention to the interpretation and application of Codes of Criminal Procedure and comparable or related legislation arises both from provisions in the former

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

that explicitly set out requirements with respect to the operation of the criminal justice system and from many others that give rise to a range of implicit requirements that will also need to be taken into account.

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

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

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

Article 1 of the Europe Convention to secure the rights and freedoms set out in it is properly fulfilled.

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

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

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

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

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

The main elements of the requirements of the European Convention regarding the criminal process are outlined in the following paragraphs to give an overview of what they entail. It is important to note that, while the criminal process follows a sequence of stages, it is possible for aspects of many of the rights and freedoms

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

under the European Convention to be engaged in more than one of them and the application of the requirements to which they give rise cannot, therefore, be rigidly compartmentalised.

The duties governing a criminal investigation – particularly as regards its thoroughness, effectiveness and independence – have arisen in the context of allegations of unlawful killing and ill-treatment contrary to Article 3 but the standards established are applicable to alleged offences in general, not least because their commission can affect many substantive rights under the European Convention and the failure to deal with them appropriately can result in the violation of the right to an effective remedy under Article 13.

The right to liberty and security under Article 5 establishes a strong presumption in favour of suspected offenders remaining free. This imposes important obligations as regards the initial apprehension and custody of such persons and the use and duration thereafter of detention on remand. The need for reasonable suspicion is a continuing requirement but is not in itself sufficient, with the European Court being concerned especially about the exercise of power that is arbitrary and the need for continued detention being for admissible reasons and objectively substantiated. Furthermore, the overall length of detention pending trial must be closely scrutinised, with particular implications for the diligence in the processing of a case.

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

Although the assistance of a lawyer is a potentially key element of the ability of someone to defend him or herself in the actual trial, the potential for the interests of the defence to be prejudiced at a much earlier stage of proceedings has led the European Court to find that such assistance may be needed even during the initial interrogation. Wherever the right to be assisted by a lawyer arises, there is a need to ensure that the possibility of having access to one is unimpeded and can take place in a manner allowing advice

to be given in confidence. Furthermore, the right to assistance may entail a duty for the state to secure and pay for the services of a lawyer where this cannot be afforded by the person concerned. This will be especially so where the competence of the accused and/or the consequences of conviction are such that the provision of legal assistance in this manner is in the interests of justice. However, the right to legal assistance – whether or not provided by the state – does not mean that it cannot be regulated, particularly where prejudice to the proceedings could result.

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

The last consideration – fairness – will inform the evaluation of many aspects of a trial and (if one is held) an appeal. Although there are particular standards concerning matters such as the adequacy of time to prepare one's defence and the summoning and cross-examination of witnesses, the case law demonstrates that the actual impact of a failure to observe them in a given instance will be the principal concern of the European Court. However, that court has the advantage of hindsight in making this assessment, whereas assumptions that a certain ruling will not be prejudicial might not be so wisely made by a court where the proceedings have still to run their course.

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

In any prosecution the presumption of innocence puts the burden of proof on the prosecution and this means that an accused cannot be compelled to incriminate him or herself and that there must be evidence to substantiate a conviction. At the same time



the drawing of presumptions from certain circumstances and a requirement that an accused explain a particular situation will not necessarily be objectionable so long as certain safeguards exist. However, the presumption of innocence also has implications for statements by officials before trial, the conduct of the judge in the course of it and the treatment of someone after an acquittal or discontinuance of proceedings.

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

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

All these issues are seen in the various extracts from the rulings of the European Court and the former European Commission. The extracts have been chosen to illustrate the different facets of the requirements of the European Convention concerning the various issues relevant to the conduct of criminal proceedings. Space allowed only limited extracts to be chosen and as a result references to the case law, parts of sentences and even paragraphs have often been omitted. This has been done in a manner which hopefully gives a sense of the essential reasoning and the specific context of the ruling while at the same time endeavouring not to misrepresent the stance of the European Court or the former European Commission.

The full text of all the rulings from which the extracts have been derived can be found on the HUDOC database of the European Court of Human Rights (<http://hudoc.echr.coe.int/>), generally in both English and French but in some instances only in one of these languages.

The extracts are from rulings up to 31 March 2009.

## Criminal charge

☰ *Ezeh and Connors v. the United Kingdom* [GC], 39665/98 and 40086/98, 9 October 2003

82. The Court notes that it remains undisputed that the starting-point, for the assessment of the applicability of the criminal aspect of Article 6 of the Convention to the present proceedings, are the criteria outlined in *Engel and others* (cited above, pp. 34-35, §§ 82-83):

“82. ...

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

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

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

83. It is on the basis of these criteria that the Court will ascertain whether some or all of the applicants were the

subject of a 'criminal charge' within the meaning of Article 6 §1.

..."

86. In addition, it is the Court's established jurisprudence that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere ... This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge ...

90. The offences with which the applicants were charged were classified by domestic law as disciplinary: paragraphs (1) and (17) of Rule 47 of the Prison Rules state that the relevant conduct on the part of a prisoner shall be "an offence against discipline" ...

Thus ... according to national law the adjudication of such offences was treated as a disciplinary matter and was designed to maintain order within the confines of the prison. The fact ... that a governor's findings would not form part of the applicants' criminal record is simply a natural consequence of the disciplinary classification of the offence.

91. However, the indications so afforded by the national law have only a formal and relative value; the "very nature of the offence is a factor of greater import" (see *Engel and others* ...) ....

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

101. ... misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that "some matters may be more serious than others", that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the Rules might also amount to an offence under the criminal law so that, theoretically at least, there was

nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.

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

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

104. Secondly ... the charge against the first applicant corresponded to an offence in the ordinary criminal law ... It is also clear that the charge of assault against the second applicant is an offence under the criminal law as well as under the Prison Rules ...

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

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

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

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

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

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

125. This being so, the mere fact ... that at the time of the governor's decision the applicants were prisoners serving a lawfully imposed prison sentence does not, in the view of the Court, serve to distinguish their case from that of civilians or military personnel at liberty. It is, moreover, for this reason that the question of the procedural protections to be accorded to prison adjudication proceedings is one properly considered under Article 6 and not, as the Government suggest, under the provisions of Article 5 of the Convention ...

126. The Court observes that in *Engel and others* ... it found as follows:

“In a society subscribing to the rule of law, there belong to the ‘criminal’ sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.”

Accordingly, given the deprivations of liberty liable to be and actually imposed on the present applicants, there is a presumption that the charges against them were criminal within the meaning of Article 6, a presumption which could be rebutted entirely exceptionally, and only if those deprivations of liberty could not be considered “appreciably detrimental” given their nature, duration or manner of execution ...

128. In the present case, it is observed that the maximum number of additional days which could be awarded to each applicant by the governor was 42 for each offence (Rule 50 of the Prison Rules). The first applicant was awarded 40 additional days and this was to be his twenty-second offence against discipline and his seventh offence involving violent threats. The second applicant was awarded 7 additional days' detention and this was to be his thirty-seventh offence against discipline. The awards of 40 and 7 additional days constituted the equivalent, in duration, of sentences handed down by a domestic court of approximately 11 and 2 weeks' imprisonment, respectively, given the provisions of section 33 (1) of the 1991 Act ....

The Court also observes that ... nothing was submitted to the Grand Chamber, to suggest that awards of additional days would be served other than in prison and under the same prison regime

as would apply until the normal release date set by section 33 of the 1991 Act.

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

The Court notes that the maximum penalty that could have been awarded against Mr Engel and the actual penalty imposed on him – 2 days' strict arrest in both respects – was found to be of too short a duration to belong to the criminal sphere. However, it observes that, in any event, even the lowest penalty imposed in the present case was substantially greater than that in Mr Engel's case ...

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

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

48. As regards the first of the Engel criteria – the classification of the proceedings under domestic law – the Court notes that the facts alleged against the applicant amounted to submission by him of an untrue lustration declaration in which he stated that he had not co-operated with the State's security services. This did not fall within the ambit of Polish criminal law but of the Lustration Act. It appears that neither the domestic law nor the established judicial interpretation consider the Lustration Act as criminal law; however, the Warsaw Court of Appeal assumed, at least on some occasions, that it is a "repression-related proceedings" and must be considered as an "other law providing for criminal liability" ....

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

subject to lustration as an “accused”, and does not use the term “charge” ....

50. The Court also notes that the organisation and the course of lustration proceedings, as governed by the Act, are based on the model of a Polish criminal trial and that the rules of the Code of Criminal Procedure are directly applicable to lustration proceedings. Lustration proceedings are conducted before a lustration court, which consists of appeal and regional court judges delegated from among judges sitting in the Criminal Divisions of those courts. The Act provides for an appeal against the first-instance judgment and a cassation appeal to the Criminal Division of the Supreme Court. The conduct of both the appellate and cassation phase, and the reopening of the proceedings, are governed by the relevant provisions of the Code of Criminal Procedure ...

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

52. The Court reiterates that the second criterion stated above – the very nature of the offence, considered also in relation to the nature of the corresponding penalty – represents a factor of appreciation of greater weight. In this regard the Court finds that the misconduct committed by the applicant consisted of his having lied in a declaration which he had a statutory obligation to submit. The Court first notes that an obligation to submit a declaration is rather a common one, embracing for example declarations of means submitted by members of parliament and many other public officials and tax returns obligatory for all taxpayers. Secondly, a breach of the obligation to state the truth on such occasions is regarded as an offence under the domestic law and normally leads to sanctions, including those of a criminal nature. The Court considers that the offence of making an untrue statement in a lustration declaration is very similar to the above-mentioned offences. Moreover, according to the ordinary meaning of the terms, it is analogous to the offence of perjury, which, outside the lustration context, would normally have led to prosecution under the criminal-law provisions.

53. The Court also notes that the legal provision infringed by the applicant is not directed at a small group of individuals possessing a special status – in the manner, for example, of disciplinary law. It is directed at a vast group of citizens, born before May 1972, who not only hold many types of public functions, but also wish to exercise professions such as those of barrister, public servant, judge and prosecutor, or intend to stand for presidential or parliamentary election. In this context the Court finds it necessary

to stress that the subject of proceedings before the lustration court is the establishment of the truthfulness of the lustration declaration. Contrary to its title, the law on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons exercising public functions is not about scrutinising the past of those persons, and the historical findings relating to past collaboration with the communist-era security services remain in the background of the proceedings. The lustration court decides whether the person subject to lustration violated the law by submitting a false declaration. If such a finding is made, the statutory sanctions are imposed. Thus, the lustration procedure in Poland is not aimed at punishing acts committed during the communist regime ... In the light of the above, the Court considers that the offence in question is not devoid of purely criminal characteristics.

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

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



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

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

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

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

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

It remains to be determined whether the impugned decisions concerned the “determination” of any such charge. In this connection, the Court has previously attached weight to the question whether the purpose of the measure was the conviction or acquittal of the applicant and whether the impugned measure had any implications for the applicant’s criminal record ... For the Court, these are relevant considerations which also apply in the present case.

The Court notes that the attachment order was a provisional measure taken in the context of criminal investigations and primarily aimed at safeguarding claims which might subsequently be brought by aggrieved third parties. If no such claims were forthcoming, the order could, furthermore, have safeguarded the subsequent possibility of forfeiture of the assets. Such forfeiture would, however, have to be determined in separate proceedings following a criminal conviction. There is no indication that the at-

tachment order as such had any impact on the applicant's criminal record. In these circumstances, the Court considers that the impugned decisions as such cannot be regarded as a "determination of a criminal charge" against the applicant within the meaning of Article 6 §§1 and 3 of the Convention.

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

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

30. The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria, sometimes referred to as the "*Engel* criteria" were most recently affirmed by the Grand Chamber in *Ezeh and Connors v. the United Kingdom* ...

32. The Court has considered whether its case-law supports a different approach in fiscal or tax cases ...

33. In *Janosevic v. Sweden* (no. 34619/97 ...), the Court ... proceeded squarely on the basis of the *Engel* criteria identified above. While reference was made to the severity of the actual and potential penalty (a surcharge amounting to 161 261 Swedish crowns (SEK), corresponding to EUR 17 284, was involved and there was no upper limit on the surcharges in this case), this was as a separate and additional ground for the criminal characterisation of the offence which had already been established on examination of the nature of the offence ...

35. The Grand Chamber agrees with the approach adopted in the *Janosevic* case, which gives a detailed analysis of the issues in a judgment on the merits after the benefit of hearing argument from the parties ... No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6.

36. Furthermore, the Court is not persuaded that the nature of tax surcharge proceedings is such that they fall, or should fall, outside the protection of Article 6. Arguments to that effect have also failed in the context of prison disciplinary and minor traffic offences ... While there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention. In this case the Court will therefore apply the *Engel* criteria as identified above.

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

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

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

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

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

It is undisputed that at least some of the acts had constituted the basis not only for the disqualification order but also for the criminal prosecution. In the end, the applicant was convicted in part on the book-keeping charges and was sentenced to fifteen days' imprisonment. The question is whether, as a result of the latter proceedings, the applicant could be said to have been "tried and punished again in criminal proceedings ... for an offence of which

he had already been finally .... convicted in accordance with the law and penal procedure of that State”.

From the outset the Court observes that the disqualification order was imposed at the end of a procedure conducted under the Bankruptcy Act which had predominantly civil-law features and which was not regarded as a “penal procedure of [the respondent] State ...

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

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

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

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

second set; whereas reasonableness of the sanction was a condition in the former context, it was not in the latter.

In the light of the above, the Court finds that the criminal proceedings brought against the applicant, which subsequently led to his conviction and sentence for book-keeping offences by the High Court on 11 September 2002, did not entail his being “tried or punished again ... for an offence for which he ha[d] already been finally ... convicted”, in breach of Article 4 §1 of Protocol No. 7.

*See also below, “Giving reasons for decision that suggest guilt” on page 149.*

# Investigation stage

## Obligations regarding investigation

### **Duty to conduct thorough and effective investigation**

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

89. ... no tests were carried out on the deceased's hands or clothing for gunpowder traces or why the weapon was not dusted for fingerprints ... these shortcomings must be considered particularly serious in view of the fact that the corpse was later handed over to villagers, thereby rendering it impossible to conduct any further analyses, including of the bullets lodged in the body. The only exhibits which were taken from the scene for further examination were the weapon and ammunition allegedly used by the deceased. However, whatever the merits of this initiative as an investigative measure at the time, it is to be noted that the public prosecutor issued his decision of non-jurisdiction without awaiting the findings of the ballistics experts ....

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

☞ *Ergi v. Turkey*, 23818/94, 28 July 1998

82. ... the obligation to protect the right to life under Article 2 ... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ... this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death ...

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

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

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

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

184. Furthermore, they handled the investigation with significant delays ...

☞ *Ramsahai and others v. the Netherlands* [GC], 53291/99, 15 May 2007

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

330. What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later ... Although, as already noted, there is no evi-

dence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation ...

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

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

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

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

347. The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next of kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures ...

348. The Court does not consider that Article 2 imposes a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.

349. The Chamber found that the applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in proceedings aimed at challenging the decision not to prosecute Officer Brons ...

353. Article 2 does not go so far as to require all proceedings following an inquiry into a violent death to be public ... the test is whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in prac-



tice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. It must be accepted in this connection that the degree of public scrutiny required may well vary from case to case.

**No obligation to be impartial**

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

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

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

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

☞ *Priebke v. Italy (dec.)*, 48799/99, 5 April 2001

1. ... Le requérant souligne en particulier les circonstances suivantes qui démontreraient, selon une démarche subjective, la prévention dont il aurait fait l'objet :

– que lors de l'audience du 10 mai 1996 I., représentant du parquet, aurait publiquement déclaré son adhésion à la résistance, montrant en même temps un mépris le plus total pour ce qui combattaient dans le champ adverse ...

b) ... la Cour rappelle d'emblée que les garanties d'indépendance et impartialité de l'article 6 de la Convention concernent uniquement les juridictions appelées à décider d'une accusation en matière pénale, et ne s'appliquent pas ... au représentant du parquet, ce dernier étant notamment l'une des parties d'une procédure judiciaire contradictoire. En tout état de cause, la Cour considère que les déclarations de I se bornaient à faire référence aux valeurs de la résistance contre le national-socialisme ...

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

105. Quant à l'allégation du requérant selon laquelle le parquet aurait systématiquement et volontairement communiqué à la presse des actes confidentiels, la Cour relève que l'intéressé n'a produit aucun élément objectif susceptible de mettre en cause la responsabilité des représentants du parquet ou d'amener à penser que ces derniers auraient manqué à leur devoir afin de nuire à l'image publique du requérant et du PSI.

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

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

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

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

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

☰ *Y.B. and others v. Turkey*, 48173/99 and 48319/99, 28 October 2004

49. Or, le contenu du communiqué de presse rédigé par la police et distribué à la presse désignait les requérants, sans nuance ni réserve, comme « membres de l'organisation illégale », à savoir le MLKP. De même, toujours selon le libellé de ce communiqué, « [il] a été établi que » les personnes interpellées ont commis plusieurs infractions dans différents lieux du département d'Izmir .... De l'avis de la Cour, ces deux remarques pouvaient être interprétées comme confirmant que, selon la police, les requérants avaient commis les infractions dont ils étaient accusés.

50. Prise dans son ensemble, l'attitude des autorités policières, dans la mesure où elle reflète une appréciation préalable des

**Statements to the media**

charges pouvant être retenues contre les requérants et fournit à la presse des moyens matériels permettant facilement de les identifier, ne se concilie pas avec le respect de la présomption d'innocence. La conférence de presse ainsi réalisée, d'une part, incitait le public à croire en la culpabilité des requérants et, de l'autre, préjudiciait de l'appréciation des faits par les juges compétents.

☰ *Khuzhin and others v. Russia*, 13470/02, 23 October 2008

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

96. As regards the contents of the show, the Court notes that all three prosecution officials described the acts imputed to the applicants as a "crime" which had been committed by them ... Their statements were not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicants but represented as an established fact, without any qualification or reservation, their involvement in the commission of the offences, without even mentioning that they denied it. In addition, the town prosecutor Mr Zinterekov referred to the applicants' criminal record, portraying them as hardened criminals, and made a claim that the commission of the "crime" had been the result of their "personal qualities" – "cruelty and meaningless brutality". In the closing statement he also mentioned that the only choice the trial court would have to make would be that of a sentence of an appropriate length, thus presenting the applicants' conviction as the only possible outcome of the judicial proceedings ... The Court considers that those statements by the public officials amounted to a declaration of the applicants' guilt and prejudged the assessment of the facts by the competent judicial authority. Given that those officials held high positions in the town and regional prosecuting authorities, they should have exercised particular caution in their choice of words for describing pending criminal proceedings against the applicants. However, having regard to the contents of their statements as outlined above, the Court finds that some of their statements could not but have encouraged the public to believe the applicants guilty before they had been proved guilty according to law. Accordingly, the

Court finds that there was a breach of the applicants' presumption of innocence.

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

**Criticism of officials**

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

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

59. Those accusations were of a serious nature and were made repeatedly. They were capable of insulting the public prosecutor, of affecting him in the performance of his duties and also, in the case of the letter sent to the General Prosecutor's Office, of damaging his reputation.

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

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

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

▣ *July and Sarl Libération v. France*, 20893/03, 14 February 2007

65. En l'espèce, la Cour constate que les requérants ont été condamnés pour avoir publié un article relatant le déroulement et le contenu d'une conférence de presse, organisée la veille de la publication de l'article incriminée, par des parties civiles critiques à l'égard d'une instruction pénale médiatique qui portait sur les conditions et les causes de la mort, dans des circonstances suspectes, d'un magistrat français en poste à Djibouti. Elle note égale-

ment que l'objet de cette conférence avait pour but de rendre publique une demande d'enquête de l'inspection générale des services judiciaires formulée le 13 mars 2000 par l'une des parties civiles – la veuve du défunt – et adressée au garde des Sceaux sur les conditions dans lesquelles l'information était menée ...

68. Ceci exposé, la Cour constate que, pour entrer en voie de condamnation, la cour d'appel de Versailles a considéré que deux passages de l'article litigieux publié portaient atteinte « à l'honneur et à la considération » des deux juges initialement en charge du dossier, en ce qu'ils leur imputaient d'avoir fait preuve de « *partialité* » lors de l'audition d'un témoin clé dans cette affaire et d'avoir mené l'instruction de manière « *rocambolique* », ces imputations étant jugées diffamatoires au sens de l'article 29, 30 et 31 de la loi du 29 juillet 1881 ...

70. Or, la Cour relève que les juges d'appel, pour écarter l'excuse de bonne foi, reprochèrent à la journaliste, d'une part, de ne « pas avoir voulu traiter le sujet dans le cadre d'une interview », faisant observer qu'elle avait choisi une « voie médiane » par souci de « facilité » et qu'elle aurait dû « préciser qu'elle se réservait d'offrir une tribune aux mis en cause » alors que – la Cour le souligne – il n'appartient pas aux juridictions nationales de se substituer à la presse pour dire quelle technique particulière de compte rendu les journalistes doivent adopter pour faire passer l'information, l'article 10 protégeant, outre la substance des idées et informations exprimées, leur mode d'expression ...

71. D'autre part, les juges d'appel estimèrent qu'en « choisissant, sur la forme, de relater en adoptant un style qui ne s'apparentait pas à une interview, la rédactrice ne pouvait ignorer que certaines parties de l'article pouvaient lui être imputées », alors que le fait d'exiger de manière générale que les journalistes se distancient systématiquement et formellement du contenu d'une citation qui pourrait insulter des tiers, les provoquer ou porter atteinte à leur honneur, ne se concilie pas avec le rôle de la presse d'informer sur des faits ou des opinions et des idées qui ont cours à un moment donné ... En cela, les motifs retenus par la cour d'appel de Versailles ne convainquent pas la Cour.

72. Cette cour considéra en outre que la « mise en cause particulièrement grave des magistrats instructeurs » obligeait la journaliste – et par là même les requérants – à prendre des précautions particulières et à faire preuve de la plus grande rigueur.

73. La Cour n'est pas davantage convaincue par ces motifs. En effet, elle considère que l'article litigieux est un compte rendu de la conférence de presse tenue le 13 mars 2000 dans une affaire qui était déjà médiatique et connue du public. Sur les mesures de pré-

caution prises, la Cour constate que l'article emploie le conditionnel à bon escient, et use à plusieurs reprises des guillemets afin d'éviter toute confusion dans l'esprit du public entre les auteurs des propos tenus et l'analyse du journal, citant à chaque fois les noms des intervenants à l'intention des lecteurs, de sorte qu'il ne saurait être soutenu, comme le fait la cour d'appel, que certains passages pouvaient être imputables à la journaliste, et donc aux requérants. En outre, l'article ne révèle pas d'animosité personnelle à l'égard des magistrats susmentionnés, comme l'ont reconnu les juridictions du fond.

74. Par ailleurs, les personnes en cause sont des magistrats. En conséquence, s'il n'est pas exact qu'ils s'exposent sciemment à un contrôle attentif de leurs faits et gestes exactement comme les hommes politiques et qu'ils devraient dès lors être traités sur un pied d'égalité avec ces derniers lorsqu'il s'agit de critiques de leur comportement ..., il n'en reste pas moins que les limites de la critique admissible sont plus larges pour des fonctionnaires agissant dans l'exercice de leurs fonctions officielles, comme en l'espèce, que pour les simples particuliers ... La Cour en déduit que les motifs retenus par la Cour de cassation pour rejeter le pourvoi des requérants ne sont ni pertinents ni suffisants, car ils se heurtent au principe précité. En effet, les personnes en cause, toutes deux fonctionnaires appartenant aux « institutions fondamentales de l'Etat », pouvaient faire, en tant que tels, l'objet de critiques personnelles dans des limites « admissibles », et non pas uniquement de façon théorique et générale.

75. Reste enfin le motif invoqué par la cour d'appel, relatif à la déformation des propos de l'un des intervenants à la conférence de presse quant à l'utilisation du qualificatif « rocambolesque », ce qui caractériserait l'absence de bonne foi des requérants. Si ce terme a bien été employé lors de la conférence, la Cour constate qu'il subsiste cependant un doute sur sa formulation précise, la cour d'appel estimant que l'auteur du propos « n'entendait pas [exprimer] une volonté non-équivoque de dénoncer la manière d'instruire de ses collègues ». La Cour relève surtout que cet adjectif, certes peu élogieux, même s'il est passé depuis longtemps dans le langage courant, était prêté par l'article à un des participants à la conférence de presse, et n'a pas été assumé personnellement par la journaliste.

76. En tout état de cause, la Cour estime que les requérants, en publiant l'article, n'ont même pas eu recours à une dose « d'exagération » ou une dose de « provocation » pourtant permise dans le cadre de l'exercice de la liberté journalistique dans une société démocratique, et n'ont donc pas dépassé les limites qui y sont attachées dont il est permis d'user. Elle ne voit pas en effet dans les

termes litigieux – qui sont rapportés – une expression « manifestement outrageante » à l'endroit des magistrats en cause..., en particulier en ce qui concerne le qualificatif « rocambolesque ». Selon elle, les motifs retenus sur ce point par le juge interne pour conclure à l'absence de bonne foi se concilient mal avec les principes relatifs au droit à la liberté d'expression et au rôle de « chien de garde » assumé par la presse ...

77. Eu égard à ce qui précède, et à la lumière du contexte de l'affaire dans lequel les propos litigieux s'inscrivaient, la condamnation des requérants pour diffamation ne saurait passer pour proportionnée, et donc pour « nécessaire dans une société démocratique » au sens de l'article 10 de la Convention. Partant, il y a eu violation de cette disposition.

## Apprehension and custody

### Legal basis

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

46. ... According to the Ombudsman, there had been no reason to fear that he would attempt to escape; nor had he been asked, prior to the measure, whether he would persist in his refusal to perform military service ... It thus follows, which was undisputed, that the applicant's arrest and detention during his transportation by the military police from the prison to the Pori barracks on 18 June 1992 was contrary to national law ...

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

☞ *Brogan and others v. the United Kingdom*, 11209/84, 11234/84, 11266/84 and 11386/84, 29 November 1998

53. ... The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 para. 1 (c) ... As the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 para. 1 ... does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the

concrete suspicions which, as the Court has found, grounded their arrest ... Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority.

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

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

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

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

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

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

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

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

*See also below, "Plausible basis" on page 39.*



**Requirement of reasonable suspicion**

*Definite proof not required*

☞ *Ferrari-Bravo v. Italy* (dec.), 9627/81, 14 March 1984, DR37, 15

3. ... the Commission stresses that there can be no question of regarding arrest or detention on remand as being justified only when the reality and nature of the offences charged have been proved, since this is the purpose of the preliminary investigations, which detention is intended to facilitate ...

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

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

*Plausible basis*

☞ *Fox, Campbell and Hartley v. the United Kingdom*, 12244/86, 12245/86 and 12383/86, 30 August 1990

32. ... having a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as “reasonable” will however depend upon all the circumstances ...

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

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

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

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

51. ... Article 5 para. 1 (c) ... of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism .... It

follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity.

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

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

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

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

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

109. However, in addition to its factual side, the existence of a "reasonable suspicion" within the meaning of Article 5 §1 (c) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred. ...

115. ... had the applicant's detention been based solely on the suspicion concerning his alleged involvement in the offence of trading in children, the legality of such detention, considering the existing contradictions in the interpretation of the domestic law, would have been doubtful. However, it was also grounded upon the suspicion that he had committed an offence of inciting per-

sons, who had participated in the adoption proceedings, to give false evidence with intent to mislead the courts.

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

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

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

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

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

76. ... Had the applicant indeed committed the crime and had he wanted to pressure the victim or witnesses or destroy evidence, he would have had plenty of time to do so before December 2005, and no evidence was submitted to the Court of any such actions

on the part of the applicant. There was, therefore, no urgency for an arrest in order to stop an ongoing criminal activity and the 24 investigators assigned to the case could have used any extra time to verify whether the complaints were *prima facie* well-founded. Instead of such verification, the applicant was arrested on the day when the investigation was initiated ...

77. More disturbingly, it follows from the statements of the two alleged victims that one of the complaints was fabricated and the investigating authority did not verify with him whether he had indeed made that complaint, while the other was the result of the direct influence of officer O., the same person who registered the first complaint against the applicant ... This renders both complaints irrelevant for the purposes of determining the existence of a reasonable suspicion that the applicant had committed a crime, while no other reason for his arrest was cited ...

78. The Court is aware of the possibility of a victim retracting his or her statements because of a change of heart or even coercion. However, whether or not a victim signed a complaint can be verified by objective forensic evidence and there is nothing in the file to suggest that the person had lied to the domestic court about not having signed the complaint. Indeed, if it were shown that the victim had actually signed the complaint but later retracted it under duress, the domestic court would have had serious reasons for refusing the applicant's request for release. No such concerns were expressed by the court ...

79. All of the above, together with the inclusion of the applicant's name in the list of suspects without cause, established in respect of his first arrest ..., creates a very troubling impression that the applicant was deliberately targeted.

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

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

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

60. ... the Court observes that the applicant's actions consisted of the gathering of signatures calling for the resignation of the Minister of Justice and displaying two posters calling him a "top idiot". When examining the criminal charges against the applicant the Supreme Court of Cassation specifically found that these actions had been entirely peaceful, had not obstructed any passers-by and had been hardly likely to provoke others to vio-

lence. On this basis, it concluded that they did not amount to the constituent elements of the offence of hooliganism and that in convicting the applicant the Pleven District Court had “failed to give any arguments” but had merely made blanket statements in this respect ... Nor did the orders for the applicant’s arrest under section 70 (1) of the 1997 Ministry of Internal Affairs Act and for his detention under Article 152a §3 of the 1974 Code of Criminal Procedure – which were not reviewed by a court – contain anything which may be taken to suggest that the authorities could reasonably believe that the conduct in which he had engaged constituted hooliganism, whose elements were comprehensively laid down in the Supreme Court’s binding interpretative decision of 1974 ...

**Circumstances and use of force**

*In front of family members*

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

92. The domestic courts held that Mrs Murray was genuinely and honestly suspected of the commission of a terrorist-linked crime ... The Court accepts that there was in principle a need both for powers of the kind granted by section 14 of the 1978 Act and, in the particular case, to enter and search the home of the Murray family in order to arrest Mrs Murray.

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

These are legitimate considerations which go to explain and justify the manner in which the entry into and search of the applicants’ home were carried out. The Court does not find that, in relation to any of the applicants, the means employed by the authorities in this regard were disproportionate to the aim pursued.

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

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

34. La Cour constate que le requérant ne se plaint pas d’une violence physique, mais des traitements inhumains et dégradants qui consistaient à l’obliger de rester assis sur une chaise pendant

trois jours, l'injurier et l'exposer en public menotté sur son lieu de travail, dans le quartier où il habite et devant sa famille ...

46. Sans antécédent faisant craindre un risque pour la sécurité, il n'y a par ailleurs aucun élément dans le dossier montrant que le requérant présentait un danger pour lui-même et pour autrui, qu'il avait commis par le passé des actes délictueux ainsi que des actes d'autodestruction ou de violence envers d'autres personnes. La Cour attache de l'importance, en particulier, au fait que, dans ses observations, le Gouvernement ne présente aucune explication justifiant la nécessité du port des menottes.

47. La Cour ne voit aucune circonstance permettant d'admettre que l'exposition du requérant menotté lors de son arrestation et des perquisitions était nécessaire. Par conséquent, elle estime que, dans le contexte particulier de l'affaire, l'exposition du requérant menotté avait pour but de créer chez lui des sentiments de peur, d'angoisse et d'infériorité propres à l'humilier, à l'avilir et à briser éventuellement sa résistance morale.

#### *Use of force*

##### **Excessive**

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

25. En l'espèce il n'est pas controversé que les blessures constatées sur le corps de la requérante lors de l'examen médico-légal du 17 août 1995 ... Ce n'est toutefois pas le cas pour ce qui est de savoir quand et comment celles-ci auraient pu être infligées.

26. Sur ce point, le Gouvernement tente d'expliquer la situation par l'altercation qu'il y aurait eu au moment de l'arrestation de la requérante et, s'appuyant sur le procès-verbal y afférent, il prétend qu'à ce moment le recours à la force physique était rendu strictement nécessaire par le comportement même de l'intéressée, au sens de la jurisprudence de la Cour ...

Or pareil argument ne tire guère à conséquence, dans la mesure où il n'est pas appuyé par des éléments médicaux, que les autorités se devaient d'obtenir immédiatement après l'arrestation litigieuse, si celle-ci s'est vraiment déroulée comme le Gouvernement l'affirme.

27. La Cour n'a d'ailleurs pas à s'attarder davantage sur cette question ... Car, en tout état de cause, le nombre et la gravité des blessures – relevées sur la requérante douze jours après l'arrestation – paraissent trop importants pour correspondre à une force proportionnée à laquelle huit policiers dussent recourir pour appréhender trois femmes, qui assurément ne constituaient pour eux aucune menace particulière ...

En bref, la Cour n'aperçoit aucun élément plausible qui puisse soustraire l'Etat défendeur de ses responsabilités au regard de l'ar-

ticle 3, à raison des blessures subies par M<sup>me</sup> Dalan aux mains de la police, quel que soit le moment où celles-ci lui auraient pu être infligées.

☰ *Nachova and others v. Bulgaria* [GC], 43577/98 and 43579/98, 6 July 2005

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

106. ... Neither man was armed or represented a danger to the arresting officers or third parties, a fact of which the arresting officers must have been aware on the basis of the information available to them. In any event, upon encountering the men in the village of Lesura, the officers, or at least Major G., observed that they were unarmed and not showing any signs of threatening behaviour ...

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

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

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

41. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the strip search of

the applicant during the police intervention at his home constituted an unjustified treatment of sufficient severity to be characterised as “degrading” within the meaning of Article 3 of the Convention.

▣ *Fabriye Çalıřkan v. Turkey*, 40516/98, 2 October 2007

42. En l'espèce, que pareil traitement ait été consécutif ou non à une agression verbale ou à une gifle de la part de la requérante n'est guère décisif ... Ce qui importe est de rechercher si la force utilisée par le commissaire S.Ç. était nécessaire et proportionnée, étant entendu qu'à cet égard la Cour attache une importance particulière aux blessures qui ont été occasionnées et aux circonstances dans lesquelles elles l'ont été ...

43. Dans ce contexte, la Cour est prête à supposer que le commissaire S.Ç. ait pu agir pour maîtriser la requérante, prétendument surexcitée au moment des faits. Ceci dit, il n'en demeure pas moins qu'il s'agissait bien d'une femme, s'étant retrouvée seule dans un commissariat, où elle avait été convoquée pour un simple problème associatif. Aussi la Cour éprouve-t-elle des difficultés à comprendre les circonstances exactes qui auraient pu la pousser à en venir aux mains avec un commissaire, rien dans le dossier n'indiquant qu'elle puisse être à ce point prédisposée à la violence.

Quoi qu'il en soit, même sous l'emprise d'un ressentiment du fait d'avoir été giflé, un commissaire, entouré de ses subordonnés, aurait dû réagir avec plus de retenue et par des moyens certainement autres que d'infliger à la requérante une incapacité temporaire de cinq jours.

Il s'agit là d'un traitement avilissant, propre à inspirer des sentiments de peur et de vulnérabilité disproportionnés et qui ne pouvait, par conséquent, correspondre à un usage de la force rendu strictement nécessaire ...

44. Il y a donc eu en l'espèce violation substantielle de l'article 3 de la Convention.

#### Not excessive

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

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



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

61. A supposer même que la lutte entre P. et les deux agents, ainsi que le voisin qui est venu à l'aide, ait aggravé les conditions de santé de P., la Cour estime que, pour engager la responsabilité internationale de l'Etat défendeur, il fallait en plus que les agents aient raisonnablement pu se rendre compte que P. se trouvait dans un état de vulnérabilité exigeant un degré de précaution élevé dans le choix des techniques d'arrestation « usuelles » ...

62. Or, en l'espèce, la Cour s'étonne que les deux agents eux-mêmes n'aient pas été interrogés sur ce point. En même temps, il ressort clairement de l'expertise médico-légale de l'Université de Zurich du 21 janvier 1997 qu'il était impossible pour les deux agents de se rendre compte que la vulnérabilité de P. était telle que le moindre impact extérieur sur son corps pouvait provoquer des complications fatales.

63. Compte tenu de ce qui précède, la Cour, estimant qu'il n'existe aucun motif de remettre en cause les conclusions des experts, dit que l'allégation selon laquelle le décès de P. était dû à l'usage de la force par les agents de police n'est pas fondée.

**Duty to give reasons**

*Sufficient information*

☞ *Fox, Campbell and Hartley v. the United Kingdom*, 12244/86, 12245/86 and 12383/86, 30 August 1990

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

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

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

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

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

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

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

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

*Done promptly*

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

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

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

78. Mrs Murray was arrested at her home at 7 a.m. and interviewed at the Army centre between 8.20 a.m. and 9.35 a.m. on the same day .... In the context of the present case this interval cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 para. 2 ...

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

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

**First appearance  
before a judge**

*Meaning of “judge”*

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

49. ... Before an “officer” can be said to exercise “judicial power” within the meaning of [Article 5 (3)] ..., he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty ...

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

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

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

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

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

*Period involved*

### Excessive

▣ *Brogan and others v. the United Kingdom*, 11209/84, 11234/84, 11266/84 and 11386/84, 29 November 1988

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

62. As indicated above ..., the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden ..., falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 .... To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 ... a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 ...

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

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

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

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

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

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

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

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

83. In contrast, however, the Court considers that in this case insufficient safeguards were available to the applicant, who was

detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

▮ *Harkmann v. Estonia*, 2192/03, 11 July 2006

38. ... the applicant – unlike his lawyer – chose not to appear before the County Court when the decision concerning his arrest was taken. This fact in itself does not give rise to an issue under Article 5 §3, as a requirement cannot be derived from the Convention to the effect that a person who is evading court proceedings should be present at the court hearing where authorisation for his or her arrest is dealt with ... However, the Court observes that the applicant had no chance to present the court with possible personal reasons militating against his detention after his actual arrest on 2 October 2002, despite the authorities' obligation under Article 5 §3 to give him a possibility to be heard.

39. The Court notes that the applicant was released after a hearing of his criminal case on 17 October 2002, that is before the lawfulness of his detention was examined. Until then, he had been kept in custody for fifteen days. The Court finds that such a period is incompatible with the requirement of “promptness” under Article 5 §3 ...

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

65. ... Article 5 §3 requires that an arrested individual be brought promptly before a judge or judicial officer, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. While promptness has to be assessed in each case according to its special features ..., the strict time constraint imposed by this requirement of Article 5 §3 leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision ...

66. ... the applicant was brought before a judge three days and twenty-three hours after his arrest ... In the circumstances, this does not appear prompt. He was arrested on charges of a minor and non-violent offence. He had already spent twenty-four hours in custody when the police proposed to the prosecutor in charge of the case to request the competent court to place the applicant in pre-trial detention. Exercising his powers ..., the prosecutor ordered that the applicant be detained for a further seventy-two hours, without giving any reasons why he considered it necessary, save for a stereotyped formula saying that there was a risk that he

might flee or re-offend. It does not seem that when thus prolonging the applicant's detention the prosecutor took appropriate steps to ensure his immediate appearance before a judge, as mandated by the provision cited above ... Instead, the matter was brought before the Pleven District Court at the last possible moment, when the seventy-two hours were about to expire ... The Court sees no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner ... This was particularly important in view of the dubious legal grounds for his deprivation of liberty.

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

#### Not excessive

☰ *Rigopoulos v. Spain*, 37388/97 (dec.), 12 January 1999

The Court notes ... that the applicant's detention lasted for sixteen days because the vessel under his command was boarded on the high seas of the Atlantic Ocean at a considerable distance – more than 5 500 km – from Spanish territory and that no less than sixteen days were necessary to reach the port of Las Palmas. On that point the applicant himself acknowledged that, owing to the resistance put up by certain members of the crew, the *Archangelos* could not set sail again until forty-three hours after it had been boarded. That delay cannot therefore be attributed to the Spanish authorities. Ultimately, it was all those circumstances which prevented the applicant from being brought before the judicial authority sooner. Having regard to the foregoing, the Court considers that it was therefore materially impossible to bring the applicant physically before the investigating judge any sooner. The Court notes on this point that once he had arrived at Las Palmas, the applicant was transferred to Madrid by air and that he was brought before the judicial authority on the following day. The Court considers unrealistic the applicant's suggestion that the Spanish authorities could have requested assistance from the British authorities to divert the *Archangelos* to Ascension Island, which is after all approximately 890 nautical miles (about 1 600 km) from where the vessel was boarded.

That being so, the Court considers that, having regard to the wholly exceptional circumstances of the instant case, the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said to have breached the requirement of promptness in paragraph 3 of Article 5.

*Hearing*

De Jong, Baljet and Van Den Brink v. the Netherlands, 8805/79, 8806/79 and 9242/81, 22 May 1984

51. .... The language of paragraph 3 ... (“shall be brought promptly before”), read in the light of its object and purpose, makes evident its inherent “procedural requirement”: the “judge” or judicial “officer” must actually hear the detained person and take the appropriate decision...

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

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

*Need for automatic examination of merits of decision*

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

43. In addition to being prompt, the judicial control of the detention must be automatic ... It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 §3, a safeguard distinct from that in Article 5 §4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court ... It might even defeat the purpose of the safeguard under Article 5 §3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny ... Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody ... Furthermore, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention ...

*Need for power of release*

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

48. ... the Court considers that the applicant’s appearance before the magistrate on 7 October 1994 was not capable of en-



sure compliance with Article 5 § 3 of the Convention since the magistrate had no power to order his release. It follows that there has been a breach of that provision.

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

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

48. The Court recalls that the applicant was arrested on 6 January 2001 at 10 p.m. on suspicion of having carried out a robbery of a petrol station. He was charged at 12.37 p.m. the next day. On 8 January 2001, at 10 a.m., the applicant made his first appearance in the magistrates' court which remanded him in custody. It is not in dispute that the magistrate had the competence to examine the lawfulness of the arrest and detention and whether there were reasonable grounds for suspicion and moreover that he had the power to order release if those requirements were not complied with. That without more provided satisfactory guarantees against abuse of power by the authorities and ensured compliance with the first limb of Article 5 §3 as being prompt, automatic and taking place before a duly empowered judicial officer.

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

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

**Duty to account for custody**

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

123. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allow-

ing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act ... What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

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

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

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

**Conditions and ill-treatment**

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

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

☰ *Elci and others v. Turkey*, 23145/93, 13 November 2003

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

646. ... the Court finds it established that the applicants ... suffered physical and mental violence at the hands of the gendarmerie during their detention in November and December 1993. Such ill-treatment caused them severe pain and suffering and was particularly serious and cruel, in violation of Article 3 of the Convention. It must therefore be regarded as constituting torture within the meaning of that article.

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

67. ... la Cour n'est pas convaincue par l'argumentation des requérants. Rappelant que les deux agents ont immédiatement appelé l'ambulance et placé P. en position latérale de sécurité, elle doute qu'on puisse raisonnablement attendre dans de telles situations que des fonctionnaires appartenant aux forces de l'ordre prennent d'autres mesures.

68. En outre, la Cour se rallie aux conclusions de l'expertise médico-légale ordonnée par le Tribunal fédéral, selon laquelle une réanimation, geste compliqué pour des non-spécialistes et présentant un taux de succès très limité, n'aurait selon toute probabilité pas empêché la mort de P. Il s'ensuit qu'on ne se trouve pas, en l'espèce, dans une situation où l'action positive de l'Etat aurait, d'un point de vue raisonnable, sans doute pallié un risque réel et immédiat de décès.

69. Compte tenu de ce qui précède, la Cour dit qu'il n'y pas eu manquement à l'obligation incombant aux agents de police de protéger la vie de P.

Dès lors, il n'y a pas eu violation de l'article 2 de la Convention à cet égard.

**Outside contact**

☰ *Sadak v. Turkey*, 25142/94 and 27099/95, 8 April 2004

39. Le requérant se plaint, sous l'angle de l'article 3 de la Convention, de sa détention de onze jours sans aucun contact avec l'extérieur lors de sa garde à vue.

45. ... La Cour n'exclut pas non plus la possibilité qu'une garde à vue d'une durée excessive en isolement total et qui se déroule

dans des conditions particulièrement difficiles pour le détenu constitue un traitement contraire à l'article 3.

46. En l'espèce, la Cour observe que le requérant ne se trouvait pas détenu en isolement sensoriel combiné à un isolement social. Il est vrai que lors de sa garde à vue, il n'a pu avoir des contacts avec l'extérieur, mais il en a eu avec le personnel travaillant dans les locaux de la détention et en grande partie avec les autres personnes gardées à vue. En outre, en l'absence de tout interrogatoire du requérant, cette détention s'est résumée en une attente prolongée avant qu'il ne soit traduit devant les magistrats. Cette période d'attente n'était pas excessivement longue au point d'affecter la personnalité du requérant.

47. Par conséquent, la Cour considère que la détention du requérant en garde à vue, à elle seule, n'a pas atteint le seuil minimum de gravité nécessaire pour constituer un traitement inhumain ou dégradant au sens de l'article 3. En conséquence, il n'y a pas eu violation de cette disposition de ce chef.

## Detention on remand

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

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

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

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

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

## Legal basis

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

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

66. With regard to the amnesty, the Court reiterates that the “lawfulness” of detention essentially means conformity with national law ...

67. The Government accepted that by virtue of the Amnesty Act the investigating officer should have stopped the proceedings against the applicant once he learned that the applicant held the Friendship of the Peoples Order. Although the Government claimed that the investigating officer first learned about that fact on 16 June 2000, they did not deny that the same investigating officer had himself entered the information about the award in the interview records of 2 November 1999 and 14 June 2000. The Court therefore finds that by 13 June 2000 the authorities did know, or could reasonably have been expected to know, that the criminal proceedings against the applicant should be stopped.

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

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

**Justification**

*Duty to consider whether required*

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

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

*Definite proof of offence not required*

☰ *Ferrari-Bravo v. Italy* (dec.), 9627/81, 14 March 1984, DR37, 15

See above, “Definite proof not required” on page 39.

*Specific reasoning necessary*

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

143. In the present case, the Court notes that both the first-instance court and the Court of Appeal, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. Nor have they attempted to refute the arguments made by the applicant's defence ...

144. ... the Court considers that the reasons relied on by the Buiucani District Court and by the Chişinău Court of Appeal in their decisions concerning the applicant's detention on remand and its prolongation were not "relevant and sufficient".

145. There has accordingly been a violation of Article 5 §3 of the Convention in this respect.

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

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

▮ *Hüseyin Esen v. Turkey*, 49048/99, 8 August 2006

77. De même, aux yeux de la Cour, si « l'état des preuves » peut se comprendre comme indiquant l'existence et la persistance d'indices graves de culpabilité et si, en général, ces circonstances peuvent constituer des facteurs pertinents, elles ne sauraient pour autant suffire à justifier, à elles seules, le maintien de la détention litigieuse pendant une si longue période ...

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

65. ... the applicant spent one year, eight months and 15 days in detention before and during his trial. In this period the courts examined the applicant's application for release at least ten times, each time refusing it on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses. However, the judicial decisions did not go any further than listing these grounds, omitting to substantiate them with relevant and sufficient reasons. The Court also notes that with the passing of time the courts' reason-

ing did not evolve to reflect the developing situation and to verify whether these grounds remained valid at the advanced stage of the proceedings. Moreover, from 7 September 2001 the decisions extending the applicant's detention no longer indicated any time-limits, thus implying that he would remain in detention until the end of the trial.

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

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

*Seriousness of offence and likely penalty insufficient*

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

74. Examining the lawfulness of, and justification for, the applicant's continued detention the district and regional courts persistently relied on the gravity of the charges as the main factor for the assessment of the applicant's potential to abscond, obstruct the course of justice or re-offend. However, the Court has repeatedly held that, although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. Nor can continuation of the detention be used to anticipate a custodial sentence ... This is particularly true in cases, such as the present one, where the characterisation in law of the facts – and thus the sentence faced by the applicant – was determined by the prosecution without judicial control of the issue whether collected evidence supported a reasonable suspicion that the applicant had committed the imputed offence ...

*Reasonable suspicion*

▮ *Labita v. Italy* [GC], 26772/95, 6 April 2000

159. ... While a suspect may validly be detained at the beginning of proceedings on the basis of statements by *pentiti*, such

statements necessarily become less relevant with the passage of time, especially where no further evidence is uncovered during the course of the investigation.

160. In the instant case, the Court notes that, as the Trapani District Court and Palermo Court of Appeal confirmed in their decisions acquitting the applicant, there was no evidence to corroborate the hearsay evidence of B.F. On the contrary, B.F.'s main, if indirect, source of information had died in 1989 and had, in turn, obtained it on hearsay from another person who had also been killed before he could be questioned. Furthermore, B.F.'s statements had already been contradicted during the course of the investigation by other *pentiti* who had said that they did not recognise the applicant ...

161. In these circumstances, very compelling reasons would be required for the applicant's lengthy detention (two years and seven months) to have been justified under Article 5 §3.

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

74. The Court notes that the charges against the applicant were based on the fact that he had deposited two cheques for 891 412 and 682 139 German marks (DEM) as security in negotiations for the sale of two department stores, and that the vendor had been unable to cash the cheques because they had been uncovered. In these circumstances, the Court considers that there existed a reasonable suspicion that the applicant had committed an offence.

▮ *N.C. v. Italy*, 24952/94, 11 January 2001

47. The applicant has not disputed that the authorities disposed of certain elements which suggested his responsibility, but has submitted factual arguments with a view to proving that the indications of his guilt could have been easily countered, had the facts been investigated in more detail. The Court considers however that it is not its task to assess whether these elements, which concern the merits of the accusation, ought to have been known to or examined in greater detail by the authorities at the time when they issued the detention order. Its task is to examine whether the elements of which the authorities had knowledge at the time when the order was issued were reasonably sufficient to believe that he had committed an offence. The Court has examined these elements and has not disclosed any manifestly unreasonable or arbitrary conclusions drawn by the competent authorities from them. It thus sees no reason to doubt that the elements of which the authorities disposed were sufficient to believe, at that time, that the applicant had committed the offence.\*



*Risk of absconding*

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

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

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

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

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

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

105. ... the competent courts considered that there was a risk the applicant might abscond if released ...based in the main on the applicant's links with Lebanon and, in some cases, his "conduct" ... and the penalty to which he was liable ...

These are undoubtedly circumstances which suggest a danger of flight, and the evidence in the file tends to show their relevance in the instant case. Nevertheless, the Court notes the sketchiness of the reasoning given on this point in the decisions in issue. It further notes that, although such a danger necessarily decreases as time passes ... the judicial authorities omitted to state exactly why

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\* This issue was not addressed in the Grand Chamber judgment of 18 December 2002.

in the present case there was reason to consider that it persisted for more than five years.

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

76. As regards the risk of the applicant's absconding, the Czech courts noted, in particular, that the applicant had earlier absconded from the criminal proceedings in Germany, that he had numerous business contacts abroad and that he risked a relatively heavy penalty. In the Court's view, this reasoning is "sufficient" and "relevant" and it outweighs the arguments put forward by the applicant.

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

76. The domestic courts gauged the applicant's potential to abscond by reference to the fact that her accomplice had gone into hiding. In the Court's view, the behaviour of a co-accused cannot be a decisive factor for the assessment of the risk of the detainee's absconding. Such assessment should be based on personal circumstances of the detainee. In the present case, the domestic courts did not point to any aspects of the applicant's character or behaviour that would justify their conclusion that she presented a persistent flight risk. The applicant, on the other hand, constantly invoked the facts mitigating the risk of her absconding. However, the domestic courts devoted no attention to discussion of the applicant's arguments that she had no criminal record, had a permanent place of residence and employment in Vladimir, a stable way of life, two minor children, and that her father had been seriously ill. They did not address the fact that the applicant had had an opportunity to flee after the search of her flat but she had remained at the investigator's disposal. In these circumstances, the Court finds that the existence of the risk of flight was not established in the present case.

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

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

126. The Court, however, cannot overlook the fact that the information from the FSB officials was not supported by any evidence (copies of sale-purchase contracts, State certificates showing change of ownership, bank records confirming the purchase of currency, and so on). The Court accepts that the extension of the applicant's detention may initially have been warranted

for a short period to provide the prosecution authorities with time to verify the information presented by the FSB officials and to adduce evidence in support. However, with the passage of time the mere availability of the information, without any evidence to support its veracity, inevitably became less and less relevant, particularly so when the applicant persistently disputed his ability to abscond, alleging that no property had been sold or foreign currency bought and referring to his age, poor health, lack of a valid passport for travel or medical insurance and the fact that he had no relatives and did not own property outside the Tomsk Region to confirm that there was no danger of his absconding ...

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

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

*Risk to administration of justice*

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

39. The Court accepts that a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but takes the view that it diminished and indeed disappeared with the passing of time.

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

36. In order to demonstrate that a substantial risk of collusion existed and continued to exist until the beginning of the trial, the indictments chamber referred essentially to the exceptional extent of the case, the extraordinary quantity of documents seized and

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

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

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

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

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

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

79. The only other ground for the applicant's continued detention was the domestic courts' finding that the applicant could destroy evidence, obstruct justice or re-offend. The Court accepts

that at the initial stages of the investigation the risk of interference with justice by the applicant could justify keeping her in custody. However, after the evidence had been collected, that ground became irrelevant.

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

46. According to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that the applicant would obstruct the proceedings. However, the Court would reiterate that, while the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the gravity of the charges cannot by itself justify long periods of pre-trial detention ...

Furthermore, the Court observes that the risk that the applicant would tamper with the evidence was not sufficiently justified by the authorities when deciding to extend his pre-trial detention. The Court notes that the Government relied on a presumption that the applicant would obstruct the proceedings and tamper with evidence because he had not pleaded guilty to the offences charged. In so far as the domestic courts appear to have drawn adverse inferences from the fact that the applicant had not pleaded guilty, the Court considers that their reasoning showed a manifest disregard for the principle of the presumption of innocence and cannot, in any circumstances, be relied on as a legitimate ground for deprivation of the applicant's liberty ...

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

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

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

130. ... the Court is mindful that the applicant's employment status was a relevant factor for the domestic courts' findings that there was a risk of tampering with witnesses. At the same time, it does not lose sight of the fact that the applicant was suspended from his position as mayor of Tomsk immediately after his arrest and that his release would not have led to his being reinstated in that position. Therefore, the Court entertains doubts as to the validity of that argument to justify the applicant's continued detention. Furthermore, the Court reiterates that for the domestic

courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to his official authority. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at falsification or destruction of evidence or manipulation of witnesses ...

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

132. However, more fundamentally, the Court finds it striking that relying on certain information, the domestic court did not provide the applicant with an opportunity to challenge it, for example, by having those witnesses examined ..., or at least by serving him with copies of their complaints or statements. It appears ... that the applicant was not even notified of the nature and content of the submissions lodged by the prosecution authorities to corroborate their assertion of witness manipulation. Moreover, the Court finds it peculiar that being informed of the intimidation, harassment or threats of retaliation against witnesses, the prosecution authorities did not institute criminal proceedings or at least open a preliminary inquiry into those allegations. The Court observes ... that the domestic authorities did not take any actions against either the applicant or his relatives and confidants, that they were never subject to any form of investigation and were not even questioned about the alleged attempts to manipulate witnesses. The Court is therefore not convinced that the domestic authorities' findings of the applicant's liability to pervert the course of justice had sufficient basis in fact.

133. Furthermore, the Court notes that the pre-trial investigation in respect of the applicant was completed at the end of August 2007 ... He remained in custody for an additional eighteen months during which the proceedings were pending before the trial court. It thus appears that the domestic authorities had sufficient time to take statements from witnesses in a manner which could have excluded any doubt as to their veracity and

would have eliminated the necessity to continue the applicant's deprivation of liberty on that ground ... The Court therefore considers that, having failed to act diligently, the national authorities were not entitled to regard the circumstances of the case as justification for using the risk of collusion as a further ground for the applicant's detention.

*Risk of further offences*

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

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

☞ *N.C. v. Italy*, 24952/94, 11 January 2001

48. The Court notes that the Judge for the Preliminary Investigations based his order of 2 November 1993, besides on the evidence of guilt, on the fact that the applicant had maintained his position as technical director of company X and was thus in a position to commit further similar offences ...

49. As regards the decision of 13 November 1993, the Court notes that the Brindisi District Court again relied on the existence of serious evidence of guilt, and explained the existence of a danger of the applicant's re-offending by reference to "how he [had] succeeded in unlawfully attaining the economic ends identified". The Court considers that, despite its conciseness, this decision fulfils the requirement of Article 274 (c) C.P.P., that the "particular modalities of the case" be taken into account when ordering precautionary measures.

50. In the light of the aforementioned, the Court does not find that the conclusion of the national authorities that there was a genuine risk that the applicant might re-offend was arbitrary.\*

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

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

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\* This issue was not addressed in the Grand Chamber judgment of 18 December 2002.

*Threat to public order and protection of detainee*

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

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

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

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

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

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

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

136. The Court has already held on a number of occasions that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law



recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence ...

137. In the present case these conditions were not satisfied. Apart from the fact that Russian law does not list the notion of disturbance to public order among permissible grounds for detention of accused persons, the Court notes that the Government relied on the alleged danger to public order from a purely abstract point of view, relying solely on the gravity of the offences allegedly committed by the applicant. They did not provide any evidence or indicate any instance which could show that the applicant's release could have posed an actual danger to public order.

*Automatic exclusion from consideration for release*

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

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

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

21. The Court accepts the Government's concession that there has been a violation of Article 5 §3 ... of the Convention in the present case, with the consequence that it is empowered to make an award of just satisfaction to the applicant under Article 41 ...

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

135. ... under section 191 of the Moldovan Criminal Procedure Code no release pending trial is possible for persons charged with intentional offences punishable with more than 10 years' imprisonment. It appears that in the present case the applicant was charged with such an offence...

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

☞ *Bonnechaux v. Switzerland*, 8224/78, 5 December 1979, DR18, 100 [DH (80) 1]

88. The Commission cannot rule out the possibility that the detention for 35 months of a person aged 74, suffering from dia-

**Duty to take account of detainee's state of health**

betes and cardio-vascular disorders might in certain circumstances raise problems in regard to Article 3 ...

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

▮ *Sakkopoulos v. Greece*, 61828/00, 15 January 2004

40. Dans le cas d'espèce, il ressort que la condition de santé du requérant était, sans aucun doute, préoccupante. Avant son transfert à la prison de Korydallos, il souffrait d'une insuffisance cardiaque et de diabète et il était hospitalisé. Néanmoins, il ne ressort d'aucun élément du dossier que l'aggravation de l'état de santé du requérant pendant sa détention, consécutive à une crise cardiaque et à une chute dans la prison, soit imputable aux autorités pénitentiaires.

41. ... La Cour constate que pendant sa détention provisoire, qui dura neuf mois et dix-neuf jours, le requérant resta tant dans un hôpital civil que dans le dispensaire de la prison de Korydallos. Des certificats médicaux des médecins qui ont examiné et soigné le requérant font ressortir que celui-ci était sous contrôle médical et pharmaceutique régulier et qu'il recevait une alimentation adaptée à son état de santé ... En particulier, le cardiologue du dispensaire attesta que le requérant était placé sous traitement constant, que le taux de sa glycémie était mesuré matin et soir et qu'il suivait le régime alimentaire pour les diabétiques ...

#### *Bail*

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

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

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

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

78. In the present case, during the entire period of the applicant's detention the authorities did not consider the possibility of ensuring her attendance by the use of a more lenient preventive measure, although many times the applicant's lawyers asked for her release on bail or under an undertaking not to leave the town – "preventive measures" which are expressly provided for by Russian law to secure the proper conduct of criminal proceedings .... Nor did the domestic courts explain in their deci-

#### **Use of alternatives**

sions why alternatives to the deprivation of liberty would not have ensured that the trial would follow its proper course. This failure is made all the more inexplicable by the fact that the new Code of Criminal Procedure expressly requires the domestic courts to consider less restrictive domestic measures as an alternative to custody ...

☰ *Bonnechaux v. Switzerland*, 8224/78, 5 December 1979, DR18, 100 [DH (80) 1]

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

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

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

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

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

85. The Court notes that during the relevant period the Czech courts rejected the applicant's offers to pay securities of up to 15 000 000 Czech korunas (CZK) as they did not consider it a sufficient guarantee for the applicant's appearance for trial. On one occasion the City Court expressed its readiness to consider releasing the applicant, in view of his health problems, if he paid a security of CZK 30 000 000. In its decision the City Court pointed out that the applicant had issued two uncovered cheques amounting to the equivalent of CZK 28 400 000, that prior to his arrest he had intended to buy two department stores for CZK 338 856 000 and 236 000 000, and that he had undertaken to pay for them by instalments of CZK 150 000 000.

86. Having considered the particular circumstances of the case, the Court finds that neither the repeated refusal of release on bail nor the eventual imposition of a security of CZK 30 000 000,

given the scale of the applicant's financial transactions, infringed the applicant's rights under Article 5 §3 ...

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

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

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

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

38. La Cour note que le requérant a été privé de liberté pendant quatre-vingt trois jours et qu'il a été libéré suite au dépôt d'un aval bancaire de 3 000 000 d'euros, correspondant au montant de la caution exigé ...

39. La Cour reconnaît le caractère élevé de la caution. Elle observe cependant qu'elle a été payée par la *London Steamship Owners Mutual Insurance Association*, qui se trouvait être l'assureur de l'armateur du Prestige, en l'occurrence, l'employeur du requérant ..., et qui, conformément au contrat conclu entre les deux parties, couvrait la responsabilité civile du navire en cas de dégâts occasionnés par la pollution. Par conséquent, la caution fut satisfaite en application de la relation juridique contractuelle existant entre l'armateur et l'assureur.

40. Certes, après l'acquittement du montant, le requérant retourna en Grèce, où il comparait régulièrement devant le commissariat. La procédure d'instruction se trouvant à ce jour pendante devant le juge d'instruction n° 1 de Corcubión ..., ce système permet aux autorités espagnoles de connaître la localisation du requérant de façon permanente. En tout état de cause, la Cour attire l'attention sur le fait que le but principal de la fixation de la caution, à savoir s'assurer la présence du requérant au procès, continue à ce jour d'être préservé ...

42. La Cour estime qu'il faut tenir compte des circonstances particulières de l'affaire, à savoir, la spécificité des infractions commises dans le cadre d'une « cascade de responsabilités » propre au domaine du droit de la mer et, en particulier, aux atteintes à l'environnement maritime, et qui la distinguent des autres affaires où elle a été amenée à connaître de la durée d'une détention provisoire. A ce sujet, la Cour est d'avis que la gravité des faits de l'espèce justifiait le souci des juridictions internes de déterminer les responsabilités dans la catastrophe naturelle et, par conséquent, il est raisonnable qu'elles aient voulu s'assurer de la présence du requérant au procès en fixant une caution élevée.

43. Au demeurant, la Cour observe que la privation de liberté du requérant s'est étendue sur une période plus courte que dans d'autres affaires examinées par la Cour, où, bien qu'il ne s'agissait pas de trancher un délit contre l'environnement maritime comme celui de l'espèce, le requérant avait été également placé en détention avec possibilité d'être libéré sous condition de paiement d'une caution ...

44. Au vu de ce qui précède, la Cour estime que les autorités nationales ont suffisamment justifié le caractère proportionné du montant de la caution devant être acquittée par le requérant et ont tenu suffisamment compte de ses circonstances personnelles, en particulier son statut de salarié de l'armateur qui, à son tour, était assuré contre ce type d'éventualités ... Elle considère que le montant de la caution en l'espèce, bien qu'élevé, n'a pas été disproportionné compte tenu de l'intérêt juridique protégé, de la gravité du délit en cause et des conséquences catastrophiques aussi bien du point de vue environnemental qu'économique découlant du déversement de la cargaison.

*Compulsory residence order*

☞ *Ciancimino v. Italy*, 12541/86, 27 May 1991, DR 70, 103

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

necessary in a democratic society in pursuit of the aims mentioned above ...

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

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

*House arrest*

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

17. ... in view of their effects and their manner of implementation, both imprisonment and house arrest amounted to a deprivation of the applicants' liberty for the purposes of Article 5 §1 (c) of the Convention. The present case therefore concerns the delay in substituting for detention in prison a more lenient security measure ...

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

*Police supervision*

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

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

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

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

*Surrender of passport*

☞ *Scmid v. Austria*, 10670/83, 9 July 1985, DR44, 195

2. ... The applicant further alleges a breach of Article 2 of Protocol No. 4 to the Convention in that the continuing bail conditions, applied even after the applicant's release from detention and the decision of 12 June 1984 prevented him from leaving the country and, because they involved denial of his travel papers, also prevented him from moving around within the country ... the Commission considers that the restrictions permitted by para. 3 of Article 2 of Protocol No. 4 must in the present case be read in conjunction with the final sentence of para. 3 of Article 5 of the Convention. The applicant was released pending trial and "guarantees to appear for trial" were imposed. The Commission considers that there is no reason why those guarantees should be limited to monetary security. It further considers that in the circumstances the bail requirements, insofar as they restricted the applicant's choice of residence and his freedom to move within the country and abroad, were "in accordance with law and ... necessary in a democratic society ... for the prevention of crime ...". They were thus covered by para. 3 of Article 2 of Protocol No. 4.

**Review of lawfulness**

*Availability*

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

52. In the present case it was not disputed that Mr R.M.D. could have made an application for release in each canton. Had he been detained in one canton only, the procedure would undoubtedly have satisfied the requirements of Article 5 §4 of the Convention. The problem was not that remedies were unavailable in each of the cantons, but that they were ineffective in the applicant's particular situation. Having been successively transferred from one canton to another, he was unable, owing to the limits of the cantonal courts' jurisdiction, to obtain a decision on his detention from a court, as he was entitled to do under Article 5 §4.

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

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

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

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

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

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

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

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

... Secondly, as regards the suggestion that the lawyers instructed by the applicant or by his close relatives could have



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

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

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

75. La Cour constate qu'à deux reprises, le 30 septembre 1997 et le 3 février 1998, le tribunal de district a refusé d'examiner les demandes d'élargissement du requérant au motif que même si l'intéressé demeurerait détenu, il n'était pas formellement sous le coup d'une mesure de détention provisoire mais d'une obligation de cautionnement.

76. La Cour relève que le premier de ces refus a été effectué en vertu des règles de procédure applicables à l'époque pertinente, qui ne prévoyait pas, au stade de l'instruction préliminaire, la faculté d'introduire un recours judiciaire contre la détention lorsque celle-ci résultait d'un défaut de versement de la garantie demandée. Concernant la deuxième demande, il ressort du droit interne pertinent ... que le tribunal devant lequel l'affaire était pendante sur le fond avait en principe compétence pour se prononcer, ce qu'il a toutefois refusé de faire dans le cas du requérant ...

78. Au vu des circonstances de la présente espèce, force est de constater que le requérant a été privé du droit à un recours garanti par l'article 5 §4 de la Convention.

#### *Speediness*

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

56. The Court has certain doubts about the overall length of the examination of the second application for release, in particular before the indictments divisions called upon to rule after a previous decision had been quashed in the Court of Cassation; it should however be borne in mind that the applicant retained the

right to submit a further application at any time. Indeed from 14 February 1986 to 5 August 1987 she lodged six other applications, which were all dealt with in periods of from eight to twenty days ...

57. There has therefore been no violation of Article 5 §4.

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

71. In that regard, the Court observes that the proceedings relating to the first application for release lasted from 7 February to 5 July 1994, that is approximately five months. The proceedings relating to the second started on 28 March 1994 and ran concurrently, lasting a little more than three months.

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

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

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

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

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

*Scope of review*

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

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

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

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

54. ... the Court observes that the decisions of the domestic courts mentioned by the Government included no reference to the applicant's numerous appeals about the unlawfulness of his detention since 9 October 1996 ... Even in its decision to release the applicant, the Regional Court refused to examine the applicant's allegations of breaches of domestic law and the Convention because of the bar created by Article 372 §4 of the Code of Criminal Procedure then in force, and did not specify any reasons for the applicant's release ... The release order could thus be interpreted as an acknowledgement that the lawfulness of the applicant's remand was open to question, but it did not constitute an adequate judicial response for the purposes of Article 5 §4 ...

*Periodicity*

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

75. ... According to the Court's case-law on the scope of paragraphs 1 and 4 of Article 5 ... of the Convention, in order to satisfy the requirements of the Convention such a review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 ..., namely to protect the individual against arbitrariness. The latter condition implies not only that the com-

petent courts must decide “speedily” ... but also that their decisions must follow at reasonable intervals ...

77. In this case the three decisions taken under Article 25 (3) of the Criminal Code were taken at intervals of fifteen months (6 November 1980-8 February 1982), two years (8 February 1982-16 February 1984) and nine months (16 February 1984-14 November 1984) respectively. The first two decisions cannot be regarded as having been taken at reasonable intervals, especially as the numerous requests for release submitted at that time by Mr Herczegfalvy brought no response ...

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

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

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

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

*Access to file*

☰ *Niedbala v. Poland*, 27915/95, 4 July 2000

67. ... The Court notes that it is not contested that the law, as it stood at that time, did not entitle either the applicant himself or his lawyer to attend the court session. Moreover, the applicable provisions did not require that the prosecutor’s submissions in support of the applicant’s detention be communicated either to the applicant or to his lawyer. Consequently, the applicant did not have any opportunity to comment on those arguments in order to contest the reasons invoked by the prosecuting authorities to justify his detention. The Court finally notes that under applicable provisions of the law on criminal procedure it was open for the prosecutor to be present at any of court sessions in which the court examined the lawfulness of the applicant’s detention and that on one occasion the prosecutor was present.

68. In conclusion, in the light of the above considerations, the Court finds that there has been a violation of Article 5 §4 of the Convention.

*Non-communication of prosecutor’s submissions*

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

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

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

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

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

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

*Adequate opportunity to prepare case*

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

76. Au regard de ces circonstances et sans se prononcer sur la manière concrète dont les avocats commis d’office ont rempli leurs obligations, la Cour conclut que les requérants n’ont pas bénéficié devant la Cour suprême de justice d’une défense effective...

77. S’agissant du délai de notification des citations à comparaître et de la possibilité pour les avocats des requérants d’assister aux audiences de la Cour suprême, la Cour note que sur sept citations, quatre ont été notifiées aux requérants la veille ou le jour même des audiences. Dans ces conditions, et compte tenu du fait que la distance entre Oradea et Bucarest est d’environ 600 kilomètres, la Cour estime que la possibilité pour les avocats de se rendre en temps utile à ces audiences était pratiquement nulle.

78. En outre, la Cour remarque que, selon les informations fournies par le Gouvernement, les requérants bénéficiaient d’une seule conversation téléphonique par semaine et que la correspon-

dance transitait par les services administratifs de la prison, ce qui retardait inévitablement la distribution du courrier. Dès lors, s'agissant des citations à comparaître pour les audiences des 2 et 3 septembre et du 3 octobre 2003 pour lesquelles les requérants ont été convoqués respectivement quatre, huit et deux jours à l'avance, la Cour considère que la possibilité d'en informer les avocats et les chances que ces derniers puissent s'y rendre étaient également très limitées.

79. Au demeurant, la Cour note que, même lorsque les requérants ont expressément fait connaître le souhait d'assister aux audiences de la Cour suprême, le procureur I.M. s'y est opposé au motif qu'ils devaient être présents à d'autres audiences de la cour d'appel.

80. Par conséquent, faute d'avoir offert aux requérants une participation adéquate à des audiences dont l'issue était déterminante pour le maintien ou la fin de leur détention, les autorités internes ont privé les requérants de la possibilité de combattre de manière appropriée les motifs avancés par le parquet pour justifier leur maintien en détention.

81. Partant, il y a eu violation de l'article 5 § 4 de la Convention.

*Presence of lawyer*

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

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

131. In these circumstances, the Court is of the view that the proceedings in which the applicant's appeal against the detention order was examined cannot be said to have been compatible with

the requirements of Article 5 §4 of the Convention. While the proceedings appear to have been conducted “speedily” within the meaning of this provision, they did not provide the “fundamental guarantees of procedure applied in matters of deprivation of liberty”.

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

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

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

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

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

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

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

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

*Presence of accused*

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

34. The Court considers that, given what was at stake for the applicant, i.e. his liberty, as well as the lapse of time between the various decisions, and the re-assessment of the basis for the remand, the applicant's presence was required throughout the pre-trial remand hearings of 3 and 17 July 1997 in order to be able to give satisfactory information and instructions to his counsel.

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

In these circumstances, the Court concludes that the applicant was not given the guarantees appropriate to the kind of deprivation of liberty in question.

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

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

92. In view of the above, the Court considers that the refusal of the request for leave to appear at the appeal hearing of 10 August 2004 deprived the applicant of an effective control of the lawfulness of her detention required by Article 5 §4 of the Convention.

*No requirement of public hearing*

▮ *Reinprecht v. Austria*, 67175/01, 15 November 2005

39. Moreover, it must be borne in mind that Articles 5 §4 and 6, despite their connection, pursue different purposes. Article 5 §4 is aimed at protecting against arbitrary detention by guaranteeing a speedy review of the lawfulness of any detention ... In cases of pre-trial detention falling within the scope of Article 5 §1 (c), the review has to establish, *inter alia*, whether there is reasonable suspicion against the detainee. Article 6 deals with the "determination of a criminal charge" and is aimed at guaranteeing that the merits of the case, that is, the question whether or not the accused is guilty of the charges brought against him, receive a "fair and public hearing".

40. This difference of aims explains why Article 5 § 4 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness.

In addition there is some force in the Government's argument that the requirement of public hearings could have negative effects on



speediness. Hearings on the lawfulness of pre-trial detention will in practice often be held in remand prisons. Either granting the public effective access to attend hearings in prison or transferring detainees to court buildings for the purpose of public hearings may indeed require arrangements which run counter to the requirement of speediness. This is all the more so in a case like the present one, in which repeated reviews at short intervals are required.

41. In conclusion, the Court finds that Article 5 §4, though requiring a hearing for the review of the lawfulness of pre-trial detention, does not as a general rule require such a hearing to be public. It would not exclude the possibility that a public hearing may be required in particular circumstances. However, no such circumstances were shown to exist in the present case. No other defects in the review of the lawfulness of the applicant's pre-trial detention have been established.

*Appropriate conduct of hearing*

☰ *Ramishvili and Kokhbreidze v. Georgia*, 1704/06, 27 January 2009

129. ... the applicants were placed in a caged dock at the far end of the court room in complete disorder and surrounded by guards. They could hardly communicate with their lawyers, could not properly hear the prosecutor and the judge and could hardly make their submissions audible due to the turmoil in the room. In order to participate in the hearing, the applicants had to stand on a chair in the barred dock, hanging on to the metal side bars, and shout. Communication in the court room was constantly hampered by the unsolicited interruptions of journalists, unabated ringing of mobile telephones, persons vehemently arguing with each other and uttering vulgar curses, etc., and the judge was either unwilling or unable to establish order.

130. ... the applicants' advocates, when making their defence statements, were dazzled by camera flashes and halogen camera lights. Their statements were hardly audible. By contrast, due to the immediate proximity of the prosecutor's seat to the judge, the dialogue of questions and answers between them was unaffected and presented no comparable obstacle of audibility ...

131. The Court considers that an oral hearing in such chaotic conditions can hardly be conducive to a sober judicial examination. It cannot accept the Government's argument that the possibility of written applications could have palliated the above-mentioned turmoil in the court room. It notes that oral hearings should create such conditions that verbal responses and audiovisual exchanges between the parties and the judge in a court room flow in a decent, dynamic and undisturbed manner.

132. The Court reiterates that the applicants' confinement inside the barred dock, which looked like a metal cage, and the presence of "special forces" in the courthouse were detrimental to their powers of concentration, powers which are indispensable for conducting an efficient defence ... such humiliating and unjustifiably stringent measures of restraint during the public hearing, the latter being broadcast throughout the country, tainted the presumption of innocence, the respect for which principle is of paramount importance at every stage of criminal proceedings, including proceedings bearing on the lawfulness of detention pending trial ...

134. ... the personal conduct of the judge presiding over the hearing ... could not be said, in the eyes of the Court, to have been devoid of bias. Thus, the Court cannot escape the observation that the judge was obviously aiding the prosecutor during the hearing, by either directly responding to the questions of the defence instead of the latter or rephrasing these questions in a manner more advantageous to the prosecutor ...

135. As to the requisite "independence", it was undoubtedly tainted by the high number of under-cover government agents and even "special forces" present during the hearing of 2 September 2005. The court cannot be said to have given the appearance of independence when the government agents seemed to be more in control of the situation in the court room than the hearing judge himself and when the latter's deliberation room, which should be private and inviolable, was easily accessed by strangers ...

136. The above considerations are sufficient for the Court to conclude that the judicial review ... lacked the fundamental requisites of a fair hearing. The review was thus held in violation of the applicants' rights under Article 5 §4 of the Convention.

*Need for power of release*

☞ *Minjat v. Switzerland*, 38223/97, 28 October 2003

50. Le requérant soutient que la décision du Tribunal fédéral de renvoyer le dossier à l'autorité cantonale pour qu'elle statue à nouveau a méconnu l'article 5 § 4 de la Convention. Selon lui, en effet, dans la mesure où il s'est plaint avec succès du défaut de motivation de l'ordonnance du 1<sup>er</sup> juillet 1997, le Tribunal fédéral, dans son arrêt du 23 juillet 1997, aurait dû non seulement annuler ladite ordonnance mais encore constater l'illégalité de sa détention et ordonner sa libération immédiate.

51. Le Gouvernement affirme que, dans la mesure où le requérant a été privé de sa liberté « selon les voies légales », au sens de l'article 5 § 1 de la Convention, du 4 au 29 juillet 1997, le grief tiré

de l'article 5 § 4 de la Convention est mal fondé, une éventuelle injonction du Tribunal fédéral de le libérer n'entrant pas en ligne de compte.

52. La Cour rappelle que la notion de « légalité » a le même sens au paragraphe 4 de l'article 5 qu'au paragraphe 1 ...

53. Compte tenu de la conclusion à laquelle elle est parvenue quant à la « légalité » du maintien en détention provisoire du requérant au regard de l'article 5 § 1, la Cour conclut à la non-violation de l'article 5 § 4 de la Convention.

## Conditions

### *Quality*

📖 *I.I. v. Bulgaria*, 44082/98, 9 June 2005

72. Turning to the specific circumstances of the present case, the Court notes that the applicant was detained for three months in a cell of six square metres apparently occupied by three to four detainees.

73. The Court further notes that the sanitary conditions in which the applicant was kept were very unsatisfactory. The cell was dark, poorly ventilated and apparently damp ... The conditions in which the detainees had to relieve themselves in the toilet and attend to their personal hygiene were also unacceptable ...

74. Also, as no possibility for outdoor or out-of-cell activities was provided, the applicant had to spend in the cell – which had no window and was lighted by a single electric bulb – practically all his time, except for two or three short visits per day to the sanitary facilities or the times when he would write a request to the competent authorities, in which case he was allowed to stay in the hallway ...

75. Furthermore, subjecting a detainee to the humiliation of having to relieve himself in a bucket in the presence of his cell-mates and of being present while the same bucket was being used by them ...cannot be deemed warranted, except in specific situations where allowing visits to the sanitary facilities would pose a concrete and serious security risk. However, no such risks were invoked by the Government as grounds for the limitation on the daily visits to the toilet by the detainees in the Shoumen Regional Investigation Service during the period in issue.

76. Regarding the impact of the conditions of detention on the applicant's health, the Court notes that his skin disease (psoriasis), which apparently required good hygiene and exposure to sunlight, severely aggravated during his detention and that he apparently even started to develop psoriatic arthritis ... It is true that in mid-March 1998 he was allowed to consult a dermatologist and was thereafter regularly administered injections ..., but the Court is struck by the fact that he was not allowed – without

any legitimate reason being put forward – to apply his psoriasis medication as often as he needed ...

79. In conclusion, having regard to the cumulative effects of the unduly stringent regime to which the applicant was subjected, the material conditions in which he has kept and to the specific impact which these conditions and regime had on the applicant's health, the Court considers that the conditions of detention of the applicant amounted to inhuman and degrading treatment contrary to Article 3 of the Convention.

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

135. ... the applicant was transported more than one hundred and fifty times in standard-issue prison vans which were sometimes filled beyond their design capacity. Given that he had to stay inside that confined space for several hours, these cramped conditions must have caused him intense physical suffering. His suffering must have been further aggravated by the absence of adequate ventilation and lighting, and unreliable heating. Having regard to the cumulative effect which these conditions of transport must have had on the applicant, the Court finds that the conditions of transport from the remand centre to the courthouse and back amounted to "inhuman" treatment within the meaning of Article 3 of the Convention. It is also relevant to the Court's assessment that the applicant was subjected to such treatment during his trial or at the hearings with regard to applications for an extension of his detention, that is, when he most needed his powers of concentration and mental alertness ...

140. The Court observes that on more than one hundred and fifty days the applicant was detained in the convoy cells located on the premises of the Moscow City Court. Whereas his detention in these cells was normally limited to several hours before, after and between court hearings, on a dozen occasions he was not summoned to a hearing and spent the entire working day inside the cell.

141. ... The Court ...notes that the convoy cells were destined for detention of a very limited duration. Accordingly, not only were they tiny in surface area – by any account no more than two square metres – but also, by their design, they lacked the amenities indispensable for longer detention. The cell did not have a window and offered no access to natural light or air. Its equipment was limited to a bench, there being no chair, table or any other furniture. It is of a particular concern for the Court that the cell did not have a toilet and that detainees could only relieve themselves on the wardens' orders. Furthermore, there is no evidence of any catering arrangements which would have enabled the detainees to receive sufficient and wholesome food and drink on a

regular basis. The Court considers it unacceptable for a person to be detained in conditions in which no provision has been made for meeting his or her basic needs ...

142. The applicant remained in these cramped conditions for several hours a day and occasionally for as long as eight to ten hours. Although his detention in the convoy premises was not continuous, the Court cannot overlook the fact that it alternated with his detention in the remand prison and transport in conditions which it has already found above to have been inhuman and degrading. In these circumstances, the cumulative effect of the applicant's detention in the extremely small cells of the convoy premises at the Moscow City Court without ventilation, food, drink or free access to toilet must have been of such intensity as to induce physical suffering and mental weariness.

143. There has accordingly been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention on the convoy premises of the Moscow City Court.

*Segregation from convicted prisoners*

▣ *Peers v. Greece*, 28524/95, 19 April 2001

76. The applicant complained that, despite the fact that he was a remand prisoner, he was subjected to the same regime as convicts. He argued that the failure of the Koridallos Prison authorities to provide for a special regime for remand prisoners amounts to a violation of the presumption of innocence ...

78. The Court recalls that the Convention contains no article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that Article 6 §2 has been violated on the grounds adduced by the applicant.

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

*Strict security regime*

▣ *Van der Ven v. the Netherlands*, 50901/99, 4 February 2003

54. It is not in dispute that, throughout his detention in the EBI, the applicant was subjected to very stringent security measures. The Court further considers that the applicant's social contacts were strictly limited, taking into account the fact that he was prevented from having contact with more than three fellow inmates at a time, that direct contact with prison staff was limited, and that, apart from once a month in the case of visits from members of his immediate family, he could only meet visitors behind a glass partition. However, ... the Court is unable to find that the applicant was subjected either to sensory isolation or to total social isolation. ...

55. The applicant was placed in the EBI because he was considered extremely likely to attempt to escape from detention facilities with a less strict regime and, if he were to escape, he was deemed to pose an unacceptable risk to society in terms of committing further serious violent crimes ...

58. ... pursuant to the EBI house rules, the applicant was strip-searched prior to and following an "open" visit as well as after visits to the clinic, the dentist's surgery or the hairdresser's. In addition to this, for a period of three and a half years he was also obliged to submit to a strip-search, including an anal inspection, at the time of the weekly cell inspection ... this weekly strip-search was carried out as a matter of routine and was not based on any concrete security need or the applicant's behaviour.

The strip-search as practised in the EBI obliged the applicant to undress in the presence of prison staff and to have his rectum inspected, which required him to adopt embarrassing positions ...

62. The Court considers that in a situation where the applicant was already subjected to a great number of surveillance measures, and in the absence of convincing security needs, the practice of weekly strip-searches that was applied to the applicant for a period of approximately three-and-a-half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. The applicant himself confirmed that this was indeed the case in a meeting with a psychiatrist, during which he also stated that he would, for instance, forgo visiting the hairdresser's so as not to have to undergo a strip-search ...

63. Accordingly, the Court concludes that the combination of routine strip-searching and the other stringent security measures in the EBI amounted to inhuman or degrading treatment in breach of Article 3 of the Convention. There has thus been a violation of this provision.

*Interception of communications*

☞ *Herczegfalvy v. Austria*, 24 September 1992

91. These very vaguely worded provisions do not specify the scope or conditions of exercise of the discretionary power which was at the origin of the measures complained of. But such specifications appear all the more necessary in the field of detention in psychiatric institutions in that the persons concerned are frequently at the mercy of the medical authorities, so that their correspondence is their only contact with the outside world.

Admittedly, as the Court has previously stated, it would scarcely be possible to formulate a law to cover every eventuality ... For all that, in the absence of any detail at all as to the kind of restrictions

permitted or their purpose, duration and extent or the arrangements for their review, the above provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society ... There has therefore been a violation of Article 8 of the Convention.

☰ *Labita v. Italy* [GC], 26772/95, 6 April 2000

175. The applicant complained that the Pianosa Prison authorities had censored his correspondence with his family and lawyer ...

181. During this period, the censorship was based on an order of the Minister of Justice made pursuant to section 41 *bis* of Law no. 354 of 1975 ...

182. The Court notes that the Italian Constitutional Court, relying on Article 15 of the Constitution, has held that the Minister of Justice had no power to take measures concerning prisoners' correspondence and had therefore acted *ultra vires* under Italian law ... The censorship of the applicant's correspondence during this period was therefore illegal under national law and was not "in accordance with the law" within the meaning of Article 8 of the Convention.

*Access to family*

☰ *Lavents v. Latvia*, 58442/00, 28 November 2002

142. Dans le cas d'espèce, la Cour constate que l'épouse et à la fille du requérant n'ont pas été autorisées à le visiter pendant trois périodes distinctes, dont la plus longue a duré du 25 septembre 1998 jusqu'au 20 avril 2000, soit près d'un an et sept mois. Qui plus est, cette interdiction revêtait un caractère absolu ; quant à la thèse du Gouvernement selon laquelle la femme du requérant avait une fois reçu l'autorisation de le visiter sans qu'elle eût utilisé cette possibilité, la Cour constate que cette assertion n'a été étayée par une pièce quelconque du dossier. En particulier, il ressort du dossier que ni le tribunal chargé de l'affaire du requérant, ni l'administration de la prison où il se trouvait confiné, n'ont fourni aucune motivation à ce sujet. En outre, la Cour constate qu'avant sa réincarcération, le 25 septembre 1998, le requérant avait passé plus de onze mois confiné à domicile, où ses contacts avec sa famille étaient illimités; or, il n'apparaît pas que, pendant cette période, le requérant ait tenté de profiter de ces contacts pour organiser une quelconque collusion ou pour faire obstacle à l'instruction de son dossier. Dans ces circonstances, la Cour n'est pas convaincue que l'application d'une mesure aussi stricte était vraiment indispensable pour atteindre les buts légitimes qu'elle pourrait poursuivre. Cette mesure n'était donc pas « nécessaire

dans une société démocratique », comme le veut l'article 8 § 2 de la Convention.

▮ *Ploski v. Poland*, 26761/95, 12 November 2002

37. The Court also notes that apparently the charges brought against the applicant did not concern violent crime and that he was released as early as February 1996 ... Therefore, the applicant could not be considered as a prisoner without any prospect of being released from a prison. It is aware of the problems of a financial and logistical nature caused by escorted leaves and the instances of shortage of police and prison officers. However, taking into account the seriousness of what is at stake, namely refusing an individual the right to attend the funerals of his parents, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leaves – could have been found ...

39. The Court concludes that, in the particular circumstances of the present case, and notwithstanding the margin of appreciation left to the respondent State, the refusals of leave to attend the funerals of the applicant's parents, were not "necessary in a democratic society" as they did not correspond to a pressing social need and were not proportionate to the legitimate aims pursued. There has therefore been a violation of Article 8 of the Convention.

▮ *Van der Ven v. the Netherlands*, 50901/99, 4 February 2003

65. ... He further complained of the conditions under which visits by members of his family had had to take place: behind a glass partition with no possibility of physical contact save for a handshake once a month in the case of his immediate family ...

71. ... In the present case, the security measures were established in order to prevent escapes ... in the EBI, security is concentrated on those occasions when, and places where, the prisoner concerned might obtain or keep objects which could be used in an attempted escape, or might obtain or exchange information relating to such an attempt. Within these constraints, the applicant was able to receive visitors for one hour every week and to have contact, and take part in group activities, with other EBI inmates, albeit in limited numbers.

72. In the circumstances of the present case the Court finds that the restrictions on the applicant's right to respect for his private and family life did not go beyond what was necessary in a democratic society to attain the legitimate aims intended.

Accordingly, there has been no violation of Article 8 of the Convention.



☰ *Kucera v. Slovakia*, 48666/99, 17 July 2007

129. ... the Court notes that the applicant was allowed to meet with his wife for the first time on 29 January 1999. The refusal to allow the applicant to meet her during the period of 13 months during which he had been held in custody undoubtedly constituted a serious interference with his right to respect for his private and family life.

130. It is evident that there was a legitimate need to prevent the applicant from hampering the investigation, for example by exchanging information with his co-accused including his wife, in particular during the investigation into the relevant facts. The Court is not persuaded, however, that the interference complained of was indispensable for achieving that aim. In particular, there is no indication that allowing the applicant to meet with his wife under special visiting arrangements including, for example, supervision by an official would have jeopardised the ongoing investigation into the criminal case.

131. It is also questionable whether relevant and sufficient grounds existed for preventing the applicant from meeting his wife for such a long period. In particular, on 6 May 1998 counsel for the applicant and his wife requested that her clients be allowed to meet each other, even if this meant that the investigator had to be present. Reference was made to the suffering caused by the lengthy separation of the applicant from his wife and also to the fact that the investigation into the offences in issue had practically ended. Similarly, in the second half of 1998 the applicant indicated in his requests for release that at that time the investigation into the case exclusively concerned offences which were unrelated to him and his wife.

132. The Court has considered the fact that the applicant attempted, on 19 January 1998, secretly to send a letter to his wife from the prison ... It does not attach particular importance to this incident as it occurred at an early stage of the proceedings and it has not been alleged that the purpose of that letter was to interfere with the investigation.

133. In view of the above, the Court considers that the interference in issue cannot be regarded as having been “necessary in a democratic society”.

134. There has therefore been a violation of Article 8 of the Convention on account of prohibition on the applicant meeting with his wife.

*Supervision of person at risk*

☞ *Tanribilir v. Turkey*, 21422/93, 16 November 2000

77. La Cour estime que les gendarmes ne sauraient être critiqués pour n'avoir pas pris de mesures spéciales, comme poster un garde 24 heures sur 24 devant la cellule du requérant ou lui confisquer ses vêtements.

78. Il est vrai qu'il ressort des dépositions tout à fait concordantes des gendarmes devant les autorités nationales qu'ils avaient contrôlé régulièrement les locaux de garde à vue, mais qu'aucun gardien ne se trouvait en permanence dans ces locaux ... Or, il résulte des témoignages des mêmes gendarmes recueillis par les délégués de la Commission que la nuit de l'incident, un caporal devait rester comme gardien de permanence dans les locaux de garde à vue ...

79. Cependant, la Cour observe qu'aucun des éléments de preuve figurant au dossier ne montre que les gendarmes auraient dû raisonnablement prévoir qu'A.T. allait se suicider et qu'ils auraient dû assurer la présence permanente d'un gardien devant la cellule d'A.T.

80. Pour les raisons exposées ci-dessus, la Cour conclut à l'absence de violation de l'article 2 de la Convention de ce chef.

*Protection from fellow detainees*

☞ *Paul and Audrey Edwards v. the United Kingdom*, 46477/99, 14 March 2002

60. The Court is satisfied that information was available which identified Richard Linford as suffering from a mental illness with a record of violence which was serious enough to merit proposals for compulsory detention and that this, in combination with his bizarre and violent behaviour on and following arrest, demonstrated that he was a real and serious risk to others and, in the circumstances of this case, to Christopher Edwards, when placed in his cell.

61. As regards the measures which they might reasonably have been expected to take to avoid that risk, the Court observes that the information concerning Richard Linford's medical history and perceived dangerousness ought to have been brought to the attention of the prison authorities, and in particular those responsible for deciding whether to place him in the healthcare centre or in ordinary location with other prisoners. It was not. ...

62. ... it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision. The defects in the information provided to the prison admissions staff were com-

bined in this case with the brief and cursory nature of the examination carried out by a screening health worker who was found by the inquiry to be inadequately trained and acting in the absence of a doctor to whom recourse could be had in case of difficulty or doubt.

63. ... while the Court deplores the fact that the cell's call button, which should have been a safeguard, was defective, it considers that on the information available to the authorities, Richard Linford should not have been placed in Christopher Edwards's cell in the first place.

*Medical care*

☰ *Kudła v. Poland* [GC], 30210/96, 26 October 2000

95. The Court observes at the outset that in the present case it was not contested that both before and during his detention from 4 October 1993 to 29 October 1996 the applicant had suffered from chronic depression and that he had twice attempted to commit suicide in prison. His state had also been diagnosed as personality or neurotic disorder and situational depressive reaction ...

96. ... the medical evidence ... shows that during his detention the applicant regularly sought, and obtained, medical attention. He was examined by doctors of various specialisms and frequently received psychiatric assistance ...

Shortly after his 1994 suicide attempt, an event which in the light of the evidence before the Court does not appear to have resulted from or have been linked to any discernible shortcoming on the part of the authorities, the applicant was given specialist treatment in the form of psychiatric observation in Wrocław Prison Hospital from 9 March to 26 May 1994 ... Later ... he also underwent two further follow-up examinations, on 9 November and 7 December 1994 ...

☰ *Popov v. Russia*, 26853/04, 13 July 2006

210. The Court notes that in 1994 the applicant underwent a resection of the cancerous tumour of the urinary bladder and subsequent chemotherapy.

211. The Court observes that given the nature of the applicant's ailment, his condition required specialised medical supervision for timely diagnosis and treatment of possible recurrent cancer ... the minimum scope of medical supervision required for the applicant's condition included regular examinations by a uro-oncologist and cystoscopy at least once a year ...

212. ... During his placement at the medical unit between 23 January and 21 March 2003 he was regularly examined by the

Head of the unit's surgical department. An examination by a uro-oncologist and cystoscopy were recommended for him. The examination was scheduled a number of times but did not take place because the applicant had to attend court hearings that coincided with the medical appointments. The applicant was released on 21 March 2003 without the examination having been conducted ... On a number of occasions the prison doctors consulted the applicant's uro-oncologist, Dr M., by telephone. However, according to Dr M.'s statement of 9 September 2004 he was provided with incomplete information concerning the applicant's condition. In particular, he was not provided with the information concerning the neoplasm detected by the ultrasound scan. In the Court's view, the fact that the information concerning the applicant's state of health made available to Dr M. was incomplete made it impossible for him to make an accurate diagnosis of the applicant's condition and recommend appropriate treatment.

213. Therefore, over a period of one year and nine months during his detention the applicant underwent neither examination by a uro-oncologist nor cystoscopy. ... the Court considers that in remand prison SIZO 77/1 the applicant was not provided with the medical assistance required for his condition.

☞ *Dzieciak v. Poland*, 77766/01, 9 December 2008

101. ... the quality and promptness of the medical care provided to the applicant during his four-year pre-trial detention put his health and life in danger. In particular, the lack of co-operation and co-ordination between the various state authorities, the failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment and constituted a violation of the State's obligation to protect the lives of persons in custody.

There has accordingly been a violation of Article 2 of the Convention on account of the Polish authorities' failure to protect the applicant's life.

☞ *Aleksanyan v. Russia*, 46468/06, 22 December 2008

156. ... as from the end of October 2007, at the very least, the applicant's medical condition required his transfer to a hospital specialised in the treatment of Aids. The prison hospital was not an appropriate institution for these purposes.

157. Finally, the Court observes that it does not detect any serious practical obstacles for the immediate transfer of the appli-

cant to a specialised medical institution. Thus, the Moscow Aids Centre ... was located in the same city, and it was prepared to accept the applicant for in-patient treatment. It appears that the applicant was able to assume most of the expenses related to the treatment. Furthermore, in view of the applicant's state of health and his previous conduct, the Court considers that the security risks he might have presented at that time, if any, were negligible compared to the health risks he faced ... In any event, the security arrangements made by the prison authorities in Hospital no. 60 did not appear very complicated.

158. ... the Court considers that the national authorities failed to take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention, at least until his transfer to an external haematological hospital on 8 February 2008. This undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment. There has therefore been a violation of Article 3 of the Convention.

☰ *Kaprykowski v. Poland*, 23052/05, 3 February 2009

71. ... the applicant had at least three serious medical conditions which required regular medical care, namely epilepsy, encephalopathy and dementia. He suffered from frequent epileptic seizures, sometimes as often as several times a day ...

72. ... Throughout his incarceration several doctors stressed that he should receive specialised psychiatric and neurological treatment and should be under constant medical supervision ... Already in 2001 the medical experts appointed by the Białystok District Court were of the opinion that the penitentiary system could no longer offer the applicant the necessary treatment and they recommended that he should undergo brain surgery ... On 9 May 2007 when the applicant was being released from Czarne Prison hospital, the doctors clearly recommended that he should be placed under 24-hour medical supervision ... In the light of the above the Court is convinced that the applicant was in need of constant medical supervision, in the absence of which he faced major health risks.

73. ... it must be noted that the applicant had frequent epileptic seizures and, when he was detained in the general wing of Poznań Remand Centre, he could count only on the immediate assistance of his fellow inmates and, possibly, on being only later examined by an in-house doctor who did not specialise in neurology. In addition, due to his personality disorder and dementia, the applicant could not act autonomously in making decisions or in

undertaking more demanding daily routines. That must have given rise to considerable anxiety on his part and must have placed him in a position of inferiority *vis-à-vis* other prisoners.

74. The fact that from 24 June until 12 July 2005 the applicant was in the Poznań Remand Centre hospital does not affect this finding, since the establishment did not specialise in treating neurological disorders and since the period of the applicant's hospitalisation was anyway very short.

Moreover, placing the applicant, from 9 May until 30 November 2007, in an ordinary cell of a general wing of Poznań Remand Centre, without providing him with a 24-hour medical supervision, was clearly in contradiction to the recommendations of the doctors who had treated the applicant in the Czarne Prison hospital in the preceding months. The fact that during that time the applicant was attended eighteen times by the remand centre's medical staff has no bearing since the medical care provided to him was of a general character, none of the doctors being a neurologist.

Finally, the Court is struck by the Government's argument that the conditions of the applicant's detention were adequate, because he was sharing his cell with other inmates who knew how to react in the event of his medical emergency. The Court wishes to stress its disapproval of a situation in which the staff of a remand centre feels relieved of its duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or, if necessary, with first aid.

75. Lastly, the Court must also be mindful of three important factors comprising the background of the case.

Firstly, the time when the applicant could rely solely on the prison health care system amounted to more than four years ... the Court is concerned about the fact that the applicant was detained most of the time in ordinary detention facilities or, at best, in an internal disease ward of a prison hospital. He was detained in the specialised neurological hospital of Gdańsk Remand Centre on only two occasions.

Secondly, the applicant was often transported long distances and transferred about eighteen times between different detention facilities ... such a frequent change of environment must have produced unnecessary negative effects on the applicant who was, at the relevant time, a person of a fragile mental state.

Thirdly, ... for a considerable time the applicant was taking certain non-generic drugs which had been prescribed by the neurology specialists of the Gdańsk Remand Centre hospital and that in June 2005 his treatment was changed to generic drugs upon the decision of the doctors practising in the Poznań Remand Centre

hospital, who were not neurologists. The Court also notes that when in October 2005 the applicant was finally transferred to the neurology ward of the Gdańsk Remand Centre hospital, he immediately resumed taking previously prescribed medicines.

The Court reiterates that the Convention does not guarantee a right to receive medical care which would exceed the standard level of healthcare available to the population generally ... Nevertheless, it takes note of the applicant's submission ... that the change to generic drugs resulted in an increase in the number of his daily seizures and made their effects more severe ... and as such contributed to the applicant's increased feeling of anguish and physical suffering.

76. In the Court's opinion the lack of adequate medical treatment in Poznań Remand Centre and the placing of the applicant in a position of dependency and inferiority *vis-à-vis* his healthy cellmates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty.

77. In conclusion, the Court considers that the applicant's continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, amounting to a violation of Article 3 of the Convention.

*Right to vote*

☰ *Labita v. Italy* [GC], 26772/95, 6 April 2000

202. The Court observes that persons who are subject to special police supervision are automatically struck off the electoral register as they forfeit their civil rights because they represent "a danger to society" or, as in the instant case, are suspected of belonging to the Mafia ... The Government pointed to the risk that persons "suspected of belonging to the Mafia" might exercise their right of vote in favour of other members of the Mafia.

203. The Court has no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim. It observes, however, that although the special police supervision measure against the applicant was in the instant case imposed during the course of the trial, it was not applied until the trial was over, once the applicant had been acquitted on the ground that "he had not committed the offence". The Court does not accept the view expressed by the Government that the serious evidence of the applicant's guilt was not rebutted during the trial. That affirmation is in contradiction with the tenor of the judgments of the Trapani District Court ... and the Palermo Court of Appeal ... When his name was removed from the electoral register, therefore, there was no concrete evi-

dence on which a “suspicion” that the applicant belonged to the Mafia could be based ...

In the circumstances, the Court cannot regard the measure in question as proportionate.

*Ill-treatment by guards*

☞ *Satik and others v. Turkey*, 31866/96, 10 October 2000

56. ... the applicants complain that they were subjected to a severe and unjustified beating by State agents. In the Government’s submission, the applicants sustained their injuries as a result of a fall which they had provoked by their own protest action.

57. ... The Government have not submitted any elements which would serve to rebut a presumption that the applicants were deliberately beaten as alleged when engaged in a protest action. In particular, it has not been suggested by the Government that the intervention of the gendarme officers was considered necessary to quell a riot or a planned attack on the internal security of Buca Prison ...

61. In the absence of a plausible explanation on the part of the authorities, the Court is led to find that the applicants were beaten and injured by State agents as alleged. The treatment to which they were subjected amounts to a violation of Article 3 of the Convention.

*Need to monitor*

**Length**

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

82. Finally, the Court observes that at no point in the proceedings did the domestic authorities consider whether the length of the applicant’s detention had exceeded a “reasonable time”. Such an analysis should have been particularly prominent in the domestic decisions after the applicant had spent many months in custody, however the reasonable-time test has never been applied.

*Defining the period*

☞ *N. v. the Federal Republic of Germany*, 9132/80, 16 December 1982, DR31, 154

11. ... When determining the period to be considered under Article 5 (3) of the Convention, regard must be had not only to the time after the applicant’s arrest on 28 July 1977, but also to the fact that the applicant had been detained on remand in connection with the same criminal proceedings already at an earlier time ... By the time of the pronouncement of the judgment of first instance on 13 January 1978 the applicant’s detention on remand had thus effectively lasted 11 months. The Commission considers



that this is the final date to be taken into account for the purposes of Article 5 (3) of the Convention ...

12. ... After this date, the applicant continued to be considered as a remand prisoner under the domestic law, but for the purposes of the Convention his detention comes under Article 5 (1) (a) which authorises the lawful detention of a person after conviction by a competent court ...

*Not unreasonable*

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

42. ... the Federal Court ... never regarded the time spent by the applicant in prison as excessive. It considered that the applicant was primarily responsible for the slow pace of the investigation: there had been great difficulties in reconstructing the financial situation of his companies, as a result of the state of their accounts. It stated that things had become even more difficult when he decided to refuse to make any statement, thereby delaying the progress of the case ...

... the Court ... notes that the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care ... it finds no period during which the investigators did not carry out their inquiries with the necessary promptness, nor was there any delay caused by possible shortage of personnel or equipment. Consequently, it appears that the length of the detention in issue was essentially attributable to the exceptional complexity of the case and the conduct of the applicant. To be sure, he was not obliged to co-operate with the authorities, but he must bear the consequences which his attitude may have caused for the progress of the investigation.

☰ *Van der Tang v. Spain*, 19382/92, 13 July 1995

58. ... The total period of the applicant's detention was therefore three years, one month and twenty-seven days ...

76. The risk of the applicant's absconding persisted throughout the whole of his detention on remand, the protracted length of which, notably as from the transfer of the case file to the Audiencia Nacional, was not attributable to any lack of special diligence on the part of the Spanish authorities.

Accordingly, the Court finds that the facts of the present case do not disclose a violation of Article 5 para. 3 ...

☰ *Contrada v. Italy*, 27143/95, 24 August 1998

67. ... In the instant case, with the exception of the analysis of the data relating to Mr Contrada's mobile telephones, which could and should have been carried out earlier, and the excessive work-

load referred to by the trial court on 31 March 1995 ..., the Court sees no particular reason to criticise the relevant national authorities' conduct of the case, especially as, when the maximum periods of detention pending trial were extended, the trial court offered to increase the rate of the hearings, but the defence declined ...

Furthermore, although investigative measures such as the hearing of witnesses and confrontations are quite unexceptional in criminal cases, it should not be forgotten that trials of presumed members of the Mafia, or, as in the present case, of persons suspected of supporting that organisation from within State institutions, are particularly sensitive and complicated. With its rigid hierarchical structure and very strict rules and its substantial power of intimidation based on the rule of silence and the difficulty in identifying its followers, the Mafia represents a sort of criminal opposition force capable of influencing public life directly or indirectly and of infiltrating the institutions. It is for that reason – to enable the “organisation” to be undermined through information supplied by former “members” – that detailed inquiries are necessary.

68. In the light of the foregoing, the Court considers that the authorities who dealt with the case could reasonably base the detention in issue on relevant and sufficient grounds and that they conducted the proceedings without delay. There has therefore been no violation of Article 5 §3.

▮ *N.C. v. Italy*, 24952/94, 11 January 2001

60. ... the period of detention on remand of which the applicant complains is of one and a half months only, two weeks of which were house arrest. It observes that, in addition to the cogency of the case against the applicant, the main reasons referred to by the District Court were the seriousness and nature of the offence and the danger of re-offending. The Court finds that these reasons were both relevant and sufficient. It further finds that detention was not unduly prolonged by the way the case was handled.

Accordingly, the Court considers that the length of the detention on remand complained of did not exceed the reasonable time referred to in Article 5 §3 of the Convention.\*

▮ *Chraidi v. Germany*, 65655/01, 26 October 2006

45. ... the Court finds that the competent national court acted with the necessary special diligence in conducting the proceedings in the applicant's case.

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\* This issue was not addressed in the Grand Chamber judgment of 18 December 2002.

46. The Court has found in previous cases that detention on remand exceeding five years constituted a violation of Article 5 §3 of the Convention ...

47. The present case involved a particularly complex investigation and trial concerning serious offences of international terrorism which caused the death of three victims and serious suffering to more than one hundred. Following his extradition from Lebanon in 1996, the sole reason for the applicant's presence in Germany was to stand trial for these offences.

49. In these exceptional circumstances, the Court concludes that the length of the applicant's detention [5 years and nearly 6 months] can still be regarded as reasonable. There has accordingly been no violation of Article 5 §3 of the Convention.

*Unreasonable*

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

48. ... Whilst the joinder of the various sets of proceedings was certainly necessary for the proper administration of justice, the successive changes of judge – the first a year after the investigation had begun, the other two after it had been under way for two years – contributed to slowing down the investigation; that fact was moreover recognised by the domestic courts ... The judicial authorities did not act with all due expedition, although the applicant had admitted the offences once and for all as soon as the investigation had begun ... and did not thereafter make any application that might have slowed its progress. The period spent by Mr Muller in detention pending trial therefore exceeded the “reasonable time” laid down in Article 5 para. 3 ...

☞ *Labita v. Italy* [GC], 26772/95, 6 April 2000

163. The Court observes that the grounds stated in the relevant decisions were reasonable, at least initially, though very general, too. The judicial authorities referred to the prisoners as a whole and made no more than an abstract mention of the nature of the offence. They did not point to any factor capable of showing that the risks relied on actually existed and failed to establish that the applicant, who had no record and whose role in the mafia-type organisation concerned was said to be minor (the prosecutor called for a three-year sentence in his case), posed a danger. No account was taken of the fact that the accusations against the applicant were based on evidence which, with time, had become weaker rather than stronger.

164. The Court accordingly considers that the grounds stated in the impugned decisions were not sufficient to justify the applicant's being kept in detention for two years and seven months.

165. In short, the detention in issue infringed Article 5 §3 of the Convention.

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

78. As regards the conduct of the proceedings by the national authorities, the Court notes, in particular, that more than eight months elapsed between the filing of the indictment and the hearing before the City Court on 28 June 1994. This period does not appear, as such, to be excessive as during this time the City Court had to deal with several requests for further evidence to be taken which the applicant made, notwithstanding that at the end of the investigation he had expressly stated that he had no other proposals in this respect.

79. However, the City Court subsequently adjourned three other hearings to enable further evidence to be taken. As a result, it delivered its first judgment after a delay of another six months.

80. Subsequently the Court of Cassation quashed the judgment of 10 January 1995 on the ground that the City Court had not established or considered all the relevant facts of the case, that it had applied the law erroneously and that its judgment was unclear. Despite the Supreme Court's intervention to accelerate the proceedings, the City Court did not deliver its second judgment until 16 January 1996, that is to say ten months after its first judgment had been quashed.

81. In these circumstances, the Court finds that "special diligence" was not displayed in the conduct of the proceedings.

82. Accordingly, there has been a violation of Article 5 §3 of the Convention as a result of the length of the applicant's detention on remand.

▣ *Adamiak v. Poland*, 20758/03, 19 December 2006

33. La Cour observe qu'en l'espèce les autorités ont justifié la prolongation de la détention par la nature de l'infraction et la sévérité de la peine encourue, par la complexité de l'affaire ainsi que par le risque de fuite et d'entrave à la bonne marche de justice.

34. La Cour considère que ces motifs pouvaient initialement suffire à légitimer la détention. Toutefois, au fil du temps, ils sont inévitablement devenus moins pertinents et seules des raisons vraiment impérieuses pourraient persuader la Cour que la longue privation de liberté (environ cinq années) se justifiait au regard de l'article 5 § 3.

35. La Cour ne décèle aucune raison de la sorte en l'espèce et constate que les juridictions nationales ont rejeté les demandes de libération du requérant et ont prolongé la détention essentiellement pour les mêmes motifs que ceux cités précédemment. La

Cour observe de surcroît que tout au long de la procédure, les juges ont motivé leurs décisions par le caractère complexe de l'affaire, soulignant surtout la sévérité de la peine encourue du fait de la nature des infractions reprochées à l'intéressé.

36. La Cour rappelle à cet égard qu'à la lumière de sa jurisprudence établie, l'existence d'un fort soupçon de participation à des infractions graves et la perspective d'une lourde sentence ne sauraient à elles seules justifier une longue détention provisoire ...

37. Par ailleurs, pour la Cour, le fait que la procédure concernait en l'occurrence un groupe criminel organisé est incontestablement un facteur rendant les investigations plus complexes et plus longues. Ceci ne saurait toutefois justifier une détention provisoire d'une durée de cinq années ...

38. En conséquence, la Cour conclut que les raisons invoquées par les tribunaux dans leurs décisions n'étaient pas suffisantes pour justifier le maintien en détention du requérant pendant la période en question.

39. Il y a donc eu violation de l'article 5 § 3 de la Convention.

*Release on termination*

▣ *Giulia Manzoni v. Italy*, 1 July 1997

23. Mrs Manzoni maintained that she had been unlawfully detained for seven hours between the end of the trial in the Rome District Court (11.45 a.m.) and her release from prison (6.45 p.m.).

24. The Government, pointing out that the applicant had no longer been regarded as being in detention after 11.45 a.m., argued that the period of time in issue had been quite normal seeing that she had been taken to the prison (roughly an hour's drive from the court) at about 1.30 p.m. and that the staff there had served the record of the hearing on her (at 3.10 p.m.), informed the police that she was about to be released and waited for confirmation that there were no objections, returned her personal effects to her, dealt with accounts and at 6.30 p.m. had taken a note of her address for notification purposes. All those measures had necessarily taken some time.

25. ... the Court ... merely notes that Mrs Manzoni was taken to Rebibbia Prison more than an hour and a half after the end of her trial and that the record of the hearing was served on her shortly after her arrival there; that procedure must be regarded as a first step towards complying with the Rome District Court's judgment. Admittedly, the administrative formalities mentioned by the Government could have been carried out more swiftly, but that is not a ground for finding that there has been a breach of the

Convention; some delay in carrying out a decision to release a detainee is often inevitable, although it must be kept to a minimum.

In conclusion, there has been no violation of Article 5 para. 1 (c) ...

▮ *Labita v. Italy* [GC], 26772/95, 6 April 2000

172. ... in the instant case the delay in the applicant's release was only partly attributable to the need for the relevant administrative formalities to be carried out. The additional delay in releasing the applicant between 12.25 a.m. and the morning of 13 November 1993 was caused by the registration officer's absence. It was only on the latter's return that it was possible to verify whether any other reasons existed for keeping the applicant in detention and to put in hand the other administrative formalities required on release ...

173. In these circumstances, the applicant's continued detention after his return to Termini Imerese Prison did not amount to a first step in the execution of the order for his release and therefore did not come within sub-paragraph 1 (c), or any other sub-paragraph, of Article 5.

174. Accordingly, there has been a violation of Article 5 §1 on that account.

▮ *Değerli and others v. Turkey*, 18242/02, 5 February 2008

22. Dans la présente affaire, la Cour note que l'ordonnance de mise en liberté des requérants, délivrée le 3 juillet 2001, a été transmise le même jour, à 17h50, à l'établissement où se trouvaient les intéressés. Or ceux-ci n'ont été libérés que le lendemain, après un délai allant de dix-huit heures et cinquante minutes à vingt-trois heures et trente-cinq minutes. La Cour estime qu'en l'absence d'un relevé strict, heure par heure, des actes et formalités accomplis par les responsables de la prison, la thèse du Gouvernement selon laquelle la remise en liberté des requérants n'a subi aucun retard ne saurait être retenue ...

25. Elle considère également que le nombre des détenus à remettre en liberté ne peut justifier les retards observés. Les États contractants, afin d'assurer le respect du droit à la liberté des personnes relevant de leur juridiction, doivent prendre les mesures nécessaires pour permettre au personnel des établissements pénitentiaires d'exécuter sans délai les ordonnances de mise en liberté, y compris lorsqu'il s'agit de la libération d'un grand nombre de détenus.

26. A la lumière de ce qui précède, la Cour conclut que le maintien en détention provisoire des requérants pendant les heures consécutives à l'ordonnance de mise en liberté contrevient aux exi-

gences de l'article 5 de la Convention, faute de reposer sur l'un des buts autorisés par son premier paragraphe.

27. Dès lors, il y a eu violation de cette disposition.

*Deduction from sentence*

▮ *P.L. v. France*, 21503/93, 2 April 1997

26. The Government informed the Court that, in a decree of 27 January 1997, the President of the French Republic had granted the applicant a pardon remitting a portion of his sentence (one year and eighteen days) equivalent to the period of detention on remand in issue ... They considered that the pardon "[met] the object of [the] application to the Convention institutions very precisely" and consequently requested that the case be struck out of the Court's list ...

27. The Court observes that the Government and the applicant have not reached a "friendly settlement" within the meaning of Rule 49 para. 2, but that the applicant has stated that he "is not proceeding (*se désiste*)".

It further notes that the pardon granted in the decree of 27 January 1997 gave the applicant what he was seeking from the French authorities. His imprisonment will be one year and eighteen days shorter, just as if his first period of detention on remand had been deducted from his sentence ... That being so, the circumstances described above may be regarded as an "arrangement or other fact of a kind to provide a solution of the matter" within the meaning of Rule 49 para. 2. Moreover, there is no reason of public policy why the case should not be struck out of the list (Rule 49 paras. 2 and 4). The case should therefore be struck out of the list.

▮ *Labita v. Italy* [GC], 26772/95, 6 April 2000

143. In the instant case, even though the Palermo Court of Appeal, in a decision of 20 January 1998 lodged at the registry on 23 January 1998, acceded to the applicant's claim for compensation for unjust detention, it based its decision on Article 314 §1 of the Code of Criminal Procedure, which affords a right to reparation to "anyone who has been acquitted in a judgment that has become final" .... The detention is deemed to be "unjust" as a result of the acquittal, and an award under Article 314 §1 does not amount to a finding that the detention did not satisfy the requirements of Article 5 of the Convention. While it is true that the length of the applicant's detention pending trial was taken into account in calculating the amount of reparation, there is no acknowledgment in the judgment concerned, either express or implied, that it had been excessive.

144. In conclusion, the Court considers that despite the payment of a sum as reparation for the time he spent in detention pending trial, the applicant can still claim to be a “victim” within the meaning of Article 34 of the Convention of a violation of Article 5 §3 ...

▮ *Chraidi v. Germany*, 65655/01, 26 October 2006

25. ... although the Convention forms an integral part of the law of the Federal Republic of Germany ... and there was accordingly nothing to prevent the Regional Court from holding, if appropriate, that the length of the applicant’s detention on remand had been in breach of the Convention, either expressly or in substance, the latter court merely conceded that the impugned detention had lasted an “unusually long” time ... Furthermore, the Court is not satisfied that the applicant was afforded adequate redress for the alleged violation because the Regional Court failed to specify to what extent the applicant’s sentence had been reduced on account of the length of his detention on remand ...

26. The Court therefore considers that the Regional Court’s statement concerning the unusual length of the applicant’s detention did not deprive the latter of his status of victim within the meaning of Article 34 of the Convention ...

## Gathering evidence

### Search

▮ *Funke v. France*, 10828/84, 25 February 1993

56. ... The Court ... recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse ...

57. This was not so in the instant case. At the material time ... the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government ... appear too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued.

▮ *L.M. v. Italy*, 60033/00, 8 February 2005

32. La Cour ... relève que le droit interne prévoit spécifiquement la validation du procès-verbal de perquisition, ainsi établis-

### Search and seizure



sant un contrôle de la part du parquet sur la légalité de la conduite de la police. L'absence totale et injustifiée d'une telle validation démontre que les organes compétents n'ont pas veillé à la conformité de la perquisition litigieuse avec les procédures prescrites par la loi.

33. Il s'ensuit qu'après l'accomplissement de la perquisition les procédures légales n'ont pas été respectées et que partant il y a eu violation de l'article 8 de la Convention.

☞ *Roemen and Schmit v. Luxembourg*, 51772/99, 25 February 2003

47. ... The measures were intended to establish the identities of the Registration and State-Property Department officials who had worked on the file concerning the imposition of a fiscal fine on the minister ... in other words, the journalist's source ...

56. ... measures other than searches of the applicant's home and workplace (for instance, the questioning of Registration and State-Property Department officials) might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions. The Government have entirely failed to show that the domestic authorities would not have been able to ascertain whether, in the first instance, there had been a breach of professional confidence and, subsequently, any handling of information thereby obtained without searching the applicant's home and workplace ...

60. It therefore finds that the impugned measures must be regarded as disproportionate and that they violated the first applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention ...

☞ *Buck v. Germany*, 41604/98, 28 April 2005

47. As to the proportionality of the search and seizure order to the legitimate aim pursued in the particular circumstances of the case, the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence in respect of which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law ... In addition to that, in the instant case all that was at stake was the conviction of a person who had no previous record of contraventions of road traffic rules.

48. Furthermore, the Court notes that, even though the contravention in question had been committed with a car belonging to the company owned by the applicant, the proceedings in the course of which the search and seizure had been executed had not

been directed against the applicant himself, but against his son, that is, a third party.

51. Finally ... the Court observes that the attendant publicity of the search of the applicant's business and residential premises in a town of some 10 000 inhabitants was likely to have an adverse effect on his personal reputation and that of the company owned and managed by him. In this connection, it is to be recalled that the applicant himself was not suspected of any contravention or crime.

52. ... Having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued.

▣ *H.M. v. Turkey*, 34494/97, 8 August 2006

28. En l'espèce, la Cour note que le 15 mars 1996 le requérant a déposé une plainte formelle au parquet de Karşıyaka, dans laquelle il alléguait que des agents de l'Etat avaient illégalement perquisitionné sa maison. A l'appui de ses dires, il a cité les témoignages de son épouse et de ses fils ...

Compte tenu des antécédents de l'intéressé, qui avait été poursuivi plusieurs fois du fait de ses activités syndicales et avait mis en cause des membres de la police locale, on pouvait escompter que le procureur, qui avait sans doute connaissance de cette situation, s'interrogeât sur la question de savoir si l'intéressé, de par sa tendance à remettre en cause la situation établie, ne risquait pas d'être la cible d'actes d'intimidation.

Quoi qu'il en soit, il aurait suffi que le procureur recueille les témoignages des membres de la famille du requérant pour vérifier le caractère « défendable » des allégations dont il était saisi, sachant que ces témoignages, tels qu'ils ont été soumis à la Cour, paraissent sincères, crédibles et concordants.

29. Or pareille vérification n'a pas été faite et le doute soulevé en l'espèce n'a pas été dissipé par la présumée enquête que le procureur a clôturée en cinq jours. Acceptant sans réserve les informations soumises par les autorités policières ..., ce magistrat a conclu que, contrairement à ce que l'intéressé prétendait, aucun agent de l'Etat n'était impliqué dans l'incident allégué.

Cependant, pareille conclusion ne résiste pas à l'examen, car aux fins de l'obligation d'enquêter que l'article 8 impose ..., c'est le grief tenant à l'existence de l'acte prohibé qui doit être « défendable », pas forcément l'appréciation faite, à tort ou à raison, par la victime

quant à l'identité des « responsables présumés ». Il s'ensuit qu'une fois dûment saisi, c'était au parquet de Karşıyaka qu'il incombait de soumettre les circonstances entourant la plainte à un examen qui dénote ne serait-ce que la volonté d'élucider les faits puis d'identifier les « vrais » responsables ...

30. Ainsi, la Cour juge que le requérant peut se prétendre victime d'une absence de protection de son droit au respect de son domicile.

📖 *Imakayeva v. Russia*, 7615/02, 9 November 2006

187. The Court notes that no search warrant was produced to the applicant during the search and that no details were given of what was being sought. Furthermore, it appears that no such warrant was drawn up at all, either before or after the search, assuming that the security forces acted in a situation which required urgency. The Government were unable to submit any details about the reasons for the search, to refer to any record of a legitimisation of it or to indicate the procedural significance of this action. The Government could not give any details about the items seized at the Imakayevs' house because they had allegedly been destroyed. It thus appears that no record or description of these items was made. The receipt drawn up by a military officer who had failed to indicate his real name or rank or even the state body which he represented, and which referred to "a bag of documents and a box of floppy discs" ..., appears to be the only existing paper in relation to the search.

188. The Government's reference to the Suppression of Terrorism Act cannot replace an individual authorisation of a search, delimiting its object and scope, and drawn up in accordance with the relevant legal provisions either beforehand or afterwards. The provisions of this Act are not to be construed so as to create an exemption to any kind of limitations of personal rights for an indefinite period of time and without clear boundaries to the security forces' actions. The application of these provisions in the present case is even more doubtful, given the Government's failure to indicate, either to the applicant or to this Court, what kind of counter-terrorist operation took place on 2 June 2002 in Novye Atagi, which agency conducted it, its purpose, etc. Moreover, the Court remarks that for over two years after the event various state authorities denied that such an operation had taken place at all. The Court is again struck by this lack of accountability or any acceptance of direct responsibility by the officials involved in the events in the present case.

189. The Court thus finds that the search and seizure measures in the present case were implemented without any authorisation or safeguards. In these circumstances, the Court concludes that

the interference in question was not “in accordance with the law” and that there has been a violation of Article 8 of the Convention.

☰ *Smirnov v. Russia*, 71362/01, 7 June 2007

46. ... the applicant himself was not charged with, or suspected of, any criminal offence or unlawful activities. On the other hand, the applicant submitted documents showing that he had represented, at different times, four persons in criminal case no. 7806, in connection with which the search had been ordered. In these circumstances, it is of particular concern for the Court that, when the search of the applicant’s flat was ordered, no provision for safeguarding the privileged materials protected by professional secrecy was made.

47. The search order was drafted in extremely broad terms, referring indiscriminately to “any objects and documents that [were] of interest for the investigation of criminal case [no. 7806]”, without any limitation. The order did not contain any information about the ongoing investigation, the purpose of the search or the reasons why it was believed that the search at the applicant’s flat would enable evidence of any offence to be obtained ... Only after the police had penetrated into the applicant’s flat was he invited to hand over “documents relating to the public company T. and the federal industrial group R.”. However, neither the order nor the oral statements by the police indicated why documents concerning business matters of two private companies – in which the applicant did not hold any position – should have been found on the applicant’s premises ... The *ex post factum* judicial review did nothing to fill the lacunae in the deficient justification of the search order. The Oktyabrskiy Court confined its finding that the order had been justified, to a reference to four named documents and other unidentified materials, without describing the contents of any of them ... The court did not give any indication as to the relevance of the materials it referred to and, moreover, two out of the four documents appeared after the search had been carried out. The Court finds that the domestic authorities failed in their duty to give “relevant and sufficient” reasons for issuing the search warrant.

48. As regards the manner in which the search was conducted, the Court further observes that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were “of interest” for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant’s personal notebook, the central unit of his computer and other materials, including his client’s authority form issued in un-

related civil proceedings and a draft memorandum in another case. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege ... Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. ...

49. ... There has therefore been a violation of Article 8 of the Convention.

☰ *Kucera v. Slovakia*, 48666/99, 17 July 2007

119. For the Court, considering the number of policemen involved, the fact that four of them belonged to a special interventions unit and openly carried submachine guns and were masked, and noting that they had come to the applicant's apartment at day-break, it can reasonably be concluded that the applicant was left with little choice but to allow them to enter his apartment. It is difficult to accept that, in the circumstances, any consent given by the applicant was free and informed. There was accordingly an interference with his right to respect for his home ...

120. ... For the Court, the interference must in the circumstances be considered disproportionate for the following reasons.

121. In particular ... the police had come to the applicant's door in order to serve charges on him and his wife and to escort them to an investigator for questioning. There is no indication that the fulfilment of that task required the police to enter the apartment ... The impugned measure must be considered disproportionate in the circumstances.

122. Furthermore, a risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in the present case where, as stated above, the applicant was confronted by a number of specially trained masked policemen at the front door of his apartment very early in the morning. In the Court's view, safeguards should be in place in order to avoid any possible abuse in such circumstances and to ensure the effective protection of a person's rights under Article 8 of the Convention. Such safeguards might include the adoption of regulatory measures which both confine the use of special forces to situations where ordinary police intervention cannot be regarded as safe and sufficient and, in addition, prescribe procedural guarantees ensuring, for example, the presence of an impartial person during the operation or the obtaining of the owner's clear, written consent as

a pre-condition to entering his or her premises. The Court notes that certain guarantees to that effect are incorporated in the Police Corps Act 1993 ... However, those guarantees failed to prevent the situation complained of in the instant case from occurring.

123. In view of the above considerations, the Court is not satisfied that the action in issue was compatible with the applicant's right to respect for his home.

▮ *Peev v. Bulgaria*, 64209/01, 26 July 2007

37. ... in the past it has found that searches carried out in business premises and the offices of persons exercising liberal professions amount to interferences with the right to respect for both the private lives and the homes of the persons concerned ... The issue in the present case is whether the search in the applicant's office, which was located on the premises of a public authority, also amounted to such interference.

39. ... the situation obtaining in the present case should ... be assessed under the "reasonable expectation of privacy" test. In the Court's opinion, the applicant did have such an expectation, if not in respect of the entirety of his office, at least in respect of his desk and his filing cabinets. This is shown by the great number of personal belongings that he kept there ... Moreover, such an arrangement is implicit in habitual employer-employee relations and there is nothing in the particular circumstances of the case – such as a regulation or stated policy of the applicant's employer discouraging employees from storing personal papers and effects in their desks or filing cabinets – to suggest that the applicant's expectation was unwarranted or unreasonable. The fact that he was employed by a public authority and that his office was located on government premises does not of itself alter this conclusion, especially considering that the applicant was not a prosecutor, but a criminology expert employed by the Prosecutor's Office ... Therefore, a search which extended to the applicant's desk and filing cabinets must be regarded as an interference with his private life.

40. Having reached this conclusion, the Court finds it unnecessary to additionally determine whether the search amounted to an interference with the applicant's right to respect for his home ...

44. ... the Government did not seek to argue that any provisions had existed at the relevant time, either in general domestic law or in the governing instruments of the Prosecutor's Office, regulating the circumstances in which that office could, in its capacity as employer or otherwise, carry out searches in the offices of its employees outside the context of a criminal investigation. The interference was therefore not "in accordance with the law", as required by Article 8 §2.

☰ *André and others v. France*, 18603/03, 24 July 2008

42. Partant, si le droit interne peut prévoir la possibilité de perquisitions ou de visites domiciliaires dans le cabinet d'un avocat, celles-ci doivent impérativement être assorties de garanties particulières. De même, la Convention n'interdit pas d'imposer aux avocats un certain nombre d'obligations susceptibles de concerner les relations avec leurs clients. Il en va ainsi notamment en cas de constat de l'existence d'indices plausibles de participation d'un avocat à une infraction ..., ou encore dans le cadre de la lutte contre certaines pratiques ... Reste qu'il est alors impératif d'encadrer strictement de telles mesures, les avocats occupant une situation centrale dans l'administration de la justice et leur qualité d'intermédiaires entre les justiciables et les tribunaux permettant de les qualifier d'auxiliaires de justice.

43. En l'espèce, la Cour note que la visite domiciliaire s'est accompagnée d'une garantie spéciale de procédure, puisqu'elle fut exécutée en présence du bâtonnier de l'Ordre des avocats dont relevaient les requérants ...

44. En revanche, outre l'absence du juge qui avait autorisé la visite domiciliaire, la présence du bâtonnier et les contestations expresses de celui-ci n'ont pas été de nature à empêcher la consultation effective de tous les documents du cabinet, ainsi que leur saisie. S'agissant notamment de la saisie de notes manuscrites du premier requérant, la Cour relève qu'il n'est pas contesté qu'il s'agissait de documents personnels de l'avocat, soumis au secret professionnel, comme le soutenait le bâtonnier.

45. Par ailleurs, la Cour relève que l'autorisation de la visite domiciliaire était rédigée en termes larges, la décision se contentant d'ordonner de procéder aux visites et aux saisies nécessitées par la recherche de la preuve des agissements dans certains lieux où des documents et supports d'information relatifs à la fraude présumée étaient susceptibles de se trouver, et ce en particulier au domicile professionnel des requérants. Dès lors, les fonctionnaires et officiers de police judiciaire se voyaient reconnaître des pouvoirs étendus.

46. Ensuite, et surtout, la Cour constate que la visite domiciliaire litigieuse avait pour but la découverte chez les requérants, en leur seule qualité d'avocats de la société soupçonnée de fraude, de documents susceptibles d'établir la fraude présumée de celle-ci et de les utiliser à charge contre elle. A aucun moment les requérants n'ont été accusés ou soupçonnés d'avoir commis une infraction ou participé à une fraude commise par leur cliente.

47. La Cour note donc qu'en l'espèce, dans le cadre d'un contrôle fiscal d'une société cliente des requérants, l'administration visait ces derniers pour la seule raison qu'elle avait des difficultés, d'une

part, à effectuer ledit contrôle fiscal et, d'autre part, à trouver des « documents comptables, juridiques et sociaux » de nature à confirmer les soupçons de fraude qui pesaient sur la société cliente.

48. Compte tenu de ce qui précède, la Cour juge que la visite domiciliaire et les saisies effectuées au domicile des requérants étaient, dans les circonstances de l'espèce, disproportionnées par rapport au but visé.

49. Partant, il y a eu violation de l'article 8 de la Convention.

▮ *Aleksanyan v. Russia*, 46468/06, 22 December 2008

217. The Court is mindful of the fact that “elaborate reasoning [of a search warrant] may prove hard to achieve in urgent situations” ... However, the Court notes that by the time of the searches the official investigation into the business activities of the *Yukos* management had been going on for almost three years. From the very beginning of the investigation the authorities should have known that the applicant had been head of the legal department of *Yukos* in 1998 and 1999, when the crimes were allegedly committed, and could have had in his possession certain documents, electronic data and other evidence pertinent to the events at issue. Therefore, the lack of proper reasoning and vagueness of the search warrant cannot be explained by the urgency of the situation.

218. The Court concludes that the serious deficiency of the search warrants of 4 and 5 April 2006 is in itself sufficient to conclude that the searches of the applicant's premises were conducted in breach of Article 8 of the Convention.

#### Seizure

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

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

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

... seizure under section 2 ter of the 1965 Act is clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an “organisation” like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.



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

☞ *Panteleyenko v. Ukraine*, 11901/02, 29 June 2006

51. ... instead of selecting the evidence necessary for the investigation, they seized all documents from the office and certain personal items belonging to the applicant which were clearly unrelated to the criminal case ...

53. In these circumstances, the Court concludes that the interference in question has not been shown to be “in accordance with the law” and that there has accordingly been a violation of Article 8 on this ground.

*Use of force*

☞ *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

77. ... in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale ... The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences ...

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant’s health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

☞ *Keegan v. the United Kingdom*, 28867/03, 18 July 2006

32. ... the police obtained a warrant from a Justice of the Peace, giving information under oath that they had reason to believe the proceeds of a robbery were at the address which had been used by one of the suspected robbers ... If this belief had been correct, the Court does not doubt that the entry would have been found to have been justified.

34. ... The Court cannot agree that a limitation of actions for damages to cases of malice is necessary to protect the police in their vital functions of investigating crime. The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being ... In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively carried out, the resulting police action, which caused the applicants considerable fear and alarm, cannot be regarded as proportionate.

35. ... this finding does not imply that any search, which turns out to be unsuccessful, would fail the proportionality test, only that a failure to take reasonable and available precautions may do so.

36. The Court accordingly concludes that the balance has not been properly struck in the present case and that there has been a violation of Article 8 of the Convention.

*Destruction of property*

☞ *Selçuk and Asker v. Turkey*, 23184/94 and 23185/94, 24 April 1998

77. ... It recalls that Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village of İslamköy all their lives ... Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards.

78. Bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 ...

86. ... There can be no doubt that these acts, in addition to giving rise to violations of Article 3, constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.

87. It follows that the Court finds violations of Article 8 of the Convention and Article 1 of Protocol No. 1.

**Body examination including autopsy**

☰ *X v. the Netherlands*, 8239/78, 4 December 1978, DR16, 184

The Commission thinks it reasonable that the authorities, in pursuance of their task, should be able to take certain measures affecting the person whom they suspect of an offence. It points out that Article 5, paragraph 1.c of the Convention even permits detention on remand in such cases. Therefore, *a fortiori*, it will tolerate minor interferences such as a blood test ...

The Commission notes that various guarantees are provided against arbitrary or improper use of the blood test ... a blood test may only be ordered by the Public Prosecutor, his deputy or another police official authorised to do so. The enabling decree accompanying this legislation also stipulates that the blood test may only be performed by an approved doctor, who may ... refuse to carry out the test for exceptional reasons of a medical character ...

The Commission therefore considers that Netherlands legislation on this point is inspired by the desire and need to protect society and, more particularly, road safety and the health of other people. Thus, while compulsory blood-testing may be seen as constituting a violation of private life within the meaning of Article 8, paragraph 1, it may also be seen as necessary for protection of the rights of others, within the meaning of paragraph 2 of the same article.

☰ *Devrim Turan v. Turkey*, 879/02, 2 March 2006

19. In the present case, the Court observes that the applicant was taken to the Tokat Maternity Hospital on the first and last days of her arrest for a gynaecological examination ...

20. ... being taken to the hospital for a gynaecological examination might have caused distress to the applicant. However, as recognised in the Court's case-law ..., medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment. Furthermore, it is clear that when the applicant refused to undergo a gynaecological examination, no force was used against her and the doctors refrained from performing the said examination.

21. In view of the above, the Court considers that the sole fact that the applicant was taken to the hospital for a gynaecological examination on the first and last days of her arrest does not attain the minimum level of severity which amounts to degrading treatment within the meaning of Article 3 of the Convention.

▮ *Akpınar and Altun v. Turkey*, 56760/00, 27 February 2007

76. ... it is undisputed that the ears of Seyit Külekçi and Doğan Altun had been cut off, in whole or in part, by the time their bodies were returned to the applicants.

78. ... the mutilation of the bodies occurred while they were in the hands of the State security forces.

81. ...the Court is led to conclude that the ears of Seyit Külekçi and Doğan Altun were cut off after their deaths.

82. Nevertheless, the Court has never applied Article 3 of the Convention in the context of disrespect for a dead body. The present Chamber concurs with this approach, finding that the human quality is extinguished on death and, therefore, the prohibition on ill-treatment is no longer applicable to corpses, like those of Seyit Külekçi and Doğan Altun, despite the cruelty of the acts concerned.

83. It follows that there has been no violation of Article 3 on this account.

▮ *Botka and Paya v. Austria*, 15882/89, 29 March 1993, DR74, 48

**Psychiatric examination**

3. ... The Commission observes that the expert S. prepared the opinion on the first applicant's mental health in the course of criminal proceedings against Mr. R., suspected of having defrauded the first applicant as well as his brother. The charges against Mr. R. raised, *inter alia*, the question of the first applicant's mental health.

The Commission notes that the preparation of the opinion in question did not necessitate any particular examination of the first applicant by Dr S. In particular, when, following the appointment of Dr S. as expert in October 1988, the first applicant refused an examination, no further steps, such as coercive measures, were taken ... Furthermore, Dr S. accompanied the Investigating Judge on the occasion of the first applicant's questioning as witness on 1 February 1989, when the first applicant did not object, but voluntarily answered also the questions put by the expert. Moreover, the expert, in his opinion of April 1989, did not establish any negative findings on the first applicant's capacity to enter into legal transactions.

In these particular circumstances, the Commission finds that the appointment of the expert S. to prepare an expert opinion on questions of the first applicant’s mental health does not show any lack of respect for the first applicant’s right to respect for his private life under Article 8 para. 1 ... of the Convention.

☰ *Worwa v. Poland*, 26624/95, 27 November 2003

82. The Court emphasises that ordering a psychiatric report in order to determine the mental state of a person charged with an offence remains a necessary measure and one which protects individuals capable of committing offences without being in full possession of their mental faculties. However, the State authorities are required to make sure such a measure does not upset the fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice.

83. In the present case the Court finds that that balance was not preserved. The judicial authorities within the territorial jurisdiction of a single court repeatedly and at short intervals summoned the applicant to undergo psychiatric examinations, and in addition she was sent home on several occasions after travelling to the specified place having been told that no appointment had been made for the day indicated on the summons ...

84. ... the Court, notwithstanding the large number of disputes in which the applicant was involved, considers that the judicial authorities failed to act with due diligence. The interference with the applicant’s exercise of her right to respect for her private life was therefore unjustified.

**Investigation of  
crime scene with  
direct assistance of  
suspect**

☰ *Demiray v. Turkey*, 27308/95, 21 November 2000

46. ... the Court notes that the authorities were certainly in a position to evaluate the risks inherent in visiting the alleged site of the arms cache in question, if only because of the sensitivity of the situation in south-east Turkey. According to the sketch map provided by the Government, Ahmet Demiray was 1 metre away from the arms cache at the time of the explosion, whereas two of the gendarmes accompanying him were 30 metres away and the third one 50 metres away, forming an isosceles triangle with the arms cache at the centre ... In the absence of an explanation by the Government of the reasons for proceeding in that way, which inevitably gives rise to serious doubts, and of any indication of other measures taken to protect Ahmet Demiray, the Court can only conclude that the relevant authorities failed to take measures which, judged reasonably, might have been expected to safeguard against the risk incurred by the applicant’s husband.

47. The Court therefore considers that the State's responsibility for the death is engaged. Accordingly, there has been a violation of Article 2 of the Convention in that regard.

☰ *Lüdi v. Switzerland*, 12433/86, 15 June 1992

38. The Court notes that, when opening a preliminary investigation against the applicant on 15 March 1984, the investigating judge of the Laufen District Court also ordered the monitoring of his telephone communications ...

39. There is no doubt that the telephone interception was an interference with Mr Lüdi's private life and correspondence.

Such an interference is not in breach of the Convention if it complies with the requirements of paragraph 2 of Article 8 ... The measure in question was based on Articles 171b and 171c of the Berne Code of Criminal Procedure, which apply ...even to the preliminary stage of an investigation, where there is good reason to believe that criminal offences are about to be committed. Moreover, it was aimed at the "prevention of crime", and the Court has no doubt whatever as to its necessity in a democratic society.

☰ *Kopp v. Switzerland*, 23224/94, 25 March 1998

73. However, the Court discerns a contradiction between the clear text of legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case-law has established the principle, which is moreover generally accepted, that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.

74. Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence.

75. In short, Swiss law, whether written or unwritten, does not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter. Consequently, Mr Kopp, as a lawyer, did not enjoy the minimum degree of protection required by the rule of law in a democratic society. There has therefore been a breach of Article 8.

## Interception of communications

**Audio and video surveillance**

☰ *P.G. and J.H. v. the United Kingdom*, 44787/98, 25 September 2001

38. As there was no domestic law regulating the use of covert listening devices at the relevant time ..., the interference in this case was not “in accordance with the law” as required by Article 8 §2 of the Convention, and there has therefore been a violation of Article 8 ...

62. ... It considers that no material difference arises where the recording device is operated, without the knowledge or consent of the individual concerned, on police premises. The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation.

☰ *Perry v. the United Kingdom*, 63737/00, 17 July 2003

47. ... The judge found shortcomings as regarded police compliance with paragraphs D.2.11, D.2.15 and D.2.16 of the Code of Practice [regarding the taking and use of video footage for identification], which concerned, significantly, their failure to ask the applicant for his consent to the video, to inform him of its creation and use in an identification parade, and of his own rights in that respect (namely, to give him an opportunity to view the video, object to its contents and to inform him of the right for his solicitor to be present when witnesses saw the videotape). In light of these findings by domestic courts, the Court cannot but conclude that the measure as carried out in the applicant’s case did not comply with the requirements of domestic law.

☰ *Van Vondel v. the Netherlands* (dec.), 38258/03, 25 October 2007

41. ... the applicant complained of a violation of his right to privacy in that a number of his (telephone) conversation with Mr R. had been recorded by the latter with recording devices made available by the National Police Internal Investigation Department to Mr R. who had also been given suggestions by the National Police Internal Investigation Department about the substance of the conversations to be held with the applicant ...

53. Although the Court understands the practical difficulties for an individual who is or who fears to be disbelieved by investigation authorities to substantiate an account given to such authorities and that – for that reason – such a person may need technical assistance from these authorities, it cannot accept that the provision of that kind of assistance by the authorities is not governed by rules aimed at providing legal guarantees against arbitrary acts. It is therefore of the opinion that, in respect of the interference complained of, the applicant was deprived of the minimum degree

of protection to which he was entitled under the rule of law in a democratic society.

54. In the light of the foregoing, the Court finds that the interference in issue was not “in accordance with law”. This finding suffices for the Court to hold that there has been a violation of Article 8 of the Convention.

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

77. ... The Government argued that the existing regulations on telephone tapping were not applicable to radio-transmitting devices and could not be extended to them by analogy. On the contrary, they emphasised the difference between the two by indicating that no judicial authorisation for the use of a radio-transmitting device was required, for the reason that this technology fell outside the scope of any existing regulations. Thus, the Government considered that the use of technology not listed in section 8 of the Operational-Search Activities Act for the interception was not subject to the formal requirements imposed by the Act.

78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, “the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence” ...

79. In the Court’s opinion, these principles apply equally to the use of a radio-transmitting device, which, in terms of the nature and degree of the intrusion involved, is virtually identical to telephone tapping.

80. In the instant case, the applicant enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. was ordered and implemented. In particular, the legal discretion of the authorities to order the interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific safeguards were provided for. Given the absence of specific regulations providing safeguards, the Court is not satisfied that, as claimed by the Government, the possibility for the applicant to bring court proceedings seeking to declare the “operative experiment” unlawful and to request the exclusion of its results as unlawfully obtained evidence met the above requirements.

81. It follows that in the absence of specific and detailed regulations, the use of this surveillance technique as part of an “operative experiment” was not accompanied by adequate safeguards against



various possible abuses. Accordingly, its use was open to arbitrariness and was inconsistent with the requirement of lawfulness.

82. The Court concludes that the interference with the applicant's right to respect for private life was not "in accordance with the law", as required by Article 8 §2 of the Convention.

### Undercover agents

☰ *Lüdi v. Switzerland*, 12433/86, 15 June 1992

40. ... in the present case the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life within the meaning of Article 8 ... Toni's actions took place within the context of a deal relating to 5 kg of cocaine. The cantonal authorities, who had been warned by the German police, selected a sworn officer to infiltrate what they thought was a large network of traffickers intending to dispose of that quantity of drugs in Switzerland. The aim of the operation was to arrest the dealers when the drugs were handed over. Toni thereupon contacted the applicant, who said that he was prepared to sell him 2 kg of cocaine, worth 200 000 Swiss francs ... Mr Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him.

☰ *Teixeira de Castro v. Portugal*, 25829/94, 9 June 1998

37. The Court notes, firstly, that the present dispute is distinguishable from the case of *Lüdi v. Switzerland* ... in which the police officer concerned had been sworn in, the investigating judge had not been unaware of his mission and the Swiss authorities, informed by the German police, had opened a preliminary investigation. The police officers' role had been confined to acting as an undercover agent.

38. In the instant case ... the Government have not contended that the officers' intervention took place as part of an anti-drug-trafficking operation ordered and supervised by a judge. It does not appear either that the competent authorities had good reason to suspect that Mr Teixeira de Castro was a drug trafficker; on the contrary, he had no criminal record and no preliminary investigation concerning him had been opened. Indeed, he was not known to the police officers, who only came into contact with him through the intermediary of V.S. and F.O. ....

Furthermore, the drugs were not at the applicant's home; he obtained them from a third party who had in turn obtained them from another person ... Nor does the Supreme Court's judgment ... indicate that, at the time of his arrest, the applicant had more drugs in his possession than the quantity the police officers had

requested thereby going beyond what he had been incited to do by the police. There is no evidence to support the Government's argument that the applicant was predisposed to commit offences. The necessary inference from these circumstances is that the two police officers did not confine themselves to investigating Mr Teixeira de Castro's criminal activity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence.

Lastly, the Court notes that in their decisions the domestic courts said that the applicant had been convicted mainly on the basis of the statements of the two police officers.

39. In the light of all these considerations, the Court concludes that the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of Article 6 §1.

▬ *Calabro v. Italy* (dec.), 59895/00, 21 March 2002

2. ... The Court notes, however, that the present case is distinguishable from *Teixeira de Castro* ... In the present case ... the undercover agent had merely made it known that he was prepared to import and sell very large quantities of drugs ... the applicant then contacted Jürgen of his own volition, paid him a sum of money and organised a rendezvous to take delivery of 46 kg of cocaine. In so doing, he showed that he was involved in an international drug-trafficking ring.

Furthermore, as the Court has just noted, the undercover agent's statements were not a decisive factor in the applicant's conviction ... In addition, the applicant was given an opportunity in the proceedings in the Milan Criminal Court to question the other police officers who had taken part in the investigation, and to clarify the nature of the police operation that had led to his arrest and the procedures used.

In these circumstances, it cannot be concluded that Jürgen incited the commission of an offence by his actions or that the offence would not otherwise have been committed. The Court consequently finds that Jürgen did not go beyond his role as an undercover agent ... and, therefore, the applicant was not denied a fair trial.

☰ *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008

63. ... The national authorities cannot be exempted from their responsibility for the actions of police officers by simply arguing that, although carrying out police duties, the officers were acting “in a private capacity”. It is particularly important that the authorities should assume responsibility as the initial phase of the operation ... took place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the use of the model and exempting AZ from all criminal responsibility, the authorities legitimised the preliminary phase *ex post facto* and made use of its results.

64. Moreover, no satisfactory explanation has been provided as to what reasons or personal motives could have led AZ to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he was not prosecuted for his acts during this preliminary phase ...

65. It follows that the Lithuanian authorities’ responsibility was engaged under the Convention for the actions of AZ and VS prior to the authorisation of the model ...

67. To ascertain whether or not AZ and VS confined themselves to “investigating criminal activity in an essentially passive manner”, the Court must have regard to the following considerations. Firstly, there is no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. Secondly, as is shown by the recordings of telephone calls, all the meetings between the applicant and AZ took place on the latter’s initiative ... through the contact established on the initiative of AZ and VS, the applicant seems to have been subjected to blatant prompting on their part to perform criminal acts, although there was no objective evidence – other than rumours – to suggest that he had been intending to engage in such activity.

68. These considerations are sufficient for the Court to conclude that the actions of the individuals in question went beyond the mere passive investigation of existing criminal activity.

☰ *Miliniene v. Lithuania*, 74355/01, 24 June 2008

37. ... There was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences. However, the initiative in the case was taken by SŠ, a private individual, who, when he understood that the applicant would require a bribe to reach a favourable outcome in his case, complained to the police. Thereafter the police approached the Deputy Prosecutor General who authorised and followed the further investigation within the legal framework of a criminal

conduct simulation model, affording immunity from prosecution to SŠ in exchange for securing evidence against the suspected offender.

38. To the extent that SŠ had police backing to offer the applicant considerable financial inducements and was given technical equipment to record their conversations, it is clear that the police influenced the course of events. However, the Court does not find that police role to have been abusive, given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society. Nor does it find that the police role was the determinative factor. The determinative factor was the conduct of SŠ and the applicant. To this extent, the Court accepts that, on balance, the police may be said to have “joined” the criminal activity rather than to have initiated it. Their actions thus remained within the bounds of undercover work rather than that of *agents provocateurs* in possible breach of Article 6 §1 of the Convention ...

▮ *Funke v. France*, 10828/84, 25 February 1993

44. The Court notes that the customs secured Mr Funke’s conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law ... cannot justify such an infringement of the right of anyone “charged with a criminal offence”, within the autonomous meaning of this expression in Article 6 ..., to remain silent and not to contribute to incriminating himself.

▮ *Z v. Finland*, 22009/93, 25 February 1997

102. ... The object was exclusively to ascertain from her medical advisers when X had become aware of or had reason to suspect his HIV infection. Their evidence had the possibility of being at the material time decisive for the question whether X was guilty of sexual offences only or in addition of the more serious offence of attempted manslaughter in relation to two offences committed prior to 19 March 1992, when the positive results of the HIV test had become available ...

103. ... under the relevant Finnish law, the applicant’s medical advisers could be ordered to give evidence concerning her without her informed consent only in very limited circumstances, namely in connection with the investigation and the bringing of charges for serious criminal offences for which a sentence of at least six years’ imprisonment was prescribed ... Since they had refused to

**Obligation to give information**

give evidence to the police, the latter had to obtain authorisation from a judicial body – the City Court – to hear them as witnesses ... The questioning took place in camera before the City Court, which had ordered in advance that its file, including transcripts of witness statements, be kept confidential ... All those involved in the proceedings were under a duty to treat the information as confidential. Breach of their duty in this respect could lead to civil and/or criminal liability under Finnish law ...

The interference with the applicant’s private and family life which the contested orders entailed was thus subjected to important limitations and was accompanied by effective and adequate safeguards against abuse ...

105. ... the Court finds that the various orders requiring the applicant’s medical advisers to give evidence were supported by relevant and sufficient reasons which corresponded to an overriding requirement in the interest of the legitimate aims pursued. It is also satisfied that there was a reasonable relationship of proportionality between those measures and aims. Accordingly, there has been no violation of Article 8 ...

☞ *Serves v. France*, 20225/92, 20 October 1997

47. ... It is understandable that the applicant should fear that some of the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. It would thus have been admissible for him to have refused to answer any questions from the judge that were likely to steer him in that direction.

It appears, however, from the interview records, which the applicant signed, that he refused at the outset to take the oath. Yet the oath is a solemn act whereby the person concerned undertakes before the investigating judge to tell, in the terms of Article 103 of the Code of Criminal Procedure, “the whole truth and nothing but the truth”. Whilst a witness’s obligation to take the oath and the penalties imposed for failure to do so involve a degree of coercion, the latter is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence.

In other words, the fines imposed on Mr Serves did not constitute a measure such as to compel him to incriminate himself as they were imposed before such a risk ever arose.

☞ *Tirado Ortiz and Lozano Martín v. Spain* (dec.), 43486/98, 22 June 1999

2. ... The Court considers, however, that the Spanish legal provisions in this domain were inspired by the concern and need to protect society and, more particularly, to ensure road safety and protect the health of others. Thus, while compulsory testing of

alcohol levels may be regarded as amounting to a violation of the applicants' private life within the meaning of Article 8 § 1 of the Convention, it may also be seen as necessary for the prevention of criminal offences and the protection of the rights and freedoms of others. It follows that this part of the application must be rejected as being manifestly ill-founded ...

☰ *Weh v. Austria*, 38544/97, 8 April 2004

54. There is nothing to show that the applicant was "substantially affected" so as to consider him being "charged" with the offence of speeding within the autonomous meaning of Article 6 §1 ... It was merely in his capacity as the registered car owner that he was required to give information. Moreover, he was only required to state a simple fact – namely who had been the driver of his car – which is not in itself incriminating.

55. In addition, although this is not a decisive element in itself, the Court notes that the applicant did not refuse to give information, but exonerated himself in that he informed the authorities that a third person had been driving at the relevant time. He was punished under section 103 §2 of the Motor Vehicles Act only on account of the fact that he had given inaccurate information as he had failed to indicate the person's complete address. Neither in the domestic proceedings nor before the Court did he ever allege that he had been the driver of the car at the time of the offence.

56. The Court ... considers that, in the present case, the link between the applicant's obligation under section 130 §2 of the Motor Vehicles Act to disclose the driver of his car and possible criminal proceedings for speeding against him remains remote and hypothetical. However, without a sufficiently concrete link with these criminal proceedings the use of compulsory powers (i.e. the imposition of a fine) to obtain information does not raise an issue with regard to the applicant's right to remain silent and the privilege against self-incrimination.

☰ *O'Halloran and Francis v. the United Kingdom* [GC],  
15809/02 and 25624/02, 29 June 2007

57. ... the compulsion was imposed in the context of section 172 of the Road Traffic Act, which imposes a specific duty on the registered keeper of a vehicle to give information about the driver of the vehicle in certain circumstances. ... Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion.

58. A further aspect of the compulsion applied in the present cases is the limited nature of the inquiry which the police were authorised to undertake. Section 172 (2) (a) applies only where the driver of the vehicle is alleged to have committed a relevant offence, and authorises the police to require information only “as to the identity of the driver” ... Further ... section 172 does not sanction prolonged questioning about facts alleged to give rise to criminal offences, and the penalty for declining to answer is “moderate and non-custodial”.

59. ... In cases where the coercive measures of section 172 of the 1988 Act are applied, the Court notes that by section 172 (4), no offence is committed under section 172 (2) (a) if the keeper of the vehicle shows that he did not know and could not with reasonable diligence have known who the driver of the vehicle was. The offence is thus not one of strict liability, and the risk of unreliable admissions is negligible.

60. As to the use to which the statements were put, Mr O’Halloran’s statement that he was the driver of his car was admissible as evidence of that fact by virtue of section 12 (1) of the Road Traffic Offenders Act 1988 ..., and he was duly convicted of speeding ... It remained for the prosecution to prove the offence beyond reasonable doubt in ordinary proceedings, including protection against the use of unreliable evidence and evidence obtained by oppression or other improper means (but not including a challenge to the admissibility of the statement under section 172), and the defendant could give evidence and call witnesses if he wished. Again ... the identity of the driver is only one element in the offence of speeding, and there is no question of a conviction arising in the underlying proceedings in respect solely of the information obtained as a result of section 172 (2) (a).

61. As Mr Francis refused to make a statement, it could not be used in the underlying proceedings, and indeed the underlying proceedings were never pursued. The question of the use of the statements in criminal proceedings did not arise, as his refusal to make a statement was not used as evidence: it constituted the offence itself ....

62. Having regard to all the circumstances of the case, including the special nature of the regulatory regime at issue and the limited nature of the information sought by a notice under section 172 of the Road Traffic Act 1988, the Court considers that the essence of the applicants’ right to remain silent and their privilege against self-incrimination has not been destroyed.

☞ *Voskuil v. the Netherlands*, 64752/01, 22 November 2007

66. ... the applicant was required to identify his source for two reasons: firstly, to guard the integrity of the Amsterdam police; and secondly, to secure a fair trial for the accused.

67. The Court sees no need on this occasion to consider whether under any conditions a Contracting Party's duty to provide a fair trial may justify compelling a journalist to disclose his source. Whatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant, the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant ... That being so, this reason given for the interference complained of lacks relevance.

☞ *Z v. Finland*, 22009/93, 25 February 1997

111. As regards the complaint that the medical data in issue would become accessible to the public as from 2002, the Court notes that the ten-year limitation on the confidentiality order did not correspond to the wishes or interests of the litigants in the proceedings, all of whom had requested a longer period of confidentiality ...

112. The Court is not persuaded that, by prescribing a period of ten years, the domestic courts attached sufficient weight to the applicant's interests. It must be remembered that, as a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for her private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years is not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 ...

☞ *Panteleyenko v. Ukraine*, 11901/02, 29 June 2006

57. In the instant case, the domestic court requested and obtained from a psychiatric hospital confidential information regarding the applicant's mental state and relevant medical treatment. This information was subsequently disclosed by the judge to the parties and other persons present in the courtroom at a public hearing.

**Privacy obligations  
with respect to evi-  
dence gathered**



58. The Court finds that those details undeniably amounted to data relating to the applicant’s “private life” and that the impugned measure led to the widening of the range of persons acquainted with the details in issue. The measures taken by the court therefore constituted an interference with the applicant’s rights guaranteed under Article 8 of the Convention ...

61. It is to be noted that the Court of Appeal, having reviewed the case, came to the conclusion that the first instance judge’s treatment of the applicant’s personal information had not complied with the special regime concerning collection, retention, use and dissemination afforded to psychiatric data ... Moreover, the Court notes that the details in issue being incapable of affecting the outcome of the litigation (i.e. the establishment of whether the alleged statement was made and the assessment whether it was libellous; compare and contrast, *Z v. Finland* ...), the Novozavodsky Court’s request for information was redundant, as the information was not “important for an inquiry, pre-trial investigation or trial”, and was thus unlawful for the purposes of Article 6 of the Psychiatric Medical Assistance Act 2000.

62. The Court finds for the reasons given above that there has been a breach of Article 8 of the Convention in this respect.

**Retention of evidence after completion of investigation/prosecution**

☐ *Van der Velden v. the Netherlands* (dec.), 29514/05, 7 December 2006

2. ... As regards the retention of the cellular material and the subsequently compiled DNA profile, the Court ... considers that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute an interference with the right to respect for private life set out in Article 8 § 1 of the Convention ....

The Court further has no difficulty in accepting that the compilation and retention of a DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. This is not altered by the fact that DNA played no role in the investigation and trial of the offences committed by the applicant. The Court does not consider it unreasonable for the obligation to undergo DNA testing to be imposed on all persons who have been convicted of offences of a certain seriousness. Neither is it unreasonable for any exceptions to the general rule which are nevertheless perceived as necessary to be phrased as narrowly as possible in order to avoid uncertainty.

Finally, the Court is of the view that the measures can be said to be “necessary in a democratic society”. In this context it notes in the first place that there can be no doubt about the substantial

contribution which DNA records have made to law enforcement in recent years. Secondly, it is to be noted that while the interference at issue was relatively slight, the applicant may also reap a certain benefit from the inclusion of his DNA profile in the national database in that he may thereby be rapidly eliminated from the list of persons suspected of crimes in the investigation of which material containing DNA has been found.

▣ *S. and Marper v. the United Kingdom* [GC], 30562/04 and 30566/04, 4 December 2008

113. In the present case, the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter ...

118. ... The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed ...; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances ...

121. ... The Court ... reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data ...

122. ... It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed ...

124. ... the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society ... the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime ...

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

## Interrogation

### Right to assistance of a lawyer

📖 *John Murray v. the United Kingdom*, 18731/91, 8 February 1996

66. ... under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.

Under such conditions the concept of fairness enshrined in Article 6 ... requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 ...

68. It is true, as pointed out by the Government, that when the applicant was able to consult with his solicitor he was advised to

continue to remain silent and that during the trial the applicant chose not to give evidence or call witnesses on his behalf. However, it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period. As matters stand, the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence. The Court's conclusion as to the drawing of inferences does not alter that ...

70. There has therefore been a breach of Article 6 para. 1 in conjunction with paragraph 3 (c) ... of the Convention as regards the applicant's denial of access to a lawyer during the first 48 hours of his police detention.

▮ *Brennan v. the United Kingdom*, 39846/98, 16 October 2001

47. ... after the 24-hour period in question the applicant was no longer being denied access to his solicitor. The fact that the solicitor did not arrive to see his client until a day later is not attributable to any measure imposed by the authorities ...

48. ... while the applicant was interviewed by the police during the 24-hour deferral period, he made no incriminating admissions. The first admissions made by him occurred during interview on the afternoon of 22 October 1990 when he was no longer being denied access to a solicitor. Nor is it the case that any inferences were drawn from any statements or omissions made by the applicant during the first 24-hour period as was the case in *John Murray* ... The essence of the applicant's complaints is not that he was denied access to legal advice to enable him to choose between silence and participation in police questioning, but rather that he made incriminating statements after the deferral period ended and before the arrival of his solicitor ... The Court is not persuaded therefore that the denial of access during this initial period can be regarded in the circumstances as infringing the applicant's rights under Article 6 §§1 or 3 (c) of the Convention.

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

131. The Grand Chamber sees no reason to disagree with the Chamber's finding that the applicant's lack of access to a lawyer while in police custody adversely affected his defence rights. The Grand Chamber agrees with the reasoning of the Chamber, which was as follows:

“... In the present case, the applicant was questioned by the security forces, a public prosecutor and a judge of the National Security Court while being held in police custody in Turkey for almost seven days, from 16 February 1999 to 23 February 1999. He received no legal assistance during

that period and made several self-incriminating statements that were subsequently to become crucial elements of the indictment and the public prosecutor's submissions and a major contributing factor in his conviction.

... As to whether the applicant had waived his right to consult a lawyer, the Court notes that on the day after his arrest, his lawyer in Turkey, Mr Feridun Çelik (who already possessed a valid authority), sought permission to visit him. However, Mr Çelik was prevented from travelling by members of the security forces. In addition, on 22 February 1999 sixteen lawyers who had been retained by the applicant's family sought permission from the National Security Court to visit the applicant, but their request was turned down by the authorities on 23 February 1999.

... In these circumstances, the Court is of the view that to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence to which the accused is entitled by virtue of Article 6 ..."

☰ *Salduz v. Turkey* [GC], 36391/02, 27 November 2008

54. ... the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial ... At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused ... Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination ... In this connection, the Court also notes the recommendations of the CPT ..., in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particu-

larly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies

55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” ... Article 6 §1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

☰ *Panovits v. Cyprus*, 4268/04, 11 December 2008

67. The Court notes that the applicant was 17 years old at the material time ...

68. ... The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct ...

70. ... the authorities’ treatment of the applicant ranged from treating him as a minor and, as such, addressing his father to explain the seriousness of the case and describe the evidence existing against the applicant, to approaching him as a person capable of being questioned in the absence of his guardian, without informing him of his right to consult a lawyer before proceeding to make any statement. Neither the applicant nor his father were adequately informed of the applicant’s rights to legal representation before the applicant’s questioning. Moreover, the applicant’s father was not invited to accompany the applicant during his initial questioning nor was any other person who would be in a position to assist the applicant to understand the proceedings. The applicant himself was not advised that he could see a lawyer before saying anything to the police and before he had his written statement taken.

71. In view of the above the Court considers that it was unlikely, given the applicant’s age, that he was aware that he was entitled to legal representation before making any statement to the

police. Moreover given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder ...

72. ... the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary ... The passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation.

73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner.

74. ... The Court notes that in accordance with domestic law the applicant was told that he was not obliged to say anything unless he wished to do so and that what he said could be put into writing and given in evidence in subsequent proceedings ... The Court finds, given the circumstances of the present case, in which the applicant had been underage and was taken for questioning without his legal guardian and without being informed of his right to seek and obtain legal representation before he was questioned, that it was unlikely that a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights.

75. Lastly, the Court considers that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence.

76. In this connection the Court notes that despite the fact that the voluntariness of the applicant's statement taken shortly after his arrest was challenged and formed the subject of a separate trial within the main trial, and although it was not the sole evidence on

which the applicant's conviction was based, it was nevertheless decisive for the prospects of the applicant's defence and constituted a significant element on which his conviction was based. It is indicative in this respect that the Supreme Court found that throughout the course of the first-instance proceedings the applicant had consistently tried to negate his initial statement, an approach which had a great impact on the court's assessment of his credibility.

77. In the light of the above considerations the Court concludes that there has been a violation of Article 6 §3 (c) in conjunction with Article 6 §1 of the Convention on account of the lack of legal assistance to the applicant in the initial stages of police questioning.

▬ *Yaremenko v. Ukraine*, 32092/02, 12 June 2008

86. The Court notes that in the instant case the applicant's conviction for the 1998 crime was based mainly on his confession, which was obtained by the investigators in the absence of a lawyer and which the applicant retracted the very next day and then from March 2001 on.

87. The Court further notes with concern the circumstances under which the initial questioning of the applicant about the 1998 crime took place ... One of the grounds for obligatory representation is the seriousness of the crime of which a person is suspected, and hence the possibility of life imprisonment as a punishment. In the present case the law-enforcement authorities, investigating the violent death of a person, initiated criminal proceedings for infliction of grievous bodily harm causing death rather than for murder. The former was a less serious crime and therefore did not require the obligatory legal representation of a suspect. Immediately after the confession was obtained, the crime was reclassified as, and the applicant was charged with, murder.

88. The Court is struck by the fact that, as a result of the procedure adopted by the authorities, the applicant did not benefit from the requirement of obligatory representation and was placed in a situation in which, as he maintained, he was coerced into waiving his right to counsel and incriminating himself. It may be recalled that the applicant had a lawyer in the existing criminal proceedings, yet waived his right to be represented during his questioning for another offence. These circumstances give rise to strong suspicion as to the existence of an ulterior purpose in the initial classification of the offence. The fact that the applicant made confessions without a lawyer being present and retracted them immediately in the lawyer's presence demonstrates the vulnerability of his position and the real need for appropriate legal assistance, which he was effectively denied on 1 February 2001



owing to the way in which the police investigator exercised his discretionary power concerning the classification of the investigated crime.

89. As to the removal of lawyer O. Kh. on 2 February 2001, the Government's argument that this was done solely at the applicant's request seems scarcely credible, since this was not mentioned in the removal decision itself, and in the replies of the prosecutors it was referred to as an additional ground for the lawyer's removal.

90. The Court notes that the fact that two other lawyers who represented the applicant saw him only once each, during questioning, and never before the questioning took place seems to indicate the notional nature of their services. It considers that the manner of and reasoning for the lawyer's removal from the case, as well as the alleged lack of legal grounds for it, raise serious questions as to the fairness of the proceedings in their entirety. The Court also notes that the lawyer was allowed back onto the case in June 2001 without any indication that the alleged grounds for his removal had ceased to exist.

91. There has therefore been a violation of Article 6 §3 (c) of the Convention.

**Right to remain silent**

☰ *Heaney and McGuinness v. Ireland*, 34720/97,  
21 December 2000

53. ... when the section 52 requests were made during those interviews, they were then effectively informed that, if they did not account for their movements at particular times, they risked six months' imprisonment. ...

55. Accordingly, the Court finds that the "degree of compulsion" imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent.

58. The Court ... finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 §1 of the Convention.

59. It concludes, therefore, that there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6 §1 of the Convention.

Moreover, given the close link, in this context, between those rights guaranteed by Article 6 §1 of the Convention and the presumption of innocence guaranteed by Article 6 §2 ..., the Court

also concludes that there has been a violation of the latter provision.

☞ *Van Vondel v. the Netherlands* (dec.), 38258/03, 23 March 2006

1. ... The right not to incriminate oneself is primarily concerned with respect for the will of an accused person to remain silent in the context of criminal proceedings and with the use made of compulsorily obtained information in criminal prosecutions. However, not every measure taken with a view to encouraging individuals to give the authorities information must be regarded as improper compulsion. It does not *per se* prohibit the use of compulsory powers to require persons to provide information about, for instance, their financial assets even though a penalty may be attached to a failure to do so ... or, in the context of the present case, compulsory powers to require persons to provide information to a parliamentary commission of inquiry, as it would be difficult to envisage such a commission functioning effectively without such powers.

... the applicant was charged with and convicted of having committed perjury before the PEC. In other words, he lied or perjured himself through giving untruthful information to the PEC. This was not an example of forced self-incrimination before the PEC relating to an offence which he had previously committed; it was the offence itself. It may be that the applicant lied in order to prevent revealing conduct which, in his perception, might possibly be criminal and lead to prosecution. However, the right to silence and not to incriminate oneself cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation. Thus, the present case is not one concerned with the use of compulsorily obtained information in subsequent criminal proceedings. Consequently, the Court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incrimination or that there has been any unfairness contrary to Article 6 §1 of the Convention in respect of the criminal proceedings brought against the applicant.

☞ *Yaremenko v. Ukraine*, 32092/02, 12 June 2008

78. Notwithstanding the Government's arguments that the applicant's right to silence was protected in domestic law, the Court notes that the applicant's lawyer was dismissed from the case by the investigator after having advised his client to remain silent and not to testify against himself. This reason was clearly indicated in the investigator's decision. It was also repeated twice in the prosecutors' replies to the lawyer O. Kh.'s complaints. In one of those replies ... it was also noted that the lawyer had breached profes-

sional ethics by advising his client to claim his innocence and to retract part of his previous confession.

79. Moreover, the Court finds it remarkable that the applicant and Mr S, over two years later, gave very detailed testimonies which according to investigator contained no discrepancies or inconsistencies. This degree of consistency between the testimonies of the applicant and his co-accused raise suspicions that their accounts had been carefully co-ordinated. The domestic courts however considered such detailed testimonies as undeniable proof of their veracity and made them the basis for the applicant's conviction for the 1998 crime despite the fact that his testimony had been given in the absence of a lawyer, had been retracted immediately after the applicant was granted access to the lawyer of his choice, and had not been supported by other materials. In those circumstances, there are serious reasons to suggest that the statement signed by the applicant was obtained in defiance of the applicant's will.

80. In light of the above considerations and taking into account that there was no adequate investigation into the allegations by the applicant that the statement had been obtained by illicit means ..., the Court finds its use at trial impinged on his right to silence and privilege against self-incrimination.

81. Accordingly, in this respect there has been a violation of Article 6 §1 of the Convention.

*See also above, "Right to assistance of a lawyer" on page 137.*

### **Illegal interrogation methods**

#### *Torture*

☞ *Selmouni v. France* [GC], 25803/94, 28 July 1999

102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report of 7 December 1991 ... that the marks of the violence Mr Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe ... Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning ...

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

▬ *Elci and others v. Turkey*, 23145/93, 13 November 2003

640. The Court notes the consistency of the allegations made by the applicants that Tahir Elçi, Niyazi Çem, Meral Daniş Beştaş and Hüsniye Ölmez were insulted, assaulted, stripped naked and hosed down with freezing cold water ...

646. In the light of the circumstances of the case as a whole, the Court finds it established that the applicants ... suffered physical and mental violence at the hands of the gendarmerie during their detention in November and December 1993. Such ill-treatment caused them severe pain and suffering and was particularly serious and cruel, in violation of Article 3 of the Convention. It must therefore be regarded as constituting torture within the meaning of that article.

▬ *Menesheva v. Russia*, 59261/00, 9 March 2006

48. The applicant submitted that on 13 February 1999 she was arrested in a manner contrary to Article 3 of the Convention. She furthermore alleged that she had been beaten up upon arrival at the police station by the officers who questioned her and then again on the same day by the police officers when she refused to let them search her flat. She alleged that she had sustained injuries, such as bruises and abrasions, and that she felt intimidated due to such treatment. She also alleged that she had received no medical assistance thereafter ...

59. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical and moral resistance. In any event, the Court reiterates that, in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 ...

60. ... The sequence of events also demonstrates that the pain and suffering was inflicted on her intentionally, in particular with the view of extracting from her information concerning L ...

61. To assess the severity of the “pain or suffering” inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim .... The Court observes that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral impact.

62. In these circumstances, the Court concludes that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention.

*Inhuman and degrading treatment*

☞ *Ribitsch v. Austria*, 18896/91, 4 December 1995

29. The applicant asserted that the injuries he had on his release from police custody, particularly the bruises on the inside and outside of his right arm ...had only one cause, namely the ill-treatment inflicted by the police officers who questioned him, who, after grossly insulting him, had assaulted him repeatedly in order to induce him to make a confession ...

38. The Court ... reiterates that the requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals ...

39. In the instant case the injuries suffered by Mr Ribitsch show that he underwent ill-treatment which amounted to both inhuman and degrading treatment.

☞ *Jager v. the Netherlands (dec.)*, 39195/98, 14 March 2000

3. ... The Court notes that, in the present case, the applicant was subjected to the “*Zaanse verhoormethode*” on 14 and 15 January 1995. After having noted the characteristic features of this interrogation technique and the manner in which it was used in the applicant’s case, the Court considers that it is a sophisticated method from a psychological point of view and therefore objectionable in the context of a criminal investigation in that it is apparently aimed at attaining, by seeking to create an atmosphere of intimacy between the suspect and the interrogators through mental stimulation, an optimal level of communication as a result of which the interrogated person is incited, on the basis of a per-

ceived relation of trust, to confide in the interrogators in order to seek relief from a mentally burdensome memory.

The Court does not find it established that the use of this method has resulted in mental pain and suffering for the applicant to such an extent that it amounts to inhuman treatment within the meaning of Article 3 of the Convention. The Court therefore cannot find that this interrogation method, as such, or the manner in which it has been applied in the present case attains the minimum level of severity required under Article 3 of the Convention.

### Discontinuance of proceedings

☰ *X v. the United Kingdom*, 8233/78, 3 October 1979, DR17, 122

**No right to be prosecuted**

66. With respect to the present case, the Prosecution undertook on 29 March 1979 not to seek a trial in respect of the three counts which remained on the F indictment on the condition that they remained on the file after a plea of *autrefois convict* had been entered in regard to the second count. The applicant appears to be of the view, however, that, irrespective of the intention of the Prosecution to proceed or not to proceed with a trial on these charges, he has an absolute right under Article 6.1 to have the remaining charges on this indictment terminated by a finding of guilty or not guilty.

67. However, the Commission has earlier accepted that Article 6.1 does not provide an accused person with a right of access to the courts in order that a criminal charge against him may be heard at a time of his choice ... It is moreover the view of the Commission that Article 6.1 of the Convention cannot be so construed as to bar the Prosecution from formally discontinuing criminal proceedings or from simply dropping charges ...

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

As to the termination of criminal proceedings, there is no right under Article 6 of the Convention to a particular outcome or, therefore, to a formal conviction or acquittal following the laying of criminal charges ... Generally such proceedings end with an official notification to the accused that he or she is no longer to be pursued on those charges such as would allow a conclusion that the situation of that person could no longer be considered to be substantially affected ... While this is commonly brought about by an acquittal or a conviction (including a conviction upheld on appeal), ... proceedings could end through a unilateral decision taken in favour of the accused including when the prosecution formally decided not to prosecute and when the trial judge termi-

nated the proceedings without a ruling. More recently, the Court has found that criminal proceedings ended when the prosecution informed the accused that it had discontinued the proceedings against him ... and when a domestic court found that an accused was unfit to stand trial by reason of his psychiatric condition ..., even though in both cases there remained a theoretical possibility that the accused could one day be proceeded against on the relevant charges.

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

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

**Giving reasons for decision that suggest guilt**

☞ *Marziano v. Italy*, 45313/99, 28 November 2002

29. ... Ce faisant, le juge des investigations préliminaires a émis un pronostic – d’ailleurs prévu, comme l’a indiqué le Gouvernement, par l’article 125 des dispositions d’application du code de procédure pénale – sur le résultat probable auquel aurait pu aboutir la procédure si l’affaire avait été portée devant le juge du siège. Le juge s’est limité à relever que, face à l’existence de raisons plausibles de soupçonner l’intéressé d’avoir commis l’infraction contestée, d’autres éléments amenaient à croire que devant un tribunal, l’accusation aurait eu peu de chances de succès. Par ailleurs, il ne s’est pas limité à prendre en considération l’impact que le procès aurait pu avoir sur X, mais il a également fait état du caractère invraisemblable de certains détails donnés par X. Bref, il a mis en exergue que le caractère véridique des déclarations de X pouvait être mis en doute.

30. Cela étant, la Cour constate qu'il appartenait au juge des investigations préliminaires – qui, par ailleurs, était au courant du contentieux existant entre le requérant et son ancienne épouse – de décider, en son âme et conscience, de la manière dont il devait exprimer son opinion eu égard aux tenants et aboutissants du contentieux. Certes, il peut se poser la question de savoir si les affirmations finalement employées étaient d'une nature et d'un degré tels qu'elles pouvaient s'analyser en la formulation d'une culpabilité. Cependant, malgré les termes employés dans l'ordonnance du 17 avril 1998, la Cour estime que cette décision décrivait un « état de suspicion » et ne renfermait pas un constat de culpabilité.

31. Or une distinction doit être faite entre les décisions qui reflètent le sentiment que la personne concernée est coupable et celles qui se bornent à décrire un état de suspicion. Les premières violent la présomption d'innocence, tandis que les deuxièmes ont été à plusieurs reprises considérées comme conformes à l'esprit de l'article 6 de la Convention ...

32. Dans ces circonstances, la Cour ne saurait conclure que la présomption d'innocence a été enfreinte en l'espèce.

▣ *Tejedor García v. Spain*, 25420/94, 16 December 1997

29. The applicant complained that the proceedings against him had been unfair because the domestic courts had granted the public prosecutor's application for an order setting aside the decision that no further action be taken some two months after the expiry of the three-day time-limit contained in Article 789 §5, no. 4 ...

32. ... Although the date appearing on the public prosecutor's application to have the decision set aside was marked as 13 September 1990, the national courts did not consider that fact to be relevant to the issue concerning the date of receipt of the file and held that that date could not be determined for certain, there being nothing to show when the decision had been sent to the public prosecutor or when he had actually received it ...

As is clear from the above, the courts were thus called upon to interpret Article 789 §5, no. 4, ... in circumstances where the date of receipt could not be established as a matter of certainty.

33. In the Court's view, the interpretation to be given to Article 789 §5, no. 4, in such circumstances is a matter for the domestic courts. Granting the public prosecutor's application almost two months after the decision not to prosecute meant that the matter had not become final under Spanish law. In these circumstances, the interpretation of the national courts cannot be described as either arbitrary or unreasonable, or of such a nature as

**Challenging a discharge order**



to taint the fairness of the proceedings. Nor can it be said that any issue arises concerning the equality of arms in this case.

34. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

# Trial stage

## Court

### Terminology

☰ *Didier v. France* (dec.), 58188/00, 27 August 2002

On 27 January 1999 the Financial Markets Board [FMB], exercising its disciplinary powers, decided to suspend the applicant's trading licence for six months and fined him 5 000 000 French francs.

On 30 April 1999 the applicant brought an action in the *Conseil d'Etat*, seeking to have the decision in issue quashed and its execution stayed.

On 3 December 1999 the *Conseil d'Etat* dismissed the applicant's action.

3. ... The Court takes the view that, in the light of the principles established in its case-law and its autonomous interpretation of the term "tribunal" in Article 6 §1 of the Convention, the FMB has to be regarded as a "tribunal" for the purposes of those provisions, irrespective of its classification in domestic law ... It further observes that a "tribunal" within the meaning of Article 6 is also one within the meaning of Article 2 of Protocol No. 7 ... The Court lastly notes that when reviewing decisions by the FMB, the *Conseil d'Etat* is competent to deal with all aspects of the case, so that in that respect it too is a "judicial body that has full jurisdiction", and thus a "tribunal" .... That being so, the Court considers that the applicant was afforded the right of appeal in a criminal matter, in accordance with the first paragraph of Article 2 of Protocol No. 7.

### Established by law

☰ *Posokhov v. Russia*, 63486/00, 4 March 2003

43. However, apart from the apparent failure to observe the requirements of the Lay Judges Act regarding the drawing of

random lots and two weeks' service per year, the Court is particularly struck by the fact that the Neklinovskiy District Authority – the body responsible for the appointment of lay judges – has confirmed that it had no list of lay judges appointed before 4 February 2000. The authority thus failed to present any legal grounds for the participation of Ms Streblyanskaya and Ms Khovyakova in the administration of justice on the day of the applicant's trial, bearing in mind that the list adopted on 4 February 2000 only took effect on 15 June 2000 after its approval by the Rostov Regional Legislature.

These circumstances, cumulatively, do not permit the Court to conclude that the Neklinovskiy District Court which heard the applicant's case on 22 May 2000 could be regarded as a "tribunal established by law".

☰ *Accardi and others v. Italy* (dec.), 30598/02, 20 January 2005

2. ... As the Court of Cassation rightly pointed out in its judgment of 22 February 2002, the questioning of X and Y was conducted by the investigating judge. The fact that, making use of his right to oversee the performance of the investigative measures, he decided to proceed through the intermediary of a psychologist in order to put certain questions to the children, does nothing to alter that conclusion. As to the fact that the investigating judge left the room while Y was being questioned, the minutes of the hearing of 16 October 1998 show that the move was designed to calm the child and that, in any event, the judge continued to follow the progress of the questioning from behind a two-way mirror.

In the light of the above circumstances, the Court cannot conclude that the Florence investigating judge was not a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention.

☰ *Coëme v. Belgium*, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000

107. The Court reiterates that organisation of the judicial system and jurisdiction in criminal cases cannot be left to the discretion of the judicial authorities, and notes that it was Article 103 of the Constitution which, until the 1998 reform ..., required government ministers, exceptionally, to be tried by the Court of Cassation. However, there was no provision extending the Court of Cassation's jurisdiction to defendants other than ministers for offences connected with those for which ministers were standing trial ...

Admittedly, as the Government submitted, application of the rules on connection, laid down in Belgium by Articles 226 and 227 of the Code of Criminal Investigation, was foreseeable in the light of the teachings of legal theory and case-law, and in particular of the Court of Cassation's judgment of 12 July 1865, even though the latter concerned a duel and pointed out that "a duel is an indivisible complex offence" and that "the indivisibility of the procedure is a necessary consequence of the indivisibility of the offence" ... In the present case these indications cannot justify the conclusion that the rule on connection was "established by law", especially since the Court of Cassation, the supreme Belgian judicial authority, itself decided, not having referred the question to the Administrative Jurisdiction and Procedure Court, that summoning persons who had never held ministerial office to stand trial before it was the result of applying Article 103 of the Constitution rather than the provisions of the Code of Criminal Investigation or the Judicial Code ...

108. Since the connection rule was not established by law, the Court considers that the Court of Cassation was not a tribunal "established by law" within the meaning of Article 6 to try these other four applicants.

☞ *Lavents v. Latvia*, 58442/00, 28 November 2002

115. ... De même, la Cour relève qu'aux termes de l'article 28 du KPK, « [u]n juge ne peut pas participer à l'examen d'une affaire (...) lorsqu'un jugement ou une ordonnance pris avec sa participation (...) ont été annulés ». La Cour estime que cette disposition est rédigée dans des termes suffisamment clairs pour permettre aux membres d'un tribunal de prévoir avec certitude l'étendue de leurs obligations et les conséquences juridiques en découlant. Il en ressort qu'à partir du 14 décembre 1999, date de l'annulation de la décision arrêtée par les deux juges assesseurs, ces assesseurs ne pouvaient plus siéger dans la même formation. Le collège de la cour régionale n'était donc plus composé conformément à la loi.

116. Il s'ensuit que l'article 6 §1 de la Convention a été violé sur ce point.

☞ *Sutter v. Switzerland*, 8209/78, 1 March 1979, DR16, 166

2. ... These judges are appointed by the Federal Council, i.e. the Government, for 3 years. This nomination procedure could not itself affect the tribunal's dependence. Actually, a judge's independence does not necessarily imply that he should be appointed for life ... or that he should be irremovable in law ..., i.e. that he cannot be given other duties without his consent. But it is essential that he should enjoy a certain stability, if only for a specific period, and that he should not be subject to any authority in the

## Independence

performance of his duties as a judge. There is nothing to indicate that judges appointed in this way can be dismissed from office. Furthermore, even if as servicemen they are subject to the authority of their hierarchical superiors in their respective units, when they sit as judges, these officers and soldiers are not answerable to anyone about the way in which they administer justice. Their independence is guaranteed in general terms by Article 183ter of the Act of 12 April 1907 on the military organisation of the Confederation, and is further protected by the secrecy of deliberations.

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

80. The Court reiterates that in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 §1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence ...

82. In the present case it appears difficult to dissociate the question of impartiality from that of independence, as the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations ...

86. Taking into account the aforementioned considerations as to the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case, the Court finds that the applicant’s doubts as to the impartiality of the judge of the Kuybyshevsky District Court of Donetsk may be said to have been objectively justified.

▣ *Whitfield and others v. the United Kingdom*, 46387/99, 48906/99, 57410/00 and 7419/00, 12 April 2005

45. The Court observes that persons answerable to the Home Office (whether as prison officer, governor or controller in the applicants’ prisons) drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants’ guilt or innocence together with their sentences. It cannot therefore be said that there was any structural independence between those with the prosecuting and adjudicating roles and the Government did not suggest that there was.

46. Accordingly, the Court considers it evident that the misgivings of Messrs Whitfield, Pewter and Gaskin about the independ-

ence and impartiality of their adjudications were objectively justified and, further, that their adjudications were consequently unfair ...

*Prior activities*

**Impartiality**

▮ *Nortier v. the Netherlands*, 13924/88, 24 August 1993

33. The Court recalls that what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified ...

The mere fact that Juvenile Judge Meulenbroek also made pre-trial decisions, including decisions relating to detention on remand, cannot be taken as in itself justifying fears as to his impartiality; what matters is the scope and nature of these decisions.

34. Apart from his decisions relating to the applicant's detention on remand, Juvenile Judge Meulenbroek made no other pre-trial decisions than the one allowing the application made by the prosecution for a psychiatric examination of the applicant, which was not contested by the latter. He made no other use of his powers as investigating judge.

35. As for his decisions on the applicant's detention on remand, they could justify fears as to the judge's impartiality only under special circumstances ... There was nothing of that nature in the present case. ... the questions which Juvenile Judge Meulenbroek had to answer when taking these decisions were not the same as those which were decisive for his final judgment. In finding that there were "serious indications" against the applicant his task was only to ascertain summarily that the prosecution had *prima facie* grounds for the charge against the applicant ... The charge had, moreover, been admitted by the applicant and had already at that stage been supported by further evidence ...

37. Under these circumstances the applicant's fear that Juvenile Judge Meulenbroek lacked impartiality cannot be regarded as objectively justified.

▮ *Ferrantelli and Santangelo v. Italy*, 19874/92, 7 August 1996

59. ... in the instant case the fear of a lack of impartiality derived from a double circumstance. In the first place, the judgment of 2 June 1988 of the Caltanissetta Assize Court of Appeal, presided over by Judge S.P. ... contained numerous references to the applicants and their respective roles in the attack on the barracks. In particular, mention was made of the "co-perpetrators" of the double crime and of "the precise statement by G.V. that G.G. together with Santangelo had been responsible for physically carrying out the murders", and it was affirmed that Mr Ferrantelli had helped to search the barracks and to transport material be-

longing to the carabinieri. Secondly, the judgment of the Juvenile Section of the Caltanissetta Court of Appeal of 6 April 1991 ... convicting the applicants cited numerous extracts from the decision of the Assize Court of Appeal concerning G.G. In the Juvenile Section it was once again Judge S.P. who presided and indeed he was the reporting judge.

60. These circumstances are sufficient to hold the applicants' fears as to the lack of impartiality of the Juvenile Section of the Caltanissetta Court of Appeal to be objectively justified.

☞ *Perote Pellon v. Spain*, 45238/99, 25 July 2002

51. La Cour estime en conséquence que, dans les circonstances de la cause, l'impartialité de la juridiction de jugement pouvait susciter des doutes sérieux dans la mesure où tant son président que son juge-rapporteur étaient intervenus dans de nombreux actes d'instruction dont, en particulier, le rejet de l'appel contre l'ordonnance d'inculpation prononcée à l'encontre du requérant et les décisions prorogeant sa détention provisoire ferme. Elle estime que les craintes du requérant à cet égard pouvaient passer pour objectivement justifiées ...

☞ *Ekeberg and others v. Norway*, 11106/04, 31 July 2007

34. A first issue is whether the High Court's impartiality was open to doubt on account of Judge G.'s participation, as one of the three professional judges sitting in the proceedings, due to her prior involvement in a decision ... to reject an appeal by the fourth applicant against a decision of 10 June 2002 by the City Court to prolong his detention....

38. ... on the basis of Article 172 of the Code of Criminal procedure, requiring that there was a particularly confirmed suspicion that he had committed the offence of which he was charged. According to relevant national case-law, a conviction at first instance was normally a sufficient reason for considering that this condition had been fulfilled, but the issue was nevertheless one that the High Court had to assess for itself. Thus, it must be assumed that the High Court carried out an assessment of its own as to whether there was a qualified suspicion with respect to the fourth applicant ...

40. In the light of the above, the Court finds that the fourth applicant had a legitimate reason to suspect that Judge G. might have had preconceived ideas as to his innocence or guilt before the opening of the High Court trial ...

41. As to Judge' G.'s subsequent participation in the trial, the Court notes that ... the present case was heard by a High Court sitting with a jury. It was not Judge G., but the presiding judge of the High Court, who at the close of the oral hearing instructed

the jury before it held its deliberations and gave its verdict on the questions of guilt. The professional judges did not deliberate until after the verdict. There is nothing to indicate that Judge G. had any influence on the jury's votes on the questions put to it regarding the fourth applicant's guilt.

42. However, if, as here, the jury's verdict is that the indicted person is guilty, but the professional judges find that there is insufficient evidence for finding the person guilty, the latter may decide that the case shall be tried anew by other judges ... In this respect the professional judges, including Judge G., had a role to play in the fourth applicant's conviction. Without their endorsement of the jury's verdict, he could not have been convicted by the High Court in the proceedings concerned. Even though, in practice, the professional judges would only exceptionally use their powers to set the jury's verdict aside, their role in the decision on conviction cannot be ignored. The Court finds that the difference between the issue that Judge G. had to settle when applying Article 172 of the Code of Criminal Procedure and the one she had to assess when endorsing the jury's verdict became tenuous.

43. In addition, along with the other two professional judges and four of the jurors, Judge G. took part in sentencing.

44. Against this background, the Court finds that the fourth applicant had legitimate grounds for fearing that, by virtue of Judge G.'s participation in the trial against him, the High Court lacked the requisite impartiality *vis-à-vis* him. The fact that neither the fourth applicant nor his counsel at any time objected to Judge G.'s participation in the High Court trial should not, in the circumstances of the case, reduce the protection that follows from the requirement of objective impartiality of judges ...

45. As to the second issue, relating to W.'s participation as a juror in the appeal trial, the Court notes that the trial was opened on 24 February 2003 and that on 21 March 2003 the jury deliberated and gave its verdict. After the first four days of the trial ... the High Court was informed of her witness statement to the police of 10 July 1997. After this was read out in court and counsel for the defence made their comments, the High Court's President ordered her to withdraw from further participation in the case. Thus, her presence on the jury bench was limited to, and terminated after, a relatively early phase of the trial.

46. Moreover, the prosecution had not deemed her statement of 10 July 1997 to be of any importance to the case and neither side had called her as a witness in the case ... The Supreme Court considered that the explanations given by the High Court President and W. to the police for the purposes of its own review of the impartiality issue did not give any reason to assume that she had



imparted information to other jurors about her prior knowledge of the case or had in any way influenced the jury before she was discharged on 28 February 2003. According to the jury foreperson, the situation that had arisen after W. had withdrawn had been discussed by the jury members internally who had agreed that her participation during the first few days had not had any effect on the jury's verdict.

47. Thus it cannot be said that juror W. was involved either directly or indirectly in determining the criminal charges against the applicants when three weeks later the jury deliberated and gave its verdict ...

48. It should further be noted that the jury's impartiality was ensured by a number of safeguards ... The rules in the Administration of Court Act governing the impartiality of judges also applied to jurors ... Not only had the presiding judge at the opening of the trial discussed with the jury the impartiality requirement applicable to jurors. Also, the jury had been reminded of the importance of this requirement when the High Court promptly ordered juror W. to withdraw from the case on the ground of disqualification ... While neither side in the trial had relied on W.'s statement to the police of 10 July 1997, the presiding judge would regularly remind the jury to rely only on statements presented in court and not to discuss the case with third parties ...

49. In light of the above, the Court finds that the nature, timing and short duration of juror W.'s involvement in the proceedings concerned were not capable of causing the applicants to have legitimate doubts as to the impartiality of the jury. The High Court was therefore not obliged to discharge the jury and order a rehearing before a differently composed jury for the purposes of the requirement of impartial tribunal in Article 6 §1 of the Convention ...

☰ *Lindon, Otchakovsky-Laurens and July v. France* [GC],  
21279/02 and 36448/02, 22 October 2007

77. ... In the present case, the fear of a lack of impartiality stemmed from the fact – moreover a proven one – that two out of the three judges on the bench of the Paris Court of Appeal which upheld the third applicant's conviction for defamation on account of the publication of the impugned petition had previously, in the case of the first two applicants, ruled on the defamatory nature of three of the offending passages from the novel which were cited in the petition ...

78. The Court notes that, even though they were connected, the facts in the two cases differed and the "accused" was not the same: in the first case the question was whether the publisher and

author, by publishing certain passages from “Jean-Marie Le Pen on Trial”, had been guilty of the offence of defamation and of complicity in that offence; in the second, the court had to decide whether, in a journalistic context, the publication director of *Libération* had committed the same offence by publishing the text of a petition which reproduced those same passages, and whose signatories, repeating them with approval, denied that they were defamatory in spite of the finding to that effect against the publisher and author ... It is moreover clear that the judgments delivered in the case of the first two applicants did not contain any presupposition as to the guilt of the third applicant ...

79. Admittedly, in the judgment given on 21 March 2001 in the third applicant’s case, the Paris Court of Appeal referred back, in respect of the defamatory nature of the impugned passages, to the judgment that it had given on 13 September 2000 in the case of the first two applicants. However, in the Court’s view this does not objectively justify the third applicant’s fears as to a lack of impartiality on the part of the judges. The first judgment of the Court of Appeal, dated 13 September 2000, had found to be defamatory certain passages of the book written by the first applicant and published by the second. On this point that judgment had become *res judicata*. The second judgment of the Court of Appeal, dated 21 March 2001, was bound to apply that authority to this aspect of the dispute, whilst the question of the good or bad faith of the third applicant, who was responsible for the publication of a petition approving that book and criticising the conviction of the first two applicants, remained open and had not been prejudiced by the first judgment. It would therefore be excessive to consider that two judges who sat on the bench which successively delivered the two judgments in question could taint the court’s objective impartiality. In reality, as regards the characterisation of the text as defamation, any other judge would have been bound by the *res judicata* principle, which means that their participation had no influence on the respective part of the second judgment. And as regards the issue of good faith, which was a totally different issue in the two cases even though they were connected, there is no evidence to suggest that the judges were in any way bound by their assessment in the first case ...

80. Lastly, the present case is manifestly not comparable to that of *San Leonard Band Club v. Malta* (no. 77562/01 ...), where the trial judges had been called upon to decide whether or not they themselves had committed an error of legal interpretation or application in their previous decision, that is to say, to judge themselves and their own ability to apply the law.

81. Consequently, any doubts the third applicant may have had as regards the impartiality of the Court of Appeal when it ruled in the second case cannot be regarded as objectively justified.

*Personal bias*

☰ *Demicoli v. Malta*, 13057/87, 27 August 1991

40. In the circumstances of the present case the House of Representatives undoubtedly exercised a judicial function in determining the applicant's guilt. ...

41. The two Members of the House whose behaviour in Parliament was criticised in the impugned article and who raised the breach of privilege in the House participated throughout in the proceedings against the accused, including the finding of guilt and (except for one of them who had meanwhile died) the sentencing. Already for this reason, the impartiality of the adjudicating body in these proceedings would appear to be open to doubt and the applicant's fears in this connection were justified ...

42. Accordingly, there has been a breach of Article 6 para. 1 ...

☰ *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005

130. ... The Court will accordingly examine a number of aspects of the judges' conduct capable of raising an issue under the subjective test.

Firstly, the judges, in their decision sentencing the applicant, acknowledged that they had been "deeply insulted" "as persons" by the applicant ..., in the Court's view this statement in itself shows that the judges had been personally offended by the applicant's words and conduct and indicates personal involvement on their part ...

Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements ...

Thirdly, they then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response". In the judges' opinion, "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned" ...

Fourthly, the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court ... they [then] gave the applicant the choice either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to re-

tract. He was, therefore, in fact asked to mitigate “the damage he had caused by his behaviour” rather than defend himself ...

131. Although the Court does not doubt that the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and that for this purpose they felt it appropriate to initiate the *instanter* summary procedure, it finds, in view of the above considerations, that they did not succeed in detaching themselves sufficiently from the situation.

132. This conclusion is reinforced by the speed with which the proceedings were carried out and the brevity of the exchanges between the judges and Mr Kyprianou.

▣ *Lindon, Otchakovsky-Laurens and July v. France* [GC],  
21279/02 and 36448/02, 22 October 2007

76. ... the personal impartiality of a judge must be presumed until there is proof to the contrary ... The third applicant argued in this connection that the reasoning in the judgment of the Paris Court of Appeal of 21 March 2001 to the effect that “[t]he authors of the [petition] had [had] no other aim than that of showing their support for Mathieu Lindon by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks” had shown that the two judges in question had felt overtly and personally targeted by the offending article.

The Court does not share that view. In its opinion, this was simply one of the factors that the Court of Appeal took into account in assessing whether the applicant had acted in good faith, without in fact drawing any conclusion from it. In reality, the third applicant was not convicted because he had published a text that challenged the first two applicants’ conviction for defamation, or because he had thus shown support for the petitioners’ “defiance”, or because he had criticised the judges in question, but because he had, without a proper preliminary investigation, disseminated a text containing “particularly serious allegations” and offensive remarks. Moreover, the Court is unable to find, in the grounds of the judgment of 21 March 2001, the slightest indication that those judges might have felt personally targeted by the offending article.

There is thus no evidence to suggest that the two judges in question were influenced by personal prejudice when they passed judgment.

*Prejudicial appearances*

☰ *Pullar v. the United Kingdom*, 22399/93, 10 June 1996

37. It is recalled that Mr Pullar's misgivings as to the impartiality of the tribunal were based on the fact that one member of the jury, Mr Forsyth, was employed by the firm in which the prosecution witness, Mr McLaren, was a partner. Understandably, this type of connection might give rise to some anxiety on the part of an accused ...

39. ... Mr Forsyth, a junior employee within Mr McLaren's firm, had not worked on the project which formed the background to the accusations against Mr Pullar and had been given notice of redundancy three days before the start of the trial ... On these facts, it is by no means clear that an objective observer would conclude that Mr Forsyth would have been more inclined to believe Mr McLaren rather than the witnesses for the defence.

40. In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population. It must also be recalled that the sheriff gave the jury directions to the effect that they should dispassionately assess the credibility of all the witnesses before them ... and that all of the jurors took an oath to a similar effect.

41. Against this background, Mr Pullar's misgivings about the impartiality of the tribunal which tried him cannot be regarded as being objectively justified.

☰ *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005

127. The present case relates to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench ...

128. The Court therefore finds that, on the facts of the case and considering the functional defect which it has identified, the impartiality of the Assize Court was capable of appearing open to doubt. The applicant's fears in this respect can thus be considered to have been objectively justified ...

▣ *Elezi v. Germany*, 26771/03, 12 June 2008

51. In the circumstances of the case, the lay judges' impartiality was ensured by sufficient safeguards ... It emerges from the lay judges' declaration made following the applicant's motion for bias against them that the president of the chamber had explained to them the nature of the essential results of the investigations prior to providing them with a copy. They had understood that the prosecution's view expressed therein was not the basis for the judgment to be rendered in the applicant's case, which was to be grounded on the evidence taken in the main hearing alone. The Court further notes that the lay judges had knowledge of the impugned part of the bill of indictment since the fifteenth day of the hearing in the applicant's case and that more than twenty further hearings were held afterwards in which evidence was taken before the Regional Court delivered its judgment in the applicant's case. In view of this, it does appear that the lay judges made their final assessment as to the applicant's guilt on the basis of the evidence produced and the arguments heard at the hearings.

52. The Court further observes that the applicant did not challenge the Regional Court's impartiality due to the fact that the latter, sitting in the same composition, had previously convicted his sister, an accomplice.

53. Therefore, the applicant's fears as to the impartiality of the lay judges cannot be regarded as objectively justified. ...

*Conduct in court*

▣ *X v. the United Kingdom*, 5574/72, 21 March 1975, DR3, 10

6. ... the following elements are relevant:

a. The views expressed by the trial judge on ... September 1970 were as such objectionable in that they raised doubts as to his impartiality. However, they were less extreme than those voiced by the same judge in the Y case ...

b. As regards the pressure which, by the judge's above remarks, might have been put on the applicant to plead guilty, it appears from the course of the trial, as reflected in the short transcript, that defence counsel was not in fact intimidated by the trial judge. As stated by the Court of Appeal ...counsel appearing before that Court "fairly and frankly concedes that he is unable to say that the remarks that had been made on ... September ...affected defence counsel or prevented him from putting forward the defence properly thereafter".

7. Having considered the trial as a whole, the Commission therefore concludes that there was finally no violation of the appli-

cant's right, under Article 6 (1) of the Convention, to receive a fair hearing by an impartial tribunal.

☰ *C.G. v. the United Kingdom*, 43373/98, 19 December 2001

41. The Court observes in the first place that, although the evidence of S. and of the applicant herself in which the interventions [by the judge] occurred was doubtless the most important oral evidence given in the trial, it made up only a part of the trial proceedings which occupied three days. Further, while certain of these interventions of the trial judge were found by the Court of Appeal to be without justification, others were found to be justified. While the Court accepts the assessment of the Court of Appeal that the applicant's counsel found himself incommoded and disconcerted by these interruptions, ... the applicant's counsel was never prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness. In addition, the Court attaches importance to the fact that the applicant's counsel was able to address the jury in a final speech which lasted for 45 minutes without interruption, apart from a brief intervention which was found to be justified, and that the substance of the applicant's defence was reiterated in the trial judge's summing-up, albeit in a very abbreviated form.

42. In these circumstances, the Court does not find that the judicial interventions in the present case, although excessive and undesirable, rendered the trial proceedings as a whole unfair.

*Statements outside court*

☰ *Lavents v. Latvia*, 58442/00, 28 November 2002

119. ... la Cour constate que, dans ses déclarations publiées les 4 et 5 novembre 1999 dans *Lauku avīze* et *Respublika ...*, M<sup>me</sup> Šteinerte critiqua l'attitude de la défense devant le tribunal. Elle formula également des prévisions sur l'issue de l'affaire. En effet, en soutenant qu'elle ne savait pas encore « si le jugement porter[ait] condamnation ou acquittement partiel », elle écarta l'hypothèse d'un acquittement total. Qui plus est, dans ses déclarations publiées le 7 décembre 1999 dans *Kommersant Baltic ...*, elle exprima son étonnement devant le fait que le requérant persistât à plaider non coupable de tous les chefs d'accusation, et lui suggéra de prouver son innocence. Aux yeux de la Cour, de telles déclarations ne constituent pas une simple « appréciation négative de la cause » du requérant, mais une véritable prise de position sur l'issue de l'affaire, avec une nette préférence pour un constat de culpabilité de l'accusé. La Cour estime qu'au-delà des motifs ayant incité M<sup>me</sup> Šteinerte à s'exprimer ainsi, ses déclarations ne peuvent en aucun cas être considérées comme compati-

bles avec les exigences de l'article 6 §1 de la Convention. Le requérant avait donc les plus fortes raisons de craindre le manque d'impartialité de cette juge ...

127. ... La Cour estime que de telles affirmations équivalent elles aussi à une reconnaissance de culpabilité du requérant. Par ailleurs, la Cour ne peut qu'exprimer sa surprise devant le fait que, dans le cadre de cette dernière interview, M<sup>me</sup> Šteinerte suggéra aux accusés de prouver au tribunal qu'ils n'étaient pas coupables. Vu sa nature générale, une telle indication va à l'encontre du principe même de présomption d'innocence, l'un des principes fondamentaux de l'Etat démocratique :

*Impact of press coverage*

▮ *Papon v. France* (dec.), 54210/00, 15 November 2001

6. ... The Court notes that the applicant's trial had its roots in events (the appraisal of the French authorities' conduct under the Vichy regime) which had long been a matter of intense controversy, and that it could not be expected that the trial itself would be conducted in a dispassionate atmosphere. In the Court's opinion, however, the applicant has not shown that a media campaign was waged against him of such virulence as to sway or be likely to sway the jurors' opinion and the outcome of the Assize Court's deliberations.

On the contrary, the very length of those deliberations, which took nineteen hours, and the verdict reached by the Assize Court would suggest that the jurors voted in accordance with their convictions and consciences and the requirement of being satisfied beyond reasonable doubt which they had sworn to discharge. The Court also considers that it must take account of the fact that the applicant was acquitted of the most serious charge against him, namely aiding and abetting murder ....

Furthermore, the Court observes that the applicant also gave television interviews himself, for example in December 1996 after the judgment committing him for trial at the Assize Court ..., and that as early as 1993 his lawyer published the expert historical report set aside by the Court of Cassation in 1987.

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

103. La Cour considère qu'il est inévitable, dans une société démocratique, que la presse exprime des commentaires parfois sévères sur une affaire sensible qui, comme celle du requérant, mettait en cause la moralité de hauts fonctionnaires et le rapport entre le monde de la politique et celui des affaires.

104. De plus, il échet de noter que les juridictions appelées à connaître de l'affaire étaient entièrement composées de juges professionnels. Contrairement aux membres d'un jury, ces derniers



jouissent d'une expérience et d'une formation leur permettant d'écarter toute suggestion extérieure au procès. Par ailleurs, la condamnation du requérant a été prononcée à l'issue d'une procédure contradictoire, au cours de laquelle l'intéressé a eu la possibilité de soumettre aux juridictions compétentes les arguments qu'il estimait utiles pour sa défense ... Rien dans le dossier ne permet de penser que, dans l'interprétation du droit national ou dans l'évaluation des arguments des parties et des éléments à charge, les juges qui se sont prononcés sur le fond ont été influencés par les affirmations contenues dans la presse ...

*Influence of others*

☰ *Papon v. France* (dec.), 54210/00, 15 November 2001

6. ... It reiterates that neither the behaviour of the civil parties nor the tactics or strategy they used to try to sway the impending decision could have engaged the responsibility of the State unless it was established that the latter had not taken the requisite measures to remedy a situation that was likely to undermine the authority and impartiality of the courts. The Court notes that in the instant case the public prosecutor brought disciplinary proceedings against the lawyer who had made the revelation. The fact that he did not consider it necessary to press charges under Article 434-16 of the Criminal Code does not appear to the Court to be a decisive factor since the applicant could have set the prosecution in motion himself, and indeed subsequently did so by lodging a complaint together with a civil-party application on 5 March 1998.

☰ *Farhi v. France*, 17070/05, 16 January 2007

27. The Court notes that in the instant case the applicant's counsel applied for formal note to be taken of what he alleged was unlawful communication between the prosecutor and certain members of the jury ...

28. ... the President and the other judges heard counsel for the applicant and for the civil party, the advocate-general, and then the accused. However, the Government have not stated how that hearing might have helped to determine the content of the communication or to identify the jurors concerned. It was the duty of the domestic court to use all the means in its power to dispel any doubts as to the reality and nature of the alleged events.

29. The Court considers, in particular, that only a hearing of the jurors would have been likely to shed any light on the nature of the remarks exchanged and the influence they might have had, if any, on their opinions.

*Trial of civilians*

**Military courts**

▮ *Ergin v. Turkey*, 47533/99, 4 May 2006

47. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.

54. ... the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified ...

*Trial of service personnel*

▮ *Findlay v. the United Kingdom*, 22107/93, 25 February 1997

75. ... It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the president, were directly or ultimately under his command ... Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial ...

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified ...

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer". Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit .... This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 para. 1 ...

☞ *Cooper v. the United Kingdom* [GC], 48843/99,  
16 December 2003

117. The judge advocate is a legally qualified civilian appointed to the staff of the Judge Advocate General (also a civilian) by the Lord Chancellor and from there to each court-martial by the Judge Advocate General ... considers that there is no ground to do so ...

The judge advocate is responsible for the fair and lawful conduct of the court-martial and his rulings on the course of the evidence and on all questions of law are binding and must be given in open court. The judge advocate has no vote on verdict and does not therefore retire with the other court-martial members to deliberate on verdict. However, he sums up the evidence and delivers further directions to the other members of the court-martial beforehand, and he can refuse to accept a verdict if he considers it “contrary to law”, in which case he gives the president and ordinary members further directions in open court, following which those members retire again to consider verdict. The judge advocate retires with the other members in order to provide advice, deliberate and vote on sentence ...

In such circumstances, the Court finds that the presence in a court-martial of a civilian with such qualifications and with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings ...

☞ *Irfan Bayrak v. Turkey*, 39429/98, 3 May 2007

35. Elle constate qu’en l’espèce, les membres du tribunal disciplinaire sont tous des officiers qui n’ont pas de statut de magistrat, ni de formation juridique. Ils sont désignés par le commandant de l’organisation militaire ou par le chef de l’institution militaire au sein de laquelle le tribunal est établi. Ces juges sont donc tous placés sous les ordres de la hiérarchie militaire.

36. La Cour souligne qu’en l’espèce, ni les membres du tribunal de première instance ni même ceux du tribunal supérieur d’appel n’étaient des officiers en fin de carrière ... Dans l’exercice de leur fonction de juge, ils relevaient donc de l’autorité supérieure et ne bénéficiaient d’aucune garantie spécifique les dispensant de rendre compte de leurs actes à la hiérarchie militaire.

37. La Cour note en outre que le colonel du régiment, qui a inculpé le requérant à deux reprises ..., était le supérieur hiérarchique des officiers qui siégeaient au tribunal disciplinaire militaire ...

38. Quant à la garantie que pourrait représenter la durée du mandat des juges, la Cour observe que celle dont bénéficiaient les

membres du tribunal disciplinaire militaire est limitée à un an. A titre de comparaison, elle rappelle avoir considéré comme court le mandat de quatre ans des juges à la cour de sûreté de l'Etat ...

39. La Cour réitère que si, d'une manière générale, on doit assurément considérer la durée du mandat des juges comme un corollaire de leur indépendance, la brièveté de ce mandat n'implique pas en soi un défaut d'indépendance du moment que les autres conditions nécessaires se trouvent réunies ...

En l'espèce, on ne peut considérer que les autres conditions nécessaires à l'indépendance soient réunies.

40. Pour l'ensemble des motifs indiqués ci-dessus, la Cour estime que les doutes nourris par le requérant quant à l'indépendance et l'impartialité du tribunal disciplinaire militaire sont objectivement justifiés ...

*State security and state of emergency courts*

▣ *Arap Yalgin and others v. Turkey*, 33370/96, 25 September 2001

46. The Court considers in this connection that where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society ... In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces ...

47. In the light of the foregoing, the Court considers that the applicants – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect ...

48. In conclusion, the applicants' fears as to the Martial Law Court's lack of independence and impartiality can be regarded as objectively justified.

▣ *Barberà, Messegue and Jabardo v. Spain*, 10590/83, 6 December 1988

**Change in composition of court**

71. On the very day of the hearing, Mr de la Concha, the presiding judge of the first section of the Criminal Division of the Audiencia Nacional, had to leave because his brother-in-law had

been taken ill; and one of the other judges mentioned in the order of 27 October 1981 ... Mr Infante, was also unable to sit as he was no longer a member of the relevant section of the court. They were replaced by Mr Pérez Lemaur, the presiding judge of the third section, and by Mr Bermúdez de la Fuente, a member of the first section ...

72. Neither the applicants nor their lawyers were given notice of these changes, particularly the change of presiding judge ... Mr Pérez Lemaur, together with Mr Barnuevo and Mr Bermúdez de la Fuente, had admittedly taken a purely procedural decision on 18 December 1981 ..., but the defence lawyers could not infer from that that he would also be sitting on the trial court, bearing in mind in particular the preparatory meeting which they had had with Mr de la Concha on the previous day ... They were therefore taken by surprise. They could legitimately fear that the new presiding judge was unfamiliar with an unquestionably complex case, in which the investigation file – which was of crucial importance for the final result – ran to 1 600 pages. This is so even though Mr Barnuevo, the reporting judge ..., remained in his post throughout the entire proceedings: Mr Pérez Lemaur had not taken part in the preparatory meeting on 11 January 1982; the case in fact proceeded without a full hearing of the evidence; the deliberations were due to take place immediately after the hearing, or at the latest on the following day ...; and the Audiencia Nacional had to give its decision – and did in fact do so – within three days.

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

176. The Court reiterates that it is the role of the domestic courts to manage their proceedings with a view to ensuring the proper administration of justice. The assignment of a case to a particular judge or court falls within the margin of appreciation enjoyed by the domestic authorities in such matters. There is a wide range of factors, such as, for instance, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties etc., which the authorities must take into account when assigning a case. Although it is not the role of the Court to assess whether there were valid grounds for the domestic authorities to (re)assign a case to a particular judge or court, the Court must be satisfied that such (re)assignment was compatible with Article 6 §1, and, in particular, with its requirements of objective independence and impartiality ...

177. The Russian legislation does not contain any provisions governing the distribution of cases among the judges of the court with appropriate jurisdiction. Section 6.2 of the Status of Judges Act implies that control over the distribution of cases is to be ex-

exercised by the court President, in a manner to be regulated by a federal law ... However, since no such law has been enacted to date, as a matter of common practice cases lodged with courts are distributed by the court Presidents at their own discretion.

178. After the case has been assigned and the proceedings begun, the law requires that the case remains with the same court composition until the final decision is taken. This principle, known as the rule of immutability of the court composition ... provided for the possibility of replacing a judge who was no longer able to take part in the proceedings with another judge. It was applicable to professional and lay judges alike ...

179. ...in the applicant's case there were eleven replacements of the judges on the bench. Four presiding judges dealt successively with the case. Each replacement of the presiding judge was followed by the replacement of both lay judges. In addition, on one occasion the substitute lay judge was called upon to step into the proceedings, and on another a new lay judge had to be designated to replace one who had withdrawn from the case. The proceedings had to be started anew each time a new member joined the formation.

180. The Government did not explain how this inordinate number of changes in the bench – which is striking in comparison to other Russian criminal cases that have come before the Court – could be reconciled with the rule of immutability of the court composition, the fundamental importance of which they themselves emphasised. It is a matter of utmost concern for the Court that not only were replacements particularly frequent in the applicant's case but that the reasons for such replacements were only made known on two occasions ...

182. The Court further observes that, as with the distribution of incoming cases among judges, the power to reassign a pending criminal case to another presiding judge was habitually exercised by the President of a court ... the law did not determine with any degree of precision the circumstances in which such reassignment could occur. The lack of foreseeability ... had the effect of giving the President of the Moscow City Court unfettered discretion in the matter of replacement and reassignment of judges in the applicant's criminal case. In this connection the Court emphasises that no procedural safeguards against the arbitrary exercise of the discretion were incorporated ... Thus, it did not require that the parties be informed of the reasons for the reassignment of the case or given an opportunity to comment on the matter ... Furthermore, the replacement of a member of the bench was not set out in any procedural decision amenable to judicial review by a higher court. The Court considers that the absence of any procedural

safeguards in the text of the law rendered the members of the bench vulnerable to outside pressure.

184. Having regard to the above considerations, the Court finds that in the applicant's case the Russian criminal law failed to provide the guarantees that would have been sufficient to exclude any objective doubt as to the absence of inappropriate pressure on judges in the performance of their judicial duties ... In these circumstances, the applicant's doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in his criminal case, which were carried out for unascertainable reasons and were not circumscribed by any procedural safeguards.

185. There has therefore been a violation of Article 6 §1 on account of the lack of independence and impartiality of the trial court.

#### The court room

☰ *Stanford v. the United Kingdom*, 16757/90, 23 February 1994

29. The applicant further maintained that the Government bore responsibility for the poor acoustics of the courtroom. While this is undoubtedly a matter which could give rise to an issue under Article 6 ... of the Convention, the expert reports which were carried out both before and after the applicant's complaint indicated that, apart from a minimal loss of sound due to the glass screen, the acoustic levels in the courtroom were satisfactory ...

30. Finally it must be recalled that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in the witness statements. Moreover a reading of the transcript of the trial reveals that he was ably defended by his counsel and that the trial judge's summing up to the jury fairly and thoroughly reflected the evidence presented to the court.

31. In addition, the Court of Appeal, which had been seised of the matter ... could not reasonably have been expected in the circumstances to correct an alleged shortcoming in the trial proceedings which had not been raised before the trial judge....

32. In light of the above the Court concludes that there had been no failure by the United Kingdom to ensure that the applicant received a fair trial.

#### Review of administrative penalties

☰ *Čanády v. Slovakia*, 53371/99, 16 November 2004

32. In the present case the applicant was fined under the Minor Offences Act of 1990 by the rector of the Military Academy in

Liptovský Mikuláš where he was employed. This decision was reviewed by the Ministry of Defence. Thus the decisions in question were taken by administrative authorities which ... did not meet the requirements of an independent and impartial tribunal within the meaning of Article 6 §1 of the Convention. Since section 83 (1) of the Minor Offences Act of 1990 and Article 248 (2) (f) of the Code of Civil Procedure, as in force at the relevant time, precluded such decisions from being examined by ordinary courts, and given that the Constitutional Court failed to redress the situation complained of, the Court concludes that the applicant's right to a hearing by a tribunal has not been respected. ....

## Public hearing

☞ *Barberà, Messegueé and Jabardo v. Spain*, 10590/83, 6 December 1988

### Content

78. ... In addition, the object and purpose of Article 6 ..., and the wording of some of the sub-paragraphs in paragraph 3 ..., show that a person charged with a criminal offence "is entitled to take part in the hearing and to have his case heard" in his presence by a "tribunal" ... The Court infers ... that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument. It will ascertain whether this was done in the instant case ...

89. Having regard to ... above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing. Consequently, there was a violation of Article 6 para. 1 ...

☞ *Riepan v. Austria*, 35115/97, 14 November 2000

29. ... The Court considers that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.



30. ... the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison ... This list was distributed to the media and was available to the general public at the Regional Court's registry and information desk. However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison, with a clear indication of the access conditions.

Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning in a room which, although not too small to accommodate an audience, does not appear to have been equipped as a regular courtroom.

31. In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing of 29 January 1996 did not comply with the requirement of publicity laid down in Article 6 §1 of the Convention ...

▣ *Craxi v. Italy (No. 2)*, 25337/94, 17 July 2003

57. ... the reading out at the hearing of 29 September 1995 and the disclosure of the content of the telephone interceptions to the press amounted to an interference with the exercise of a right secured to the applicant in paragraph 1 of Article 8 of the Convention ....

60. The Court notes that the applicant criticised, in particular, the fact that after the hearing of 29 September 1995, the press published the content of certain conversations intercepted on his telephone line in Hammamet.

66. The Court observes that in the present case some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant ...

67. In the opinion of the Court, their publication by the press did not correspond to a pressing social need. Therefore, the interference with the applicant's rights under Article 8 § 1 of the Convention was not proportionate to the legitimate aims which could have been pursued and was consequently not "necessary in a dem-

ocratic society” within the meaning of the second paragraph of this provision ...

☞ *Stefanelli v. San Marino*, 35396/97, 8 February 2000

20. In the instant case, the hearings at which evidence was taken from the witnesses were held at first instance and, as the Government indicated, could also have been held on appeal if the applicant had so requested. Nevertheless, the Court observes that the oral procedure would not have taken place before the judge called upon to decide the case ... but before the investigating judge, ... whose only role was to investigate the case. The proceedings before the trial judge took place without a public hearing either at first instance or on appeal.

21. Although the Government did not rely on this provision, the Court points out that under the second sentence of Article 6 §1 the press and public may, in certain circumstances, be excluded from the trial. The Court notes that the fact that no hearing was held did not result from a decision by the judge but from the application of the law in force. However, having regard to the facts of the case and the applicant’s alleged omissions, the Court is of the opinion that none of the sets of circumstances set out in that provision was applicable.

22. Accordingly, the Court holds that there has been a violation of Article 6 §1 of the Convention in that the applicant’s case was not heard in public by the trial and appellate courts.

☞ *Ernst and others v. Belgium*, 33400/96, 15 July 2003

67. ... En Belgique, en effet, l’instruction est secrète. Le secret de l’instruction trouve sa raison d’être dans la sauvegarde de deux intérêts majeurs : d’une part, le respect de l’intégrité morale et de la vie privée de toute personne présumée innocente et, d’autre part, l’efficacité dans la conduite de l’instruction. Il s’ensuit que lorsqu’une juridiction statue en tant que juridiction d’instruction, l’audience se tient en principe à huis clos et la décision n’est pas prononcée en audience publique ... il n’apparaît pas que les requérants aient demandé la publicité ou émis des réserves quant au huis clos des audiences.

68. La Cour estime que le caractère secret de la procédure d’instruction peut se justifier par des raisons relatives à la protection de la vie privée des parties au procès et aux intérêts de la justice, au sens de la deuxième phrase de l’article 6 § 1. Elle relève, en outre, que si l’affaire des requérants avait donné lieu, après une instruction complète, à un renvoi devant une cour d’appel, statuant comme juridiction de jugement, les prévenus et les requérants, en tant que parties civiles, auraient eu droit à la publicité complète de la procédure. Elle rappelle à cet égard que, si l’article 6

**Restrictions including waiver**

peut jouer un rôle avant la saisine du juge du fond, les modalités de son application durant l’instruction dépendent des particularités de la procédure et des circonstances de la cause ...

Au total, la Cour considère que l’examen à huis clos de la recevabilité de la constitution de partie civile des requérants n’a pas porté atteinte aux exigences de l’article 6 § 1 en matière de publicité des débats.

☞ *Hermi v. Italy* [GC], 18114/02, 18 October 2006

78. However, the Court observes that the fact that the hearings were not held in public was the result of the adoption of the summary procedure, a simplified procedure which the applicant himself had requested of his own volition. The summary procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence ... On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular with reference to the public nature of the hearings and the possibility of requesting the admission of evidence not contained in the file held by the Public Prosecutor’s Office.

79. The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived ...

80. In that connection the Court reiterates that it has accepted that other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts’ case-load, must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance ... Introduction of the summary procedure by the Italian legislature seems to have been expressly aimed at simplifying and thus expediting criminal proceedings ...

81. In the light of the above considerations, the fact that the hearings at first and second instance were conducted in private, and hence without members of the public being present, cannot be regarded as being in breach of the Convention.

☞ *M. v. France*, 10147/82, 4 October 1984, DR40, 166

The applicant complains *inter alia* that in the Assize Court the presiding judge, exercising his discretionary powers, allowed documents from the case file to be shown on closed-circuit television in the courtroom. He complains that as well as being contrary to

the principle of oral proceedings this infringed his right to have his case heard in the manner required by Article 6 para. 1 of the Convention ... The Court of cassation judgment of 21 April 1982 makes clear that the Assize Court used the procedure to show a map and photographs of the scene of the crime simultaneously to the jury, the bench, the advocate-general, the parties claiming damages and their counsel, and the accused and their counsel.

Although the applicant objects to a procedure which made the case file public and so may have swayed the public gallery and the jury, the Commission, from the information at its disposal, cannot see how that procedure could have harmed the orderliness, and thus the fairness, of the trial, particularly as the documents were in the case file and the defence was bound to have known of them.

▣ *Sutter v. Switzerland*, 8209/78, 22 February 1984

31. In accordance with section 197 of the 1889 Act, the judgment delivered on 21 October 1977 by the Military Court of Cassation was served on the parties but not pronounced in open court ...

34. ... anyone who can establish an interest may consult or obtain a copy of the full text of judgments of the Military Court of Cassation; besides, its most important judgments, like that in the *Sutter* case, are subsequently published in an official collection. Its jurisprudence is therefore to a certain extent open to public scrutiny.

Having regard to the issues dealt with by the Military Court of Cassation in the instant case and to its decision – which made the judgment of the Divisional Court final and changed nothing in respect of its consequences for Mr Sutter – a literal interpretation of the terms of Article 6 para. 1 ..., concerning pronouncement of the judgment, seems to be too rigid and not necessary for achieving the aims of Article 6 ...

The Court thus concurs with the Government and the majority of the Commission in concluding that the Convention did not require the reading out aloud of the judgment delivered at the final stage of the proceedings.

▣ *Campbell and Fell v. the United Kingdom*, 7819/77 and 7878/77, 28 June 1984

89. ...the applicant complained of the fact that the Board of Visitors had not pronounced publicly its decision in his case ...

91. The Court has said in other cases that it does not feel bound to adopt a literal interpretation of the words “pronounced publicly”: in each case the form of publication given to the “judgment” under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in

### **Announcement of judgment**

question and by reference to the object pursued by Article 6 para. 1 ... in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial ...

92. However, in the present case it does not appear that any steps were taken to make public the Board of Visitors' decision. There has accordingly been a violation of Article 6 para. 1 ... on this point.

☞ *Lamanna v. Austria*, 28923/95, 10 July 2001

33. In the present case, the Salzburg Regional Court's decision of 10 October 1994 – although taken after a public hearing of the applicant's compensation claim – was not delivered publicly as it was dependent on his acquittal becoming final. Instead, it was served in writing on 4 November 1994. The decision by the Linz Court of Appeal of 1 February 1995, which contained a summary of the Regional Court's decision, confirmed its application of section 2 §1 (b) of the 1969 Act and rendered its decision final, was initially also delivered in writing and was not rendered public by any other means. However, following the Supreme Court's judgment of 9 November 2000, it was delivered publicly on 9 February 2001.

34. Having regard to the compensation proceedings as a whole as well as to their specific features, the Court finds that the purpose of Article 6 §1, namely subjecting court decisions to public scrutiny, thus enabling the public to study the manner in which the courts generally approach compensation claims for detention on remand, was achieved in the present case by the public delivery of the appellate court's judgment.

Accordingly, there has been no violation of Article 6 §1 of the Convention.

*See also below, "Access to the court record" on page 306.*

## Reporting restrictions

☞ *Z v. Finland*, 22009/93, 25 February 1997

113. Finally, the Court must examine whether there were sufficient reasons to justify the disclosure of the applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press ...

Under the relevant Finnish law, the Court of Appeal had the discretion, firstly, to omit mentioning any names in the judgment permitting the identification of the applicant and, secondly, to keep the full reasoning confidential for a certain period and instead publish an abridged version of the reasoning, the operative part and an indication of the law which it had applied ...

Irrespective of whether the applicant had expressly requested the Court of Appeal to omit disclosing her identity and medical condition, that court was informed by X's lawyer about her wishes that the confidentiality order be extended beyond ten years ... It evidently followed from this that she would be opposed to the disclosure of the information in question to the public.

In these circumstances ... the Court does not find that the impugned publication was supported by any cogent reasons. Accordingly, the publication of the information concerned gave rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8 ...

☞ *Worm v. Austria*, 22714/93, 29 August 1997

52. The Court of Appeal's judgment was not directed to restricting the applicant's right to inform the public in an objective manner about the development of Mr Androsch's trial. Its criticism went essentially to the unfavourable assessment the applicant had made of the former minister's replies at trial, an element of evidence for the purposes of section 23 of the Media Act ...

54. Having regard to the State's margin of appreciation, it was also in principle for the appellate court to evaluate the likelihood that at least the lay judges would read the article as it was to ascertain the applicant's criminal intent in publishing it ... the fact that domestic law as interpreted by the Vienna Court of Appeal did not require an actual result of influence on the particular proceedings to be proved ... does not detract from the justification for the interference on the ground of protecting the authority of the judiciary ...

57. Given the amount of the fine and the fact that the publishing firm was ordered to be jointly and severally liable for payment of it ..., the sanction imposed cannot be regarded as disproportionate to the legitimate aim pursued.

58. The Court accordingly finds that the national courts were entitled to consider that the applicant's conviction and sentence were "necessary in a democratic society" for maintaining both the authority and the impartiality of the judiciary within the meaning of Article 10 §2 of the Convention.

☞ *News Verlags GmbH & CoKG v. Austria*, 31457/96, 11 January 2000

58. The Court acknowledges that there may be good reasons for prohibiting the publication of a suspect's picture in itself, depending on the nature of the offence at issue and the particular circumstances of the case ... However, no reasons to that effect were adduced by the Vienna Court of Appeal.

59. It is true ... that the injunctions did not in any way restrict the applicant company's right to publish comments on the criminal proceedings against B. However, they restricted the applicant company's choice as to the presentation of its reports, while it was undisputed that other media were free to continue to publish B.'s picture throughout the criminal proceedings against him. Having regard to these circumstances and to the domestic courts' finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B.'s rights, the Court finds that the absolute prohibition on the publication of B.'s picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence. Thus, there is no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued.

60. It follows from these considerations that the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society".

▣ *Dabrowski v. Poland*, 18235/02, 19 December 2006

33. ... In three articles the applicant reported on criminal proceedings pending against a local politician and about the subsequent judgment of the Ostróda District Court. The Court considers that the content and the tone of the articles were on the whole fairly balanced ...

34. The Court further agrees that some of the applicant's statements were value judgments on a matter of public interest which cannot be said to have been devoid of any factual basis. Moreover, the applicant's statements were not a gratuitous personal attack on a politician. It also cannot be said that the purpose of the statements in question was to offend or to humiliate the criticised person.

35. ... the domestic courts ... failed to have regard to the fact that the applicant, as a journalist, had a duty to impart information and ideas on political questions and on other matters of public interest and in so doing to have possible recourse to a degree of exaggeration. The Court next notes that neither the first-instance nor the appellate courts took into account the fact that Mr Lubaczewski, being a politician, should have shown a greater degree of tolerance in the face of criticism. In sum, the Court is of the opinion that the reasons adduced by the domestic courts cannot be regarded as relevant and sufficient to justify the interference at issue.

36. ... while the penalty imposed on the applicant was relatively light (a fine of PLN 1 000 and costs of PLN 300 – approximately EUR 330), and although the proceedings against him were

conditionally discontinued, nevertheless the domestic courts found that the applicant had committed a criminal offence of defamation. In consequence, the applicant had a criminal record. Moreover, it remained open to the courts to resume the proceedings at any time during the period of his probation should any of the circumstances defined by law so justify ...

37. Furthermore, while the penalty did not prevent the applicant from expressing himself, his conviction nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. Such a conviction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog ...

Having regard to the above considerations, the applicant's conviction was disproportionate to the legitimate aim pursued, having regard in particular to the interest of a democratic society in ensuring and maintaining the freedom of the press.

▣ *Dupuis and others v. France*, 1914/02, 7 June 200

44. ... It is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. However, in the circumstances of the present case, the Court considers that, at the time when the offending book was published, in January 1996, in addition to there being very wide media coverage of the so-called "Elysée eavesdropping" case, it was already publicly known that G.M. had been placed under investigation in this case, in the context of a pre-trial judicial investigation which had started about three years earlier, and which ultimately led to his conviction and suspended prison sentence on 9 November 2005, that is to say just over nine years and nine months after the book was published. Moreover, the Government have failed to show how, in the circumstances of the case, the disclosure of confidential information could have had a negative impact on G.M.'s right to the presumption of innocence or on his conviction and sentence almost ten years after that publication. In actual fact, following the publication of the impugned book and while the judicial investigation was ongoing, G.M. regularly commented on the case in numerous press articles. In those circumstances, the protection of the information on account of its confidentiality did not constitute an overriding requirement.

45. In this connection it is noteworthy that, while the applicants' conviction for the offence of handling was based on the reproduction and use in their book of documents which had come



from the investigation file and which, accordingly, were found to have been communicated in breach of the secrecy of the judicial investigation or in breach of professional confidence, that conviction inevitably concerned the disclosure of information. It is open to question, however, whether there was still any need to prevent disclosure of information that was already, at least partly, available to the public ... and might already have been known to a large number of people ... having regard to the media coverage of the case, on account of the facts and of the celebrity of many of the victims of the telephone tapping in question.

46. The Court further considers that it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as “watchdogs” of democracy. Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism ... In the present case, it transpires from the applicants’ undisputed allegations that they acted in accordance with the standards governing their profession as journalists, since the impugned publication was relevant not only to the subject matter but also to the credibility of the information supplied, providing evidence of its accuracy and authenticity ...

48. The Court ... notes that the two authors were fined EUR 762.25 each and were also ordered jointly to pay EUR 7 622.50 in damages to G.M. In addition, the applicant company was found to be civilly liable. However, no order to destroy or seize the book was issued and its publication was not prohibited ... That being said, the amount of the fine, although admittedly fairly moderate, and the award of damages in addition to it, do not appear to have been justified in the circumstances of the case ... Moreover, as the Court has stated on numerous occasions, interference with freedom of expression might have a chilling effect on the exercise of that freedom ... – an effect that the relatively moderate nature of a fine would not suffice to negate.

49. In conclusion, the Court considers that the judgment against the applicants constituted a disproportionate interference with their right to freedom of expression and that it was therefore not necessary in a democratic society.

## Burden of proof

☰ *Capeau v. Belgium*, 42914/98, 13 January 2005

25. ... The Court would observe in that connection that, in criminal cases, the whole matter of the taking of evidence must be looked at in the light of Article 6 §2 and requires, *inter alia*, that the burden of proof be on the prosecution ... Consequently, the reasoning of the Unwarranted Pre-trial Detention Appeals Board was incompatible with respect for the presumption of innocence.

**Suspect benefits  
from reasonable  
doubt**

☰ *Salabiaku v. France*, 10519/83, 7 October 1988

30. ...It is clear ... that the courts in question were careful to avoid resorting automatically to the presumption laid down in Article 392 para. 1 of the Customs Code. As the Court of Cassation observed in its judgment of 21 February 1983, they exercised their power of assessment “on the basis of the evidence adduced by the parties before [them]”. They inferred from the “fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid” ... Moreover, as the Government said, the national courts identified in the circumstances of the case a certain “element of intent”, even though legally they were under no obligation to do so in order to convict the applicant.

**Presumptions and  
shifting burden**

It follows that in this instance the French courts did not apply Article 392 para. 1 of the Customs Code in a way which conflicted with the presumption of innocence.

☰ *Pham Hoang v. France*, 13191/87, 25 September 1992

34. ... Mr Pham Hoang ... could try to demonstrate that he had “acted from necessity or as a result of unavoidable mistake” ... The presumption of his responsibility was not an irrebuttable one ....

35. Furthermore, in its judgment ... the Court of Appeal did not cite in the reasons for its decision any of the impugned provisions of the Customs Code when it ruled on the accused’s guilt, even if it in substance took Articles 399 and 409 as its basis for holding that he had had “an interest in customs evasion” and that he was guilty of an attempted customs offence ... The court set out the circumstances of the applicant’s arrest and took account of a cumulation of facts ...

36. It therefore appears that the Court of Appeal duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code

and did not apply them in a manner incompatible with Article 6 paras. 1 and 2 ... of the Convention ....

☰ *John Murray v. the United Kingdom*, 18731/91, 8 February 1996

54. In the Court's view, having regard to the weight of the evidence against the applicant ...the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. ... the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of the specific safeguards mentioned above, it constitutes, as described by the Commission, "a formalised system which aims at allowing common-sense implications to play an open role in the assessment of evidence".

Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.

56. ... Immediately after arrest the applicant was warned in accordance with the provisions of the Order but chose to remain silent. The Court ... observes that there is no indication that the applicant failed to understand the significance of the warning given to him by the police prior to seeing his solicitor. Under these circumstances the fact that during the first 48 hours of his detention the applicant had been refused access to a lawyer does not detract from the above conclusion that the drawing of inferences was not unfair or unreasonable ...

Nevertheless, the issue of denial of access to a solicitor, has implications for the rights of the defence which call for a separate examination ... [see above, "Right to assistance of a lawyer" on page 137].

☰ *Radio France v. France*, 53984/00, 30 March 2004

24. ... Therefore, as the Government submitted, a publishing director has a valid defence if he can establish the good faith of the person who made the offending remarks or prove that their content was not fixed before being broadcast; moreover, the applicants raised such arguments in the domestic courts.

That being the case, and having regard to the importance of what was at stake – effectively preventing defamatory or insulting allegations and imputations being disseminated through the media by requiring publishing directors to exercise prior supervision – the Court considers that the presumption of responsibility established by section 93-3 of the 1982 Act remains within the requisite “reasonable limits”. Noting in addition that the domestic courts examined with the greatest attention the applicants’ arguments relating to the third applicant’s good faith and their defence that the content of the offending statement had not been fixed in advance, the Court concludes that in the present case they did not apply section 93-3 of the 1982 Act in a way which infringed the presumption of innocence.

▣ *Falk v. the Netherlands* (dec.) 66273/01, 19 October 2004

In assessing whether, in the present case, this principle of proportionality was observed, the Court understands that the impugned liability rule [applied to the registered car owner] was introduced in order to secure effective road safety by ensuring that traffic offences, detected by technical or other means and committed by a driver whose identity could not be established at the material time, would not go unpunished whilst having due regard to the need to ensure that the prosecution and punishment of such offences would not entail an unacceptable burden on the domestic judicial authorities. It further notes that ... the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Act and/or claim that at the material time the police had a realistic opportunity of stopping the car and establishing the identity of the driver.

... the Court cannot find that Article 5 of the Act – which obliges a registered car owner to assume the responsibility for his or her decision to allow another person to use his or her car – is incompatible with Article 6 §2 of the Convention. The Court is therefore of the opinion that the domestic authorities, in imposing the fine at issue on the applicant, did not fail to respect the presumption of innocence.

▣ *Grayson and Barnham v. the United Kingdom*, 19955/05 and 15085/06, 23 September 2007

37. In *Phillips v. the United Kingdom* (no. 41087/98 ...) the Court held that the making of a confiscation order under the 1994 Act was analogous to a sentencing procedure. Article 6 §1, which applies throughout the entirety of proceedings for “the determination of ... any criminal charge”, including proceedings whereby a sentence is fixed, was therefore applicable ...

38. The Court recalls that during the first stage of the procedure under the 1994 Act the onus was on the prosecution to establish, on the balance of probabilities, that the defendant had spent or received specific sums of money during the six years preceding the trigger offence. The sentencing court was then required, under section 4 of the Act, to assume that these receipts or items of expenditure derived from the proceeds of drug trafficking. The burden then passed to the defendant to show, again on the balance of probabilities, that the money had instead come from a legitimate source ...

42. The Court's task, in a case involving the procedure for the imposition of a confiscation order under the 1994 Act, is to determine whether the way in which the statutory assumptions were applied in the particular proceedings offended the basic principles of a fair procedure inherent in Article 6 §1 ... The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair ...

45. Throughout these proceedings, the rights of the defence were protected by the safeguards built into the system. Thus, in each case the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence ... Each applicant was represented by counsel of his choice. The burden was on the prosecution to establish that the applicant had held the assets in question during the relevant period. Although the court was required by law to assume that the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice ...

46. ... The Court does not consider that in either case, in principle or practice, it was incompatible with the concept of a fair trial under Article 6 to place the onus on the applicant, once he had been convicted of a major offence of drug dealing, to establish that the source of money or assets which he had been shown to have possessed in the years preceding the offence was legitimate. Given the existence of the safeguards referred to above, the burden on him did not exceed reasonable limits.

47. The second stage of the procedure involved the calculation of the value of the realisable assets currently available to the applicant. The legislation at this stage did not require the sentencing court to make any assumption about past criminal activity: instead it had to make an assessment of the applicant's means at

the time the order was made. ... the burden at this stage was on the defendant to establish to the civil standard that the amount that might be realised was less than the amount assessed as benefit.

48. Each of the present applicants chose to give oral evidence relating to his realisable assets. Again, they had the advantage of the safeguards referred to ... above. They were legally represented and had been informed, through the judges' detailed rulings, exactly how the benefit figure had been calculated. Each applicant was given the opportunity to explain his financial situation and describe what had happened to the assets which the judge had taken into account in setting the benefit figure. ...

49. The Court agrees ... that it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. In each case, having been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. Such matters fell within the applicants' particular knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true.

50. There has, therefore, been no violation of Article 6 §1 of the Convention in respect of either applicant.

☞ *Saunders v. the United Kingdom*, 19187/91, 17 December 1996

**Prohibition on self-incrimination**

74. ... The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.

75. ... the various procedural safeguards to which reference has been made by the respondent Government ... cannot provide a defence in the present case since they did not operate to prevent the use of the statements in the subsequent criminal proceedings.

76. Accordingly, there has been an infringement in the present case of the right not to incriminate oneself.

☰ *Tirado Ortiz and Lozano Martín v. Spain* (dec.), 43486/98, 22 June 1999

1. The applicants alleged that their conviction for serious failure to obey orders for refusing to submit to a breath test infringed the principle that anyone charged with a criminal offence has the right not to make self-incriminating statements ... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent ... it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant; breath, blood and urine samples; and bodily tissue for the purpose of DNA testing ... The Court notes in the instant case that the legal provision objected to is based on an analogous principle.

The Court also observes that the police officers requested breath tests because they suspected the applicants of committing an offence. Furthermore, various guarantees are provided against arbitrary or improper use of tests. Moreover, tests of alcohol level are commonly used in Council of Europe member States in connection with traffic legislation.

Having regard to the foregoing, the Court considers that the legal provision in question, as applied in the applicants' case, does not disclose any appearance of a violation of Article 6 of the Convention.

## Witnesses

### Duty to hear

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

83. ... Par ailleurs, dans la mesure où le requérant affirme que M. Pacini Battaglia était un témoin à décharge, la Cour relève que M. Craxi n'a pas indiqué précisément les circonstances sur lesquelles celui-ci aurait dû témoigner. Il n'a donc pas démontré que la convocation de ce témoin était nécessaire à la recherche de la vérité et que le refus de l'interroger a porté atteinte aux droits de la défense ...

☰ *Popov v. Russia*, 26853/04, 13 July 2006

184. The Court notes that the applicant sought leave to call before the trial court several witnesses who, according to him, could have confirmed his alibi ... However, the court dismissed the witnesses' statements on the ground that being the applicant's relatives they had tried to help him ...

185. The Court further notes that in refusing to examine Mrs R. and Mr Kh. [who were not relatives] the trial court did not consider whether their statements could have been important for the examination of the case. However, from the fact that the defence's previous motions to have them examined were formally granted a number of times both during the preliminary investigation and the court proceedings, it follows that the domestic authorities agreed that their statements could have been relevant.

188. ... Taking into account that the applicant's conviction was founded upon conflicting evidence against him, the Court finds that the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial enshrined in Article 6 ....

📖 *Doorson v. the Netherlands*, 20524/92, 26 March 1996

**Anonymity**

71. ... Although, as the applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable *per se*. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them ... Furthermore, the statements made by the witnesses concerned to the investigating judge show that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened ...

In sum, there was sufficient reason for maintaining the anonymity of Y.15 and Y.16 ...

📖 *Krasniki v. the Czech Republic*, 51277/99, 28 February 2006

81. The Court notes that the investigating officer apparently took into account the nature of the environment of drug dealers who, as the Government said, frequently use threats or actual violence against drug addicts and other persons who testify against them. They could thus fear reprisals at the hands of drug dealers and risk personal injury. However, it cannot be established from the records taken during the witnesses' interviews of 11 July 1997 or from the reports of the trial ... how the investigating officer and the trial judge assessed the reasonableness of the personal fear of the witnesses, *vis-à-vis* the applicant, either when they were questioned by police or when "Jan Novotný" was examined at the trial.

82. Neither did the Regional Court carry out such an examination into the seriousness and substantiation of the reasons for



granting anonymity to the witnesses when it approved the judgment of the District Court which had decided to use the statements of the anonymous witnesses in evidence against the applicant ... In this respect, referring to the grounds of the complaint against a breach of law lodged by the Minister of Justice in the applicant's favour ..., the Court is not convinced by the Government's contradictory argument.

83. In the light of these circumstances, the Court is not satisfied that the interest of the witnesses in remaining anonymous could justify limiting the rights of the applicant to such an extent ...

### Cross-examination

☞ *Lüdi v. Switzerland*, 12433/86, 15 June 1992

42. ...The applicant maintained that his conviction had been based above all upon the undercover agent's report and the transcripts of his telephone conversations with the agent, although he had not at any stage of the proceedings had an opportunity to question him or to have him questioned ...

49. ... neither the investigating judge nor the trial courts were able or willing to hear Toni [the undercover agent] as a witness and carry out a confrontation which would enable Toni's statements to be contrasted with Mr Lüdi's allegations; moreover, neither Mr Lüdi nor his counsel had at any time during the proceedings an opportunity to question him and cast doubt on his credibility. Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future ...

50. In short, the rights of the defence were restricted to such an extent that the applicant did not have a fair trial. There was therefore a violation of paragraph 3 (d) in conjunction with paragraph 1 of Article 6 ...

☞ *Doorson v. the Netherlands*, 20524/92, 26 March 1996

73. In the instant case the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity, even if the defence was not. She noted, in the official record of her findings dated 19 November 1990, circumstances on the basis of which the Court of Appeal was able to draw conclusions as to the reliability of their evidence ... Counsel was not only present, but he was put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered ...

74. While it would clearly have been preferable for the applicant to have attended the questioning of the witnesses, the Court considers, on balance, that the Amsterdam Court of Appeal was entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses. More generally, the Convention does not preclude identification – for the purposes of Article 6 para. 3 (d) ... – of an accused with his counsel ...

75. In addition, although it is normally desirable that witnesses should identify a person suspected of serious crimes in person if there is any doubt about his identity, it should be noted in the present case that Y.15 and Y.16 identified the applicant from a photograph which he had acknowledged to be of himself ...; moreover, both gave descriptions of his appearance and dress ...

It follows from the above considerations that in the circumstances the “counterbalancing” procedure followed by the judicial authorities in obtaining the evidence of witnesses Y.15 and Y.16 must be considered sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, which it did in open court by, amongst other things, drawing attention to the fact that both were drug addicts ...

76. Finally, it should be recalled that even when “counterbalancing” procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements. That, however, is not the case here: it is sufficiently clear that the national court did not base its finding of guilt solely or to a decisive extent on the evidence of Y.15 and Y.16 ...

Furthermore, evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. The Court is satisfied that this was done in the criminal proceedings leading to the applicant’s conviction, as is reflected in the express declaration by the Court of Appeal that it had treated the statements of Y.15 and Y.16 “with the necessary caution and circumspection” ...

▮ *Van Mechelen and others v. the Netherlands*, 21363/93, 21364/93, 21427/93 and 2056/93, 23 April 1997

59. In the present case, the police officers in question were in a separate room with the investigating judge, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was thus not only unaware of the identity of the police witnesses but were also prevented from

observing their demeanour under direct questioning, and thus from testing their reliability ...

60. It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered. In the absence of any further information, the Court cannot find that the operational needs of the police provide sufficient justification ...

61. Nor is the Court persuaded that the Court of Appeal made sufficient effort to assess the threat of reprisals against the police officers or their families. It does not appear from that court's judgment that it sought to address the question whether the applicants would have been in a position to carry out any such threats or to incite others to do so on their behalf. Its decision was based exclusively on the seriousness of the crimes committed ....

In this connection, it is to be noted that Mr Engelen, a civilian witness who in the early stages of the proceedings had made statements identifying one of the applicants as one of the perpetrators, did not enjoy the protection of anonymity and it has not been claimed that he was at any time threatened.

62. It is true ... that the anonymous police officers were interrogated before an investigating judge, who had himself ascertained their identity and had, in a very detailed official report of his findings, stated his opinion on their reliability and credibility as well as their reasons for remaining anonymous.

However these measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability. It thus cannot be said that the handicaps under which the defence laboured were counterbalanced by the above procedures.

☰ *Ferrantelli and Santangelo v. Italy*, 19874/92, 7 August 1996

52. In this instance, even though the judicial authorities did not, as would have been preferable, organise a confrontation between all the accused during the twenty months preceding G.V.'s tragic death, they cannot be held responsible for the latter event. Furthermore, in its judgment of 6 April 1991, the Juvenile Section of the Caltanissetta Court of Appeal carried out a detailed analysis of the prosecution witness's statements and found them to be corroborated by a series of other items of evidence, such as the fact that all the accused had made statements implicating each other, the fact that the applicants had helped G.V. to buy and to

transport the two gas bottles used in the attack on the barracks and the lack of a convincing alibi for either of the accused ...

▣ *Luca v. Italy*, 33354/96, 27 February 2001

40. ... it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 ...

41. In that regard, the fact that the depositions were, as here, made by a co-accused rather than by a witness is of no relevance ... Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§1 and 3 (d) of the Convention apply ...

42. In the light of the foregoing, the reasons given by the Court of Cassation in its judgment of 19 October 1995 for dismissing the appeal brought under Article 6 §3 (d) of the Convention ... do not appear pertinent. In particular, the fact that under the domestic law in force at the material time ... the court could rule statements made before the trial admissible if a co-accused refused to give evidence could not deprive the accused of the right which Article 6 §3 (d) afforded him to examine or have examined in adversarial proceedings any material evidence against him.

43. In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N. before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

44. In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

45. The applicant was, therefore, denied a fair trial.

☞ *P.S. v. Germany*, 33900/96, 20 December 2001

26. The Court notes that at no stage of the proceedings has S. [an eight-year-old girl] been questioned by a judge, nor did the applicant have any opportunity of observing the demeanour of this witness under direct questioning, and thus from testing her reliability ...

27. At first instance, the District Court, in its decision of 10 January 1994, relied on the statements made by S.'s mother, who had given evidence concerning her daughter's account of the events and her behaviour on 29 April 1993 as well as her character in general, and of the police officer who had questioned the girl shortly after the offence in April 1993.

The District Court decided not to hear S. in order to protect her personal development as, according to her mother, she had meanwhile repressed her recollection of the event and would seriously suffer if reminded thereof.

28. ... However, the reasons given by the District Court, in its judgment of 10 January 1994, for refusing to question S. and dismissing the applicant's request for an expert opinion are rather vague and speculative and do not, therefore, appear relevant...

30. Finally, the information given by the girl was the only direct evidence of the offence in question and the domestic courts based their finding of the applicant's guilt to a decisive extent on S.'s statements ...

31. In these circumstances, the use of this evidence involved such limitations on the rights of the defence that the applicant cannot be said to have received a fair trial.

☞ *Birutis and others v. Lithuania*, 47698/99 and 48115/99, 28 March 2002

31. The Court observes that the third applicant was convicted solely on the basis of anonymous evidence ... As the Convention effectively prohibits a conviction based solely on anonymous evidence ..., the third applicant's defence rights and his right to a fair trial have been violated in this respect.

32. ... the first and the second applicants' conviction was not based solely, or to a decisive extent, on the anonymous evidence. This being said, the number of the anonymous statements taken into account by the trial court effectively demonstrated that the statements in question were among the grounds upon which the first and the second applicants' conviction was based ...

34. However, despite the allegations that the credibility of the anonymous evidence was open to question, the first and the second applicants or their representatives were not enabled to question the anonymous witnesses. Nor did the courts avail

themselves of the statutory opportunity ... to examine, of their own motion, the manner and the circumstances in which the anonymous statements had been obtained. In fact, the statements in question were read before the trial court as they had been recorded by the investigating authorities. The trial court then referred to the anonymous statements to base the first and the second applicants' conviction. In such circumstances, the handicaps on the first and the second applicants' defence rights were not counterbalanced by the procedures followed by the domestic judicial authorities. The courts' failure to question anonymous witnesses, and to conduct a scrutiny of the manner and circumstances in which the anonymous statements had been obtained, was unacceptable from the point of view of the first and the second applicants' defence rights and their right to a fair trial under Article 6 §§1 and 3 (d) of the Convention. There has thus been a breach of this article in this respect.

▣ *S.N. v. Sweden*, 34209/96, 2 July 2002

52. Nor can it be said that the applicant was denied his rights under Article 6 §3 (d) on the ground that he was unable to examine or have examined the evidence given by M. [a child] during the trial and appeal proceedings. Having regard to the special features of criminal proceedings concerning sexual offences ..., this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means. The Court notes that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audiotape of that interview was played back before the Court of Appeal. In the circumstances of the case, these measures must be considered sufficient to have enabled the applicant to challenge M.'s statements and his credibility in the course of the criminal proceedings. Indeed, that challenge resulted in the Court of Appeal reducing the applicant's sentence because it considered that part of the charges against him had not been proved.

53. ... The court took into account the fact that some of the information given by M. had been vague and uncertain and lacking in detail. The court also had regard to the leading nature of some of the questions put to him during the police interviews. In these circumstances, the Court is satisfied that the necessary care was applied in the evaluation of M.'s statements.

54. Having regard to the foregoing, the Court considers that the criminal proceedings against the applicant, taken as a whole, cannot be regarded as unfair.

☞ *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003

90. The Court further points out that the applicant was not assisted by a lawyer during the investigation, at which stage the main evidence was obtained, such as the record of the confrontation and his confessions. It was of crucial importance in that connection that the prosecution witnesses should be examined by the trial court, as that court alone could have made an effective assessment at close quarters of their demeanour and of the reliability of their versions of events.

☞ *Al-Khawaja and Tahery v. the United Kingdom*, 26766/05 and 22228/06, 20 January 2009

41. In examining the facts of Mr Al-Khawaja's case, the Court observes that the counterbalancing factors relied by the Government are the fact that S.T.'s statement alone did not compel the applicant to give evidence; that there was no suggestion of collusion between the complainants; that there were inconsistencies between S.T.'s statement and what was said by other witnesses which could have been explored in cross-examination of those witnesses; the fact that her credibility could be challenged by the defence; and the warning to the jury to bear in mind that they had neither seen nor heard S.T.'s evidence and that it had not been tested in cross-examination.

42. Having considered these factors, the Court does not find that any of them, taken alone or together, could counterbalance the prejudice to the defence by admitting S.T.'s statement. It is correct that even without S.T.'s statement, the applicant may have had to give evidence as part of his defence to the other count, count two. But had S.T.'s statement not been admitted, it is likely that the applicant would only have been tried on count two and would only have had to give evidence in respect of that count. In respect of the inconsistencies between the statement of S.T. and her account as given to two witnesses, the Court finds these were minor in nature. Only one such inconsistency was ever relied on by the defence, namely the fact that at one point during the alleged assault, S.T. had claimed in her statement that the applicant had touched her face and mouth while in the account given to one of the witnesses she had said that she had touched her own face at the instigation of the applicant. While it was certainly open to the defence to attempt to challenge the credibility of S.T., it is difficult to see on what basis they could have done so, particularly as her account corresponded in large part with that of the other complainant, with whom the trial judge found that there was no evidence of collusion. The absence of collusion may be a factor in domestic law in favour of admissibility but in the present case it cannot be regarded as a counterbalancing factor for the purposes

of Article 6 §1 read with Article 6 §3(d). The absence of collusion does not alter the Court's conclusion that the content of the statement, once admitted, was evidence on count one that the applicant could not effectively challenge. As to the judge's warning to the jury, this was found by the Court of Appeal to be deficient. Even if it were not so, the Court is not persuaded that any more appropriate direction could effectively counterbalance the effect of an untested statement which was the only evidence against the applicant.

43. Therefore the Court finds a violation of Article 6 §1 read in conjunction with Article 6 §3 (d) of the Convention in respect of Mr Al-Khawaja ...

44. In turning to Mr Tahery's case, the Court first notes that, while the witness T. was absent, he was not anonymous. Although the trial judge found witness T. to have a genuine fear of giving evidence, no attempt was made to conceal his identity: he was known not only by the applicant but by all the others present at the scene of the crime. Nonetheless, the Court accepts the trial judge's informed view that T. had a genuine fear and that this was the reason why the judge allowed his statement to be adduced in evidence.

45. In this case, the Government relied on the following principal counterbalancing factors: that alternative measures were considered by the trial judge; that the applicant was in a position to challenge or rebut the statement by giving evidence himself and by calling other witnesses; that the trial judge warned the jury that it was necessary to approach the evidence given by the absent witness with care; and that the judge told the jury that the applicant was not responsible for T.'s fear.

46. The Court does not find that these factors, whether considered individually or cumulatively, would have ensured the fairness of the proceedings or counterbalanced the grave handicap to the defence that arose from the admission of T.'s statement. It is appropriate for domestic courts, when faced with the problem of absent or anonymous witnesses, to consider whether alternative measures could be employed which would be less restrictive of the rights of the defence than admitting witness statements as evidence. However, the fact that alternative measures are found to be inappropriate does not absolve domestic courts of their responsibility to ensure that there is no breach of Article 6 §§ 1 and 3 (d) when they then allow witness statements to be read. Indeed, the rejection of less restrictive measures implies a greater duty to ensure respect for the rights of the defence. As regards the ability of the applicant to contradict the statement by calling other witnesses, the very problem was that there was no witness, with the



exception of T., who was apparently able or willing to say what he had seen. In these circumstances, the Court does not find that T.'s statement could have been effectively rebutted. The Court accepts that the applicant gave evidence himself denying the charge, though the decision to do so must have been affected by the admission of T.'s statement. The right of an accused to give evidence in his defence cannot be said to counterbalance the loss of opportunity to see and have examined and cross-examined the only prosecution eye-witness against him.

47. Finally, as to the trial judge's warning to the jury, the Court accepts that this was both full and carefully phrased ... However, in the case of an absent witness such as T., the Court does not find that such a warning, including a reminder that it was not the applicant who was responsible for the absence, however clearly expressed, would be a sufficient counterbalance where that witness's untested statement was the only direct evidence against the applicant.

48. The Court therefore also finds a violation of Article 6 §1 read in conjunction with Article 6 §3 (d) of the Convention in respect of Mr Tahery.

## Credibility

☰ *Cornelis v. the Netherlands* (dec.), 994/03, 25 May 2004

In the instant case the public prosecution service concluded an arrangement with Mr Z. and statements obtained from him were used in evidence against the applicant. The Court observes that, from the outset, the applicant and the domestic courts were aware of this arrangement and extensively questioned Mr Z. in order to test his reliability and credibility. Moreover, the domestic courts showed that they were well aware of the dangers, difficulties and pitfalls surrounding arrangements with criminal witnesses. In the judgments handed down in the applicant's case, all aspects of the agreements were extensively and carefully scrutinised, with due attention being paid to the numerous objections raised by the defence.

The Court concludes therefore that it cannot be said that the applicant's conviction was based on evidence in respect of which he was not, or not sufficiently, able to exercise his defence rights under Article 6 §1 of the Convention.

☰ *Doorson v. the Netherlands*, 20524/92, 26 March 1996

77. The witness N. made a statement to the police inculcating the applicant but retracted it when questioned on oath in open court in the presence of the applicant, both before the Regional Court and the Court of Appeal. The Court of Appeal nonetheless decided to attach some credence to N.'s statement to the police.

78. ... the Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence; this is for the domestic courts, the task of the European Court being to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. The Court cannot hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict.

The Court, therefore, does not find that the decision taken by the Court of Appeal with regard to the evidence given by N., whether considered on its own or together with the other matters complained of, rendered the applicant's trial unfair.

☰ *Hauschildt v. Denmark*, 10486/83, 9 October 1986, DR49, 86

3. ... d. ...With regard to this complaint the Commission recalls that when a witness was heard in the Court of Appeal, his statement in the City Court was first read out and the witness was thereafter asked whether he could stand by his statement. Then followed a further hearing of the witness during which the defence counsel, the prosecutor and the judges could put supplementary questions in order to clarify the situation. The Commission considers generally that it may reduce the value of the statements of a witness if he is first reminded in detail of what he said when giving evidence before the lower court. However, it notes that the parties were given the opportunity of putting further questions to the witnesses in order to obtain further information or to question the correctness of their evidence. In these circumstances, the Commission finds that the method used was not of such a character that it could render the hearing unfair and it does not therefore constitute a violation of the Convention.

☰ *X and Y v. the Federal Republic of Germany*, 8744/79, 2 March 1983, DR32, 141

**Perjury**

Witnesses appearing at the trial or before the investigating judge are under a formal and severe obligation to speak the truth. In the present case it is clear that witness D did not speak the truth when he gave evidence on 26 April. This led to his later conviction for perjury which is not in dispute. Since the witness had testified differently before the investigating judge a severe suspicion was immediately created by his statements on 26 April. Under these circumstances the prosecuting authorities were, under German law, bound to investigate the matter. When they decided to arrest witness D on the spot they may have done so in the expectation that this would show that perjury in a trial will not go unpun-

ished. However, as there existed a very clear suspicion in the sense which later proved to be correct the Commission cannot find that this action interfered with the fairness of the trial against the applicants. The position would be different where the prosecution would resort to such a measure without good reasons in order to bring pressure on witnesses. Where, however, a possible pressure is only the result of consequences brought about by clearly untrue statements it must be accepted as an element of the general protection of the criminal procedure as such. The Commission must take into account in this context that the system of criminal justice protecting society in general presupposes that the witness' obligation to speak the truth is being enforced scrupulously.

## Expert witnesses

### Neutrality

☞ *Bönisch v. Austria*, 8658/79, 6 May 1985

32. It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his report that in fact prompted the bringing of a prosecution. In the present case, appearances suggested that the Director was more like a witness against the accused. In principle, his being examined at the hearings was not precluded by the Convention, but the principle of equality of arms inherent in the concept of a fair trial ... required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence.

33. The Court considers ... that such equal treatment had not been afforded in the two proceedings in issue.

In the first place, the Director of the Institute had been appointed as "expert" by the Regional Court in accordance with Austrian law; by virtue of that law, he was thereby formally invested with the function of neutral and impartial auxiliary of the court. By reason of this, his statements must have carried greater weight than those of an "expert witness" called, as in the first proceedings, by the accused ..., and yet his neutrality and impartiality were, in the particular circumstances, capable of appearing open to doubt ...

☞ *Brandstetter v. Austria*, 11170/84, 12876/87 and 13468/87, 28 August 1991

44. Admittedly, the fact that Mr Bandion was a member of the staff of the Agricultural Institute which had set in motion the prosecution may have given rise to apprehensions on the part of Mr Brandstetter. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified ...

Such an objective justification is lacking here: in the Court's opinion, the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence raised any objection, either at the first hearing of 4 October 1983 when the District Court appointed Mr Bandion, or at the second hearing of 22 November 1983 when Mr Bandion made an oral statement and was asked to draw up a report; it was not until 14 February 1984, after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticised the expert for his close links with the Agricultural Institute ...

45. The mere fact that Mr Bandion belonged to the staff of the Agricultural Institute does not justify his being regarded ... as a witness for the prosecution. Nor does the file disclose other grounds for so considering him. It is true that to a certain extent Mr Bandion stepped outside the duties attaching to his function by dealing in his report with matters relating to the assessment of evidence, but this does not warrant the conclusion that the position which he occupied in the proceedings under review was that of a witness for the prosecution either.

Accordingly, the District Court's refusal of the defence's request to appoint other experts ... cannot be seen as a breach of the principle of equality of arms.

📖 *Bönisch v. Austria*, 8658/79, 6 May 1985

33. ... In addition, various circumstances illustrate the dominant role that the Director was enabled to play.

In his capacity of "expert", he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on their evidence at the appropriate moment ...

The lack of equal treatment was particularly striking in the first proceedings, by reason of the difference between the respective positions of the court expert and the "expert witness" of the defence. As a mere witness, Mr Prändl was not allowed to appear before the Regional Court until being called to give evidence; when giving his evidence, he was examined by both the judge and the expert; thereafter he was relegated to the public gallery ... The Director of the Institute, on the other hand, exercised the powers available to him under Austrian law. Indeed, he directly examined Mr Prändl and the accused.

**Equality of arms/  
counter-expertise**

34. In addition, as the applicant experienced in his case, there was little opportunity for the defence to obtain the appointment of a counter-expert ...

If the competent court has need of clarification in respect of the Institute's opinion, it must first hear a member of the Institute's staff ...; the court may not have recourse to another expert except in the contingencies referred to in Articles 125 and 126 of the Code of Criminal Procedure ..., none of which obtained in the present case.

35. Consequently, there has been a breach of Article 6 para. 1 ...

☞ *G.B. v. France*, 44069/98, 2 October 2001

68. The Court would point out that the mere fact that an expert expresses a different opinion to that in his written statement when addressing an assize court is not in itself an infringement of the principle of a fair trial ... Similarly, the right to a fair trial does not require that a national court should appoint, at the request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case ... Accordingly, the refusal to order a second opinion cannot in itself be regarded as unfair.

69. The Court notes, however, that in the instant case the expert not only expressed a different opinion when addressing the court from that set out in his written report – he completely changed his mind in the course of one and the same hearing ... It also notes that the application for a second opinion lodged by the applicant followed this “volte-face” which the expert had effected having rapidly perused the new evidence, adopting a highly unfavourable stance towards the applicant. While it is difficult to ascertain what influence an expert's opinion may have had on the assessment of a jury, the Court considers it highly likely that such an abrupt turnaround would inevitably have lent the expert's opinion particular weight.

70. Having regard to these particular circumstances, namely the expert's volte-face, combined with the rejection of the application for a second opinion, the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§1 and 3 (b) of the Convention taken together.

☞ *Accardi and others v. Italy* (dec.), 30598/02, 20 January 2005

As to the decision not to order a psychologist's report or to question the defence's expert witness during the hearing, the Court notes that the domestic courts, on the basis of logical and perti-

nent arguments, concluded that such investigative measures were of no relevance to the proceedings. The Florence Court of Appeal stressed that X and Y had been under observation for a long time by a psychologist employed by the social services department, and that there were no grounds for doubting the children's ability to recount their experiences. Moreover, the questioning of the children had been conducted with the assistance of Mrs B., an expert in child psychology.

Accordingly, the Court cannot conclude that the rights of the defence were restricted to the extent that there was an infringement of the principles of a fair hearing established by Article 6 of the Convention.

▮ *Cottin v. Belgium*, 48386/99, 2 June 2005

### Cross-examination

32. Le requérant fut empêché de participer à la séance d'expertise du 4 avril 1997, alors que D.H, qui s'y était fait accompagner de son frère aîné P.H. lui-même partie à la procédure pénale en cause, s'était vu offrir la possibilité de se faire assister d'un conseil médical personnel. Pourtant, aucune difficulté technique ne faisait obstacle à ce que le requérant fût associé au processus d'élaboration de celui-ci, ladite expertise consistant en l'audition et l'examen de la partie civile D.H. et l'examen de pièces. En conséquence, le requérant n'eut pas la possibilité de contre-interroger, personnellement ou par l'intermédiaire de son avocat ou d'un conseil médical, les personnes entendues par l'expert, de soumettre à ce dernier des observations sur les pièces examinées et les informations recueillies et de lui demander de se livrer à des investigations supplémentaires. Dans de telles circonstances, le requérant n'a pu faire entendre sa voix de manière effective avant le dépôt du rapport de l'expertise en cause. La possibilité indirecte de discuter le rapport d'expertise dans des mémoires ou lors d'une des audiences d'appel ne peut, en l'espèce, passer pour un équivalent valable du droit de participer à la séance d'expertise. Ainsi, le requérant n'a pas eu la possibilité de commenter efficacement un élément de preuve essentiel et une demande d'expertise complémentaire n'y aurait rien changé. En effet, eu égard à la situation existant à l'époque en droit belge, une nouvelle expertise aurait elle aussi été unilatérale.

▮ *Balsyte-Lideikiene v. Lithuania*, 72596/01, 4 November 2008

63. In the present case the Court notes that sub-paragraph (d) of paragraph 3 of Article 6 relates to witnesses and not experts. However the Court would like to recall that the guarantees contained in paragraph 3 are constituent elements, amongst others, of the concept of a fair trial set forth in paragraph 1 ... In the circumstances of the instant case, the Court, whilst also having due regard to the paragraph 3 guarantees, including those enunciated

in sub-paragraph (d), considers that it should examine the applicant's complaints under the general rule of paragraph 1 ...

64. ... the conclusions provided by the experts during the pre-trial stage had a key place in the proceedings against the applicant. It is therefore necessary to determine whether the applicant expressed a wish to have the experts examined in open court and, if so, whether she had such an opportunity.

65. Relying on the documents at its disposal the Court draws attention to the applicant's written request of 12 March 2001, received by the Vilnius City Second District Court the following day, by which the applicant asked the court to postpone the hearing as the experts had not appeared at the hearing for the third time in a row ... The applicant also asked the court to determine the reasons behind the experts' absence and to sanction them. Furthermore, in her appeal the applicant referred to her request to have the experts present at the hearing at the first-instance court and the refusal of that court to summon them. However, the Supreme Administrative Court rejected the applicant's request, noting that under the circumstances of the case her inability to question the experts did not violate any of the procedural legal norms.

66. Having analysed all the material submitted to it, the Court considers that neither at the pre-trial stage nor during the trial was the applicant given the opportunity to question the experts, whose opinions contained certain discrepancies, in order to subject their credibility to scrutiny or cast any doubt on their conclusions. Relying on its case-law on the subject, the Court concludes that in the instant case the refusal to entertain the applicant's request to have the experts examined in open court failed to meet the requirements of Article 6 §1 of the Convention.

## Admissibility of evidence

### Issue of admissibility to be scrutinised

☰ *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003

91. The Court notes that it has held that the conditions in which the applicant was kept in police custody breached Article 3 of the Convention. It would observe in that connection that Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence ... Although it is not its task to examine in the abstract the issue of the admissibility of evidence in criminal law, the Court finds it regrettable that in the instant case the National Security Court did not determine that issue before going on to examine the merits of the case. Such a preliminary investigation would clearly have given the national

courts an opportunity to condemn any unlawful methods used to obtain evidence for the prosecution.

▣ *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

105. ...the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the US Supreme Court’s judgment in the *Rochin* case ..., to “afford brutality the cloak of law”. It notes in this connection that Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant’s conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered

**Use of torture and inhuman and degrading treatment**



the administration of emetics to be authorised by the domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

▮ *Harutyunyan v. Armenia*, 36549/03, 28 June 2007

64. In the present case, the Court notes that the applicant was coerced into making confession statements and witnesses T. and A. into making statements substantiating the applicant's guilt ... the Court notes with approval the findings of the Avan and Nor Nork District Court of Yerevan ..., condemning the actions of the police officers and evaluating them as having the attributes of torture ... Furthermore, the Government in their submissions also characterised the ill-treatment inflicted on the applicant and witnesses T. and A. as torture ... Even if the Court lacks competence *ratione temporis* to examine the circumstances surrounding the ill-treatment of the applicant and witnesses T. and A. within the context of Article 3, it is nevertheless not precluded from taking the above evaluation into account for the purposes of deciding on compliance with the guarantees of Article 6. The Court further recalls its finding that the statements obtained as a result of such treatment were in fact used by the domestic courts as evidence in the criminal proceedings against the applicant ... Moreover, this was done despite the fact that ill-treatment had already been established in parallel proceedings instituted against the police officers in question.

65. In this respect the Court notes that the domestic courts justified the use of the confession statements by the fact that the applicant confessed to the investigator and not to the police officers who had ill-treated him, the fact that witness T. confirmed his earlier confession at the confrontation of 11 August 1999 and the fact that both witnesses T. and A. made similar statements at the hearing of 26 October 1999 before the Syunik Regional Court. The Court, however, is not convinced by such justification. First of all, in the Court's opinion, where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confes-

sion or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter. Secondly, such justification clearly contradicted the finding made in the judgment convicting the police officers in question, according to which “by threatening to continue the ill-treatment the police officers forced the applicant to confess” ... Finally, there was ample evidence before the domestic courts that witnesses T. and A. were being subjected to continued threats of further torture and retaliation throughout 1999 and early 2000 ... Furthermore, the fact that they were still performing military service could undoubtedly have added to their fear and affected their statements, which is confirmed by the fact that the nature of those statements essentially changed after demobilisation. Hence, the credibility of the statements made by them during that period should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.

66. In the light of the foregoing considerations, the Court concludes that, regardless of the impact the statements obtained under torture had on the outcome of the applicant’s criminal proceedings, the use of such evidence rendered his trial as a whole unfair ...

▮ *Allan v. the United Kingdom*, 48539/99, 5 November 2002

52. In the present case, the Court notes that in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant’s cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant’s trial showed that the police had coached H. and instructed him to “push him for what you can”. In contrast to the position in *Khan*, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been

**Contrary to prohibition on self-incrimination**

subjected to psychological pressures which impinged on the “voluntariness” of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant’s right to silence and privilege against self-incrimination.

☞ *P.G. and J.H. v. the United Kingdom*, 44787/98,  
25 September 2001

80. In so far as the applicants complained of the underhand way in which the voice samples for comparison were obtained and that this infringed their privilege against self-incrimination, the Court considers that the voice samples, which did not include any incriminating statements, may be regarded as akin to blood, hair or other physical or objective specimens used in forensic analysis and to which privilege against self-incrimination does not apply...

81. In these circumstances, the Court finds that the use at the applicants’ trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 §1 of the Convention.

☞ *Jalloh v. Germany* [GC], 54810/00, 11 July 2006

113. In the Court’s view, the evidence at issue in the present case, namely, drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, as with the impugned measures in the *Funke* and *J.B. v. Switzerland* cases, the administration of emetics was used to retrieve real evidence in defiance of the applicant’s will. Conversely, the bodily material listed in the *Saunders* case concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the de-

fendant's active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity so as to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 §2 as being necessary for the prevention of criminal offences (see, *inter alia*, *Tirado Ortiz and Lozano Martin* ...).

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity ...

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparably small scale and was finally given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that section 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried

out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug-trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

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

99. ... The applicant argued that the police had overstepped the limits of permissible behaviour by secretly recording his conversation with V., who was acting on their instructions. He claimed that his conviction had resulted from trickery and subterfuge incompatible with the notion of a fair trial ...

102. The Court notes that in the present case the applicant had not been under any pressure to receive V. at his "guest house", to speak to him, or to make any specific comments on the matter raised by V ... the applicant was not detained on remand but was at liberty on his own premises attended by security and other personnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him. Thus, the Court is not convinced that the obtaining of evidence was tainted with the element of coercion or oppression ...

103. The Court also attaches weight to the fact that in making their assessment the domestic courts did not directly rely on the recording of the applicant's conversation with V., or its transcript, and did not seek to interpret specific statements made by the ap-

plicant during the conversation. Instead they examined the expert report drawn up on the conversation in order to assess his relations with V. and the manner in which he involved himself in the dialogue. Moreover, at the trial the recording was not treated as a plain confession or an admission of knowledge capable of lying at the core of a finding of guilt; it played a limited role in a complex body of evidence assessed by the court.

104. Having examined the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation was put, the Court finds that the proceedings in the applicant's case, considered as a whole, were not contrary to the requirements of a fair trial.

See also above, "*Obligation to give information*" on page 130 and "*Prohibition on self-incrimination*" on page 188.

📖 *Edwards and Lewis v. the United Kingdom* [GC], 39647/98 and 40461/98, 27 October 2004

**Entrapment and incitement**

46. The "Law" part of the Chamber's judgment of 22 July 2003 stated as follows (original paragraph numbering omitted):

... the Government, which requested the referral of this case to the Grand Chamber, no longer wish to pursue the referral and confirm that they are content for the Grand Chamber simply to endorse the judgment of the Chamber of 22 July 2003. The applicants accept the Chamber's judgment and do not object to the procedure proposed by the Government.

Having examined the issues raised by the case in the light of the Chamber's judgment, the Grand Chamber sees no reason to depart from the Chamber's findings. It therefore concludes that there has been a violation of Article 6 §1 of the Convention, for the reasons elaborated by the Chamber.

In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police (see paragraph 30 above). Had the defence been able to persuade the judge that the police had acted

improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications.

Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue ... Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure ...

In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6 §1 in this case.

47. As noted ... above, the Government, which requested the referral of this case to the Grand Chamber, no longer wish to pursue the referral and confirm that they are content for the Grand Chamber simply to endorse the judgment of the Chamber of 22 July 2003. The applicants accept the Chamber's judgment and do not object to the procedure proposed by the Government.

48. Having examined the issues raised by the case in the light of the Chamber's judgment, the Grand Chamber sees no reason to depart from the Chamber's findings. It therefore concludes that there has been a violation of Article 6 §1 of the Convention, for the reasons elaborated by the Chamber.

☰ *Khudobin v. Russia*, 59696/00, 26 October 2006

133. ... the applicant put forward an "entrapment defence" which required appropriate review by the trial court, especially as the case contained certain *prima facie* evidence of entrapment ...

137. In sum, although in the present case the domestic court had reason to suspect that there was an entrapment, it did not analyse the relevant factual and legal elements which would have helped it to distinguish entrapment from a legitimate form of investigative activity. It follows that the proceedings which led to the applicant's conviction were not "fair". Accordingly, there has been a violation of Article 6 §1 of the Convention.

☞ *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008

69. Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. It is therefore not sufficient for these purposes ... that general safeguards should have been observed, such as equality of arms or the rights of the defence.

70. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention ...

71. The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination ... of whether the prosecuting authorities had gone beyond the limits authorised by the criminal conduct simulation model ..., in other words whether or not they had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. This was especially important having regard to the fact that VS, who had originally introduced AZ to the applicant and who appears to have played a significant role in the events leading up to the giving of the bribe, was never called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of these points.

72. However, the domestic authorities denied that there had been any police incitement and took no steps at judicial level to carry out a serious examination of the applicant's allegations to that effect. More specifically, they did not make any attempt to clarify the role played by the protagonists in the present case, including the reasons for AZ's private initiative in the preliminary phase, despite the fact that the applicant's conviction was based on the evidence obtained as a result of the police incitement of which he complained.

Indeed, the Supreme Court found that there was no need to exclude such evidence since it corroborated the applicant's guilt, which he himself had acknowledged. Once his guilt had been es-



tablished, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. However, a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects.

73. In conclusion ... the Court considers, ... that the actions of AZ and VS had the effect of inciting the applicant to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention.

☞ *Miliniene v. Lithuania*, 74355/01, 24 June 2008

39. ... the Court notes that the applicant was able to put clear entrapment arguments before the domestic courts ... a reasoned response was given to them, particularly by the Supreme Court in its rejection of her cassation appeal ... As the Court has already noted, there were clearly good reasons to commence the investigation after SŠ had contacted the police. It was established that SŠ had no special relationship with the applicant, from which can be inferred that he had no ulterior motive in denouncing the applicant ... The model had been lawfully conceived and put into action. Moreover it had been adequately supervised by the prosecution, even if court supervision would have been more appropriate for such a veiled system of investigation.

41. In the light of the foregoing considerations, the Court finds that there has been no violation of Article 6 §1 of the Convention. See also above, "Undercover agents" on page 127.

### **Breach of privacy**

#### *Illegal searches and seizures*

☞ *Miailhe v. France (No. 2)*, 18978/91, 26 September 1996

38. ... Essentially, the applicant said he was the victim of the consequences of the original breach of Article 8 of the Convention ... found by the Court in the *Miailhe* (No. 1) judgment; the prosecuting authorities had rendered his criminal conviction unfair, based as it was almost exclusively on the documents seized by the customs in circumstances held to have been contrary to the Convention.

43. It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence ... It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any ...

44. The Court points out that in the instant case the ordinary courts did, within the limits of their jurisdiction, consider the objections of nullity raised by Mr Mialhe and dismissed them.

Furthermore, it appears clearly from their decisions that they based their rulings – among other things as to residence for tax purposes – solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial ...

46. In conclusion, the proceedings in issue, taken as a whole, were fair. There has therefore been no breach of Article 6 para. 1 ...

*Use of listening devices*

☰ *Khan v. the United Kingdom*, 35394/97, 12 May 2000

36. The Court notes at the outset that, in contrast to the position examined in the *Schenk* case, the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law ... Moreover, as was further noted, there was no suggestion that, in fixing the device, the police had operated otherwise than in accordance with the Home Office Guidelines. In addition, as the House of Lords found, the admissions made by the applicant during the conversation with B. were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions. The "unlawfulness" of which complaint is made in the present case relates exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life and that, accordingly, such interference was not "in accordance with the law", as that phrase has been interpreted in Article 8 §2 of the Convention.

37. The Court next notes that the contested material in the present case was in effect the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker ...

38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the *Schenk* case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did

not challenge its authenticity, but challenged its use at the *voir dire* and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE, and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference ...

39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.

40. In these circumstances, the Court finds that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 §1 of the Convention.

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

95. ... the Court reiterates that where the reliability of evidence is in dispute the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance ... In the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and dismissed in reasoned decisions. The Court notes that the applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence.

98. ... the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant's conviction, corroborated as it was by other conclusive evidence. Nothing has been shown to support the conclusion that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary.

*Use of video surveillance*

📖 *Perry v. the United Kingdom* (dec.), 63737/00, 26 September 2002

2. ... This case presents some similarities to that of *Schenk* in that evidence was obtained by methods which were in breach of requirements of domestic procedure, in this case breach of the

PACE Code ... The applicant asserted that in this case the blatant disregard of procedure rendered the use of the material unfair. In particular, as he had not been warned of the making of the videotape, he did not have the opportunity to agree instead to an identification parade or to object to any of the volunteers who participated in the compilation. The Court would observe that the applicant had already been afforded a number of opportunities to participate in a conventional identification parade and failed to make use of them. It also recalls that the trial judge reviewed the making of the videotape in some detail and that he found that there was no unfairness in the use of the film for identification purposes as the eleven persons used as volunteers were suitable comparators, more in fact than the required eight. Though the applicant's solicitor had not been present at the showing of the film to the witnesses, the video film showed the process by which the tape was shown to witnesses and the applicant and the court were able to see how the witnesses had, or had not, reached an identification of the applicant. The Court further notes that, as in the *Schenk* case, this material was not the only evidence against the applicant.

In the circumstances however, as in the *Schenk* and *Khan* cases, the existence of fair procedures to examine the admissibility and test the reliability of the disputed evidence takes on importance. The Court recalls in that regard that the applicant's counsel challenged the admissibility of the video tape in a *voir dire*, which was in fact repeated due to the change of judge. He was able to put forward arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner. The second judge in a careful ruling however admitted the evidence and the applicant remained entitled to challenge it before the jury. The Court considers that there was no unfairness in leaving it to the jury, on the basis of a conscientious summing-up by the judge, to decide where the weight of the evidence lay. Furthermore, the judge's approach was reviewed on appeal by the Court of Appeal which found that he had taken into account all the relevant factors and that his ruling and summing-up could not be faulted. At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and quality of the identification evidence based on the videotape ...

The Court is satisfied in the circumstances that the applicant's trial and appeal satisfied the requirements of Article 6 §1 of the Convention. It would observe that the use at trial of material obtained without a proper legal basis or through unlawful means will not generally offend the standard of fairness imposed by Article 6 §1 where proper procedural safeguards are in place and the nature and source of the material is not tainted, for example,

by any oppression, coercion or entrapment which would render reliance on it unfair in the determination of a criminal charge ... The obtaining of such information is rather a matter which calls into play the Contracting State's responsibility under Article 8 to secure the right to respect for private life in due form.

**Confessions made without the assistance of a lawyer**

☰ *Brennan v. the United Kingdom*, 39846/98, 16 October 2001

53. The applicant argued that in the absence of independent evidence of video or taped records of the police interviews, and the absence of the accused's solicitor, there were considerable difficulties for an accused to convince a court, against the testimony of the police officers, that any oppression took place. The Court agrees that the recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect's lawyer. However, it is not persuaded that these are an indispensable precondition of fairness within the meaning of Article 6 §1 of the Convention. The essential issue in each application brought before this Court remains whether, in the circumstances of the individual case, the applicant received a fair trial. The Court considers that the adversarial procedure conducted before the trial court, at which evidence was heard from the applicant, psychological experts, the various police officers involved in the interrogations and the police doctors who examined him during his detention, was capable of bringing to light any oppressive conduct by the police. In the circumstances, the lack of additional safeguards has not been shown to render the applicant's trial unfair.

54. As regards the applicant's reliance on *Magee* ..., the Court observes that this case concerned a more extreme situation where the applicant was kept incommunicado by the police for a 48-hour period and his admissions were all made before he was allowed to see his solicitor. In the present case, the applicant's access to his solicitor was deferred for twenty-four hours and his admissions were made during the subsequent period when he was not being denied legal consultation ...

55. The Court concludes that there has been no violation of Article 6 §1 of the Convention and/or Article 6 §3 (c) as regards the police interviews.

☰ *Kolu v. Turkey*, 35811/97, 2 August 2005

62. ... la Cour estime que la privation du requérant de l'assistance juridique lors des interrogatoires – quelle qu'en soit la justification – a fait subir à ses droits de la défense une atteinte qui n'a pu être réparée par la suite. Car les garanties procédurales offertes en l'espèce n'ont pas joué de manière à empêcher l'emploi des aveux obtenus en méconnaissance du droit de ne pas s'incriminer soi-

même, ni de manière à permettre de contrecarrer les témoignages à charge des plaignantes. Ainsi, le requérant s'est vu, en pratique, refuser non seulement la possibilité de remettre en cause les allégations de ses dénonciatrices mais aussi – du même coup – l'utilisation des aveux obtenus, en l'absence d'un avocat et pendant une garde à vue au secret dont le déroulement demeure douteux.

Dans la mesure où la Cour de cassation ne saurait passer pour avoir remédié à ces manquements ..., force est donc d'observer que le résultat voulu par l'article 6 – un procès équitable – n'a pas été atteint dans la procédure litigieuse, considérée dans son ensemble.

▣ *Salduz v. Turkey* [GC], 36391/02, 27 November 2008

56. In the present case, the applicant's right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively ...no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect ...

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution's arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police, both at the trial and on appeal. However, as is apparent from the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge ... Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy ... In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's ... It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody ...

59. ... in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent ...

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody ... the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

61. Still, in the present case, as explained above, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the state security courts.

62. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights ...

## Hearsay

☰ *X v. the Federal Republic of Germany*, 8414/78, 4 July 1979, DR17, 231

Article 6.1 of the Convention. ... does not exclude that the trial court, in order to establish the full truth, relies on indirect ("hearsay") evidence, as long as the use of such evidence is not in the circumstances unfair. In the present case there is no appearance of unfairness in the use of the indirect evidence relied on by the German Courts. The Commission here notes that the applicant's conviction was based not only on the evidence concerning the statements made by MM. A. and W. before the police but also on the testimony of Miss G., who at the trial stated that she had received heroin from the applicant, and on the evidence of two police officers, MM. H. and P. who, at the trial, stated that they had found traces of possession and consumption of drugs by the applicant. The Commission finally observes that, in view of the contradiction between MM. A.'s and W.'s statements before the police and their subsequent evidence at the trial, both the District Court and the Regional Court had to consider the credibility of their declarations. The Commission finds that the courts carefully examined this question and that their determination of credibility again raises no issue under Article 6.1 of the Convention.

☞ *Haas v. Germany* (dec.), 73047/01, 17 November 2005

Having regard to the proceedings as a whole, and considering the alleged shortcomings together, as required by Article 6 §§1 and 3 (d) ..., the Court observes that there has been an accumulation of hearsay evidence in the proceedings against the applicant. Various witnesses had introduced into the main hearing the statements of witnesses whom the applicant, for different reasons, had no opportunity to examine or have examined. However, the domestic courts made considerable efforts to obtain oral testimony notably from Said S. and assessed his depositions, as well as those obtained from the anonymous informers and B., very carefully. Given that the applicant's conviction had also been based on several further items of evidence, the Court finds that the rights of the defence had not been restricted to an extent incompatible with the guarantees of Article 6 §§1 and 3 (d).

☞ *S. v. the Federal Republic of Germany*, 8945/80, 13 December 1983, DR39, 43

9. ... the Commission ... notes that the applicant's conviction was based not only on the records of statements made in the Netherlands but also, and primarily, on his own statements before the Gerntan courts: when convicting the applicant the Frankfurt Regional Court referred in the first place to his own declarations at the trial in connection with his admission, at the earlier hearing before the Frankfurt District Court, that he had tried to procure heroin in Amsterdam. It is true that, at the trial, the applicant refused to make detailed statements. He did not expressly repeat the admission made earlier before the District Court, but he did not deny having made it nor revoke it either. On the contrary he argued that his offence had been sufficiently sanctioned by his punishment in the Netherlands and, in his final address, he requested a mild sentence, observing that he thereby contradicted counsel's plea for an acquittal. The Commission does not find that in these circumstances, the Frankfurt Regional Court proceeded unfairly in convicting the applicant on the basis of his admission at the earlier hearing before the District Court in connection with his declarations at the trial and – as to further details, i.e. the exact location in Amsterdam, the time and the amount of heroin – on the indirect evidence obtained from the Netherlands.

☞ *Ninn-Hansen v. Denmark* (dec.), 28972/95, 18 May 1999

The Court recalls that the Court of Impeachment did not base its conviction of the applicant on previously made statements by witnesses who were not heard by the Court of Impeachment as well. The Court considers that the Court of Impeachment's admission of the transcripts of the Court of Inquiry in order merely to con-

**Previously given  
statements and  
confrontations**



front witnesses with their previous statements cannot be considered contrary to Article 6 of the Convention. There is therefore no appearance of a violation of Article 6 with regard to the Court of Impeachment's decision to admit the transcripts of the Court of Inquiry.

**Immunity given to witnesses**

☰ *X v. the United Kingdom*, 7306/75, 6 October 1976, DR 7, 115

The Commission observes in this connection that the use at the trial of evidence obtained from an accomplice by granting him immunity from prosecution may put in question the fairness of the hearing granted to an accused person and thus raise an issue under Article 6 (1) of the Convention. In the present case, however, the manner in which the evidence given by S. was obtained was openly discussed with counsel for the defence and before the jury. Furthermore the Court of Appeal examined carefully whether due account was taken of these circumstances in the assessment of the evidence and whether there was corroboration. The Commission concludes, therefore, that an examination of the trial as a whole does not disclose any appearance of a violation of Article 6 (1) of the Convention.

**Breach of national law**

☰ *Parris v. Cyprus* (dec.), 56354/00, 4 July 2002

In the present case, the Court notes that a first post-mortem examination was carried out by two pathologists instructed by the coroner. As the family of the victim were not satisfied with the conclusions of the report, they asked the coroner to authorise a second examination. The coroner, who had in the meantime ordered the burial of the body, refused to grant the authorisation. However, the Attorney General gave his authorisation and a second post mortem examination was carried out by another pathologist [Dr Matsakis] who concluded that another cause had led the victim's death.

... The Supreme Court stressed that besides the evidence of Dr Matsakis, there was also the testimony of the victim's father whose narration corroborated the findings of Dr Matsakis and which seriously contradicted the applicant's line of defence that the victim had jumped out of the window by herself. Moreover the Court notes that the applicant was able to challenge the accuracy of the second report and its author seems to have been exhaustively cross-examined by the defence ...

Furthermore, the Court cannot overlook the nature and the scope of the provision of the domestic law which was breached. It notes that Section 15 (2) of the Coroner's Law forms part of the provisions regarding the viewing of bodies and as such is primarily intended, as the Government also emphasise, to ensure respect of

the corpse of a deceased and not of the procedural rights of an accused.

Finally, the Court notes that the applicant did not fail to draw the attention of the courts to a possible violation of Article 6 of the Convention and that the Supreme Court assessed the effect of admission of the evidence on the fairness of the trial.

In these circumstances, the Court considers that the proceedings as a whole were fair.

## Right to an interpreter

▮ *X v. Austria*, 6185/73, 29 May 1975, DR 2, 68

### When applicable

1. The applicant complains that he was not given the free assistance of an interpreter for contacts with his defence counsel who did not speak the applicant's own language ... Article 6 (3) (e) in fact only applies to the relations between the accused and the judge ... In the circumstances of the present case, the Commission cannot exclude that the preparation of the defence was made more difficult as a result of misunderstandings between the applicant and his counsel. Nevertheless the applicant must be taken to be responsible for that situation. It was indeed for him either to appoint another lawyer with a good knowledge of French or to call for an interpreter he would have remunerated. If he had not sufficient means to pay for a defence counsel and/or an interpreter, he could still have applied for free legal aid. The Commission notes in this respect that, according to Austrian practice, specific linguistic requirements are taken into account by the designation of a court appointed defence counsel. Furthermore free legal aid may be extended to include the service of an interpreter ...

2. ... one cannot derive from [Article 6 (3)] ... a general right for the accused to have the court files translated. The Commission recalls that the rights secured under Article 6 (3) are those of the defence in general and not those of the accused considered separately ... It should thus be pointed out that part of the file was drafted in German so that the applicant's lawyer could understand it while many documents were in French and could be read by the applicant himself. Again the applicant must assume personal responsibility for any remaining linguistic difficulty, for the very reasons set out above ...

▮ *Kamasinski v. Austria*, 9783/82, 19 December 1989

74. The right stated in paragraph 3 (e) of Article 6 ... to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Paragraph 3 (e) ... signifies that a

person “charged with a criminal offence” who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court’s language in order to have the benefit of a fair trial ...

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

### Duty to provide

☞ *K. v. France*, 10210/82, 7 December 1983, DR 35, 203

7. The applicant further complains that the Tribunal did not permit him the services of an interpreter to enable him to conduct his defence in the Breton language.

8. ... it is clear from the decision of the Tribunal that the applicant was born and educated in France and had no difficulty in understanding and speaking the French language in which the proceedings were conducted. The Convention right to the assistance of an interpreter contained in Article 6, para. 3 (e) clearly applies only where the accused cannot understand or speak the language used in court.

☞ *Cuscani v. the United Kingdom*, 32771/96, 24 September 2002

38. The Court observes that the applicant’s alleged lack of proficiency in English and his inability to understand the proceedings became a live issue for the first time on 4 January 1996 when the trial court was informed by his legal team that the applicant wished to enter a guilty plea to the charges brought against him. At the request of the applicant’s counsel, the trial judge directed that an interpreter be present at the hearing on sentence to be held on 26 January 1996 ... The judge was thus put on clear notice that the applicant had problems of comprehension. However, notwithstanding his earlier concern to ensure that the applicant could follow the subsequent proceedings it would appear that the judge allowed himself to be persuaded by the applicant’s counsel’s confidence in his ability to “make do and mend” ... Admittedly, the trial judge left open the possibility of the applicant having recourse to the linguistic assistance of his brother if the need arose. However, in the Court’s opinion the verification of the applicant’s need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had

been alerted to counsel's own difficulties in communicating with the applicant. It is to be noted that the applicant had pleaded guilty to serious charges and faced a heavy prison sentence. The onus was thus on the judge to reassure himself that the absence of an interpreter at the hearing on 26 January 1996 would not prejudice the applicant's full involvement in a matter of crucial importance for him. In the circumstances of the instant case, that requirement cannot be said to have been satisfied by leaving it to the applicant, and without the judge having consulted the latter, to invoke the untested language skills of his brother ...

39. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 §1 of the Convention taken in conjunction with Article 6 §3 (e).

☞ *Kamasinski v. Austria*, 9783/82, 19 December 1989

74. ... In view of the need for the right guaranteed by paragraph 3 (e) ... to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided ....

83. ... The Court does not find it substantiated on the evidence taken as a whole that Mr Kamasinski was unable because of deficient interpretation either to understand the evidence being given against him or to have witnesses examined or cross-examined on his behalf.

☞ *Husain v. Italy* (dec.), 18913/03, 24 February 2005

In the present case the applicant received free assistance from an Arabic interpreter when the committal warrant was served on him. There is nothing in the case file to show that the interpreter's translation was inaccurate or otherwise inadequate. Moreover, the applicant did not contest the quality of the translation, and this may have led the authorities to believe that he had understood the content of the document concerned ...

☞ *Luedicke v. the Federal Republic of Germany*, 6210/73, 6877/75 and 7132/75, 28 November 1978

46. ... the ordinary meaning of the terms "gratuitement" and "free" in Article 6 para. 3 (e) ... is not contradicted by the context of the sub-paragraph and is confirmed by the object and purpose of Article 6 ... The Court concludes that the right protected by Article 6 para. 3 (e) ... entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.

**Quality**

**Subsequent charging where provided free**

☰ *Isyar v. Bulgaria*, 391/03, 20 November 2008

45. La Cour rappelle sa jurisprudence constante selon laquelle le droit protégé par l'article 6 § 3 e) de la Convention comporte, pour quiconque ne parle ou ne comprend pas la langue employée à l'audience, le droit d'être assisté gratuitement d'un interprète sans pouvoir se voir réclamer après coup le paiement des frais résultant de cette assistance ...

46. ...la Cour observe que le tribunal de district de Svilengrad a condamné le requérant à payer la totalité des frais encourus pendant l'instruction préliminaire et pendant l'examen de l'affaire en première instance ... La Cour suprême de cassation, quant à elle, a mis les frais d'interprète engagés au cours de la procédure en dernière instance à la charge du requérant ... la Cour estime établi que le requérant s'est vu infliger le paiement des frais d'interprète engagés au stade de l'instruction préliminaire et pendant l'examen de son affaire en première instance et devant la Cour suprême de cassation.

47. La Cour observe que la présente affaire fait apparaître une certaine incohérence dans la jurisprudence de la Cour suprême de cassation bulgare sur la question de savoir si les frais d'interprète peuvent être mis à la charge du condamné au pénal : en effet, dans le cadre d'une affaire identique à celle de l'espèce, la même juridiction a exempté le condamné de l'obligation de payer les frais d'interprète ...

48. ... Dans le cas d'espèce, elle constate que l'interprétation du droit interne par les tribunaux a résulté en l'imposition au requérant de l'obligation de payer les frais d'interprète engagés pendant la procédure pénale à son encontre et que, de ce fait, l'intéressé a été privé de son droit à l'assistance gratuite d'un interprète.

## Defence

### Notification of charge

☰ *Brozicek v. Italy*, 10964/84, 19 December 1989

41. In the Court's opinion, it is necessary to proceed on the basis of the following facts. The applicant was not of Italian origin and did not reside in Italy. He informed the relevant Italian judicial authorities in an unequivocal manner that because of his lack of knowledge of Italian he had difficulty in understanding the contents of their communication. He asked them to send it to him either in his mother tongue or in one of the official languages of the United Nations.

On receipt of this request, the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6 §3 (a) ..., unless they were in a position to establish that the applicant in fact had sufficient knowl-

edge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him.

No such evidence appears from the documents in the file or the statements of the witnesses heard on 23 April 1989 ... On this point there has therefore been a violation of Article 6 §3 (a) ...

42. On the other hand, the Court considers the allegation that the judicial notification of 23 February 1976 did not identify "in detail ... the nature and cause of the accusation" to be unfounded. This communication was intended to inform Mr Brozicek of the institution of proceedings against him; it sufficiently listed the offences of which he was accused, stated the place and the date thereof, referred to the relevant articles of the Criminal Code and mentioned the name of the victim.

▮ *Gea Catalán v. Spain*, 19160/91, 10 February 1995

25. Mr Gea Catalán alleged a violation of Article 6 para. 3 (a) ... The violation derived from the fact that he had been sentenced on the basis of paragraph 7 of Article 529 of the Criminal Code and not on the basis of paragraph 1 of that Article, which had been relied on by the prosecuting authority and the civil party.

28. ... the Court considers that the discrepancy complained of was clearly the result of a mere clerical error, committed when the prosecution submissions were typed and subsequently reproduced on various occasions by the prosecuting authority and the civil party ...

29. Having regard to the clarity of the legal classification given to the findings of fact set out in the investigating judge's committal order of 1 July 1986 ..., he Court fails to see how Mr Gea Catalán could complain that he had not been informed of all the components of the charge, since the prosecution submissions were based on the same facts ... Furthermore in the instant case it would, as the Supreme Court rightly noted ..., have been absurd to have applied paragraph 1 of Article 529 of the Criminal Code, whereas the inference that it was paragraph 7 that applied, although not an automatic conclusion, could at any event have been arrived at through minimal recourse to logic.

30. In sum, the Court holds the applicant's complaint to be unfounded and therefore finds that there has been no breach of Article 6 para. 3 (a) ...

▮ *De Salvador Torres v. Spain*, 21525/93, 24 October 1996

27. Mr de Salvador Torres alleged that the fact that he had been convicted of an offence with an aggravating circumstance with which he had never been expressly charged constituted a violation of Article 6 para. 3 (a) ...

33. ... the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the possibility that the courts ... would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence.

Therefore, the Court finds no infringement of the applicant's right under Article 6 para. 3 (a) ... to be informed of the nature and cause of the accusation against him.

☰ *Mattoccia v. Italy*, 23969/94, 25 July 2000

71. ... the Court is conscious of the fact that rape trials raise very sensitive and important issues of great concern to society and that cases concerning the very young or the mentally disabled often present the prosecuting authorities and the courts with serious evidential difficulties in the course of the proceedings. It considers, however, that in the present case the defence was confronted with exceptional difficulties. Given that the information contained in the accusation was characterised by vagueness as to essential details concerning time and place, was repeatedly contradicted and amended in the course of the trial, and in view of the lengthy period that had elapsed between the committal for trial and the trial itself (more than three-and-a-half years) compared to the speed with which the trial was conducted (less than one month), fairness required that the applicant should have been afforded greater opportunity and facilities to defend himself in a practical and effective manner, for example by calling witnesses to establish an alibi.

72. Against this background, the Court finds that the applicant's right to be informed in detail of the nature and cause of the accusation against him and his right to have adequate time and facilities for the preparation of his defence were infringed.

☰ *Sadak and others v. Turkey*, 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001

56. ... the Court considers that belonging to an illegal armed organisation did not constitute an element intrinsic to the offence of which the applicants had been accused since the start of the proceedings.

57. The Court therefore considers that, in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Ankara National Security Court should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective

manner, particularly by giving them the necessary time to do so. The case file shows that the National Security Court, which could, for example, have decided to adjourn the hearing once the facts had been recharacterised, did not give the applicants the opportunity to prepare their defence to the new charge, which they were not informed of until the last day of the trial, just before the judgment was delivered, which was patently too late. In addition, the applicants' lawyers were absent on the day of the last hearing. Whatever the reason for their absence, the fact is that the applicants could not consult their lawyers on the recharacterisation of the facts by the prosecution and the National Security Court.

58. Having regard to all the above considerations, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed ...

☰ *Vaudelle v. France*, 35683/97, 30 January 2001

58. ...The applicant was accused of sexual abuse of minors aged under 15. The offences were therefore particularly serious, as the Criminal Court itself indicated ... The nature of the offences also made an assessment of the applicant's mental condition necessary since, after the applicant had been questioned by the gendarmerie, the public prosecutor ordered a psychiatric report on him. The applicant did not, however, attend either of the two appointments he was given and offered no explanation for his failure to do so, so that the Criminal Court had no means of knowing the reason for his absence.

65. ... the Court considers that in a case such as the present one, which concerns a serious charge, the national authorities should take additional steps in the interests of the proper administration of justice. They could have ordered the applicant to attend the appointment with the psychiatrist ... and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6 §3 (a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly. However, that did not happen.

66. In the special circumstances of this case, the Court therefore holds that there has been a violation of Article 6 of the Convention.



☰ *Miroux v. France*, 73529/01, 26 September 2006

33. En l'espèce, la Cour observe que si la question litigieuse fut posée à l'issue des débats devant la cour d'assises et avant que le jury ne se retire pour délibérer, la requalification ne s'est concrétisée que par la réponse apportée à cette question lors du délibéré. Ainsi, l'usage de l'article 352 du code de procédure pénale ne pouvait-il jouer qu'un rôle préventif, aucune voie de recours n'étant ouverte au requérant pour présenter ses arguments de défense une fois la requalification opérée ...

35. Par ailleurs, l'acte de renvoi devant la cour d'assises de la Seine-Maritime ne visait que les qualifications de « tentative de viol » et d'« agression sexuelle » et ce n'est qu'à l'issue des débats que la question subsidiaire, par le biais de laquelle la requalification litigieuse est intervenue, fut posée. La qualification de viol ayant été envisagée dans un précédent acte de renvoi en date du 18 février 1997, déclaré non avenu par la Cour de cassation le 21 mai 1997, puis ayant été expressément écartée par l'acte de renvoi devant la cour d'assises du 23 octobre 1997, le requérant pouvait raisonnablement estimer ne plus avoir à se défendre de l'accusation de « viol » et concentrer sa défense sur la qualification de « tentative de viol » finalement retenue. La Cour considère, au vu de ces éléments, de la « nécessité de mettre un soin extrême à notifier l'accusation à l'intéressé » et du rôle déterminant joué par l'acte d'accusation dans les poursuites pénales ..., qu'il n'est pas établi que le requérant aurait eu connaissance de la possibilité d'une condamnation pour viol ...

36. Certes, la Cour observe que la base juridique du « viol » et de la « tentative de viol » est la même, à savoir l'article 222-23 du code pénal, et que, plus généralement, selon le droit pénal français, la personne qui tente de commettre un crime est considérée comme l'auteur du crime, à l'égal de celle qui commet celui-ci ... Il est toutefois possible d'observer que ces deux infractions, en l'espèce un viol et une tentative de viol, diffèrent de façon significative par leur degré de réalisation. En effet, à la différence de l'infraction consommée, qui suppose la concrétisation matérielle d'une intention criminelle par un certain résultat, la tentative se caractérise par un commencement d'exécution, c'est-à-dire la réalisation partielle d'une infraction, constituée par des actes tendant directement à la consommation de celle-ci et accomplis avec cette intention, ainsi que l'absence de désistement volontaire de son auteur. Ainsi, le « viol » nécessite-t-il l'accomplissement d'un résultat spécifique, à savoir une pénétration sexuelle, alors que cet élément n'est pas nécessaire pour que soit retenue l'infraction de « tentative de viol » à l'encontre du requérant. Dès lors, on peut soutenir qu'il existe une différence de degré de gravité entre ces

deux infractions, laquelle exerce sans aucun doute une influence sur l'appréciation des faits et la détermination de la peine par le jury, et ce d'autant plus que les jurés sont, de façon générale, particulièrement sensibles au sort des victimes, notamment lorsque celles-ci ont subi des infractions de caractère sexuel, domaine dans lequel, subjectivement et en dépit du traumatisme psychologique que la victime subit en tout état de cause, la tentative est moins « préjudiciable » que le crime consommé. Or, si l'auteur d'une tentative encourt une peine maximale identique à celle pouvant être infligée à l'auteur de l'infraction commise, il ne saurait être exclu qu'une cour d'assises tienne compte, lors de la détermination du *quantum* de la peine, de la différence existant entre tentative et infraction consommée quant à leur gravité « réelle » et au résultat dommageable. Il peut donc être valablement soutenu que le changement de qualification opéré devant la cour d'assises était susceptible d'entraîner une aggravation de la peine infligée au requérant, sans que celui-ci ait eu l'occasion de préparer et de présenter ses moyens de défense relatifs à la nouvelle qualification et à ses conséquences, y compris, le cas échéant, au regard de la peine susceptible d'être prononcée concrètement. La Cour note d'ailleurs qu'alors que le plafond légal de la peine applicable est de quinze ans de réclusion criminelle, le requérant a été condamné à douze ans de réclusion criminelle, soit une durée proche dudit plafond.

37. Eu égard à tous ces éléments, la Cour estime qu'une atteinte a été portée au droit du requérant à être informé d'une manière détaillée de la nature et de la cause de l'accusation portée contre lui, ainsi qu'à son droit à disposer du temps et des facilités nécessaires à la préparation de sa défense.

☞ *X v. the United Kingdom*, 8231/78, 6 March 1982, DR28, 5

**Summons to trial**

2. ... It appears on the other hand, that the applicant was not informed about the precise date of the trial until immediately beforehand. The Commission considers it desirable that accused persons be informed with reasonable notice of the date and place of the trial. However, this particular aspect of the applicant's trial alone cannot in this case be considered decisive for the question whether the applicant was granted a fair hearing. In view of the fact that he had ample time to prepare his defence, and considering the trial in its entirety, the Commission is satisfied that the conditions in which the applicant's case was heard by the Court were not incompatible with the notion of a fair hearing as understood by Article 6 (1) of the Convention.

☞ *Vaudelle v. France*, 35683/97, 30 January 2001

See above, page 230.

**Adequate time and facilities**

☰ *Ferrari-Bravo v. Italy* (dec.), 9627/81, 14 March 1984, DR37, 15

23. In this connection, the applicant also complains that his counsel were not given the time and facilities which they needed to prepare his defence (Article 6 para. 3 (b)).

The Commission emphasises that the applicant has not shown how the fact of his lawyers' having only two months to inspect the file [which consisted of more than 56 000 pages] before the investigating judge committed him for trial violated the right which he claims. It points out that the trial is still under way. There is thus nothing in the file to indicate that the provision in question has been violated.

☰ *Padin Gestoso v. Spain* (dec.), 39519/98, 8 December 1998

2. The applicant complained that after his detention in June 1990 his lawyers had to wait until August 1990 before they could inspect the file ... the Court notes that, at the time when the applicant was charged and remanded in custody by the investigating judge on 11 June 1990 a lawyer was appointed under the legal aid scheme to defend his interests during the period of solitary confinement, which continued until 6 August 1990. In that connection, the applicant did not contest the fact that he was able to speak to a lawyer appointed under the legal aid scheme in order to prepare his defence. Furthermore, the applicant accepted that from the time when the solitary confinement was rescinded, that is from 6 August 1990 onwards, he had had access to the file. The Court notes in particular that after the forty-seven persons charged, including the applicant, were committed on 19 February 1992 for trial before the Criminal Division of the *Audiencia Nacional*, that court, by a decision of 29 October 1992, ordered that each of their lawyers be supplied with a complete copy of the investigation file, which ran to more than eighty volumes, so that they could make a provisional classification of the offences. The Court therefore notes that investigation of the case continued for several years, so that the applicant had sufficient time, after being served with the decision to charge him of 11 June 1990, for the preparation of his defence, which is the main purpose of Article 6 §3 (b) of the Convention. In addition, there is nothing in the file which supports the conclusion that after the order to keep the investigation secret was lifted on 6 August 1990 the applicant suffered any hindrance preventing him from instructing or consulting a lawyer in order to prepare the case for his defence. That being so, the Court considers that this part of the application must be rejected as being manifestly ill-founded ...

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

134. After the first two visits by his lawyers, which were approximately two weeks apart, contact between the applicant and his lawyers was restricted to two one-hour visits per week ...

137. ... the Court considers that the restriction on the number and length of the applicant's meetings with his lawyers was one of the factors that made the preparation of his defence difficult ...

144. ... the fact that the applicant was not given proper access to any documents in the case file other than the bill of indictment also served to compound the difficulties encountered in the preparation of his defence ...

147. ... the Grand Chamber agrees with the Chamber's findings regarding the difficulties the applicant's lawyers encountered in gaining access to the court file, which were exacerbated by the same kinds of problem the applicant had experienced:

"... the applicant's lawyers received a 17 000-page file approximately two weeks before the beginning of the trial in the National Security Court. Since the restrictions imposed on the number and length of their visits made it impossible for the applicant's lawyers to communicate the documents in the file to their client before 2 June 1999 or to involve him in its examination and analysis, they found themselves in a situation that made the preparation of the defence case particularly difficult. Subsequent developments in the proceedings did not permit them to overcome those difficulties: the trial proceeded apace; the hearings continued without interruption until 8 June 1999; and on 23 June 1999 the applicant's lawyers were invited to present their submissions on all the evidence in the file, including that taken at the hearings."

☰ *Makhfi v. France*, 59335/00, 19 October 2004

34. La Cour note qu'en l'espèce le requérant était accusé de viols et de vol en réunion en état de récidive et comparait devant la cour d'assises.

35. L'audience devant la cour d'assises reprit le 4 décembre à 9h15. En cette journée, les débats eurent lieu de 9h15 à 13h, puis de 14h30 à 16h40, de 17h à 20h et de 21h à 00h30. Lors de cette dernière interruption, l'avocat du requérant déposa une demande de suspension en invoquant les droits de la défense.

36. Cette demande ayant été rejetée par la cour, les débats reprirent à 1h du matin le 5 décembre et se poursuivirent jusqu'à 4h.

37. La Cour note ainsi que l'avocat du requérant plaida à la reprise de l'audience à 4h25 du matin, après son confrère défendant l'autre accusé, vers 5h du matin, après une durée cumulée des

débats de 15h45. Les accusés, dont le requérant, eurent la parole en dernier.

38. Les débats s'étalèrent sur cette journée sur une durée totale de 17h15 à l'issue desquelles la cour se retira pour délibérer. La Cour note encore que la cour d'assises, juges et jurés, délibéra entre 6h15 et 8h15 le 5 décembre au matin. Le requérant fut finalement condamné à huit ans de réclusion criminelle.

39. La Cour rappelle qu'elle a déjà estimé qu'un état de fatigue avait dû placer des accusés dans un état de moindre résistance physique et morale au moment où « ils abordèrent une audience très importante pour eux, vu la gravité des infractions qu'on leur reprochait et des peines qu'ils encouraient. Malgré l'assistance de leurs conseils, qui eurent l'occasion de présenter leurs arguments, ce fait par lui-même regrettable affaiblit sans nul doute leur position à un moment crucial où ils avaient besoin de tous leurs moyens pour se défendre, et notamment pour affronter leur interrogatoire dès l'ouverture de l'audience et pour se concerter efficacement avec leurs avocats » ...

40. La Cour est d'avis qu'il est primordial que, non seulement les accusés, mais également leurs défenseurs, puissent suivre les débats, répondre aux questions et plaider en n'étant pas dans un état de fatigue excessif. De même, il est crucial que les juges et jurés bénéficient de leurs pleines capacités de concentration et d'attention pour suivre les débats et pouvoir rendre un jugement éclairé.

41. La Cour estime que cette situation s'est produite en l'espèce. Elle est d'avis que les conditions décrites ci-dessus ... ne peuvent répondre aux exigences d'un procès équitable et notamment de respect des droits de la défense et d'égalité des armes.

42. Partant, il y a eu violation du paragraphe 3 de l'article 6 de la Convention, combiné avec le paragraphe 1.

☰ *Galstyan v. Armenia*, 26986/03, 15 November 2007

85. In the present case, the Court notes that the applicant's case was examined in an expedited procedure under the CAO: according to Article 277 of the CAO, cases concerning offences of minor hooliganism were to be examined within one day. The Court recalls, however, that the existence and utilisation of expeditious proceedings in criminal matters is not in itself contrary to Article 6 of the Convention as long as they provide the necessary safeguards and guarantees contained therein ... the Government have failed to demonstrate convincingly that the applicant unequivocally enjoyed, both in law and in practice, the right to have the examination of his case adjourned in order to prepare his

defence and that such an adjournment would have possibly been granted, had the applicant made a relevant request ...

86. The Court notes that, according to the Government, the entire pre-trial procedure lasted two hours from 17.30 to 19.30. The Government claimed that, since the applicant's case was not a complex one, two hours had been sufficient, taking into account that he had refused to have a lawyer, had not availed himself of his right to lodge motions and challenges, and had voluntarily signed the record of an administrative offence. The Court considers, however, that the mere fact that the applicant signed a paper in which he stated that he did not wish to have a lawyer and chose to defend himself in person does not mean that he did not need to be afforded adequate time and facilities to prepare himself effectively for trial. Nor does the fact that the applicant did not lodge any specific motions during the short pre-trial period necessarily imply that no further time was needed for him to be able – in adequate conditions – to properly assess the charge against him and to consider various avenues to defend himself effectively. Finally, the Court agrees that the applicant had the choice of refusing to sign the record of an administrative offence. However, contrary to what the Government claim, nothing in law or in the materials of the applicant's administrative case suggests that the applicant's signing of the record pursued any other purpose than confirming the fact of him having been familiarised with it and made aware of his rights and the charge against him.

87. The Court notes that the record of an administrative offence, which contained the charge and was the main evidence against the applicant, does not indicate precisely at what time he was presented with this document and how much time he was given to review it. Nor can this be established in respect of the police report and other materials prepared by the police. The parties disagreed as regards the exact length of the pre-trial period but, in any event, it is evident that this period was not longer than a few hours. The Court further notes that during this time the applicant was either in transit to the court or was being kept in the police station without any contact with the outside world. Furthermore, during this short stay at the police station, the applicant was subjected to a number of investigative activities, including questioning and a search. Even if it is accepted that the applicant's case was not a complex one, the Court doubts that the circumstances in which the applicant's trial was conducted – from the moment of his arrest up until his conviction – were such as to enable him to familiarise himself properly with and to assess adequately the charge and evidence against him, and to develop a viable legal strategy for his defence.

88. The Court concludes that the applicant was not afforded adequate time and facilities for the preparation of his defence. There has accordingly been a violation of Article 6 §3 taken together with Article 6 §1 of the Convention.

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

222. In the instant case the Court takes note of its ... findings under Article 3 of the Convention that the applicant had been detained, transported and confined at the courthouse in extremely cramped conditions, without adequate access to natural light and air or appropriate catering arrangements. The applicant could not read or write, since he was confined to such a tiny space with so many other detainees. The suffering and frustration which the applicant must have felt on account of the inhuman conditions of transport and confinement undoubtedly impaired his faculty for concentration and intense mental application in the hours immediately preceding the court hearings. Admittedly, he was assisted by a team of professional attorneys who could make submissions on his behalf. Nevertheless, taking into account the nature of the issues raised in the proceedings and their close connection to the applicant's field of competence, the Court considers that his ability to instruct his counsel effectively and to consult with them was of primordial importance. The cumulative effect of the above-mentioned conditions and inadequacy of the available facilities excluded any possibility for the advance preparation of the defence by the applicant, especially taking into account that he could not consult the case file or his notes in his cell.

223. The Court therefore holds that the applicant was not afforded adequate facilities for the preparation of his defence, which undermined the requirements of a fair trial and equality of arms.

#### **Disclosure of prosecution evidence**

*Access to the case file*

☰ *Miaillhe v. France (No. 2)*, 18978/91, 26 September 1996

44. ... Furthermore, it appears clearly from their decisions that they based their rulings – among other things as to residence for tax purposes – solely on the documents in the case file, on which the parties had presented argument at hearings before them, thereby ensuring that the applicant had a fair trial. The failure to produce certain documents during the procedure of consulting the CIF or in the criminal proceedings therefore did not infringe Mr Miaillhe's defence rights or the principle of equality of arms ...

☰ *Foucher v. France*, 22209/93, 18 March 1997

35. In the instant case, three considerations are of crucial importance.

Firstly, Mr Foucher chose to conduct his own case, which he was entitled to do both under the express terms of the Convention and under domestic law ...

Secondly, as the applicant had been committed directly for trial in the police court without a preliminary investigation, the question of ensuring the confidentiality of the investigation did not arise.

Lastly, the applicant's conviction by the Caen Court of Appeal was based solely on the game wardens' official report, which, under Article 537 of the Code of Criminal Procedure ..., was good evidence in the absence of proof to the contrary.

36. The Court ... therefore considers that it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him ...

As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3 ...

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

215. The Government acknowledged that the applicant's request for a copy of the bill of indictment had been refused on the ground that it had contained sensitive information. Throughout the proceedings the bill of indictment had been kept either at the special department of the remand prison or special registry of the City Court, from where it could not be removed. The Government did not contest the applicant's submission that all other case materials and the notes taken during the hearings, whether by the applicant or his representatives, had to be handed in to the special registry after the hearings.

216. The Court accepts that national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights, such as the right to a fair trial, should have a lawful basis and should be appropriate to achieve their protective function. In the present case the Government did not invoke any act or regulation or other provision of domestic law governing the functioning of special departments in remand prisons or special registries in the courts. Nor did they put forward any justification for the sweeping nature of the restrictions on the applicant's access to the case materials. They did not explain why the domestic authorities had not been able to present the bill of indictment in such a way that the classified information



be contained in a separate annex, which would have then been the only part with restricted access. Likewise, it does not appear that the Russian authorities considered separating the case materials constituting State secrets from all the other materials, such as for instance, the courts' procedural decisions, to which access should in principle be unrestricted. Finally, the Court considers that the fact that the applicant and his defence team could not remove their own notes in order to show them to an expert or use them for any other purpose effectively prevented them from using the information contained in them, since they had then to rely solely on their recollections ...

217. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, were important guarantees of a fair trial in the context of lustration proceedings. The failure to afford such access weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached ... This finding applies *a fortiori* in the circumstances of the present case, where the applicant stood trial and could forfeit not just his good name or possibility to hold public office (as in lustration proceedings) but his liberty. Moreover, as the Court found above, the restrictions on the applicant's access to the case materials and notes had no basis in domestic law and were excessively broad in their scope.

218. The Court therefore holds that the fact that the applicant and his defence team were not given appropriate access to the documents in the case file and were also restricted in the use of their notes, served to compound the difficulties encountered in the preparation of his defence.

▣ *Natunen v. Finland*, 21022/04, 31 March 2009

44. Turning to the present case, the Court observes that the number of the destroyed recordings, or the contents thereof, cannot be verified from the material submitted. The Government have not, however, contested the applicant's submission that the amount of such recordings was of some significance. Nor have they been able to provide any specific information about their contents ...

46. The Court reiterates that the requirements of Article 6 presuppose that having given specific reasons for the request for disclosure of certain evidence which could enable the accused to exonerate himself, he should be entitled to have the validity of those reasons examined by a court. Although the applicant, in this case, must have known the contents of the destroyed recordings, as far as they involved him, and even if he had been able to put questions during the trial concerning all of the conversations with

the other defendants, the Court points out that the national courts did not find the defendants' allegations about the purchase of illegal weapons credible, for lack of other supporting evidence ... Furthermore, the Court of Appeal did not refuse to order the disclosure of the requested recordings on the ground that the applicant had not given specific and acceptable reasons for his request. Instead, it declined to render a decision in that respect, as the recordings had been destroyed and could thus not have been disclosed to the defence or produced to the court ...

47. Even though the police and the prosecutor were obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the investigating authority itself, even when co-operating with the prosecution, attempts to assess what may or may not be relevant to the case, cannot comply with the requirements of Article 6 §1. Moreover, it is not clear to what extent the prosecutor was, in fact, involved in the decision to destroy those recordings which were not included in the case file. In this case, the destruction of certain material obtained through telephone surveillance made it impossible for the defence to verify its assumptions as to its relevance and to prove their correctness before the trial courts.

48. ... in this case, the decision regarding the undisclosed evidence was, presumably, made in the course of the pre-trial investigation without providing the defence with the opportunity to participate in the decision-making process.

49. ... the Court further notes that the contested measure stemmed from a defect in the legislation, in that it failed to offer adequate protection to the defence, rather than any misconduct of the authorities, who were obliged by law, in force at the time, to destroy the impugned recordings ... The Court observes that in the Government Bill for the amendment of the Coercive Measures Act it was considered problematic that information supporting the innocence of the suspect could be destroyed before the resolution of the case ... The relevant provision was amended with effect from 1 January 2004 with a view to better safeguarding the rights of the defence. This amendment, however, came too late for the applicant.

50. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 §1 of the Convention taken together with Article 6 §3 (b) of the Convention.

*Withholding of evidence in the public interest*

☰ *Rowe and Davis v. the United Kingdom* [GC], 28901/95,  
16 February 2000

63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 §1 ...

64. It is true that at the commencement of the applicants' appeal, prosecution counsel notified the defence that certain information had been withheld, without however revealing the nature of this material, and that on two separate occasions the Court of Appeal reviewed the undisclosed evidence and, in *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, decided in favour of non-disclosure.

65. However, the Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence.

66. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial.

☰ *P.G. and J.H. v. the United Kingdom*, 44787/98,  
25 September 2001

71. The Court is satisfied ... that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds ... The Court also notes that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6 §1. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial ...

☰ *Mirilashvili v. Russia*, 6293/04, 11 December 2008

200. At the outset, the Court notes that the materials withheld from the defence did not contain information about the events of 7 and 8 August 2000. They rather concerned the manner in which the “direct” evidence against the applicant (the audiotapes) had been obtained. However, it does not make them less relevant. Not only should the evidence directly relevant to the facts of the case be examined in an adversarial procedure, but also other evidence that might relate to the admissibility, reliability and completeness of the former ...

202. The Court considers that the limitation complained of pursued a legitimate aim. Organising criminal proceedings in such a way as to protect information about the details of undercover police operations is a relevant consideration for the purposes of Article 6. The Court is prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence.

203. The question arises whether the non-disclosure was counterbalanced by adequate procedural guarantees. The Court notes in this connection that the materials relating to the authorisation of the wiretapping were examined by the presiding judge *ex parte* at the hearing of 12 September 2002. Therefore, the decision to withhold certain documents was taken not by the prosecution unilaterally ... but by a member of the judiciary.

205. ... the Court will examine whether the judge weighed the public interest against the interests of the accused and afforded the defence an opportunity to participate in the decision-making process to the maximum extent possible.

206. The Court notes that the essential point in the reasoning of the domestic court was that the materials at issue related to the OSA and, as such, could not have been disclosed to the defence. It appears that the court did not analyse whether those materials would have been of any assistance for the defence, and whether their disclosure would, at least arguably, have harmed any identifiable public interest. The court's decision was based on the type of material at issue (material relating to the OSA), and not on an analysis of its content.

207. The military court probably had no other choice in the situation at hand, having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to the OSA in such situations and did not provide for any "balancing exercise" by a judge. Still, the fact remains that the court's role in deciding on the disclosure request lodged by the defence was very limited.

208. Having regard to the above the Court finds that the decision-making process was seriously flawed. As regards the substantive justification for the decision, the Court notes that the impugned decision was vague; it did not specify what kind of sensitive information the court's order of 11 July 2000, and other materials relating to the operation could have contained. The court accepted the blanket exclusion of all the materials from the adversarial examination. Furthermore, the Court observes that the surveillance operation did not target the applicant or his co-accused.

209. In sum, the Court concludes that the decision to withhold materials relating to the surveillance operation was not accompanied by adequate procedural guarantees, and, furthermore, was not sufficiently justified. The Court will take this aspect of the case into consideration when analysing the overall fairness of the proceedings.

*See also above, "Contrary to prohibition on self-incrimination" on page 208.*

**Right of defendant to represent himself**

☰ *X v. Norway*, 5923/72, 20 May 1975, DR 3, 43

It is true that in the wording of Article 6 (3) (c) of the Convention everyone charged with a criminal offence shall have the right 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.

In its case-law ... the Commission held that Article 6 (3) (c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court.

☰ *X v. the United Kingdom*, 8231/78, 6 March 1982, DR28, 5

2. ... Article 6 (3) (b) and 6 (3) (c) respectively guarantee a person charged with a criminal offence the right to have "adequate time and facilities for the preparation of his defence" and the right "to defend himself in person or through legal assistance of his own choosing ..." However, the Commission finds nothing to suggest that the requirements laid down in these provisions were not fulfilled in the present case. It notes, in particular, that the applicant was free on bail during almost six months after the perpetration of the crime of which he was eventually convicted. He must have anticipated the trial and, whilst at liberty, he had ample time to prepare his defence and to consult a lawyer if he so wished. Moreover, after the committal proceedings on ... December 1976 when he was committed for trial, the applicant had over a month, albeit in custody, to prepare himself for the trial and to consult a lawyer for this purpose. The applicant has submitted no evidence to show that the United Kingdom authorities on any occasion hindered him from preparing his defence or prevented him from calling a lawyer. The Commission refers in this respect also to the fact that, in imposing sentence, the trial judge expressly stated that it was the applicant's own choice that he had no lawyer.

☰ *Correia de Matos v. Portugal* (dec.), 48188/99, 15 November 2001

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

It should be stressed that the reasons relied on for requiring compulsory representation by a lawyer for certain stages of the proceedings are, in the Court's view, sufficient and relevant. It is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests. The domestic courts are

therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer.

The fact that the accused is himself also a lawyer, as is the case here – even if the applicant’s name has been temporarily removed from the Bar Council’s roll – does not in any way undermine the preceding observations. Although it is true that, as a general rule, lawyers can act in person before a court, the relevant courts are nonetheless entitled to consider that the interests of justice require the appointment of a representative to act for a lawyer charged with a criminal offence and who may therefore, for that very reason, not be in a position to assess the interests at stake properly or, accordingly, to conduct his own defence effectively. In the Court’s view, the issue again falls within the limits of the margin of appreciation afforded to the national authorities.

The Court considers that in the instant case the applicant’s defence was conducted appropriately. It points out in that connection that the applicant did not allege that he had been unable to submit his own version of the facts to the courts in question and that he was represented by an officially assigned lawyer at the hearing of 15 December 1998.

There is therefore no evidence to support the allegation that the trial in question was unfair or that the applicant’s rights of defence were breached.

☞ *Barberà, Messegué and Jabardo v. Spain*, 10590/83,  
6 December 1988

69. On 11 January 1982, that is to say the day before the opening of the hearing before the Audiencia Nacional, the applicants were still in Barcelona Prison. They did not leave for Madrid until the evening of 11 January. They arrived early in the morning of the following day after a journey of more than 600 kilometres in a prison van, although the hearing was due to start at 10.30 a.m. ...

70. Mr Barberà, Mr Messegué and Mr Jabardo thus had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance.

Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.

▣ *Galstyan v. Armenia*, 26986/03, 15 November 2007

91. The Court notes that all the materials before it indicate that the applicant expressly waived his right to be represented by a lawyer both before and during the court hearing ... It is clear from the text of Article 6 §3 (c) that an accused has the choice of defending himself either “in person or through legal assistance”. Thus, it will normally not be contrary to the requirements of this Article if an accused is self-represented in accordance with his own will, unless the interests of justice require otherwise. In the present case, there is no evidence that the applicant’s choice to be self-represented was the result of any threats or physical violence. Furthermore, there is no evidence to support the applicant’s allegation that he was “tricked” into refusing a lawyer. Even though the PACE and Human Rights Watch reports referred to ... contain relevant information, these materials are, nevertheless, not sufficient for the Court to conclude that actions, similar to the ones described in these reports, happened in the applicant’s particular case. Finally, noting that the applicant was accused of a minor offence and the maximum possible sentence could not exceed 15 days of detention, the Court does not discern in the present case any interests of justice which would have required a mandatory legal representation.

92. Having concluded that it was the applicant’s own choice not to have a lawyer, the Court considers that the authorities cannot be held responsible for the fact that he was not legally represented in the course of the administrative proceedings against him. There has accordingly been no violation of Article 6 §§1 and 3 (c) of the Convention taken together.

*Timing*

▣ *Berliński v. Poland*, 27715/95 and 30209/96, 20 June 2002

75. The Court recalls that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that this provision of the Convention has no application to pre-trial proceedings ...

76. ... although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing ...

77. The Court observes that it is undisputed that the applicants lacked means to employ a private representative in the

**Legal representation**



context of criminal proceedings against them. It is also uncontested that the applicants' request for an official lawyer to be appointed was ignored by the authorities, with the result that they had no defence counsel for more than a year. Given that a number of procedural acts, including questioning of the applicants and their medical examinations, were carried out during that period ..., the Court finds no justification for this restriction which deprived the applicants of the right to adequately defend themselves during the investigation and trial.

78. Accordingly, there has been a breach of Article 6 §§1 and 3 (c) of the Convention.

*See also above, "Right to assistance of a lawyer" on page 137.*

*Interests of justice require state provision*

#### *Relevant circumstances*

☰ *Quaranta v. Switzerland*, 12744/87, 24 May 1991

32. In order to determine whether the "interests of justice" required that the applicant receive free legal assistance, the Court will have regard to various criteria ...

33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked ... Under section 19 para. 1 of the Federal Misuse of Drugs Act, in conjunction with Article 36 of the Swiss Criminal Code, the maximum sentence was three years' imprisonment ... In the present case, free legal assistance should have been afforded by reason of the mere fact that so much was at stake.

34. An additional factor is the complexity of the case ... the case did not raise special difficulties as regards the establishment of the facts ... However, the outcome of the trial was of considerable importance for the applicant since the alleged offence had occurred during the probationary period to which he was made subject in 1982 ... The Criminal Court therefore had both to rule on the possibility of activating the suspended sentence and to decide on a new sentence. The participation of a lawyer at the trial would have created the best conditions for the accused's defence, in particular in view of the fact that a wide range of measures was available to the Court.

35. Such questions, which are complicated in themselves, were even more so for Mr Quaranta on account of his personal situation: a young adult of foreign origin from an underprivileged background, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.

36. In the circumstances of the case, his appearance in person before the investigating judge, and then before the Criminal Court, without the assistance of a lawyer, did not therefore enable him to present his case in an adequate manner ...

☞ *Benham v. the United Kingdom*, 19380/92, 10 June 1996

61. ... where deprivation of liberty is at stake, the interests of justice in principle call for legal representation ... In this case, Mr Benham faced a maximum term of three months' imprisonment.

62. Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and to operate ...

64. In view of the severity of the penalty risked by Mr Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr Benham ought to have benefited from free legal representation during the proceedings before the magistrates.

☞ *Talat Tunç v. Turkey*, 32432/96, 27 March 2007

57. En l'espèce, le requérant encourait une peine de mort pour matricide. À cela s'ajoutait les difficultés pour le requérant, qui a plaidé non coupable lors de la procédure pénale, de contrebalancer ses aveux, faits au stade de l'enquête.

58. Il s'ensuit que la deuxième condition prévue à l'article 6 § 3 était remplie ...

60. Or, en l'espèce la Cour constate que le requérant a bien déclaré le 26 décembre 1994 devant le parquet d'Alaşehir, n'avoir pu agir de son plein gré lors de ses interrogatoires par le parquet et le juge d'instruction du fait des gendarmes qui l'auraient menacé de le maltraiter. On ne saurait considérer que le requérant, sans formation professionnelle et originaire d'un milieu modeste, aurait pu raisonnablement apprécier les conséquences de son acte consistant à ne pas solliciter l'assistance d'un avocat lors de la procédure pénale où il risquait la peine de mort.

61. Certes, les obstacles à l'exercice effectif des droits de la défense auraient pu être surmontés si les autorités internes, conscientes des difficultés du requérant, avaient adopté un comportement plus actif visant à assurer que l'intéressé savait qu'il pouvait demander l'assignation d'un avocat gratuit commis d'office. Elles sont toutefois restées passives, négligeant ainsi leur obligation de garantir de l'équité du procès ...

62. Au vu de ces éléments, la Cour considère qu'il n'est pas établi que le requérant ait renoncé à son droit de bénéficier des conseils d'un avocat commis d'office. Or, vu la sévérité de la peine

encourue par lui, la Cour estime que les intérêts de la justice commandait que, pour jouir d'un procès équitable, l'intéressé bénéficiait d'une assistance judiciaire gratuite dans le cadre de la procédure pénale à son encontre.

### Duty of reimbursement

☰ *Croissant v. Germany*, 13611/88, 25 September 1992

33. Unlike the rights embodied in other provisions of Article 6 para. 3 ... the right to free legal assistance conferred by sub-paragraph (c) ... is not absolute; such assistance is to be provided only if the accused "has not sufficient means to pay".

35. ... under German law an accused who is acquitted is, irrespective of his means, under no obligation to pay either the court costs or the fees of the court-appointed lawyers; all these items are borne by the State. On the other hand, a convicted person is in principle always bound to pay the fees and disbursements of his court-appointed lawyers, this being held to be a normal consequence of the conviction.

It is only in the enforcement procedure that follows the final judgment that the financial situation of the convicted person plays a role; in this respect, it is immaterial whether he had sufficient means during the trial, only his situation after the conviction being relevant.

36. Such a system would not be compatible with Article 6 ... of the Convention if it adversely affected the fairness of the proceedings. However, it cannot be said that the system generally produces such a result or did so in the present case. As already stated, the appointment of the three defence counsel was compatible with the requirements of Article 6 ... Accordingly, it is not incompatible with that provision that the applicant is liable to pay their fees. The national courts were entitled to consider it necessary to appoint them and the amounts claimed for them are not excessive.

... there is no reason to doubt that, should the applicant be able to establish that he cannot afford to pay the entire amount, the relevant legislation and practice will be applied ... In this respect the Court considers it admissible, under the Convention, that the burden of proving a lack of sufficient means should be borne by the person who pleads it.

38. The Court concludes that the reimbursement order is not incompatible with Article 6 para. 3 (c) ...

Choice

☞ *Ensslin, Baader and Raspe v. the Federal Republic of Germany*, 7572/76, 7586/76 and 7587/76, 8 July 1978, DR14, 64

19. ... By stipulating that the accused may have legal assistance of his own choosing, Article 6 (3) (c) does not secure the right to an unlimited number ... the purpose of this provision is to ensure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional. By limiting the number of lawyers freely chosen by the accused to three, without prejudice to the *ex officio* addition of other defence counsel appointed by the Court, an arrangement peculiar to the German procedural system, the authorities of the Federal Republic of Germany therefore did not violate the right secured by this provision ...

20. Refusal to accept, or the exclusion of, a defence is a more difficult question, both in its principle and its effects. It is a measure which may intimidate other potential defence counsel or cast discredit on the defence in general; further, a succession of defence lawyers may be damaging to the presentation of the case and introduce greater uncertainty into the barrister's role as "the watchdog of procedural regularity". However, ... the right to defend one's case with the assistance of the defence counsel of one's choice ... is not an absolute right: it is limited by the State's right to make the appearance of barristers before the courts subject to regulations ... and the obligation on defence counsel not to transgress certain principles of professional ethics. In the case in point, certain barristers were excluded from the defence because they were strongly suspected of supporting the criminal association of the accused. This was not simply a measure taken by the Court in the interests of procedural order, since the lawyers in question are currently the subject of criminal proceedings before the courts. Their exclusion did not end the effective defence of the applicants, since they were still represented by an average of ten defence counsel, some of them ... having been chosen by them.

☞ *X v. the United Kingdom*, 8295/78, 9 October 1978, DR15, 242

1. ... Considering the applicant's defence as a whole therefore, the Commission notes that he was given an ample opportunity to present his own case. The restriction imposed on the applicant's choice of representation was limited to excluding his son on reasonable grounds of professional etiquette. The applicant could have chosen any other barrister to represent him but apparently made no effort to do so. An examination of the trial transcript

does not disclose any disadvantage to the defence or unfairness in this respect. The Commission finds therefore that the exclusion of the applicant's son from representing the applicant at his trial does not disclose any appearance of a violation of Article 6 (3) (c) of the Convention.

☰ *Croissant v. Germany*, 13611/88, 25 September 1992

27. ... The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings ... – which finds parallels in the legislation of other Contracting States – cannot, in the Court's opinion, be deemed incompatible with the Convention.

Again, the appointment of more than one defence counsel is not of itself inconsistent with the Convention and may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel a court should pay heed to the accused's views as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under Article 6 para. 1 ... it lacks relevant and sufficient justification.

28. ... In the first place, avoiding interruptions or adjournments corresponds to an interest of justice which is relevant in the present context and may well justify an appointment against the accused's wishes. Moreover, the nomination of Mr Hauser had additional aims. It was based, according to the Regional Court's decision of 1 March 1978 ... on the need to ensure that Mr Croissant was adequately represented throughout his trial, having regard to its probable length and to the size and complexity of the case; the Regional Court stressed that its selection of Mr Hauser was grounded on its view that he possessed the qualifications called for by those special features ....

29. ... When appointing defence counsel the national courts must certainly have regard to the defendant's wishes ... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.

30. In its decision of 1 March 1978, the Regional Court stressed that it had selected Mr Hauser because it considered that, having regard to the subject-matter of the trial, the complexity of the factual and legal issues involved and the defendant's personality, he offered the best guarantees of an adequate defence. Furthermore, it found that the reason advanced by the applicant for his being unable to place confidence in Mr Hauser was not valid; in this connection, it also had regard to the fact that the ap-

plicant himself had chosen the other two court-appointed lawyers ... The Stuttgart Court of Appeal, which upheld the Regional Court's decision, added that Mr Hauser had been appointed because, unlike those two lawyers, he had his office within the Regional Court's jurisdiction ...; this would have had advantages, having regard to the expected length of the trial, in the event that they had been unable to attend ...

Finally, in the opinion of the Regional Court there were valid reasons – namely a possible conflict of interests between Mr Croissant and one of his former employees – for refusing to designate Mr Künzel ...

The grounds on which the national courts based their appointment of Mr Hauser and their rejection of the reasons advanced by the applicant in favour of its revocation are, in the Court's view, relevant and sufficient.

31. Furthermore ... Mr Hauser took an active part in the defence and was closely involved with the other two counsel in planning the strategy to be adopted. Accordingly, his designation cannot be said to have adversely affected the applicant's defence.

32. To sum up, the appointment of the three lawyers in question cannot be held to have been incompatible with the requirements of paragraphs 3 (c) and 1 of Article 6 ... taken together.

☰ *Mayzit v. Russia*, 63378/00, 20 January 2005

68. The Court notes that Article 47 of the CCrP sets as a general rule the requirement that defenders must be professional advocates, members of the bar. Pursuant to the same provision the Moskovskiy District Court could, if it had seen fit, have let the applicant's mother and sister act as his defenders. The court considered, however, that as lay persons they would not be able to ensure the applicant's efficient defence in compliance with the procedure. Furthermore, the court concluded that they would not, for the reasons of health or occupation, be able sufficiently to attend to the proceedings. In the Court's opinion, these considerations were legitimate and outweighed the applicant's wishes ...

69. Considering the applicant's defence as a whole, the Court notes that he was given an ample opportunity to present his own case. The restriction imposed on the applicant's choice of representation was limited to excluding his mother and sister on the grounds cited above. The applicant could have chosen any advocate to represent him but apparently made no effort to do so. The facts of the case do not disclose any disadvantage to the defence or unfairness in this respect.

## Competence

☰ *W. v. Switzerland*, 9022/80, 13 July 1983, DR 33, 21

4. ... Mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of this, the authorities must replace him or persuade him to perform his task. It is only in this way that the Convention's aim of guaranteeing not theoretical or illusory rights, but rights that are practical and effective, can be achieved.

6. ... It does indeed seem that throughout the proceedings the authorities were unaware of the differences of opinion between the applicant and his lawyers as to the way in which the defence should be conducted, and did not know that the applicant might have been misled about the desirability of more active intervention by his defence lawyers. It was only at the reading of the judgment that this situation was brought to the notice of the judicial authorities, together with an offer of supplementary evidence. As from that time the applicant benefited from an effective defence and no intervention by the authorities was called for. In the light of these considerations, the Commission is of the opinion that at no time did the competent authorities fail to fulfil their obligations under Article 6 (3) (c) of the Convention.

☰ *Daud v. Portugal*, 22600/93, 21 April 1998

39. ... The Court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer ... and the hearing ... [3 days] was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds ...

Mr Daud consequently did not have the benefit of a practical and effective defence as required by Article 6 §3 (c) ...

40. The Court must therefore ascertain whether it was for the relevant authorities, while respecting the fundamental principle of the independence of the Bar, to act so as to ensure that the appli-

cant received the effective benefit of his right, which they had acknowledged.

41. The Court notes, firstly, that the application for a judicial investigation made by the applicant on 15 October 1992 was refused by the investigating judge on the principal ground that it was written in Spanish ...

42. In his letter of 15 December 1992, after more than eight months had elapsed, the applicant also asked the court for an interview with his lawyer, who had still not contacted him ... Because the letter was written in a foreign language, the judge disregarded the request. Yet the request should have alerted the relevant authorities to a manifest shortcoming on the part of the first officially assigned lawyer, especially as the latter had not taken any step since being appointed in March 1992. For that reason, and having regard to the refusal of the two applications made during the same period by the defendant himself, the court should have inquired into the manner in which the lawyer was fulfilling his duty and possibly replaced him sooner, without waiting for him to state that he was unable to act for Mr Daud. Furthermore, after appointing a replacement, the Lisbon Criminal Court, which must have known that the applicant had not had any proper legal assistance until then, could have adjourned the trial on its own initiative. The fact that the second officially assigned lawyer did not make such an application is of no consequence. The circumstances of the case required that the court should not remain passive.

☰ *Sannino v. Italy*, 30961/03, 27 April 2006

50. In the instant case, on 18 January 1999 Mr G., the lawyer chosen by the applicant, withdrew from the case ... Mr B., the lawyer appointed by the court to represent the applicant, was informed of the date of the next hearing, but not of his appointment ... That omission on the part of the authorities partly explained Mr B.'s absence, which led to the situation complained of by the applicant, namely, the fact that at each hearing he was represented by a different replacement lawyer ... There was nothing to suggest that the replacement lawyers had any knowledge of the case. However, they did not request an adjournment in order to acquaint themselves with their client's case. Nor did they ask to examine the defence witnesses whom the District Court had given the applicant's first two lawyers leave to call ...

51. Admittedly, the applicant, who until 2 November 1999 had attended a lot of hearings, never informed the authorities of the difficulties he had been having preparing his defence ... The applicant also failed to get in touch with his court-appointed lawyers to seek clarification from them about the conduct of the proceedings and the defence strategy. Nor did he contact the court regis-



try to ask about the outcome of his trial. However, the Court considers that the applicant's conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene. However, there is nothing to suggest that the latter took measures to guarantee the accused an effective defence and representation.

52. Accordingly, there has been a violation of Article 6 of the Convention.

☰ *Bogumil v. Portugal*, 35228/03, 7 October 2008

47. La Cour constate que durant la phase initiale de la procédure, le requérant a été assisté par un avocat stagiaire, qui est intervenu à plusieurs reprises. Le 15 janvier 2003, le procureur ayant constaté que cet avocat stagiaire ne pouvait pas représenter le requérant compte tenu de la lourdeur de la peine encourue en l'espèce, un nouvel avocat, censé être plus expérimenté, a été commis d'office. Cet avocat n'est intervenu dans la procédure que pour demander à être relevé de ses fonctions, le 15 septembre 2003, soit trois jours avant le début du procès. Une nouvelle avocate d'office a été désignée le jour même de l'audience ; elle a pu étudier le dossier entre 10h et 15h15.

48. En l'occurrence, il y a lieu de partir de la constatation qu'eu égard à la préparation et à la conduite de l'affaire par les avocats commis d'office, le résultat auquel tend l'article 6 § 3 n'a pas été atteint. S'agissant en particulier de l'avocate d'office désignée le jour même de l'audience, l'intervalle d'un peu plus de cinq heures dont elle a disposé afin de préparer la défense était de toute évidence trop bref pour une affaire grave pouvant déboucher sur une lourde condamnation ...

49. Confronté à une telle « carence manifeste » de la défense, le requérant a attiré l'attention des autorités judiciaires. Toutefois, la 9<sup>e</sup> chambre du tribunal criminel de Lisbonne n'a pas donné de suite adéquate à ses demandes, et ne s'est pas assurée que l'intéressé était véritablement « assisté » par un défenseur d'office. Ainsi, après avoir désigné un remplaçant, le tribunal criminel de Lisbonne, qui devait savoir que le requérant n'avait pas bénéficié jusqu'alors d'une véritable assistance juridique, aurait pu de sa propre initiative ajourner les débats. Que l'avocate d'office en question n'ait pas présenté une telle demande ne porte pas à conséquence. Les circonstances de la cause commandaient à la juridiction de ne pas demeurer passive et d'assurer le respect concret et effectif des droits de la défense du requérant ...

50. L'ensemble de ces appréciations amène la Cour à constater un manquement aux exigences des paragraphes 1 et 3 c), combinés, de l'article 6. Il y a donc eu violation de ces dispositions.

*Independence*

▮ *Morris v. the United Kingdom*, 38784/97, 26 February 2002

90. ... had the applicant accepted the Legal Aid Authority's offer of legal aid as communicated in its letter of 21 April 1997, he would have been represented at his court martial by an independent legal representative. Instead, the applicant refused that offer before the Legal Aid Authority had even responded to his solicitor's request for reconsideration of the terms of the offer. Indeed, the applicant certified on 2 May 1997 that he wanted to be represented by no other than his defending officer, and that he had made this choice of his own free will ...

91. As a result, the Court finds no merit in the applicant's complaints about the independence of his defending officer and that officer's handling of his defence. In any event, it finds on the evidence that the defending officer did not fail adequately to advise or represent the applicant, save as regards the risks consequent to his appealing against the court martial's verdict. Even in that regard, the applicant went on to pursue an appeal with the assistance of legal representation, so that this error proved to be without consequence for the applicant.

*Communication*

**Meetings**

▮ *Bonzi v. Switzerland*, 7854/77, 12 July 1978, DR12, 185

2. ... In the absence of any explicit provision, it cannot be maintained that the right implicitly guaranteed by Article 6 (3) to confer with one's counsel and exchange confidential instructions or information with him is subject to no restriction whatsoever. In the case in point, while the lawyer's visits were forbidden after the decision to place the accused in solitary confinement, it must be pointed out that the applicant was free to inform his counsel in writing, under supervision of the court, of the progress of the investigatory proceedings. In addition, he could have requested a relaxation of his isolation where his counsel's visits were concerned. This being so, the relative and temporary limitation of contacts between the applicant and his defence counsel, seen in the context of the criminal proceedings as a whole, cannot be said to have constituted a refusal on the part of the judicial authorities to grant the applicant the necessary facilities for the preparation of his defence.

☰ *Brennan v. the United Kingdom*, 39846/98, 16 October 2001

61. The consultation was ... the first occasion since his arrest at which the applicant was able to seek advice from his lawyer. He had been cautioned under Article 3 of the 1988 Order ... and, as noted in *John Murray* ... his decision as to whether to answer particular questions or to risk inferences being drawn against him later was potentially of great importance to his defence at trial. ....

62. ...the Court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him. Both the applicant and the solicitor had been warned that no names should be mentioned and that the interview would be stopped if anything was said which was perceived as hindering the investigation. It is immaterial that it is not shown that there were particular matters which the applicant and his solicitor were thereby stopped from discussing. The ability of an accused to communicate freely with his defence lawyer, recognised, *inter alia*, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners, was subject to express limitation. The applicant had already made admissions before the consultation, and made admissions afterwards. It is indisputable that he was in need of legal advice at that time, and that his responses in subsequent interviews, which were to be carried out in the absence of his solicitor, would continue to be of potential relevance to his trial and could irretrievably prejudice his defence.

63. The Court finds therefore that the presence of the police officer within hearing during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defence rights and that there has been, in that respect, a violation of Article 6 §3 (c) of the Convention taken in conjunction with Article 6 §1.

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

132. In the absence of any specific observations by the parties on this point in the proceedings before it, the Grand Chamber endorses the Chamber's findings:

“... the applicant's first visit from his lawyers took place under the supervision and within sight and hearing of members of the security forces and a judge, all of whom were present in the same room as the applicant and his lawyers. The security forces restricted the visit to twenty minutes. The record of the visit was sent to the National Security Court.

... As regards subsequent visits, ... the Court accepts that meetings between the applicant and his lawyers after the initial visit took place within hearing of members of the security forces, even though the security officers concerned were not in the room where the meetings took place.”

133. The Grand Chamber agrees with the Chamber’s assessment of the effects of the applicant’s inability to consult his lawyers out of the hearing of third parties:

“... an accused’s right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 §3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *S. v. Switzerland* ...). The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments (see *Brennan v. the United Kingdom*, ...). However, as stated above ... restrictions may be imposed on an accused’s access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing.

... In the present case, the Court accepts ... that the applicant and his lawyers were unable to consult out of the hearing of the authorities at any stage. It considers that the inevitable consequence of that restriction, which was imposed during both the preliminary investigation and the trial, was to prevent the applicant from conversing openly with his lawyers and asking them questions that might prove important to the preparation of his defence. The rights of the defence were thus significantly affected.

... The Court observes in that connection that the applicant had already made statements by the time he conferred with his lawyers and made further statements at hearings before the National Security Court after consulting them. If his defence to the serious charges he was required to answer was to be effective, it was essential that those statements be consistent. Accordingly, the Court considers that it was necessary for the applicant to be able to speak with his lawyers out of the hearing of third parties.

... As to the Government’s contention that the supervision of the meetings between the applicant and his lawyers was necessary to ensure the applicant’s security, the Court observes that the lawyers had been retained by the applicant himself and that there was no reason to suspect that they threatened their client’s life. They were not permitted to see the applicant until they had undergone a series of searches. Mere visual surveillance by the prison officials, accompanied by other measures, would have sufficed to ensure the applicant’s security.”

Consequently, the Court holds that the fact that it was impossible for the applicant to confer with his lawyers out of the hearing of members of the security forces infringed the rights of the defence.

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

204. ... counsel for the applicant were required to seek special permits to visit and confer with him. Permits were valid for one visit only and the lawyers’ attempts to have extended their period of validity proved to be unsuccessful. Permits were issued by the authority in charge of the case. After the Constitutional Court declared unconstitutional the provisions of the Custody Act which granted the authority in charge of the criminal case discretion in the matter of meetings with counsel ..., counsel for the applicant obtained an unrestricted permit; however, by that time the conviction had already been upheld in the final instance. It follows that for the entire duration of the criminal proceedings against the applicant visits by the applicant’s counsel were conditional on authorisation by the authorities.

205. The prosecution in the applicant’s case was instituted and conducted by the Federal Security Service. The Lefortovo remand centre, in which the applicant was held, was also under the jurisdiction of the Federal Security Service. Under these circumstances the prosecuting authority enjoyed unrestricted access to the applicant for its own purposes but exercised full and effective control over his contacts with the defence counsel, who were required to apply for a permit from the investigator – an officer of the Federal Security Service – each time they wished to visit him in the remand centre. The Court takes note of the Government’s assertion that at no point in the proceedings was permission for a visit by counsel unreasonably withheld. Nevertheless, it has no doubt that the need to apply for an individual permit for every visit created considerable practical difficulties in the exercise of the rights of the defence because it detracted time and effort from pursuing the defence team’s substantive mission. What causes the Court still greater concern is that this arrangement put the defence in a position of dependence on, and subordination to, the

discretion of the prosecution and therefore destroyed the appearance of the equality of arms. On several occasions the Federal Security Service abused the dominant position it had in the matter by refusing to accept Mrs Moskalenko's request for an unrestricted permit or threatening criminal prosecution against her in the absence of any evidence that the permit had been forged ...

206. The Court further notes that the Government omitted to make any comments on the legal basis which would have allowed the domestic authorities to require special permits for visits by counsel in the first place. Nothing in the text of section 18 of the Custody Act suggests that a mandate from the legal services office and an identity document were not sufficient for allowing visits to the applicant by professional advocates, which all of the applicant's legal representatives were. Whereas section 18 explicitly requires consent by the competent authority for a family visit, it does not mention that visits by counsel may be subordinate to any such consent. It follows that the requirement on the applicant's counsel to seek permission to visit him was not only excessively onerous for the defence team but also devoid of legal basis and therefore arbitrary.

207. In the light of the above, the Court finds that the control exercised by the prosecution over access to the applicant by his counsel undermined the appearances of a fair trial and the principle of equality of arms.

▣ *Rybacki v. Poland*, 52479/99, 13 January 2009

57. ... the applicant was represented by his lawyer who was appointed on 9 May 1996, a day after the applicant's arrest. When the applicant was questioned by the prosecutor on that date, the lawyer was present. He participated in the interview, put questions and made requests for evidence to be taken ... Hence, for a short period at the beginning of the proceedings the applicant had benefited from unfettered contacts with his legal representation.

58. However, on 17 May 1996 the prosecutor reserved the right to be present whenever the applicant saw his defence counsel ... However, in the present case no reference was made to the grounds on which this decision was given, even of a general nature, such as, for example, the need to secure the proper conduct of the investigation. Nor were concrete reasons adduced to show that such supervision was, in the circumstances of the case, necessary and justified.

59. In particular, the Court observes that it was not shown or argued ... that when imposing the measures the prosecuting authorities considered that there were any indications pointing to a risk of collusion arising out of the lawyer's contacts with the applicant. Neither the professional ethics of the lawyer nor the lawful-

ness of his conduct were at any time called into question ... The Court can only conclude that it has not been shown that there were sufficient grounds for the imposition of the measures complained of.

60. The Court further notes that as a result of the order of 17 May 1996 the applicant's contacts with his lawyer were, from that date until 7 November 1996, supervised by police officers present at their meetings. Not only were they present in the same room, but they also listened to the conversations between the applicant and the lawyer. The Court notes the applicant's contention that during the supervised visits of his lawyer, whenever they started to talk about the case a police officer interrupted their conversation and warned them that if they continued the visit would have to be stopped ... The Government have not countered this contention. Hence it cannot be said that the applicant's contacts with his lawyer were, in such a setting, capable of assisting him in the effective exercise of his defence rights.

61. Lastly, the Court notes that it has not been argued that the fairness of the proceedings was vitiated by reason of the prosecution's reliance on, for example, incriminating statements made by the applicants in the period between May and November, namely when the applicant could not benefit from unsupervised legal advice. However, the Court cannot but observe that the restrictions concerned were applied for over six months during the investigation which lasted, overall, seven months and two weeks ... The Court further notes that throughout this period the prosecution authorities gathered very voluminous evidence ... The fact that the authorities were actively preparing the bill of indictment against the applicant taken together with the considerable length of that period cannot but strengthen the conclusion that the absence of unhindered contacts with his lawyer throughout that period negatively affected the effective exercise of his defence rights.

62. Having regard to the circumstances of the case seen as a whole, the Court is therefore of the view that there has been a violation of Article 6 §3 (c) taken in conjunction with Article 6 §1 of the Convention.

### Correspondence and telephone calls

☰ *Domenichini v. Italy*, 15943/90, 15 November 1996

37. Mr Domenichini ... stated that after receiving notification of the dismissal of his appeal against the decision taken by the judge responsible for the execution of sentences on 16 September 1988, he appealed on points of law (on 9 November 1988) and then wrote to his lawyer, who had to file the grounds in support of

that appeal within the statutory ten days. That letter had been intercepted at the prison, read and then forwarded to Mr Piscopo after the ten days had elapsed ...

39. ... As to the delay in sending Mr Piscopo the letter in question ..., the Court considers that, notwithstanding the foreseeable outcome of the proceedings ..., the monitoring of the letter infringed Mr Domenichini's defence rights. His lawyer filed the grounds in support after the statutory ten-day period had expired. There has consequently been a breach of Article 6 para. 3 (b) ...

▬ *Zagaria v. Italy*, 58295/00, 27 November 2007

32. La Cour observe tout d'abord qu'en l'espèce l'ingérence incriminée n'avait aucune base légale ; bien au contraire, l'article 146 *bis* des dispositions d'exécution du CPP prévoit que « le défenseur ou son remplaçant présents dans la salle d'audience et l'accusé peuvent se consulter de manière confidentielle, au moyen d'instruments techniques adaptés » ... En écoutant la conversation téléphonique du requérant avec son conseil, le surveillant a donc violé la règle de la confidentialité voulue par cette disposition. Aucune justification valable pour un tel comportement n'a été donnée par le Gouvernement, qui s'est borné à invoquer une « écoute involontaire » ...

33. Pour ce qui est des effets de la mesure litigieuse, la Cour relève que la conversation dont il s'agit avait eu lieu au cours d'une audience se déroulant devant la cour d'assises de Santa Maria Capua Vetere. Le conseil du requérant se trouvait dans la salle d'audience, alors que l'intéressé suivait les débats par vidéo-conférence depuis son lieu de détention. De l'avis de la Cour, la possibilité, pour un accusé, de donner des instructions confidentielles à son défenseur au moment où son cas est discuté et les preuves sont produites devant la juridiction du fond est un élément essentiel d'un procès équitable.

34. Il est vrai que la conversation interceptée, relative à l'envoi d'un fax et à des protestations à propos des fouilles corporelles ..., ne semble avoir aucun rapport direct avec le bien-fondé des accusations ou la stratégie de la défense. Il est également nécessaire de tenir compte du fait que le requérant et son conseil semblent avoir eu connaissance de l'écoute litigieuse, qui a eu lieu le 15 avril 1999, seulement plus de dix mois plus tard, le 7 mars 2000 ... Le Gouvernement le souligne à juste titre ...

35. ... il convient de noter qu'en mars 2000, la procédure n° 8/98 R.G. était encore pendante en première instance et que d'autres audiences allaient avoir lieu devant la cour d'assises de Santa Maria Capua Vetere et la juridiction d'appel, devant laquelle le procès ne s'est terminé qu'en janvier 2002. La procédure



n° 9/98 R.G., quant à elle, était au 29 avril 2005 encore pendante en première instance ... Compte tenu de la faible réaction de l'Etat à l'égard du surveillant ayant violé l'obligation de confidentialité, qui a bénéficié du classement des accusations pénales et n'a pas fait l'objet de poursuites disciplinaires ..., rien ne garantissait au requérant que l'incident ne se serait pas répété. Dès lors, il pouvait raisonnablement craindre que d'autres conversations soient écoutées, ce qui a pu lui donner des motifs d'hésiter avant d'aborder des questions susceptibles de revêtir une importance pour l'accusation ...

36. En conséquence, la Cour juge que l'écoute de la conversation téléphonique du requérant avec son conseil du 15 avril 1999 a porté atteinte au droit de l'intéressé d'exercer de manière effective les droits de la défense. Partant, il y a eu violation de l'article 6 § 3 c) de la Convention, combiné avec l'article 6 § 1.

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

208. In addition to seeking permission for visits, counsel for the applicant and the applicant himself were required to obtain special permission from the remand centre administration for any documents they wished to pass to each other. The documents were read by the administration before being exchanged ...

210. The Court observes that section 20 of the Custody Act – which apparently was the legal basis for perusing the documents passed between the applicant and his lawyers – provided for censorship of all correspondence by detainees in general terms, without exception for privileged correspondence, such as that with legal counsel. The Court reiterates in this connection that correspondence with lawyers, whatever its purpose, is always privileged and that the reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, when the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature ...

211. As noted above, the Lefortovo remand centre was managed by the same authority that prosecuted the case against the applicant. Thus, the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent. This flagrant breach of confidentiality of the client-attorney relationship could not but adversely affect the applicant's right to defence and deprive the legal assistance he received of much of its usefulness. It has not been claimed that the application of such a sweeping measure throughout the entire duration of the criminal

proceedings was justified by any exceptional circumstances or previous abuses of the privilege. The Court considers that perusal of the documents passed between the applicant and his counsel encroached on the rights of the defence in an excessive and arbitrary fashion.

212. Accordingly, the Court finds that the routine reading of the defence materials by the prosecuting authority was in breach of the principle of equality of arms and eroded the rights of the defence to a significant degree.

*Liability of representative for statements*

▬ *Nikula v. Finland*, 31611/96, 21 March 2002

51. It is true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant's view, constituted "role manipulation ... breaching his official duties". Although some of the terms were inappropriate, her criticism was strictly limited to T.'s performance as prosecutor in the case against the applicant's client, as distinct from criticism focusing on T.'s general professional or other qualities. In that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel.

52. The Court notes, moreover, that the applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media ... Nor can the Court find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult ...

53. The Court further reiterates that even though the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court. There is no indication that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question ... In that connection, the Court would stress the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.

54. It is true that, following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. It is likewise relevant that the Supreme Court waived

her sentence, considering the offence to have been minor in nature. Even though the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an *ex post facto* review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred ...

56. In these circumstances the Court concludes that Article 10 of the Convention has been breached in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

☞ *Kyprianou v. Cyprus* [GC], 73797/01, 15 December 2005

178. The Limassol Assize Court sentenced the applicant to five days' imprisonment. This cannot but be regarded as a harsh sentence, especially considering that it was enforced immediately. It was subsequently upheld by the Supreme Court.

179. The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.

180. Having regard to the above, the Court is not persuaded by the Government's argument that the prison sentence imposed on the applicant was commensurate with the seriousness of the offence, especially in view of the fact that the applicant was a lawyer and considering the alternatives available ...

181. Accordingly, it is the Court's assessment that such a penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel ... The Court's finding of procedural unfairness in the summary proceedings for contempt ... serves to compound this lack of proportionality ... This being so, the Court considers that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression. The fact that the applicant only served part of the prison sentence ... does not alter that conclusion.

183. The Court accordingly holds that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant.

▮ *Saday v. Turkey*, 32458/96, 30 March 2006

35. En l'espèce, il est indéniable que le requérant a tenu des propos particulièrement acerbes dans sa plaidoirie, tels que « L'État veut que l'on soit assassiné par des bourreaux vêtus de robes » ou « La dictature fasciste (...) veut maintenant me juger devant une cour de sûreté de l'État », qui donnent au récit une connotation profondément hostile. La Cour ne saurait minimiser l'assertion reprochée au requérant en la ramenant en une simple critique structurelle des cours de sûreté de l'État. En effet, il était tout à fait possible au requérant de contester la composition ou le fonctionnement de la cour de sûreté sans attaquer personnellement les juges qui y siégeaient. Cette constatation se trouve renforcée par la gravité et la généralité des reproches formulés par l'intéressé ainsi que par le ton choisi à cet effet, qui peuvent avoir comme conséquence de saper l'autorité judiciaire en créant une atmosphère d'insécurité au détriment de la bonne marche de la justice.

36. Il s'ensuit que face aux propos tenus par le requérant, de nature à mettre directement en cause la dignité des magistrats, la Cour peut accepter que le tribunal ait estimé nécessaire l'imposition d'une sanction. La Cour relève à cet égard que la nature et la lourdeur des peines infligées sont aussi des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence ... En l'espèce, le requérant s'est vu infliger par la cour de sûreté une peine d'emprisonnement de six mois, soit la sanction maximale prévue par l'article 23 § 3 de la loi n° 2845, dont les deux premiers mois devaient être purgés en isolement cellulaire. Bien que la cour de sûreté ait décidé de surseoir à l'exécution des quatre mois restant à purger, la lourdeur et la gravité de la peine qu'il a du exécuter, à savoir, l'isolement cellulaire pour les deux premiers mois, apparaît comme étant disproportionnée aux buts visés et dès lors, non « nécessaire dans une société démocratique ».

37. Il y a donc eu violation de l'article 10 de la Convention.

*Presence at hearing*

▮ *Balliu v. Albania*, 74727/01, 16 June 2005

35. The Court notes that, as the applicant did not wish to defend himself in person and his chosen lawyer did not fulfil his duty, different courses were open to the Albanian authorities. Either they could cause Mr Leli, the applicant's chosen lawyer, to fulfil his duty, or they could replace him with an officially appointed lawyer. However, it was impossible, in view of the inde-

pendence of the Bar, to force the applicant’s counsel to act. Moreover, the applicant refused to be defended through the officially appointed lawyer. Thus, the domestic court chose a third course, namely to adjourn the hearings and then to proceed in the absence of the applicant’s counsel, albeit in the applicant’s presence.

36. The Court further notes that the applicant never informed the Durrës District Court of any shortcomings on the part of his representative or of the officially appointed lawyer, nor did he ask for a different one.

37. In this situation the Court finds that the authorities adequately discharged their obligation to provide legal assistance, both by adjourning the hearings in order to give the applicant’s counsel an opportunity to fulfil his duty and by appointing a lawyer under the legal-aid scheme.

38. Bearing in mind also the authorities’ obligation under Article 6 §1 of the Convention to conduct the proceedings “within a reasonable time”, the circumstances of the applicant’s representation during his trial do not disclose a failure to provide legal assistance as required by Article 6 §3 (c) of the Convention or a denial of a fair hearing under paragraph 1 of that provision ...

44. At the hearings before the Durrës District Court both the applicant and his counsel, when confronted with the witnesses for the prosecution, had the opportunity to put questions to them, though they chose not to do so: the applicant’s lawyer by being absent and the applicant by remaining silent.

#### *Payment of fees*

☞ *Morris v. the United Kingdom*, 38784/97, 26 February 2002

88. The Court recalls that, in *Croissant v. Germany* ..., it held that there was no violation of Article 6 §3 (c) where an individual was required to pay a contribution to the cost of providing legal assistance and had sufficient means to pay.

89. The Court notes that the applicant was offered legal aid subject to a contribution of GBP 240. It does not regard the terms of the offer as arbitrary or unreasonable, bearing in mind the applicant’s net salary levels at the time, regardless of whether or not the applicant was given the option of paying by way of instalments.

*Financial penalties for misconduct*

☞ *X and Y v. Austria*, 7909/74, 12 October 1978, DR15, 160

4. ... the costs of the adjournment of the trial ... were imposed under Section 274 of the Code of Criminal Procedure which provides that in certain cases such costs have to be borne by the lawyer who is responsible for causing them. This provision ... corresponds to similar regulations in the law of other High Contracting Parties, can reasonably be considered as “necessary” within the meaning of Article 1 (2) of the Protocol, and the only remaining question is therefore whether its application in the particular case can also be justified ...

*Withdrawal*

☞ *Panovits v. Cyprus*, 4268/04, 11 December 2008

96. The Court notes that the applicant’s lawyer and the judges of the Assize Court engaged in various disagreements over the course of the applicant’s trial, and that the applicant’s lawyer had felt the need to request leave to withdraw from the proceedings due to the court’s interferences with his conduct of the applicant’s defence. His request was refused and he continued to represent the applicant.

97. The Court further notes that upon the resumption of the main trial following the contempt proceedings Mr Kyprianou felt that it was necessary for another lawyer to represent the applicant and request the court itself to withdraw from the further examination of the case. The request was refused as the Assize Court considered that no reasonable person could conclude that the applicant could have been prejudiced in any way by the contempt proceedings.

98. ... Although the contempt proceedings were separate from the applicant’s main trial, the fact that the judges were offended by the applicant’s lawyer when he complained about the manner in which his cross-examination was received by the bench undermined the conduct of the applicant’s defence.

99. ... although the conduct of the applicant’s lawyer could be regarded as disrespectful for the judges of the Assize Court, his comments were aimed at and were limited to the manner in which the judges were trying the case and, in particular, their allegedly insufficient attention to his cross-examination of a witness carried out in the course of defending the applicant. In this respect, the interference with the freedom of expression of the applicant’s lawyer in conducting the applicant’s defence, had breached Article 10 of the Convention ... Moreover, the Court held that the sentence imposed on the applicant’s lawyer had been capable

of having a “chilling effect” on the performance of the duties attached to lawyers when acting as defence counsel.

100. The Court finds that the refusal of Mr Kyprianou’s request for leave to withdraw from the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner exceeded, in the present circumstances, the limits of a proportionate response given the impact on the applicant’s rights of defence. Further, in the view of the Court, the Assize Court’s response to Mr Kyprianou’s discourteous criticism of the manner in which they were trying the case, which was to convict him immediately of contempt of court and impose a sentence of imprisonment on him, was also disproportionate. It further considers that the “chilling effect” on Mr Kyprianou’s performance of his duties as defence counsel was demonstrated by his insistence, upon the resumption of the proceedings, that another lawyer should address the court in respect of the request for the continuation of the proceedings before a different bench.

101. In these circumstances, the Court concludes that the Assize Court’s handling of the confrontation with the applicant’s defence counsel rendered the trial unfair. It follows that there has been a violation of Article 6 §1 in this respect.

#### **Availability of evidence**

☞ *Sofri and others v. Italy* (dec.), 37235/97, 27 May 2003

1. ... it is extremely regrettable that items of evidence in a homicide trial should have been destroyed shortly after the suspects were charged. Responsibility for the destruction of that evidence, which was probably due to an administrative mix-up at the Milan court, lies with the Italian authorities.

However, this is not sufficient for the Court to find a violation of Article 6 of the Convention. It must also be established that the consequences of the malfunctioning put the applicants at a disadvantage compared to the prosecution ...

In that connection, the Court notes that the applicants have not indicated how Superintendent Calabresi’s clothes could have assisted the defence case. On the other hand, forensic tests on the car and bullets could have shed light on the dynamics of the road-traffic accident that took place after the murder and the sequence in which the shots were fired. If the results of such tests had contradicted all or part of Mr Marino’s account, his credibility would have been affected.

The Court observes, however, that the public prosecutor’s office found itself in a similar situation to the applicants, as the inability to perform forensic tests also prevented the public prosecutor’s office from relying on the evidence that had been lost or de-

stroyed. In these circumstances, the parties to the trial were therefore on an equal footing.

Moreover, both the car and the bullets were described, examined and photographed prior to their destruction, so that the applicants were able to exercise their defence rights in respect of that evidence. In particular, they were able to obtain expert evidence and a computer presentation of the photographs and that evidence helped them to obtain a ruling that their application for review was admissible. Lastly, they had an opportunity to contest many other aspects of their accuser's version of events throughout the various stages of the adversarial judicial proceedings.

In these circumstances, the Court cannot conclude that the destruction or loss of the items of evidence mentioned above affected the fairness of the proceedings ...

It follows that this complaint is manifestly ill-founded and must be dismissed pursuant to Article 35 §§3 and 4 of the Convention.

*See also above, "Access to the case file" on page 237.*

*Present*

☞ *Ensslin, Baader and Raspe v. the Federal Republic of Germany, 7572/76, 7586/76 and 7587/76, 8 July 1978, DR14, 64*

**Ability of defendant to be heard and to adduce evidence**

22. ... The decision at issue was taken on the 40th day of a trial which lasted 191 days. Subsequently, the applicants again attended the proceedings intermittently, at least until 8 May 1976, the date of U. Meinhof's death; whatever their reason for refusing the traditional form of judicial exchange, they were able to explain their motives and attitudes and to criticise the legitimacy of the system established to try them, these being the main lines of their own defence. The reason for the decision was their medically attested unfitness to attend the hearings for more than three hours each day, over a period of least six months. It refers to statements by the accused indicative of their wish to make it impossible for the trial to begin, particularly by recourse to hunger strikes. In the circumstances, the judge was able legitimately to make use of the only means at his disposal for preventing the proceedings from grinding to a halt, without however placing the defence at any disadvantage, their lawyers being present and having practically unlimited opportunities for contact with their clients. In the light of all the factors recapitulated above, the continuation of the hearings in absence of accused cannot therefore be deemed to have infringed the rights and freedoms guaranteed by the Convention, and particularly by the above-mentioned provisions.



☰ *Zana v. Turkey*, 18954/91, 25 November 1997

69. In the instant case the Court notes that Mr Zana was not requested to attend the hearing before the Diyarbakır National Security Court, which sentenced him to a twelve-month prison term ... In accordance with Article 226 §4 of the Code of Criminal Procedure, the Aydın Assize Court had been asked to take evidence from him in his defence, under powers delegated by the National Security Court ...

71. In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person ... If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intentions had been when he had made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording.

72. Neither the "indirect" hearing by the Aydın Assize Court nor the presence of the applicant's lawyers at the hearing before the Diyarbakır National Security Court can compensate for the absence of the accused.

73. The Court accordingly considers ... that such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention.

*Need to be heard*

☰ *Constantinescu v. Romania*, 28871/95, 27 June 2000

58. In the instant case the Court notes that, having quashed the decision to acquit reached at first instance, the Bucharest County Court determined a criminal charge against the applicant, convicting him of criminal libel, without hearing evidence from him. The Court is not satisfied with the Government's argument according to which the fact that the accused addressed the court last was sufficient in the present case. It notes, first, that the Government and the applicant disagree as to whether the applicant did in fact address the court last. Secondly, it stresses that, although an accused's right to address the court last is certainly of importance, it cannot be equated with his right to be heard by the court during the trial.

59. Accordingly, the Court finds that the Bucharest County Court determined a criminal charge against the applicant and found him guilty of libel without his having the opportunity to give evidence and defend himself. It considers that the Bucharest County Court should have heard evidence from the applicant,

having regard, in particular, to the fact that it was the first court to convict him in proceedings brought to determine a criminal charge against him.

*Ability to adduce evidence*

▮ *Georgios Papageorgiou v. Greece*, 59506/00, 9 May 2003

37. ... the instant case does not concern the concealment of evidence, but the refusal to order production of the originals of documents used as evidence for the prosecution. At no stage of the proceedings were the courts dealing with the case able to examine extracts from the log file of the bank's computer or the original cheques, or to check whether the copies submitted to them corresponded to the originals. Furthermore, the first-instance court ordered the destruction of the cheques presumed to have been forged, the crucial piece of evidence in the applicant's trial. The applicant's conviction for fraud was, moreover, based to a large extent on the photocopies of the cheques in question. It is also apparent from the Court of Appeal's judgment that the means used to carry out the fraud were the cheques and the computer, which was necessary to alter the data from the bank's central computer. In those circumstances, the Court considers that production of the original cheques was vital to the applicant's defence since it would have enabled him, as he himself pointed out, to show that the instructions for the payment in issue had been given by employees of the bank other than him, which would have compelled the judges to conclude that the accusation of fraud was unfounded ...

39. Having regard to the fact that, in spite of his repeated requests, essential pieces of evidence were not adequately adduced and discussed at the trial in the applicant's presence, the Court concludes that the proceedings in issue, taken as a whole, did not satisfy the requirements of a fair trial.

40. There has therefore been a violation of Article 6 §§1 and 3 (d) of the Convention.

▮ *Perna v. Italy* [GC], 48898/99, 6 May 2003

31. ... The Court agrees with the Italian courts that, even supposing that adding the two press articles to the file and taking evidence from Mr Caselli could have shed light on the latter's political leanings and his relations with third parties, those measures would not have been capable of establishing that he had failed to observe the principles of impartiality, independence and objectivity inherent in his duties. On that crucial aspect, at no time did the applicant try to prove the reality of the conduct alleged to be contrary to those principles. On the contrary, his

defence was that these were critical judgments which there was no need to prove.

32. In the light of the above considerations, the Court considers that the decisions in which the national authorities refused the applicant's requests are not open to criticism under Article 6, as he had not established that his requests to produce documentary evidence and for evidence to be taken from the complainant and witnesses would have been helpful in proving that the specific conduct imputed to Mr Caselli had actually occurred. From that point of view, it cannot therefore be considered that the defamation proceedings brought by Mr Caselli against the applicant were unfair on account of the way the evidence was taken ... In conclusion, there has been no violation of Article 6 §1 and 3 (d) of the Convention.

**Need for a pre-scribed procedure**

☞ *Coëme v. Belgium*, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000

99. ... There is no doubt that the Court of Cassation, which in Belgian law was the only court which had jurisdiction to try Mr Coëme, was a "tribunal established by law" ...

100. The Court notes that no legislation implementing Article 103 of the Constitution was in force when the applicants stood trial in the Court of Cassation ... Yet Article 103 §2 required Parliament to lay down the procedure before the Court of Cassation, and Article 139 of the Constitution of 7 February 1831 insisted on the need to do so as soon as possible ... When the trial opened on 5 February 1996 ... the President of the Court of Cassation himself confirmed that the procedure of the ordinary criminal courts would be followed, announcing that the case would be tried in accordance with the provisions of Article 190 of the Code of Criminal Investigation.

101. However, the Government acknowledged that the procedure of the ordinary criminal courts could not be adopted as such by the Court of Cassation sitting as a full court. In its interlocutory judgment of 12 February 1996 ... the Court of Cassation announced that the rules governing the procedure in the ordinary criminal courts would be applied only in so far as they were compatible "with the provisions governing the procedure in the Court of Cassation sitting as a full court". As a result, the parties could not ascertain in advance all the details of the procedure which would be followed. They could not foresee in what way the Court of Cassation would amend or modify the provisions governing the normal conduct of a criminal trial, as established by the Belgian parliament.

In so doing, the Court of Cassation introduced an element of uncertainty by not specifying which rules were contemplated in the

restriction adopted. Even if the Court of Cassation had not made use of the possibility it had reserved for itself of making certain changes to the rules governing procedure in the ordinary criminal courts, the task of the defence was made particularly difficult because it was not known in advance whether or not a given rule would be applied in the course of the trial.

102. The Court reiterates that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim "*nullum iudicium sine lege*". It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms ... The Court further observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.

103. Consequently, the Court considers that the uncertainty caused by the lack of procedural rules established beforehand placed the applicant at a considerable disadvantage *vis-à-vis* the prosecution, which deprived Mr Coëme of a fair trial for the purposes of Article 6 §1 of the Convention.

▮ *Claes and others v. Belgium*, 46825/99 and 6 others, 2 June 2005

35. Comme le Gouvernement l'a relevé, un élément nouveau existe incontestablement dans la présente affaire : l'essentiel des questions actuellement posées s'étaient déjà posées dans le cadre de la procédure suivie dans « l'affaire Inusop » qui fit l'objet de la requête *Coëme et autres* ... et elles avaient été tranchées par les autorités compétentes, plus particulièrement par la Cour de cassation dans son arrêt interlocutoire du 12 février 1996. Les décisions procédurales adoptées dans cette affaire par la Cour de cassation ont, de toute évidence, constitué un précédent judiciaire et, du fait du déroulement antérieur du procès « Inusop » qui avait fait l'objet d'une ample couverture médiatique et de nombreuses analyses doctrinales, la défense du procès « Agusta-Dassault » connaissait l'essentiel des modalités de la procédure qui serait suivie. Les deux premiers requérants, MM. Claes et Coëme, ne peuvent donc plus soutenir comme tel, comme la Cour l'a constaté dans l'arrêt *Coëme et autres* précité, que « l'incertitude qui a existé en raison de l'absence de règles de procédure préalablement établies plaçait [le requérant] dans une situation de net désavantage par rapport au ministère public ». Ce constat se justifie d'autant plus que M. Coëme était partie aux deux procès et que l'un des

avocats de M. Claes était celui-là même qui avait représenté M. Coëme tout au long de l'affaire Inusop et qui représente encore actuellement ces deux requérants devant la Cour. La notion de prévisibilité dépend dans une large mesure du contenu du texte dont il s'agit, du domaine qu'il couvre ainsi que du nombre et de la qualité de ses destinataires .... Les deux premiers requérants ont donc pu, a tout le moins par l'intermédiaire de leur avocat ou grâce à ses conseils éclairés, profiter « *in media res* » des clarifications jurisprudentielles réalisées tout au long du procès Inusop.

36. Dans ce contexte, il n'apparaît pas que, dans la présente affaire, les deux premiers requérants se soient trouvés désavantagés par rapport au ministère public. Les griefs des requérants restent théoriques et abstraits et ils s'abstiennent d'avancer le moindre élément concret quant aux difficultés d'organiser leur défense en raison de leur prétendue ignorance de la procédure à suivre ou de leurs incertitudes et doutes à ce sujet. Rien ne montre donc, dans la présente affaire, que l'égalité des armes n'aurait pas été respectée.

37. ... la Cour constate que l'examen du grief ne permet de déceler aucune apparence de violation de l'article 6 §2 de la Convention.

#### Use of restraining measures

☰ *Gorodnichev v. Russia*, 52058/99, 24 May 2007

103. En l'espèce, la Cour note d'abord que le requérant, détenu régulièrement, comparut menotté les 5 et 22 février 1999 devant le tribunal de Kirovskii. Il ne prête pas à une controverse entre les parties qu'il ne fit pas l'objet de l'usage de la force. Le requérant n'a pas soutenu par ailleurs que le port de menottes l'ait affecté physiquement.

104. La Cour rappelle ensuite que, sous l'angle du procès équitable, le Gouvernement, ainsi que les juridictions internes dans leurs décisions, concédèrent que le port de menottes litigieux n'était pas conforme aux droits du requérant à la défense, garantis par l'article 46 du CPP ... La Cour en déduit que l'usage de menottes en l'espèce n'était pas un comportement normal lié à la détention de l'intéressé ...

105. ... Pour sa part, la Cour ne discerne rien dans le dossier pouvant laisser supposer que l'absence de menottes lors de la comparution du requérant devant le tribunal de Kirovskii pourrait faire craindre un risque de violence, de dommage, de fuite ou encore d'atteinte à la bonne administration de la justice. Elle n'estime pas dès lors que le recours aux menottes avait pour objet de restreindre l'intéressé de manière raisonnable ... et considère que cette mesure était disproportionnée au regard des nécessités de la sécurité, invoquées par le Gouvernement ...

106. Quant au caractère public de la mesure, les parties soumettent des thèses diamétralement opposées. Selon le Gouvernement, les audiences des 5 et 22 février 1999 furent reportées, le requérant n'étant donc pas resté exposé au public pendant longtemps. Le requérant conteste cette version des faits et affirme que les audiences en question eurent bien lieu.

107. La Cour est d'avis que les pièces du dossier, y compris celles produites par le Gouvernement, confirment la thèse du requérant. Notamment, le vice-président de la Cour suprême de la Fédération de Russie dans son recours en supervision du 16 janvier 2001 et le *Presidium* de la cour régionale de Novossibirsk dans son jugement du 8 février 2001 affirmèrent que, « lors des audiences des 5 et 22 février 1999, le requérant avait porté des menottes » et qu'il avait demandé que les menottes « lui soient ôtées pour qu'il puisse prendre des notes en vue de sa défense » ... Selon le vice-président de la Cour suprême, « les procès-verbaux des audiences ne fournissaient pas les raisons d'une telle mesure ». Ces documents émanant des juridictions internes démentissent, aux yeux de la Cour, la thèse du Gouvernement et confirment le fait que les audiences publiques litigieuses eurent bien lieu. Par ailleurs, si celles-ci avaient été réellement reportées, il aurait été difficile de comprendre le souci des autorités de protéger le public du requérant, comme le soutient le Gouvernement.

108. Ainsi, même s'il n'est pas démontré que la mesure litigieuse visait à avilir ou à humilier le requérant ... la Cour estime que l'exposition du requérant en menottes durant les audiences publiques des 5 et 22 février 1999 ..., sans qu'une telle mesure ait été raisonnablement nécessaire à la sécurité du public ou à la bonne administration de la justice, constitua un traitement dégradant au sens de l'article 3 de la Convention.

109. Il y a dès lors eu violation de cette disposition.

## Rights of victims

▮ *Perez v. France* [GC], 47287/99, 12 February 2004

70. The Court considers that in such cases the applicability of Article 6 has reached its limits. It notes that the Convention does not confer any right, as demanded by the applicant, to “private revenge” or to an *actio popularis*. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation” ...

**No right to have someone prosecuted**

☰ *Jankovic v. Croatia*, 38478/05, 5 March 2009

48. ... violent acts committed by private individuals are prohibited in a number of separate provisions of the Criminal Code. The Court observes further that the Croatian criminal law distinguishes between criminal offences to be prosecuted by the State Attorney's Office, either of its own motion or upon a private application, and criminal offences to be prosecuted by means of a private prosecution. The latter category concerns criminal offences of a lesser nature. The Court also notes that the applicant alleged that the acts of violence committed against her constituted, *inter alia*, the criminal offences of violent behaviour and making threats. Prosecution in respect of both these offences is to be undertaken by the State Attorney's Office, of its own motion in the case of the former offence and on a private application in the case of the latter.

49. ... In respect of criminal offences for which the prosecution is to be undertaken by the State Attorney's Office, either of its own motion or upon a private application, where the Office declines to prosecute on whatever ground, the injured party may take over the prosecution as a subsidiary prosecutor. In contrast, a private prosecution is undertaken from the beginning by a private prosecutor. Furthermore, a criminal complaint lodged in due time in respect of a criminal offence subject to private prosecution is to be treated as a private prosecution ....

50. ... the Court cannot accept the applicant's arguments that her Convention rights could be secured only if the attackers were prosecuted by the State and that the Convention requires State-assisted prosecution. ... the Court is satisfied that in the present case domestic law afforded the applicant a possibility to pursue the prosecution of her attackers, either as a private prosecutor or as the injured party in the role of a subsidiary prosecutor, and that the Convention does not require State-assisted prosecution in all cases ...

52. ... the applicant's decision not to bring a private prosecution on the charges of causing bodily injury of a lesser nature but instead to request an investigation against her attackers on charges of violent behaviour and making serious threats was in compliance with the rules of the Code of Criminal Procedure concerning the role of the injured party as a subsidiary prosecutor.

53. ... in her initial request for an investigation the applicant had already made it clear that she sought an investigation, *inter alia*, into her allegations that on 6 June 2003 three individuals had attacked her. She named the individuals concerned and listed their addresses. She alleged that the acts of violence against her constituted, *inter alia*, the criminal offences of making threats and

violent behaviour. She submitted relevant medical documentation in support of her allegations. However, the domestic authorities declared her request inadmissible as being incomplete, without specifying exactly what formal requirements were not met.

54. It might be true that the applicant's submission did not strictly follow the exact form required for requests lodged with the State Attorney's Office in criminal proceedings. In this connection the Court notes that the applicant was not legally represented in the proceedings at issue. She is unemployed and obviously lacking the means for legal representation at her own expense. Furthermore, under the relevant provisions of the Code of Criminal Procedure ..., the applicant had no right to legal aid since the alleged criminal offences did not carry a sentence of imprisonment exceeding three years.

55. The Court also notes that there had already been a police report on the incident, which also described the acts of violence against the applicant, and that the Split Municipality State Attorney's Office had also produced an account of the event in question. Therefore, it is difficult to accept the conclusion of the Split County Court investigation judge that the applicant's request for an investigation was to be dismissed on the grounds that it was incomprehensible and incomplete. On the contrary, the Court finds that the applicant had made it clear that she was seeking an investigation into an act of violence against her. She showed great interest in her case and made serious attempts to have the attackers prosecuted. Her submissions were sufficient to enable the competent investigation judge to proceed upon her request. They contained all the information required under Article 188(3) of the Code of Criminal Procedure, namely the identification of the person against whom the request was submitted, a description and the legal classification of the offence at issue, the circumstances confirming a reasonable suspicion that the person concerned had committed the offence at issue, and the existing evidence.

56. As to the Government's assertion that the applicant had failed to bring a private prosecution, the Court notes that the applicant did lodge a timely criminal complaint with the Split Municipality State Attorney's Office ... On 11 November 2003 that office decided not to open an official investigation on the ground that the act in question qualified as a criminal offence for which a prosecution had to be brought privately by the victim ... Under Article 48 (3) of the Code of Criminal Procedure, in these circumstances the applicant's criminal complaint had to be treated as a private prosecution ... However, the competent authorities com-



pletely ignored that rule and failed to proceed with the applicant's criminal complaint.

57. The above analysis shows firstly that the relevant State authorities decided not to prosecute the alleged perpetrators of an act of violence against the applicant. Furthermore, the relevant authorities did not allow the applicant's attempts at a private prosecution. Lastly, as to the Government's contention that adequate protection was given to the applicant in the minor-offences proceedings, the Court notes that those proceedings were terminated owing to statutory limitation and were thus concluded without any final decision on the attackers' guilt. In view of these findings, the Court holds the view that the decisions of the national authorities in this case reveal inefficiency and a failure to act on the part of the Croatian judicial authorities.

58. In the Court's view, the impugned practices in the circumstances of the present case did not provide adequate protection to the applicant against an attack on her physical integrity and showed that the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.

**No right to join a prosecution as a civil party**

☰ *Ernst and others v. Belgium*, 33400/96, 15 July 2003

49. La Cour relève que tant la chambre du conseil du tribunal de première instance de Bruxelles que la Cour de cassation étaient appelées à statuer sur le règlement de la procédure et que les requérants ont eu accès à la Cour de cassation seulement pour entendre déclarer irrecevable leur constitution de partie civile au motif qu'elle était dirigée contre un magistrat bénéficiant du privilège de juridiction ...

54. A cet égard, la Cour attache de l'importance au fait qu'en droit belge, la constitution de partie civile entre les mains du juge d'instruction est un des modes d'exercice de l'action civile et que les victimes disposent en principe d'autres voies pour revendiquer leurs droits civils. En l'espèce, dans la mesure où leur plainte était dirigée contre d'autres personnes que des magistrats, ils auraient pu intenter une action civile contre ces personnes devant le tribunal civil.

Pour ce qui est d'une action civile contre un magistrat, elle semble être subordonnée aux conditions restrictives que le Code judiciaire prévoit pour la « prise à partie » d'un magistrat (articles 1140 et 1147). Il s'agit d'un moyen extraordinaire, qui ne peut être utilisé que dans des cas exceptionnels. La Cour doute qu'il eût pu être utilisé en l'espèce ; elle constate que le Gouvernement, dans ses mémoires, n'y a pas consacré une attention particulière.

55. Si les requérants n'ont pas tenté une action civile contre des individus, ils ont par contre, parallèlement à leur constitution de partie civile, engagé dès le 21 novembre 1995 une action en dommages et intérêts contre l'Etat belge devant le tribunal civil à raison des mêmes faits que ceux invoqués dans leur plainte avec constitution de partie civile ...; cette procédure est toujours pendante. Plus fondamentalement, les faits démontrent que l'irrecevabilité de la constitution civile des requérants et le classement sans suite de leur plainte par le procureur général près la cour d'appel n'ont pas eu pour conséquence de les priver de toute action en réparation.

56. Dans ces conditions, la Cour estime que, se limitant à reconnaître les spécificités liées au privilège de juridiction, les restrictions apportées au droit d'accès n'ont pas porté atteinte à la substance même de leur droit à un tribunal ou qu'elles aient été disproportionnées sous l'angle de l'article 6 §1 de la Convention.

☞ *Sottani v. Italy* (dec.), 26775/02, 24 February 2005

2. The applicant also complained under Article 6 §1 and Article 13 of the Convention that the public prosecutor had failed to order a judicial autopsy during the initial investigation ... Whilst it is admittedly true that under Italian law injured parties cannot join the proceedings as a civil party until the preliminary hearing ..., at the preliminary investigation stage they can exercise the rights and powers expressly recognised by law ... Those rights include, by way of example, the possibility of requesting that the prosecutor apply to the investigating judge for the immediate production of evidence ... and the right to appoint a statutory representative for the exercise of the rights and powers enjoyed by the injured party ... Moreover, the exercise of those rights may prove to be essential for effective participation in the proceedings as a civil party, especially where, as in the instant case, certain evidence is likely to deteriorate over time and will no longer be obtainable at later stages in the proceedings. In addition, the injured party is entitled to submit pleadings at all stages of the proceedings and, except in cassation proceedings, may request the inclusion of evidence ...

Accordingly, the Court considers that, in view of the foregoing, Article 6 §1 of the Convention is applicable in the present case.

However ... the applicant should have requested that the public prosecutor apply to the investigating judge for the immediate production of evidence, namely a judicial autopsy. As the applicant failed to make use of the remedy available to him under domestic law, the Court considers that this part of the application must be rejected for failure to exhaust domestic remedies ...

**Ability to participate in the investigation**

☰ *Menet v. France*, 39553/02, 14 June 2005

48. En l'espèce, la Cour note que le requérant, qui n'a jamais été représenté par un avocat ... n'a eu aucune possibilité de consulter les pièces du dossier. Elle reconnaît, en conséquence, que la présentation de sa cause aux juridictions internes a pu être affectée par la limitation de l'accès au dossier de l'instruction aux avocats.

49. Toutefois, la Cour relève qu'en droit français, les accusés et les parties civiles, en tant que personnes privées, ne sont pas soumises au secret professionnel, à la différence des avocats. Or, le fait que l'accès au dossier de l'instruction est réservé aux avocats, soit directement, soit par leur intermédiaire, et qu'en conséquence le requérant n'a pu le consulter, découle précisément de la nécessité de préserver le caractère secret de l'instruction.

50. La Cour rappelle que le caractère secret de la procédure d'instruction peut se justifier par des raisons relatives à la protection de la vie privée des parties au procès et aux intérêts de la justice, au sens de la deuxième phrase de l'article 6 § 1 de la Convention et que, si cet article peut jouer un rôle avant la saisine du juge du fond, les modalités de son application durant l'instruction dépendent des particularités de la procédure et des circonstances de la cause ...

52. Eu égard à l'ensemble des circonstances et compte tenu des intérêts en jeu, la Cour estime que la restriction apportée aux droits du requérant n'a pas apporté une atteinte excessive à son droit à un procès équitable.

**Discontinuance and acquittal as a determination of a civil right**

☰ *Cordova v. Italy (No. 1)*, 40877/98, 30 January 2003

49. In the present case, the Court notes that the applicant, considering himself defamed by Mr Cossiga's behaviour, had lodged a complaint against him and had joined the subsequent criminal proceedings as a civil party. From that moment, those proceedings covered a civil right – namely the right to the protection of his reputation – to which the applicant could, on arguable grounds, claim to be entitled ....

50. The Court notes further that, by its resolution of 2 July 1997, the Senate declared that Mr Cossiga's behaviour was covered by the immunity provided for in Article 68 §1 of the Constitution ..., so making it impossible for any criminal or civil proceedings aimed at establishing his liability or at securing reparation for the damage suffered to be continued ...

63. The Court takes the view that the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed ...

64. The Court therefore considers that in this case the decisions that Mr Cossiga had no case to answer and that no further proceedings could be brought to secure the protection of the applicant's reputation did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals.

65. The Court also attaches some significance to the fact that the Senate's resolution of 2 July 1997 left the applicant with no reasonable alternative means of effectively protecting his Convention rights ...

66. In the light of the foregoing, the Court finds that there has been a violation of the applicant's right of access to a court guaranteed by Article 6 §1 of the Convention.

▬ *Gorou v. Greece (No. 2)* [GC], 12686/03, 20 March 2009

38. ... the Court notes that, when an acquittal has been decided, under domestic law the civil party is not, in principle, entitled to appeal directly on points of law or to seek redress from the public prosecutor at the Court of Cassation. The Court has nevertheless acknowledged that the existence of an established judicial practice cannot be disregarded in this case and that, in view of the specific features of the applicant's request to the public prosecutor at the Court of Cassation, Article 6 § 1 of the Convention is applicable. That same practice should be taken into account in assessing the extent of the reasoning to be given by the public prosecutor in his reply.

39. The Court has already observed that the public prosecutor is accustomed to responding, albeit in a summary manner, to requests from the civil party to appeal on points of law. In practice, the civil party draws the public prosecutor's attention to certain specific circumstances of the case, while the prosecutor remains free to take his decision after weighing up the arguments submitted.

40. Moreover, it should be noted that, under Article 506 of the Code of Criminal Procedure, a "positive" decision by a public prosecutor is not addressed to the civil party but gives rise to the prosecutor's own appeal on points of law. Similarly, a "negative" decision means that the public prosecutor declines to lodge an appeal on points of law himself ...

41. Lastly, the Court observes that, as regards the preliminary procedure for the examination and admission of appeals on points of law by an organ operating within the Court of Cassation, it has previously acknowledged that an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no pros-

pects of success, without further ... The Court considers that the same principle may apply in the case of a public prosecutor at the Court of Cassation who is requested by the civil party to lodge an appeal on points of law in his own name.

42. To sum up, the handwritten note placed on the applicant's request simply gives information about the discretionary decision taken by the public prosecutor. Seen from that perspective, and having regard to the existing judicial practice, the public prosecutor does not have a duty to justify his response but only to give a response to the civil party. To demand more detailed reasoning would place on the public prosecutor at the Court of Cassation an additional burden that is not imposed by the nature of the civil party's request for him to appeal on points of law against an acquittal. The Court therefore considers that, by indicating that "[t]here [were] no legal or well-founded grounds of appeal to the Court of Cassation", the public prosecutor gave sufficient reasons for his decision to reject the request.

Having regard to the foregoing, there has been no violation of Article 6 §1 of the Convention.

**Restriction on participation in the proceedings**

☰ *Berger v. France*, 48221/99, 3 December 2002

35. ... Under the criminal law, an appeal to the Court of Cassation is open to any party to criminal proceedings who has an interest in appealing on a point of law. Although the admissibility of an appeal by the civil party is – other than in the seven exhaustively listed situations – conditional on the existence of an appeal by the prosecution, this limitation derives from the nature of judgments given by the investigation divisions and the role accorded to civil actions in criminal proceedings. The Court agrees with the Government that civil parties should not have an unlimited right to appeal to the Court of Cassation against judgments discontinuing the proceedings ....

38. ... the applicant's right to a court as guaranteed by Article 6 §1 of the Convention was not infringed as a result of the conditions imposed on her for the admissibility of her appeal to the Court of Cassation. Having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution, the Court cannot accept that the equality-of-arms principle has been infringed in the instant case. In that connection the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.

☰ *Chesnay v. France*, 56588/00, 12 October 2004

20. Le requérant se plaint de ce que ni lui-même ni son avocat aux Conseils n'ont reçu communication du rapport du conseiller rapporteur avant l'audience, alors que ce document avait été fourni à l'avocat général.

21. La Cour rappelle que la question de l'absence de communication du rapport du conseiller rapporteur au justiciable ne soulève un problème au regard de l'article 6 que dans la mesure où ledit rapport a été communiqué à l'avocat général avant l'audience ... Tel est le cas en l'espèce.

22. La Cour rappelle également que le rapport se composait de deux volets : le premier contient un exposé des faits, de la procédure et des moyens de cassation, et le second, une analyse juridique de l'affaire et un avis sur le mérite du pourvoi ... De l'avis de la Cour, si le second volet du rapport, destiné au délibéré, peut (à l'instar du projet d'arrêt) rester confidentiel tant à l'égard des parties que de l'avocat général, le premier volet, non couvert par le secret du délibéré, doit être communiqué, le cas échéant, dans les mêmes conditions aux parties et à l'avocat général.

23. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

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

125. ... A reading of the decisions given in these proceedings ... shows that the case was not a particularly complex one. In addition, the applicant hardly contributed to delaying the outcome of the proceedings by challenging in the Bordeaux indictments division the decision finding no case to answer and by requesting that division to order a further inquiry ... Responsibility for the delays found lies essentially with the judicial authorities. In particular, the Bastia public prosecutor allowed more than a year and a half to elapse before asking the Court of Cassation to designate the competent investigating authority ... The Bordeaux investigating judge heard Mr Tomasi only once and does not seem to have carried out any investigative measure between March and September 1985, and then between January 1986 and January 1987 ... There has accordingly been a violation of Article 6 para. 1 ...

☰ *Calvelli and Ciglio v. Italy* [GC], 32967/96, 17 January 2002

65. In the instant case the Court notes that the proceedings concerned were undeniably complex. Further, although after the applicants were initially joined as civil parties to the proceedings on 7 July 1989 the proceedings at first instance were affected by regrettable delays (notably, between E.C.'s committal on 12 June 1991 and the first hearing – a year later, on 2 July 1992 ...), there

**Non-disclosure of submissions**

**Excessive delay**

were no further significant periods of inactivity attributable to the authorities (apart from the adjournment of the first hearing, which was caused by a lawyers' strike – ...).

66. In those circumstances the Court considers that a period of six years, three months and ten days for proceedings before four levels of jurisdiction cannot be regarded as unreasonable.

67. Consequently, there has been no violation of Article 6 §1 of the Convention

## *Trial in absentia*

### **Waiver of right to participate**

☞ *Colozza v. Italy*, 9024/80, 12 February 1985

28. ..., the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption ..., inferred from the status of "latitante" which they attributed to Mr Colozza that there had been such a waiver.

In the Court's view, this presumption did not provide a sufficient basis. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General's records (via Fonteiana), yet it was known that he was no longer living there ... The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor's office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr Colozza's new address ...; it was thus possible to locate him even though – as the Government mentioned by way of justification – no databank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 ... are enjoyed in an effective manner ...

In conclusion, the material before the Court does not disclose that Mr Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question.

☞ *Somogyi v. Italy*, 67972/01, 18 May 2004

70. ... the applicant repeatedly challenged the authenticity of the signature attributed to him, which was the only evidence capable of proving that the defendant had been informed that proceedings had been instituted against him. It could not be considered that the applicant's allegations were *prima facie* without foundation, particularly in view of the difference between the signatures he produced and the one on the return slip acknowledging receipt and the difference between the applicant's forename (Tamas) and that of the person who signed the slip (Thamas). In addition, the mistakes in the address were such as to raise serious doubts about the place to which the letter had been delivered.

71. In response to the applicant's allegations, the Italian authorities dismissed all the applicant's attempts to seek a domestic remedy and refused to reopen the proceedings or the time allowed for an appeal, without examining the question which, in the Court's view, lay at the heart of the case, namely the identity of the person who had signed the return slip. In particular, no investigation was ordered to look into the disputed facts and, despite the applicant's repeated requests, there was no comparison of the signatures by means of expert handwriting analysis.

72. The Court considers that, in view of the prominent place held in a democratic society by the right to a fair trial ... Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit ...

73. In the instant case, however, the Bologna Court of Appeal and the Court of Cassation did not make any such check, thereby depriving the applicant of the possibility of remedying, if that should prove necessary, a situation contrary to the requirements of the Convention. Thus there was no close scrutiny to determine whether, beyond a reasonable doubt, the convicted man had unequivocally waived the right to appear at his trial.

74. It follows that in the instant case the means employed by the national authorities did not achieve the result required by Article 6 of the Convention.

75. Lastly, as regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the ac-



cused's rights, as is moreover clear from Article 6 §3 (a) of the Convention; vague and informal knowledge cannot suffice ...

☞ *Mariani v. France*, 43640/98, 31 March 2005

41. En l'espèce ... M. Mariani n'a pas refusé d'être présent. Il était dans l'incapacité matérielle de se présenter en raison de la peine qu'il purgeait alors en Italie. A cet égard, la Cour note que les autorités françaises, nonobstant l'indication de l'arrêt de la cour d'assises de Paris selon laquelle l'intéressé était déclaré en fuite, avaient connaissance de la situation pénale du requérant, l'arrêt de renvoi devant la cour d'assises lui ayant été précédemment notifié sur son lieu de détention ...

42. ... En conclusion, il y a eu violation de l'article 6 §§ 1 et 3 c), d) et e) combinés de la Convention.

### Legal representation

☞ *Van Geyselhem v. Belgium* [GC], 26103/95, 21 January 1999

34. ... The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended. The Court notes that Article 185 § 3 of the Code of Criminal Procedure ... provides that in any event the Criminal Court may order an accused to attend and that no appeal lies against such a decision.

35. ... Even if Mrs Van Geyselhem did have several opportunities of defending herself, it was the Brussels Court of Appeal's duty to allow her counsel – who attended the hearing – to defend her, even in her absence.

That was particularly true in this case since the defence which Mr Verstraeten intended to put forward concerned a point of law ... Mr Verstraeten intended to plead statutory limitation, an issue which the Court has described as crucial ... Even if, as the Government maintained, the Court of Appeal must have examined of its own motion the issue of statutory limitation, the fact remains that counsel's assistance is indispensable for resolving conflicts and his role is necessary in order for the rights of the defence to be exercised. Furthermore, it does not appear from the judgment of 4 October 1993 ... that any ruling was given on the issue.

36. In conclusion, there has been a violation of Article 6 §1 taken together with Article 6 §3 (c) of the Convention.

☞ *Krombach v. France*, 29731/96, 13 February 2001

90. In the instant case, the Court observes that the wording of Article 630 of the French Code of Criminal Procedure makes the bar on lawyers representing an accused being tried *in absentia* absolute and that an assize court trying such an accused has no possibility of derogating from that rule.

The Court considers, however, that it should have been for the Assize Court, which was sitting without a jury, to afford the applicant's lawyers, who were present at the hearing, an opportunity to put forward the defence case even in the applicant's absence as, in the instant case, the argument they intended to rely on concerned a point of law ..., namely an objection on public-policy grounds based on an estoppel *per rem judicatam* and the *non bis in idem* rule ... The Government have not suggested that the Assize Court would have had no jurisdiction to examine the issue had it given the applicant's lawyers permission to plead it. Lastly, the Court observes that the applicant's lawyers were not given permission to represent their clients at the hearing before the Assize Court on the civil claims. To penalise the applicant's failure to appear by such an absolute bar on any defence appears manifestly disproportionate.

91. In conclusion, there has been a violation of Article 6 §1 of the Convention taken in conjunction with Article 6 §3 (c).

☞ *Medenica v. Switzerland*, 20491/92, 14 June 2001

**Need for retrial**

57. It is true that Article 331 of the Geneva Code of Procedure in principle allows persons convicted *in absentia* to have the proceedings set aside and to secure a rehearing of both the factual and the legal issues in the case. However, in the instant case, the Canton of Geneva Court of Justice dismissed the applicant's application to have the conviction quashed on the grounds that he had failed to show good cause for his absence, as required by that provision, and that there was nothing in the case file to warrant finding that he had been absent for reasons beyond his control ... That judgment was upheld by the Geneva Court of Cassation and the Federal Court. In the Court's view, there is nothing to suggest that the Swiss courts acted arbitrarily or relied on manifestly erroneous premisses ...

58. ..., the Court likewise considers that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the Geneva Assize Court. It refers, in particular, to the opinion expressed by the Federal Court in its judgment of 23 December 1991 that the applicant had misled the American court by making equivocal and even knowingly inaccurate statements – notably about Swiss procedure – with the aim

of securing a decision that would make it impossible for him to attend his trial.

59. In the light of the foregoing, and since the instant case did not concern a defendant who had not received the summons to appear ... or who had been denied the assistance of a lawyer ..., the Court considers that, regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant's conviction *in absentia* and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty.

▣ *Sejdovic v. Italy* [GC], 56581/00, 1 March 2006

100. ... The establishment of the applicant's guilt according to law was the purpose of criminal proceedings which, at the time when the applicant was deemed to be a fugitive, were at the preliminary investigation stage.

101. In those circumstances, the Court considers that it has not been shown that the applicant had sufficient knowledge of his prosecution and of the charges against him. It is therefore unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court ...

103. In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time ... the applicant would have encountered serious difficulties in satisfying one of the legal preconditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition ... Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected ... Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 §2 of the CCP ...

104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant

would have the opportunity of appearing at a new trial to present his defence ...

105. In the light of the foregoing, the Court considers that the applicant, who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights.

106. There has therefore been a violation of Article 6 of the Convention in the instant case.

☞ *Stoichkov v. Bulgaria*, 9808/02, 24 March 2005

57. In the instant case the applicant was convicted *in absentia* ... There is no indication – and it has not been argued by the respondent Government – that he has waived, either expressly or tacitly, his right to appear and defend himself. Therefore, in order for the proceedings leading to his conviction to not represent a “denial of justice”, he should have had the opportunity to have them reopened and the merits of the rape charges against him determined in his presence. As of 1 January 2000 Bulgarian law expressly provides for such a possibility ... However, when the applicant requested reopening on the basis of the new Article 362a of the CCP in February 2001 – approximately one year after his arrest –, the Supreme Court of Cassation refused, essentially on the ground that the case-file of the original proceedings had been destroyed in 1997, which, in its view, rendered a rehearing impossible in practice ... In this connection, it is noteworthy that the applicant subsequently requested the restoration of the case-file by the Pernik District Court, but has apparently received no reply to his request .... The applicant was thus deprived of the possibility to obtain from a court, which has heard him, a fresh determination of the merits of the charges on which he was convicted.

58. The Court therefore considers that the criminal proceedings against the applicant, coupled with the impossibility to obtain a fresh determination of the charges against him from a court which had heard him, were manifestly contrary to the principles embodied in Article 6. Therefore, while his initial deprivation of liberty in February 2000 may be deemed justified under Article 5 §1 (a), having been effected for the purpose of enforcing a lawful sentence, it ceased to be so after 19 July 2001, when the Supreme Court of Cassation refused reopening of the proceedings. This conclusion makes it unnecessary to determine whether the applicant was imprisoned despite the expiry of the limitation period for the enforcement of his sentence.

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

See also below “Right of appeal” on page 307.

### Absence from sentencing

☞ *B. v. France*, 10291/83, 12 May 1986, DR47, 59

... if an accused person is sentenced *in absentia* without his express consent and is later able, on learning of the sentence, to have proceedings on the merits re-opened, the right to a hearing, and thus the concrete rights of the defence, have not be weakened in a way that has the result of depriving such rights of any practical effect. The Commission considers that an issue of this kind would arise if it were shown, in the circumstances of the case, that the accused sentenced *in absentia* had at no stage been aware of the proceedings against him and had thus been prevented from participating in the investigatory phase of those proceedings. This was not the case in this instance, and the question does not arise since, as the applicant himself admits, he participated in all the investigatory proceedings against him. It appears from Section 627 of the Code of Criminal Procedure, taken in conjunction with Section 639 of the same Code, that, although re-trial after conviction *in absentia* automatically annuls the sentence, the proceedings up to the decision to commit for trial remain valid. In conclusion, having regard to the circumstances of the case, and particularly both the fact that the applicant participated in the investigatory proceedings and refused to accept notification of the decision committing him for trial, the Commission takes the view that the application must be rejected as being manifestly ill-founded ...

## Judgment

### Conviction

*Need for reasons*

☞ *Papon v. France* (dec.), 54210/00, 15 November 2001

6. ... The requirement that reasons must be given must also accommodate any unusual procedural features, particularly in assize courts, where the jurors are not required to give reasons for their personal convictions.

The Court notes that in the instant case the Assize Court referred in its judgment to the answers which the jury had given to each of the 768 questions put by the President of the Assize Court and also to the description of the facts declared to have been established and to the Articles of the Criminal Code which had been applied. Although the jury could answer only “yes” or “no” to each of the questions put by the President, those questions formed a framework on which the jury’s decision was based. The Court considers that the precision of those questions sufficiently offsets the fact that no reasons are given for the jury’s answers.

The Court accordingly considers that sufficient reasons were given for the Assize Court's judgment for the purposes of Article 6 §1 of the Convention.

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

92. ... the Court considers that the applicant did not have the benefit of fair proceedings in so far as the domestic courts gave no reasoned answer as to why the Kuybyshevsky District Court of Donetsk had originally found no evidence to convict the applicant of the offences with which he was charged and remitted the case for additional investigation on 7 March 2000 and yet, on 6 July 2000, found the applicant guilty of interfering with voters' rights. The lack of a reasoned decision also hindered the applicant from raising these issues at the appeal stage ...

▮ *Boldea v. Romania*, 19997/02, 15 February 2007

31. La Cour note que le tribunal de première instance de Timișoara a condamné le requérant au paiement d'une amende administrative, après avoir établi les faits et estimé que l'élément intentionnel et le caractère public des faits étaient bien remplis en la cause. Toutefois, le tribunal n'a fait aucune référence concrète aux éléments de fait qui auraient pu justifier la conclusion visant la culpabilité du requérant et le caractère public des faits retenus. Il s'est borné à affirmer que ces conditions étaient remplies en l'espèce.

32. ... dans la présente affaire, la Cour note que le tribunal de première instance n'a pas procédé à l'interprétation de tous les éléments constitutifs d'une infraction et qu'il n'a pas non plus analysé les preuves versées par le requérant, ce qui lui eût permis, le cas échéant, de façon motivée, celles qu'il n'aurait pas jugées pertinentes.

33. Qui plus est, le tribunal qui s'est prononcé sur le recours du requérant n'a nullement répondu aux motifs de ce recours, tirés, en particulier, de l'absence de motivation du jugement rendu en première instance. S'il est vrai que l'obligation de motiver leurs décisions que l'article 6 § 1 impose aux tribunaux ne peut se comprendre comme exigeant une réponse détaillée à chaque argument ... force est de constater qu'en l'espèce le tribunal départemental de Timiș n'a fait que renvoyer aux considérants du jugement du tribunal de première instance. Même si cela peut constituer une motivation par voie d'incorporation des motifs du tribunal inférieur ..., il aurait fallu une décision motivée de manière détaillée et complète du tribunal de première instance pour pouvoir qualifier d'équitable la procédure engagée à l'encontre du requérant. Or, en l'espèce, comme déjà constaté ci-dessus, cela fait défaut.

34. Ces éléments suffisent à la Cour pour conclure que le requérant est fondé à soutenir que les décisions du tribunal de première instance de Timișoara et du tribunal départemental de Timiș n'étaient pas suffisamment motivées et que sa cause portant sur sa condamnation au paiement d'une amende administrative n'a pas été entendue équitablement.

▮ *Gradinar v. Moldova*, 7170/02, 8 April 2008

109. In the present case, although G. died before the re-examination of the case against him, he was found guilty of the crime with which he had been charged. The Court has serious reservations in respect of a legal system allowing the trial and conviction of deceased persons, given the obvious inability of such persons to defend themselves. However, the very special circumstances of the case include a request by the applicant, as the deceased person's relative and legal representative, to continue the proceedings in order to prove his innocence ...

111. The Court notes that a number of findings of the Chișinău Regional Court were not contradicted by the findings of the higher courts and that, accordingly, they must be considered as established facts ... These included the fact that G. and the other accused were arrested and detained on the basis of a fabricated administrative offence, during which period of detention they were questioned and made self-incriminating statements in the absence of any procedural safeguards ... There was no response to the finding that G. had unlawfully been shown the video recording of D.C.'s statement at the crime scene ... in order to obtain consistent statements by all the accused.

112. The Court further notes that the higher courts did not deal with the finding of the lower court that G. and the other co-accused had an alibi for the presumed time of the crime ..., and that a number of serious procedural violations made unreliable most of the expert reports ...

113. The higher courts also relied on the many witness statements in G.'s case. However, the Court observes that no comment was made on the finding by the lower court that some of those statements were fabricated by the police ...

114. The Court concludes that while accepting as "decisive evidence" ... the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect.

115. In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting G. and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention.

116. The Court recalls its finding that the proceedings against G. concerned directly the applicant's own rights ... It concludes that G.'s conviction, in the absence of sufficient reasons, necessarily breached the applicant's right to a fair trial.

*Further proceedings on same facts*

☒ *Sergey Zolotukhin v. Russia* [GC], 14939/03, 10 February 2009

70. The body of case-law that has been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrates the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same.

71. The first approach, which focuses on the "same conduct" on the applicant's part irrespective of the classification in law given to that conduct (*idem factum*), is exemplified in the *Gradinger* judgment ... although the designation, nature and purpose of the two offences were different, there had been a breach of Article 4 of Protocol No. 7 in so far as both decisions had been based on the same conduct by the applicant ...

72. The second approach also proceeds from the premise that the conduct by the defendant which gave rise to prosecution is the same, but posits that the same conduct may constitute several offences (*concoure idéal d'infractions*) which may be tried in separate proceedings. ... in the case of *Oliveira* ... the facts ... were a typical example of a single act constituting *various* offences, whereas Article 4 of Protocol No. 7 only prohibited people from being tried twice for the *same* offence. In the Court's view, although it would have been more consistent with the principle of the proper administration of justice if the sentence in respect of both offences had been passed by the same court in a single set of proceedings, the fact that two sets of proceedings were at issue in the case in question was not decisive. The fact that separate offences, even where they were all part of a single criminal act, were tried by different courts did not give rise to a breach of Article 4 of Protocol No. 7, especially where the penalties were not cumulative ...

73. The third approach puts the emphasis on the "essential elements" of the two offences. In *Franz Fischer v. Austria* (no. 37950/97 ...), the Court confirmed that Article 4 of Protocol No. 7 tol-



erated prosecution for several offences arising out of a single criminal act (*concours idéal d'infractions*). However, since it would be incompatible with this provision if an applicant could be tried or punished again for offences which were merely “nominally different”, the Court held that it should additionally examine whether or not such offences had the same “essential elements” ...

78. The Court considers that the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence ...

79. An analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety of terms in which it is couched. ... The difference between the terms “same acts” or “same cause” (“*mêmes faits*”) on the one hand and the term “[same] offence” (“*[même] infraction*”) on the other was held by the Court of Justice of the European Communities and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act ...

80. The Court considers that the use of the word “offence” in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach ...

81. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention ...

82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.

83. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first “penal procedure” was

concluded and the list of charges levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal ...

84. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings ...

97. The facts that gave rise to the administrative charge against the applicant related to a breach of public order in the form of swearing at the police officials Ms Y. and Captain S. and pushing the latter away. The same facts formed the central element of the charge under Article 213 of the Criminal Code, according to which the applicant had breached public order by uttering obscenities, threatening Captain S. with violence and offering resistance to him. Thus, the facts in the two sets of proceedings differed in only one element, namely the threat of violence, which had not been mentioned in the first proceedings. Accordingly, the Court finds that the criminal charge under Article 213 § 2 (b) embraced the facts of the offence under Article 158 of the Code of Administrative Offences in their entirety and that, conversely, the offence of "minor disorderly acts" did not contain any elements not contained in the offence of "disorderly acts". The facts of the two offences must therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7. As the Court has emphasised above, the facts of the two offences serve as its sole point of comparison, and the Government's argument that they were distinct on account of the seriousness of the penalty they entailed is therefore of no relevance for its inquiry ...

109. In the instant case the administrative judgment of 4 January 2002 was printed on a standard form which indicated that no appeal lay against it and that it took immediate effect ... However, even assuming that it was amenable to an appeal within ten days of its delivery as the Government claimed, it acquired the force of *res judicata* after the expiry of that time-limit. No further

ordinary remedies were available to the parties. The administrative judgment was therefore “final” within the autonomous meaning of the Convention term by 15 January 2002, while the criminal proceedings began on 23 January 2002 ...

110. ... the Court reiterates that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice ... Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence ...

111. The applicant in the present case was finally convicted of minor disorderly acts and served the penalty imposed on him. He was afterwards charged with disorderly acts and remanded in custody. The proceedings continued for more than ten months, during which time the applicant had to participate in the investigation and stand trial. Accordingly, the fact that he was eventually acquitted of that charge has no bearing on his claim that he was prosecuted and tried on that charge for a second time ...

116. Turning to the facts of the present case, the Court finds no indication that the Russian authorities at any point in the proceedings acknowledged a breach of the *non bis in idem* principle. The applicant’s acquittal under Article 213 §2 of the Criminal Code was not based on the fact that he had been tried for the same actions under the Code of Administrative Offences. The reference to the administrative proceedings of 4 January 2002 in the text of the judgment of 2 December 2002 was merely a statement that those proceedings had taken place. On the other hand, it emerges clearly from the text of the judgment that the District Court had examined the evidence against the applicant and found that it failed to meet the criminal standard of proof. Accordingly, his acquittal was founded on a substantive rather than a procedural ground ...

121. In the light of the foregoing, the Court considers that the proceedings instituted against the applicant under Article 213 §2 (b) of the Criminal Code concerned essentially the same offence as that of which he had already been convicted by a final decision under Article 158 of the Code of Administrative Offences.

122. There has therefore been a violation of Article 4 of Protocol No. 7.

## Discontinuance

▣ *Panteleyenko v. Ukraine*, 11901/02, 29 June 2006

70. ... the court decisions terminating the criminal proceedings against the applicant were couched in terms which left no doubt

as to their view that the applicant had committed the offence with which he was charged. In particular, the Desniansky Court indicated that the investigation case file contained sufficient evidence to establish that the applicant had forged a notarial document and had wittingly carried out an invalid notarial action, its only reason for discontinuing the proceedings being the impracticality of prosecuting an insignificant offence ... In the Court's view, the language employed by the Desniansky Court was in itself sufficient to constitute a breach of the presumption of innocence. The fact that the applicant's compensation claim was rejected on the basis of the findings reached in the criminal proceedings merely exacerbated this situation. Although the Desniansky Court reached its conclusion after a hearing held in the presence of the applicant, the proceedings before it were not criminal in nature and they lacked a number of key elements normally pertaining to a criminal trial. In that respect, it cannot be concluded that the proceedings before that court resulted, or were intended to result in the applicant being "proved guilty according to law". In these circumstances, the Court considers that the reasons given by the Desniansky Court, as upheld on appeal, combined with the rejection of the applicant's compensation claim on the basis of those same reasons, constituted an infringement of the presumption of innocence.

☰ *Marziano v. Italy*, 45313/99, 28 November 2002

29. ... Dans ce contexte, la Cour note que, tout en arrivant à la même conclusion de classement, le juge des investigations préliminaires n'a pas partagé l'analyse juridique soumise par le parquet. En particulier, il n'a pas partagé l'appréciation que celui-ci avait faite de l'audition de X et des différentes déclarations que X avait faites pendant les poursuites pénales en question et les procédures civiles parallèles. Par conséquent, il était tout à fait raisonnable que le juge des investigations préliminaires – qui se devait de rendre une décision motivée – explique pourquoi, tout en se rattachant aux réquisitions du parquet, il décidait de clore la procédure. Étant donné que la divergence avec le parquet portait sur les faits et sur leur évaluation plutôt que sur leur appréciation juridique, il était normal que le juge des investigations préliminaires indique ces faits dans sa décision.

Ce faisant, le juge des investigations préliminaires a émis un pronostic – d'ailleurs prévu, comme l'a indiqué le Gouvernement, par l'article 125 des dispositions d'application du code de procédure pénale – sur le résultat probable auquel aurait pu aboutir la procédure si l'affaire avait été portée devant le juge du siège. Le juge s'est limité à relever que, face à l'existence de raisons plausibles de soupçonner l'intéressé d'avoir commis l'infraction contestée, d'autres

éléments amenaient à croire que devant un tribunal, l'accusation aurait eu peu de chances de succès. Par ailleurs, il ne s'est pas limité à prendre en considération l'impact que le procès aurait pu avoir sur X, mais il a également fait état du caractère invraisemblable de certains détails donnés par X. Bref, il a mis en exergue que le caractère véridique des déclarations de X pouvait être mis en doute.

30. Cela étant, la Cour constate qu'il appartenait au juge des investigations préliminaires – qui, par ailleurs, était au courant du contentieux existant entre le requérant et son ancienne épouse – de décider, en son âme et conscience, de la manière dont il devait exprimer son opinion eu égard aux tenants et aboutissants du contentieux. Certes, il peut se poser la question de savoir si les affirmations finalement employées étaient d'une nature et d'un degré tels qu'elles pouvaient s'analyser en la formulation d'une culpabilité. Cependant, malgré les termes employés dans l'ordonnance du 17 avril 1998, la Cour estime que cette décision décrivait un « état de suspicion » et ne renfermait pas un constat de culpabilité.

31. Or une distinction doit être faite entre les décisions qui reflètent le sentiment que la personne concernée est coupable et celles qui se bornent à décrire un état de suspicion. Les premières violent la présomption d'innocence, tandis que les deuxièmes ont été à plusieurs reprises considérées comme conformes à l'esprit de l'article 6 de la Convention ...

32. Dans ces circonstances, la Cour ne saurait conclure que la présomption d'innocence a été enfreinte en l'espèce.

## Sentence

📖 *E.K. v. Turkey*, 28496/95, 7 February 2002

54. Pour la Cour, l'interprétation du droit pertinent à laquelle s'est livrée la cour de sûreté de l'Etat pour condamner la requérante lors de la seconde phase de la procédure, confirmée par la Cour de cassation, n'allait pas au-delà de ce que l'on pouvait raisonnablement prévoir dans les circonstances de l'espèce. La Cour conclut que la condamnation de la requérante en vertu de l'article 8 de la loi de 1991 n'a pas méconnu le principe « *nullum crimen sine lege* » consacré à l'article 7 de la Convention.

55. En revanche, la requérante se plaint d'avoir été condamnée à une peine d'emprisonnement en vertu d'une disposition de l'article 8, deuxième alinéa, qui s'applique expressément aux rédacteurs en chef, les éditeurs n'étant quant à eux passibles que d'une amende. A cet égard, le Gouvernement souligne que l'application de l'article 8, deuxième alinéa, aux éditeurs se traduit normalement par une peine plus légère que celle de l'article 8, premier alinéa. S'il se peut qu'il en soit ainsi, il apparaît plutôt que l'article 8, deuxième alinéa, est une *lex specialis* valable pour les rédacteurs en

chef et les éditeurs de publications périodiques et que la condamnation de la requérante en tant qu'éditrice d'une publication non périodique se fondait en l'occurrence sur une interprétation extensive, par analogie, de la règle énoncée dans le même alinéa applicable à la sanction des rédacteurs en chef ...

56. Dans ces conditions, la Cour considère que la condamnation de la requérante à une peine d'emprisonnement était incompatible avec le principe « *nulla poena sine lege* » consacré à l'article 7.

57. Partant, il y a eu violation de l'article 7 de la Convention.

▣ *Böhmer v. Germany*, 37568/97, 3 October 2002

61. The Court first notes that in accordance with section 56 of the Penal Code, the execution of a sentence to imprisonment will be suspended, if it can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence. In making this prognosis, the criminal court has to consider the personality of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his living conditions and the effects which can be expected as a result of the suspension.

62. The Court is prepared to consider ... that the decision to revoke a suspension, to the extent that it is based on an assessment, with the benefit of hindsight, that the convicted person showed that he or she did not fulfil the expectations upon which the suspension was based, may be no more than a correction of the initial prognosis.

63. Section 56f (1) of the Penal Code, however, requires a court to base this assessment on a finding that the person has committed a criminal offence during the period of probation.

64. In this legal situation, the reasoning contained in the Court of Appeal's decision was not limited to assessing the applicant's personality or to describing a "state of suspicion" that the applicant had committed a criminal offence during his period of probation.

65. In the Court's opinion, the Court of Appeal, sitting as court supervising the execution of sentences, had assumed the role of the Hamburg District Court, the competent trial court, and had unequivocally declared that the applicant was guilty of a criminal offence. That is evidenced by the clear phrasing that it had obtained "certainty" that the applicant had committed fraud ... This conclusion is further supported by facts that the Court of Appeal opted for the taking of evidence under section 308 of the Code of Criminal Procedure and proceeded to a substantial and detailed

evaluation of the probative value of the statements made by the witnesses in its decision ....

69. In these circumstances, the Court finds that the Hamburg Court of Appeal's reasoning, in its decision of 14 October 1996, offended the presumption of innocence, which is a specific aspect of the requirements of a fair trial.

☰ *Geerings v. the Netherlands*, 30810/03, 1 March 2007

43. ... Once an accused has properly been proved guilty of that offence, Article 6 §2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention ...

44. The Court has in a number of cases been prepared to treat confiscation proceedings following on from a conviction as part of the sentencing process and therefore as beyond the scope of Article 6 §2 (see, in particular, *Phillips* ... and *Van Offeren v. the Netherlands* (dec.), no. 19581/04 ...). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.

45. The present case has additional features which distinguish it from *Phillips* and *Van Offeren*.

46. Firstly, the Court of Appeal found that the applicant had obtained unlawful benefit from the crimes in question although in the present case he was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.

47. The Court considers that "confiscation" following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, "deprivation of illegally obtained advantage" – is a measure (*maatregel*) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained,

such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 §2 ...

48. Secondly, unlike in the *Phillips* and *Van Offeren* cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.

49. ... Article 6 §2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been "found guilty according to law" ...

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

*Effect*

☞ *Guisset v. France*, 33933/96, 26 September 2000

68. The Court notes that in the instant case, despite acquitting the applicant, the judgment of the Disciplinary Offences (Budget and Finance) Court of 12 April 1995 expressly stated in its reasoning that the applicant had "infringed the Rules governing State Income and Expenditure and [was] liable to the penalties laid down by section 5 of the Law of 25 September 1948, as amended". The Court points out in that connection that the reasoning in a decision forms a whole with and cannot be dissociated from the operative provisions ...

69. Thus, the applicant was considered guilty and liable to the imposition of a fine. Furthermore, the Disciplinary Offences (Budget and Finance) Court expressly dismissed his complaints under the Convention. Accordingly, the fact that he was ultimately exonerated from the penalty to which he was liable cannot, in the particular circumstances in which the offence was committed, be regarded as a remedy for the alleged violation.

70. Consequently, having regard to both the reasoning in and the operative provisions of the judgment of the Disciplinary Offences (Budget and Finance) Court of 12 April 1995, the Court concludes that the applicant has not ceased to be a "victim" within the meaning of Article 34 of the Convention ...

☞ *Vassilios Stavropoulos v. Greece*, 35522/04, 27 September 2007

38. ... Selon la jurisprudence, une fois l'acquittement devenu définitif – même s'il s'agit d'un acquittement au bénéfice du doute conformément à l'article 6 §2 – l'expression des doutes de culpabilité, y compris ceux tirés des motifs de l'acquittement, ne sont pas compatibles avec la présomption d'innocence ...

**Acquittal**



39. La Cour estime qu'en vertu du principe « *in dubio pro reo* », qui constitue une expression particulière du principe de la présomption d'innocence, aucune différence qualitative ne doit exister entre une relaxe faute de preuves et une relaxe résultant d'une constatation de l'innocence de la personne ne faisant aucun doute. En effet, les jugements d'acquiescement ne se différencient pas en fonction des motifs qui sont à chaque fois retenus par le juge pénal. Bien au contraire, dans le cadre de l'article 6 § 2 de la Convention, le dispositif d'un jugement d'acquiescement doit être respecté par toute autre autorité qui se prononce de manière directe ou incidente sur la responsabilité pénale de l'intéressé.

40. En l'occurrence, la Cour observe que les juridictions administratives ont, explicitement et sans aucune réserve, appuyé sur le fait que le requérant avait été acquitté au bénéfice du doute pour justifier leur conclusion que son omission était bien intentionnelle. Ainsi, tant le Conseil d'Etat que la cour administrative d'appel ont utilisé des termes qui outrepassaient le cadre administratif du litige et ne laissaient aucun doute sur l'intention supposée du requérant de ne pas inclure dans sa déclaration tous les biens immobiliers dont il disposait ... Vu ce qui précède, le raisonnement du Conseil de l'Etat et de la cour administrative d'appel se révèle incompatible avec le respect de la présomption d'innocence.

41. Partant, il y a eu violation de l'article 6 § 2 de la Convention.

*Duty of compliance*

📖 *Assanidze v. Georgia* [GC], 71503/01, 8 April 2004

172. In the instant case, the applicant was detained by the Ajarian authorities for the purposes set out in Article 5 §1 (c) from 11 December 1999 onwards, that being the date he was charged in a fresh set of proceedings .... However, that situation ended with his acquittal on 29 January 2001 by the Supreme Court of Georgia, which at the same time ordered his immediate release ... Since then, despite the fact that his case has not been reopened and no further order has been made for his detention, the applicant has remained in custody. Thus, there has been no statutory or judicial basis for the applicant's deprivation of liberty since 29 January 2001. It cannot, therefore, be justified under any sub-paragraph of Article 5 §1 of the Convention ...

174. As the documents in the case file show, the central State authorities themselves pointed out on a number of occasions that there was no basis for the applicant's detention. The central judicial and administrative authorities were forthright in telling the Ajarian authorities that the applicant's deprivation was arbitrary for the purposes of domestic law and Article 5 of the Convention.

However, their numerous reminders and calls for the applicant's release went unanswered ...

175. The Court considers that to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty ... and arbitrary, and runs counter to the fundamental aspects of the rule of law.

176. The Court accordingly finds that since 29 January 2001 the applicant has been arbitrarily detained, in breach of the provisions of Article 5 §1 of the Convention.

*Subsequent civil proceedings*

☞ *Ringvold v. Norway*, 34964/97, 11 February 2003

38. ... the fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence cannot, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being "charged with a criminal offence". Nor can the fact that evidence from the criminal trial is used to determine the civil-law consequences of the act warrant such a characterisation ...

... while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof ...

In the present case the impugned national ruling on compensation, which appeared in a separate judgment from the acquittal, did not state, either expressly or in substance, that all the conditions were fulfilled for holding the applicant criminally liable with respect to the charges of which he had been acquitted ... The ensuing civil proceedings were not incompatible with, and did not "set aside", that acquittal.

39. Furthermore, the purpose of establishing civil liability to pay compensation was, unlike that of establishing criminal liability, primarily to remedy the injury and suffering caused to the victim. The amount of the award – 75 000 Norwegian kroner – could be considered justified on account of the damage caused. It seems clear that neither the purpose of the award nor its size conferred on the measure the character of a criminal sanction for the purposes of Article 6 §2.

40. Against this background, the Court does not find that the compensation claim amounted to the bringing of another "criminal charge" against the applicant after his acquittal.

41. ... The Court reiterates that the outcome of the criminal proceedings was not decisive for the issue of compensation. In this

particular case, the situation was reversed: despite the applicant's acquittal it was legally feasible to award compensation. Regardless of the conclusion reached in the criminal proceedings against the applicant, the compensation case was thus not a direct sequel to the former. In this respect, the present case is clearly distinguishable from those ... where the Court found that the proceedings concerned were a consequence and the concomitant of the criminal proceedings, and that Article 6 §2 was applicable to the former.

42. In sum, the Court concludes that Article 6 §2 was not applicable to the proceedings relating to the compensation claim against the applicant and that this provision has therefore not been violated in the instant case.

*Accuracy of the record*

☰ *Cemalettin Canli v. Turkey*, 22427/04, 18 November 2008

40. The Court has had regard to these Regulations and notes that they set out in detail the circumstances in which the police can keep and forward to other State departments personal information and the fingerprints of persons accused and convicted of criminal offences. Of particular importance for the purposes of the present case, the Regulations authorise the police to keep such information in their records in respect of persons accused of serious offences, including membership of an illegal organisation, that is, the offence with which the applicant was charged in the past but of which he was subsequently cleared in 1990.

41. The Regulations also contain provisions for the correction and revision of the information contained in police records. They oblige the police to include in their records all information regarding the outcome of any criminal proceedings relating to the accusations ...

42. Nevertheless, as pointed out above, not only was the information set out in the report false, but it also omitted any mention of the applicant's acquittal and the discontinuation of the criminal proceedings. Moreover, the decisions rendered in 1990 were not appended to the report when it was submitted to the Ankara court in 2003. These failures, in the opinion of the Court, were contrary to the unambiguous requirements of the Police Regulations and removed a number of substantial procedural safeguards provided by domestic law for the protection of the applicant's rights under Article 8 of the Convention ...

43. Accordingly, the Court finds that the drafting and submission to the Ankara court by the police of the report in question was not "in accordance with the law", within the meaning of Article 8 §2 of the Convention ...

☰ *Z v. Finland*, 22009/93, 25 February 1997

**Access to the court  
record**

111. As regards the complaint that the medical data in issue would become accessible to the public as from 2002, the Court notes that the ten-year limitation on the confidentiality order did not correspond to the wishes or interests of the litigants in the proceedings, all of whom had requested a longer period of confidentiality ...

112. The Court is not persuaded that, by prescribing a period of ten years, the domestic courts attached sufficient weight to the applicant's interests. It must be remembered that, as a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for her private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years is not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 ...

☰ *Craxi v. Italy (No. 2)*, 25337/94, 17 July 2003

75. In the present case the Court recalls that disclosures of a private nature inconsistent with Article 8 of the Convention took place ... It follows that once the transcripts were deposited under the responsibility of the registry, the authorities failed in their obligation to provide safe custody in order to secure the applicant's right to respect for his private life. Also, the Court observes that it does not appear that in the present case an effective inquiry was carried out in order to discover the circumstances in which the journalists had access to the transcripts of the applicant's conversations and, if necessary, to sanction the persons responsible for the shortcomings which had occurred ...

76. ... There has consequently been a violation of Article 8 of the Convention ...

# Appeal

## Appeal

### Right of appeal

☞ *Ross v. the United Kingdom*, 11396/85, 11 December 1986, DR50, 179

3. ... although Article 6 ... does not guarantee an appeal in criminal proceedings, where the opportunity to lodge an appeal in regard to the determination of a criminal charge is provided under domestic law, the guarantees of Article 6 ... continue to apply to the appeal proceedings, since those proceedings form part of the whole proceedings which determine the criminal charge at issue ...

☞ *Krombach v. France*, 29731/96, 13 February 2001

96. The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 §1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right .... This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: "... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court".

97. ... at the material time ... the only available appeal was an appeal on points of law. At first sight, the French rules of criminal procedure therefore appear to comply with Article 2 of Protocol No. 7 ...

98. However, the Court notes that the French declaration regarding the interpretation of the Protocol does not relate to Article 636 of the Code of Criminal Procedure, which expressly provides that persons convicted after trial *in absentia* have no right of appeal to the Court of Cassation. Consequently, the applicant had no “remedy” before a tribunal, within the ordinary meaning of that word, against his conviction, *in absentia*, by a single level of jurisdiction ...

99. The applicant’s complaint in the instant case was that he had no right of appeal to the Court of Cassation against defects in the trial *in absentia* procedure itself. The Court considers that the fact that the accused may purge his or her contempt is not decisive in that connection ..., as although purging the contempt may enable the accused to obtain a full retrial of his case in his presence, the positive obligation thus imposed on the State in the event of an arrest is intended essentially to guarantee adversarial process and compliance with the defence rights of a person accused of a criminal offence.

100. In the present case the applicant wished both to defend the charges on the merits and to raise a preliminary procedural objection. The Court attaches weight to the fact that the applicant was unable to obtain a review, at least by the Court of Cassation, of the lawfulness of the Assize Court’s refusal to allow the defence lawyers to plead ...

By virtue of Articles 630 and 639 of the Code of Criminal Procedure taken together ... the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer ..., and, on the other, was unable to appeal to the Court of Cassation as he was a defendant *in absentia*. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court.

Consequently, there has also been a violation of Article 2 of Protocol No. 7 to the Convention.

▮ *Gurepka v. Ukraine*, 61406/00, 6 September 2005

60. The Court has examined the extraordinary review procedure prescribed by the Code of Administrative Offences. It could only be initiated by a prosecutor or by a motion of the president of the higher court .... Given that this procedure was not directly accessible to a party to the proceedings and did not depend on his or

her motion and arguments, the Court considers that it was not a sufficiently effective remedy for Convention purposes.

61. As to the Government's argument that the decision ordering the applicant's administrative arrest and detention was actually reviewed by a higher court, the Court finds no evidence that the extraordinary appeal lodged by the Prosecutor's Office was initiated upon the applicant's own motion. Moreover, this appeal reflected the position of the Prosecutor's Office, and not of the applicant. During these proceedings the applicant was not given an opportunity to present any arguments, and the issue under consideration was the dispute between the Prosecutor's Office and the court over the competence to impose a sanction on the applicant. The Court considers that the mere fact that the review initiated by the Prosecutor's Office had some positive, albeit temporary, impact on the applicant's situation, namely the suspension of his sentence, was not in itself sufficient to conclude that the extraordinary appeal was an effective remedy which could have satisfied the requirements of Article 2 of Protocol No. 7.

☰ *Greco v. Romania*, 75101/01, 30 November 2006

82. ... Or, en l'occurrence, l'infraction dont le requérant s'était rendu coupable aux yeux des autorités était passible d'une peine d'emprisonnement comprise entre six mois et cinq ans ... Il ne s'agissait donc pas, comme l'indique le Gouvernement, d'une infraction mineure qui aurait justifié qu'il n'y ait qu'un seul degré de juridiction en matière pénale. L'exception au droit à un double degré de juridiction en matière d'infractions mineures, prévue par le paragraphe 2 de l'article précité, n'est donc pas applicable vu les circonstances de l'espèce.

83. ... La seule autorité judiciaire indépendante et impartiale qui s'est donc penchée, en la présente espèce, sur la culpabilité présumée du requérant est le tribunal départemental de Bucarest, dans son arrêt du 25 avril 2000.

84. Or, un éventuel recours du requérant contre ledit arrêt semblait immanquablement voué à l'échec : comme l'admet le Gouvernement, il n'y avait pas, à l'époque, de disposition législative qui régissait les voies de recours dont celui qui a introduit une plainte contre une ordonnance du parquet aurait disposé pour attaquer, le cas échéant, la décision des premiers juges devant une juridiction supérieure ; pour autant que le Gouvernement renvoie aux règles de caractère général, il ressort de toute évidence des pratiques internes pertinentes que les juridictions nationales de contrôle, plus particulièrement la Cour suprême de justice, déclaraient à l'époque irrecevable tout recours contre la décision par laquelle les premiers juges avaient examiné la légalité ou le bien-fondé des actes du procureur ...

85. La Cour relève, certes, que la question du défaut de réglementation nationale des voies de recours contre la décision rendue en première instance par le tribunal compétent pour examiner la plainte contre une ordonnance du procureur est désormais réglée par le nouvel article 278 de la loi n° 281 du 26 juin 2003 ...

86. Compte tenu de la législation et des pratiques nationales pertinentes à l'époque des faits, ainsi que des répercussions que cela a entraîné sur la procédure pénale dirigée contre le requérant, la Cour estime que le requérant a été privé du droit de voir examiner sa cause pénale par deux degrés de juridiction, en violation de l'article 2 du Protocole n° 7.

▬ *Zaicevs v. Latvia*, 65022/01, 31 July 2007

55. Le Gouvernement soutient que l'infraction pour laquelle le requérant a été condamné s'analyse en une « infraction mineure », au sens de l'article 2 § 2. A cet égard, la Cour s'est penchée sur les termes du rapport explicatif au Protocole n° 7, d'où il ressort expressément que, pour décider si une infraction est de caractère mineur, un critère important est la question de savoir si l'infraction est passible d'emprisonnement ou non ... En l'occurrence, l'article 201-39 du code des contraventions administratives rendait la contravention litigieuse passible d'une détention pouvant aller jusqu'à quinze jours. Or, eu égard à l'objectif de l'article 2 et à la nature des garanties qu'il prévoit, la Cour est convaincue qu'une infraction pour laquelle la loi prévoit une peine privative de liberté à titre de sanction principale ne peut pas être qualifiée de « mineure » au sens du paragraphe 2 de cet article. Quant à la qualification de l'infraction en droit national, la Cour a déjà rappelé qu'elle n'a qu'une valeur relative. L'exception invoquée par le Gouvernement n'est donc pas applicable dans la présente affaire.

56. La Cour note enfin que, par son arrêt du 20 juin 2002, la Cour constitutionnelle a déclaré l'article 279, deuxième alinéa, du code des contraventions administratives contraire, entre autres, à l'article 2 du Protocole n° 7, et l'a annulé. Toutefois, ce changement n'affecte en rien la situation du requérant, qui a pleinement subi les effets de la disposition en cause et qui reste donc « victime » de la violation alléguée.

57. Partant, il y a eu violation de l'article 2 du Protocole n° 7.

▬ *Galstyan v. Armenia*, 26986/03, 15 November 2007

124. The Court first notes that the applicant was convicted under the CAO, which prescribes penalties for offences that do not fall within the criminal sphere in the domestic law. This may raise a question as to whether or not the offence of which the applicant was convicted was of a minor character within the



meaning of Article 2 § 2 of Protocol No. 7 and the exception contained in that provision should apply. The Court recalls that the Commission has previously found an offence, such as an “offence against the order in court”, for which a maximum penalty of 10 000 Austrian shillings or, if indispensable for maintaining the order, imprisonment for a period not exceeding eight days was prescribed by the Austrian Code of Criminal Procedure, to be of a “minor character” ... In the present case, the applicant was sentenced to three days of detention. However, Article 172 of the CAO, under which this sentence was imposed, prescribed up to 15 days of detention as a maximum penalty. The Court considers that a penalty of 15 days of imprisonment is sufficiently severe not to be regarded as being of a “minor character” within the meaning of Article 2 §2 of Protocol No. 7.

125. The Court recalls that Contracting States enjoy in principle a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. In certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on that right of review must, by analogy with the right of access to a court embodied in Article 6 §1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right ...

126. The Court is mindful of its finding above that the review procedure prescribed by Article 294 of the CAO does not provide an individual with a clear and accessible right to appeal ... This Article prescribes a power of review by the chairman of a superior court – whether or not upon the individual’s request – which, moreover, lacks any clearly defined procedure or time-limits and consistent application in practice. In the Court’s opinion, such a review possibility cannot be compatible with Article 2 of Protocol No. 7. It follows that the applicant did not have at his disposal an appeal procedure which would satisfy the requirements of this Article.

📖 *Hajiyev v. Azerbaijan*, 5548/03, 16 November 2006

39. The Court considers that the applicant’s understanding of the system must be assessed at the time when he tried to make use of the remedy in question ... the Transitional Law provided for a right to have his case re-examined by “the appellate court or the Supreme Court”. This wording ... could not reasonably give the applicant a clear understanding that his appeal was within the competence of the Supreme Court as a cassation instance, thus bypassing the appellate instance which was ordinarily available to other convicted persons under the new criminal procedure introduced by the new CCrP.

40. The applicant lodged his full appellate complaint on 7 March 2002. Despite the fact that he re-submitted his appeal several times thereafter, it has neither been examined on the merits nor rejected by a formal court decision due to lack of the Court of Appeal's competence to hear the appeal. Moreover, following the applicant's continuous inquiries, he was twice reassured by letters from the Court of Appeal's clerk of 24 October and 27 November 2002 that his case would be examined shortly. Until 31 March 2004, more than two years after the time of lodging his appeal, the applicant had not been specifically informed by the Court of Appeal of the fact that the appeal was within the competence of the Supreme Court, and not the Court of Appeal. On the contrary, he was led to believe that his case was actually pending examination in the Court of Appeal, albeit with a significant delay.

41. The Court further notes that, during the same period, the cases of three other persons, who appeared to be in a comparable position from a procedural standpoint, were actually examined under the appellate procedure by the Court of Appeal pursuant to the same provision of the Transitional Law ...

42. The Court is not convinced by the Government's argument that these three cases were distinguishable from the applicant's case to any significant degree ...

43. In such circumstances, the Court concludes that, given the ambiguity of the Transitional Law and the absence of a clear domestic judicial interpretation of its relevant provisions, as well as the existence of at least three domestic precedents where the reconsideration of cases based on the Transitional Law had been carried out by the Court of Appeal, it was reasonable for the applicant to believe that it was for the Court of Appeal to examine his appellate complaint.

44. Moreover, the Court notes that, according to Articles 391.1 and 391.2 of the CCrP, even if the appeal does not fall under the Court of Appeal's competence or is inadmissible for any other reason (e.g. the expiry of an appeal period), the Court of Appeal must hold a preliminary hearing within 15 days after the receipt of an appellate complaint and determine whether it has competence under the domestic law to examine the appeal. Furthermore, in accordance with Article 391.3 of the CCrP, if the Court of Appeal finds that it has no such competence, it must issue a decision on refusal to admit the appeal for examination and/or refer it to a competent court. Accordingly, even if the Court of Appeal were to find that it had no competence to hear the applicant's appeal on the merits, it was still obliged under the domestic law to hold a preliminary hearing and adopt a decision on the inadmissi-

bility of the appeal within 15 days of receipt of the applicant's appellate complaint.

45. However, for more than two years, the Court of Appeal failed to either deal with the applicant's appeal and institute appellate proceedings or formally reject the appeal due to lack of competence. As noted above, the letter of 31 March 2004 signed by a clerk working in the Court of Appeal does not constitute, under the domestic law, a formal judicial decision of that court.

46. ... At the time of lodging his appeal and during the following period of at least two years, the applicant was not afforded sufficient safeguards to prevent a misunderstanding of the procedure made available to him under the Transitional Law and was led to believe that his case would be examined by the Court of Appeal. In view of the peculiarities of this case, the Court finds that it was for the Court of Appeal to take steps to ensure that the applicant enjoyed effectively the right to which he was entitled under the Transitional Law. However, the Court of Appeal has failed to do so. The Court also finds that, in such circumstances, the applicant could not be required to apply to the Supreme Court.

47. In the light of the foregoing considerations, the Court concludes that the applicant suffered a restriction in his right of access to a court and, therefore, in his right to a fair trial.

Accordingly, the Court dismisses the Government's preliminary objection and holds on the merits that there has been a violation of Article 6 §1.

📖 *Patsouris v. Greece*, 44062/05, 8 January 2009

36. La Cour note d'emblée que, selon les éléments du dossier, la loi n° 3346/2005 bénéficie en principe aux personnes condamnées en première instance ou en appel à des peines allant jusqu'à six mois d'emprisonnement, notamment dans la mesure où ces peines ne sont ni exécutées ni inscrites dans leur casier judiciaire. Sur ce dernier point, la Cour accorde un poids particulier à l'avis exprimé de façon concordante par les procureurs du pays sur l'interdiction d'inscrire au casier judiciaire une condamnation comme celle infligée au requérant (voir paragraphe 26 ci-dessus). De plus, la Cour admet que la nouvelle loi poursuit un but légitime, à savoir l'accélération de la justice pénale moyennant le désengorgement du rôle des tribunaux des affaires moins importantes.

37. S'agissant du cas personnel du requérant, il reste donc à la Cour à déterminer si le classement de son affaire pénale a eu d'autres conséquences négatives, ce qui aurait pu lui conférer un intérêt légitime à voir son affaire jugée à nouveau par un degré de juridiction supérieur.

38. Il est vrai que le maintien, même sous condition, de la possibilité de relancer les poursuites en cas d'une commission de nouvelle infraction ..., crée des doutes quant aux droits de l'accusé. Toutefois, la Cour rappelle que dans des affaires issues d'une requête individuelle, elle n'a point pour tâche de contrôler dans l'abstrait la législation litigieuse ; elle doit se borner autant que possible à examiner les problèmes soulevés par le cas dont on l'a saisie ... Or, en l'occurrence, la Cour relève que le requérant n'a de toute évidence pas commis d'infraction dans les dix-huit mois à partir de la publication de la nouvelle loi et que, dès lors, son affaire pénale ne saurait plus jamais être retirée des archives et lui être opposée.

39. Cela dit, il est exact que la condamnation du requérant en première instance fut aussi prise en compte lors de son procès disciplinaire, actuellement en cours. La Cour note, toutefois, qu'elle n'a pas joué dans le processus décisionnel un rôle exclusif. En effet, elle observe que, pour motiver leurs décisions, les instances disciplinaires se fondèrent sur plusieurs éléments de preuve, notamment les dépositions de plusieurs témoins et des documents, produits lors des débats contradictoires qui se déroulèrent en présence du requérant et de son conseil. Par ailleurs, dans la mesure où le requérant semble affirmer que son sort devant les organes disciplinaires fut un « dommage collatéral » de l'application dans son cas de la loi n° 3346/2005, la Cour estime que cet argument se fonde sur l'hypothèse que le requérant aurait été irrévocablement acquitté par les juridictions pénales supérieures si son affaire n'avait pas été classée après la décision rendue en première instance ; or, même dans ce dernier cas, la Cour relève qu'au vu du droit et de la pratique internes pertinents, il serait toujours loisible aux organes disciplinaires d'infliger une sanction au requérant s'ils estimaient que son comportement avait nui à son honneur et à la réputation de la police hellénique ...

40. Qui plus est, la Cour estime que suivre la proposition du requérant, selon laquelle les instances disciplinaires auraient dû ignorer totalement la procédure pénale dont il fit l'objet, pour pouvoir affirmer que le classement de son affaire était compatible avec l'article 2 du Protocole n° 7, équivaldrait à remettre en cause les compétences des organes disciplinaires, autorisés pourtant par le droit et la pratique internes à prendre en considération la décision du tribunal pénal et à apprécier les faits sur lesquels portaient les poursuites pénales ... Or, la Cour rappelle que le litige dont elle fut en l'espèce saisie ne porte pas sur l'équité de la procédure disciplinaire en cause, procédure qui de toute façon n'a pas encore pris fin, mais sur la limitation au droit du requérant de faire examiner par une juridiction supérieure sa condamnation pénale.

41. Au vu de ce qui précède, la Cour estime que, dans les circonstances particulières de la présente affaire, l'application des dispositions de la loi n° 3346/2005 a eu des effets qui peuvent être comparés à une mise hors de cause. Dès lors, la Cour conclut que le classement de l'affaire pénale du requérant en vertu de la nouvelle loi n'a posé aucun problème sous l'angle du droit à un double degré de juridiction, même si, dans un stade initial, le requérant avait été condamné pour une infraction qui était passible d'une peine d'emprisonnement ...

42. Partant, il n'y a pas eu violation de l'article 2 du Protocole n° 7.

## Refusal

☰ *Khalfaoui v. France*, 34791/97, 14 December 1999

43. ...the obligation to surrender to custody compels an appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, even though in French law appeals on points of law have suspensive effect and the judgments challenged by means of such appeals are not yet final. Consequently, a sentence becomes enforceable only if and when the appeal on points of law is dismissed.

44. While the concern to ensure that judicial decisions are enforced is in itself legitimate, the Court observes that the authorities have other means at their disposal whereby they can take the convicted person in charge, whether before ... or after the appeal on points of law is heard. In practice, the obligation to surrender to custody is intended to substitute for procedures having to do with the exercise of police powers an obligation which is imposed on defendants themselves, and which is backed up moreover by the sanction of depriving them of their right to appeal on points of law.

45. Lastly, the Court observes that the obligation to surrender to custody is not justified by the special features of the cassation procedure either; the procedure in the Court of Cassation, to which only arguments on points of law can be submitted ... is essentially written, and it has not been contended that the defendant's presence was necessary at the hearing ...

46. In the present case, in accordance with the provisions of Article 583 of the Code of Criminal Procedure, the applicant's failure to comply with the obligation to surrender to custody was penalised by forfeiture of his right to appeal on points of law. In that connection, contrary to the Government's submission, the Court sees no great difference between an automatic declaration of inadmissibility, prescribed only by the case-law of the Criminal Division of the Court of Cassation ... and forfeiture of the right of appeal, which is expressly provided for in Article 583 ...

47. Having regard to the importance of the final review carried out by the Court of Cassation in criminal matters, and to what is at stake in that review for those who may have been sentenced to long terms of imprisonment, the Court considers that this is a particularly severe sanction affecting the right of access to a court guaranteed by Article 6 of the Convention ...

53. ... the possibility of requesting exemption from the obligation to surrender to custody is not, in the Court's opinion, capable of eliminating the disproportionality of the sanction of forfeiture of the right to appeal on points of law.

54. In conclusion, having regard to all the circumstances of the case, the Court considers that the applicant suffered an excessive restriction on his right of access to a court, and therefore on his right to a fair trial.



*Eliazer v. Netherlands*, 38055/97, 16 October 2001

33. In the present case ... the applicant was under no obligation to surrender to custody as a precondition to the objection proceedings before the Joint Court of Justice taking place. It was the applicant's choice not to appear at these proceedings because of the risk that he could have been arrested. Furthermore ... the path to the court of cassation opened itself to the applicant once he chose to be present at the objection proceedings ...

34. Against this background the Court finds that, in the present case, the State's interest in ensuring that as many cases as possible are tried in the presence of the accused before allowing access to cassation proceedings outweighs the accused's concern to avoid the risk of being arrested by attending his trial ...

35. In reaching this conclusion, the Court has taken into account the entirety of the proceedings, in particular the facts that the applicant's lawyer had been heard in the appeal proceedings before the Joint Court of Justice even though the applicant had not appeared at these proceedings ... and that it was open to the applicant to secure access to the Supreme Court by initiating proceedings which would lead to a retrial of the charges against him subject to the condition that he attend the proceedings. In the Court's view, it cannot be said that such a system, which seeks to balance the particular interests involved, is an unfair one.

36. The decision declaring the applicant's appeal in cassation inadmissible cannot, therefore, be considered as a disproportionate limitation on the applicant's right of access to a court or one that deprived him of a fair trial. Accordingly, there has been no violation of Article 6 §§1 and 3 of the Convention.

☰ *Osu v. Italy*, 36534/97, 11 July 2002

29. The Court first observes that the applicant, who left Italy shortly after his acquittal at first instance, failed to inform the authorities of his change of address, as requested by the relevant provisions of national law. The Italian authorities then tried to serve all the acts concerning the appeal proceedings at the address the applicant had elected in Italy. As these attempts failed, the applicant had no knowledge of the appeal proceedings instituted by the Public Prosecutor attached to the Arezzo District Court.

30. The Court further notes that the applicant was informed of the conviction issued by the Florence Court of Appeal at the latest on 19 August 1995, date of his arrest. On 22 September 1995, he applied to the Court of Cassation seeking leave to lodge a late appeal ...

34. ... the applicant's request ... was declared inadmissible on the ground that it had not been filed within the ten-day time-limit provided for by Article 175 of the Code of Criminal Procedure ...

36. .... the Court observes that Section 1 of Law no. 742 of 7 October 1969 provides that the running of procedural terms is automatically suspended from 1 August to 15 September each year and that, should a term start running during this period, the starting-date is automatically postponed until the end of such period. The applicant in fact filed his request on 22 September, i.e. within the ten-day time-limit starting on 16 September 1995.

37. However, the Court of Cassation did not apply the provisions of Law no. 742 and rejected the applicant's request as being lodged out of time. There is no explanation in the decision of the Court of Cassation or in the observations from the Government why the clear wording of Section 1 of Law no. 742 was not applied in the applicant's case ...

38. In the light of the foregoing, the Court considers that the applicant could have reasonably expected that the suspension of procedural time-limits be applied in his case, and that under the relevant domestic legislation, the Court of Cassation's decision of 30 January 1996 was not foreseeable.

39. By introducing his request for leave to lodge a late appeal seven days after the end of the suspension period the applicant cannot be considered to have acted negligently. In these circumstances, the Court considers that failure to apply Section 1 of Law 747/69 without any reasons therefore deprived the applicant of the right of access to a court to challenge his conviction *in absentia*.

40. There has therefore been a violation of Article 6 § 1.

☞ *AEPI SA v. Greece*, 48679/99, 11 April 2002

24. La Cour note qu'il ressort des articles 505 § 2 et 479 § 2 que le délai pour l'introduction d'un pourvoi en cassation par le procureur est de trente jours et que ce délai court à compter du prononcé de la décision attaquée. L'article 473 § 3 contient une disposition particulière quant au point de départ de ce délai lorsque la décision attaquée ne peut pas être frappée d'appel : dans ce cas, le délai court à compter de la mise au net de la décision.

25. En l'espèce, la requérante se pourvut en cassation vingt jours après avoir pris connaissance du texte même du jugement du tribunal correctionnel, par l'intermédiaire du procureur adjoint auprès de la Cour de cassation, qui concluait que ce tribunal avait mal interprété et appliqué l'article 70 de la loi sur la propriété intellectuelle. Toutefois, la Cour de cassation rejeta le pourvoi comme tardif ; elle releva que le jugement pouvait encore faire l'objet d'un appel et que donc le délai courait à compter du prononcé de celui-ci et non de sa mise au net.

26. La Cour note qu'indépendamment de la possibilité qui existait en l'espèce d'interjeter appel contre le jugement du tribunal correctionnel, la requérante souhaitait se pourvoir en cassation contre ce jugement afin de contester, non pas des points de faits, mais certains points de droit contenus dans les motifs du jugement. Le texte intégral du jugement était donc nécessaire afin qu'elle puisse formuler avec clarté et précision ses moyens en cassation.

27. Mais avant tout et surtout, la Cour rappelle que la requérante se pourvut en cassation par l'intermédiaire du ministère public. Or, si l'état du droit pertinent en la matière était tel que le décrit le Gouvernement, le ministère public, rôdé aux questions procédurales liées à ses compétences, aurait sans doute refusé de le faire.

28. En rejetant le pourvoi comme tardif dans ces circonstances, au motif qu'il était introduit dans un délai qui courait à partir du prononcé du jugement, et non de la mise au net de celui-ci, la Cour estime que la Cour de cassation a privé la requérante du droit d'accès à un tribunal. Elle conclut donc qu'il y a eu violation de l'article 6 § 1. »

☞ *Didier v. France* (dec.), 58188/00, 27 August 2002

**Body**

3. ... a "tribunal" within the meaning of Article 6 is also one within the meaning of Article 2 of Protocol No. 7 ... The Court lastly notes that when reviewing decisions by the FMB [Financial Markets Board], the *Conseil d'Etat* is competent to deal with all aspects of the case, so that in that respect it too is a "judicial body that has full jurisdiction", and thus a "tribunal" ... That being so,



the Court considers that the applicant was afforded the right of appeal in a criminal matter, in accordance with the first paragraph of Article 2 of Protocol No. 7 ...

### Impartiality

☞ *Bonazzi v. Italy*, 7975/77, 13 December 1978, DR15, 169

9. ... As regards the conduct of the judges, the Commission observes that no evidence, tending to prove that the judges were biased, was furnished by the applicant to the Court of Cassation. The fact that the Assize Court of Appeal altered the charge and increased the sentence (from about 11 years to about 14 years) cannot, in the present case, be regarded as a proof of bias.

☞ *Oberschlick v. Austria*, 11662/85, 23 May 1991

50. ... Article 489 para. 3 of the Code of Criminal Procedure, which lays down that the Court of Appeal shall not comprise, in a case like this, any judge who has previously dealt with it in the first set of proceedings ..., manifests the national legislature's concern to remove all reasonable doubts as to the impartiality of that court. Accordingly the failure to abide by this rule means that the applicant's appeal was heard by a tribunal whose impartiality was recognised by national law to be open to doubt.

51. ... Here, not only the President but also the other two members of the Court of Appeal should have withdrawn *ex officio* in accordance with Article 489 para. 3 of the Code of Criminal Procedure. Whatever the position might have been with respect to the presiding judge, neither the applicant nor his counsel were aware until well after the hearing of 17 December 1984 that the other two judges had also participated in the decision of 31 May 1983.

It is thus not established that the applicant had waived his right to have his case determined by an "impartial" tribunal.

☞ *Borgers v. Belgium*, 12005/86, 30 October 1991

28. Further and above all, the inequality was increased even more by the *avocat général's* participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended, as the Government also affirmed, to contribute towards maintaining the consistency of the case-law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the *avocat général* an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed.

29. In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 para. 1 ...

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

33. ... the Court notes that the President of the Criminal Division of the Supreme Court lodged a petition with the judges of that division to quash the Court of Appeal's judgment following the request by the first-instance judge, who was dissatisfied with that judgment. The President proposed the quashing of the Court of Appeal's decision and the reinstatement of the first-instance judgment. The same President then appointed the judge rapporteur and constituted the Chamber which was to examine the case. The President's petition was endorsed by the prosecution at the hearing and eventually upheld by the Supreme Court ...

35. ... the Court considers that such an opinion cannot be regarded as neutral from the parties' point of view. By recommending that a particular decision be adopted or quashed, the President necessarily becomes the defendant's ally or opponent ...

In the present application the President was in effect taking up the case of the prosecution because at the hearing the President's petition was contested by the applicant but endorsed by the prosecution, which had not itself lodged an appeal ...

36. Furthermore, while it is true that the President did not sit as a member of the court which determined the petition, he did choose the judge rapporteur and the members of the Chamber from amongst those judges of the Criminal Division which he heads ...

... when the President of the Criminal Division not only takes up the prosecution case but also, in addition to his organisational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure. The fact that the President's intervention was prompted by the first-instance judge only aggravates the situation ...

▮ *Chmelír v. the Czech Republic*, 64935/01, 7 June 2005

60. ... the Court thus notes that, as president of the division to which Mr Chmelír's appeal was referred, M.V. became the defendant in an action brought by the applicant on 7 February 2000 for the protection of personality rights. Then on 15 February 2000 M.V. ordered the applicant to pay a disciplinary fine for contempt of court on the ground that he had made false allegations in his application for the judge's withdrawal of 3 December 1999 and

that those allegations had constituted an insolent and unprecedented attack on his person and were intended to delay the proceedings. Lastly, on 1 March 2000, the High Court dismissed the applicant's second application for the judge's withdrawal, after the action had been brought against M.V. for the protection of personality rights.

67. ...an application for withdrawal is a statutory remedy that is available to litigants under the Code of Criminal Procedure. Moreover, the reasoning of that decision suggests that the president of the division was unable sufficiently to distance himself from the comments made about him in the context of the applicant's first application for withdrawal. In the Court's opinion, it would be academic to claim that the judge was acting without any personal interest and was simply defending the court's authority and status. In reality, courts are not impersonal institutions and operate through the intermediary of the judges on the bench. Since, in the instant case, the contempt of court was constituted by an insolent and unprecedented attack on the president of the division, this indicates that the applicant's conduct was assessed by the judge concerned in relation to his personal understanding, his feelings, his sense of dignity and his standards of behaviour, since he felt personally targeted and insulted. Thus, his own perception and assessment of the facts and his own judgment were involved in the process of determining whether the court had been insulted in that specific case.

Emphasis should also be laid, in this context, on the severity of the penalty imposed (the highest possible fine provided for by the Code of Criminal Procedure) and on the warning to the applicant to the effect that any similar attack in the future was likely to be classified as a criminal offence. All these elements show, in the Court's view, that the judge overreacted to the applicant's conduct ...

69. For the Court, these elements are sufficient to justify the objective existence of fears in the applicant's mind, namely that M.V., as president of the High Court division, lacked the requisite impartiality.

#### Notice of hearing

☰ *Vacher v. France*, 20368/92, 17 December 1996

25. Under Articles 585 and 588 of the Code of Criminal Procedure ... a convicted appellant has the choice between instructing a member of the *Conseil d'Etat* and Court of Cassation Bar or presenting his own case. However, the reporting judge will only give a time-limit for filing a pleading in the first of those eventualities. In the instant case Mr Vacher, assisted by Mr Ricard (who is not a member of the *Conseil d'Etat* and Court of Cassation Bar), had until the date of the hearing to file his pleading.

27. On the basis of the information supplied by the Government, the average time taken by the Court of Cassation to consider a case is approximately three months from the date of the appeal – two months for the case file to reach the Court of Cassation and one month for the court to deliver judgment. In the instant case the appeal was dismissed within a shorter period without the applicant being informed of the date of the hearing. Mr Vacher may have been taken by surprise by the fact that the proceedings took less time than average and, consequently, believing himself to be within the usual time for filing a pleading, may have seen no reason to worry about the hearing date.

28. The Court emphasises that States must ensure that everyone charged with a criminal offence benefits from the safeguards provided by Article 6 para. 3 ... Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the “diligence” which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 ... are enjoyed in an effective manner ...

30. In conclusion, since there was no fixed date for filing a pleading and the Court of Cassation took less time than usual to hear the appeal, without Mr Vacher being either warned of the fact by the registry or able to foresee it, he was deprived of the possibility of putting his case in the Court of Cassation in a concrete and effective manner.

There has therefore been a violation of Article 6 ...

📖 *Wynen v. Belgium*, 32576/96, 5 November 2002

35. ... In the instant case the date of the hearing in the Court of Cassation was displayed at the registry and in the courtroom of the Court of Cassation on 8 January 1996, sixteen days before the hearing. The applicants were represented by four lawyers, all of them members of the Brussels .... even if they were unusual or outmoded, the applicable rules were apparent from the CCP and were therefore accessible and sufficiently coherent and clear, so that lawyers, being professionally concerned with judicial procedure, cannot legitimately claim to have been unaware of them ....

Furthermore, and above all, there was a practice whereby the parties and their counsel could request the registry of the Court of Cassation to inform them in writing of the date of the hearing, or to obtain the relevant information by telephone ... The Court considers that it is not unreasonable to require appellants wishing to be personally informed of the date on which their case has been set down for hearing in the Court of Cassation to avail themselves of these additional notification arrangements ...

That being so, the applicants cannot argue that the authorities made it impossible for them to attend the hearing in the Court of Cassation. In conclusion, there has been no violation of Article 6 §1 of the Convention on that account.

☰ *Hermi v. Italy* [GC], 18114/02, 18 October 2006

90. ... the Grand Chamber considers that it is clear from the case file that the applicant had sufficient command of Italian to grasp the meaning of the notice informing him of the date of the appeal court hearing ... Moreover ... at the time of the appeal proceedings the applicant had been living in Italy for at least ten years, and when he was arrested in 1999 had been able to provide the *carabinieri* with details about the factual basis of the allegations against him ...

91. In the Court's view, these elements gave the domestic judicial authorities sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing, and that it was not necessary to provide any translation or interpretation. The Court also notes that the applicant does not appear to have informed the prison authorities of any difficulties in understanding the document in question.

☰ *Zaytsev v. Russia*, 22644/02, 16 November 2006

22. In so far as the applicant's complaint concerns the failure to notify him of the appeal hearing of 26 October 2001, the Court notes that the appeal judgment was quashed precisely on that ground and the case remitted for a fresh appeal examination. The Court reiterates that, where criminal proceedings are reopened after a conviction has become final, a decision quashing the conviction is, in itself, not sufficient to deprive an individual of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and afforded redress for, the breach of the Convention ...

23. In the present case, on 27 June 2005 the Presidium of the Tula Regional Court quashed the applicant's final conviction on the ground that the examination of his appeal in his absence, without his having been duly notified of the hearing, had violated his right to a defence. Accordingly, the Presidium expressly acknowledged that the applicant's right to a fair trial had been breached.

**Re-characterisation of charge**

☰ *Pelissier and Sassi v. France* [GC], 25444/94, 25 March 1999

61. ... the Court also finds that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings ...

62. The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late.

63. In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.

▬ *Dallos v. Hungary*, 29082/95, 1 March 2001

48. In the present case, the Court observes that the applicant was indeed not aware that the Regional Court might reclassify his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of.

49. However ... the Court attributes in this respect decisive importance to the subsequent proceedings before the Supreme Court.

52. ... the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the proceedings as a whole – and in view of the nature of the examination of the case before the Supreme Court – the Court is satisfied that any defects in the proceedings before the Regional Court were cured before the Supreme Court.

The Court is therefore convinced that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed.

▬ *Bäckström and Andersson v. Sweden* (dec.), 67930/01, 5 September 2006

In the instant case, the Court notes that, by the prosecutor's bill of indictment of 11 February 2000, the applicants were ... charged with attempted aggravated robbery ... By the District Court's judgment of 17 April 2000, the applicants were convicted of the

offence in question, the court having found that the evidence supported the prosecutor's description of events.

On 19 June 2000, towards the end of the hearing in the Court of Appeal and following the intervention of its president, the prosecutor adjusted the charge to concern a completed offence of aggravated robbery. In its judgment of 4 July 2000, the appellate court considered that the prosecutor had not introduced an additional charge of theft of the vehicle but that, following the adjustment, he had claimed that the robbery had been completed through the appropriation of the vehicle. In agreeing with this contention, the court found that the very fact that the applicants had taken possession of the vehicle with its money contents meant that the offence had been completed.

In the Court's view, it follows from these circumstances that the applicants were made aware of all the material facts of the offence ascribed to them already by way of the prosecutor's bill of indictment. The new element introduced on 19 June 2000 was whether their actions had progressed to the point where the offence could be considered to have been completed ... it must be determined whether they were promptly informed of the possibility that they might be convicted of the completed offence, and whether they were afforded an adequate opportunity to prepare their defence.

In this respect, the Court notes that the applicants were made aware of this possibility only on 19 June 2000, on the penultimate day of the appellate court hearing. While this short notice gives rise to some concern, the Court observes that all the facts underlying the adjusted charge were known to the applicants long before. Moreover, counsel for the second applicant was of the opinion that the charge of aggravated robbery could be considered as having been covered by the original indictment. Further, counsel for both applicants stated their position on the adjusted charge on the day when it was introduced. They did not submit any additional arguments on this issue the following day, the last day of the hearing, although they would have been free to do so. Nor did they request an adjournment of the proceedings in order to have more time to consider the issue ... the Court finds that there is nothing in the case which supports the applicants' contention that a request for an adjournment would obviously have been refused by the Court of Appeal.

The Court considers that the intervention of the president of the Court of Appeal was made in order to make the parties aware that the acts with which the applicants were charged could constitute a completed robbery offence. The applicants were thus given an opportunity to present their arguments on this issue. Moreover, as the court was not bound by the prosecutor's characterisation of

the offence and, accordingly, his adjustment of the charge was not a prerequisite for finding the applicants guilty of the completed offence, the president's intervention cannot be considered to have upset the principle of "equality of arms".

In these circumstances, the Court considers that, in reality, defence counsel had an adequate opportunity to state comprehensively the applicants' position on the adjusted charge before the Court of Appeal. Moreover, the appellate court could reasonably and justifiably conclude that this had indeed been the case.

Finally, the Court finds that the present case can be distinguished from the case of *Miroux v. France*, simultaneously examined by the Court [see above, page 231] ..., where a violation of Articles 6 §§1 and 3 was found. In that case, a new factual element – penetration – was introduced in the proceedings when the president of the court, after the parties' closing statements, asked the jury the supplementary question whether the accused was guilty of rape rather than attempted rape. In contrast, the facts which the applicants in the present case had to address remained the same throughout the proceedings; the prosecutor's adjustment of the robbery charge did not alter the description of events, but only changed the legal characterisation of the offence. Moreover, whereas the accused in the French case was not given an opportunity to present his arguments in relation to the new factual element, counsel for the present applicants were able – and did – state their position on the adjusted charge. It should further be noted that the French case involved a jury trial concerning a sexual offence, where special prudence is called for due to the sensitive nature of such offences and the possibility that jurors could be swayed by a proposition that the act charged might constitute an offence of a more aggravated nature. The present case did not give rise to any such special concerns.

Considering the proceedings in the instant case as a whole, the Court therefore finds that the information given to the applicants about the accusation against them was sufficiently prompt, and that they had adequate time and facilities for the preparation of their defence, within the meaning of Article 6 §3 (a) and (b) of the Convention.

☞ *Mattei v. France*, 34043/02, 19 December 2006

39. ... la Cour considère qu'il n'est pas établi que la requérante a eu connaissance de la possibilité de requalification des faits en complicité de tentative d'extorsion de fonds. En tout état de cause, compte tenu de la « nécessité de mettre un soin extrême à notifier l'accusation à l'intéressé » et du rôle déterminant joué par l'acte d'accusation dans les poursuites pénales ..., la Cour estime qu'aucun des arguments avancés par le Gouvernement, pris en-



semble ou isolément, ne pouvait suffire à garantir le respect des dispositions de l'article 6 § 3 a) de la Convention ...

40. Par ailleurs, la Cour, qui est sensible à l'argument du Gouvernement selon lequel la Cour de cassation mentionne, depuis 2001, l'article 6 § 1 dans ses visas et reprend l'attendu de principe précisant « que s'il appartient aux juges répressifs de restituer aux faits dont ils sont saisis leur véritable qualification, c'est à la condition que le prévenu ait été mis en mesure de se défendre sur la nouvelle qualification envisagée », relève, qu'en l'espèce, la Cour de cassation a considéré que « la requalification des faits de tentative d'extorsion de fonds en complicité de ce délit n'a en rien modifié la nature et la substance de la prévention dont les prévenus avaient été entièrement informés lors de leur comparution devant le tribunal correctionnel ».

41. Concernant le contenu de la requalification, la Cour rappelle qu'on ne peut soutenir que la complicité ne constitue qu'un simple degré de participation à l'infraction ... Soulignant son attachement au principe de l'interprétation stricte du droit pénal, la Cour ne saurait admettre que les éléments spécifiques de la complicité soient éludés. A cet égard, elle note ... qu'elle n'a pas à apprécier le bien-fondé des moyens de défense que la requérante aurait pu invoquer si elle avait eu la possibilité de débattre de la complicité de tentative d'extorsion de fonds, mais relève simplement qu'il est plausible de soutenir que ces moyens auraient été différents de ceux choisis afin de contester l'action principale.

42. Quant aux peines prononcées à l'encontre de la requérante, la Cour ne saurait souscrire aux arguments développés par le Gouvernement. En effet, elle considère tout d'abord qu'on ne peut pas affirmer que la requalification a été sans incidence sur la condamnation au motif, qu'en tout état de cause, la requérante a été condamnée pour participation à une entente en vue de préparer des actes de terrorisme puisqu'on ne peut spéculer sur la peine qui aurait été effectivement prononcée si la requérante avait pu se défendre utilement sur la nouvelle qualification retenue de complicité de tentative d'extorsion de fonds. Enfin, elle relève qu'effectivement la peine prononcée par la cour d'appel, à la suite de la requalification, est plus clémente que celle prononcée par le tribunal correctionnel, passant de quatre années d'emprisonnement à trois années d'emprisonnement dont une avec sursis. Toutefois, la Cour souligne que la peine prononcée en appel a été motivée par « l'état de santé actuel de l'intéressée » et par ses antécédents judiciaires, la requérante n'ayant « pas été condamnée dans les cinq années précédant les faits, pour crime ou délit de droit commun, à une peine de réclusion ou d'emprisonnement ».

43. Eu égard à tous ces éléments, la Cour estime qu'une atteinte a été portée au droit de la requérante à être informée d'une manière détaillée de la nature et de la cause de l'accusation portée contre elle, ainsi qu'à son droit à disposer du temps et des facilités nécessaires à la préparation de sa défense.

▮ *Brandstetter v. Austria*, 11170/84, 12876/87 and 13468/87, 28 August 1991

**Non-communication of submissions**

67. ...In the present case it is common ground that no copy of the submissions of the Senior Public Prosecutor was sent to the applicant and that he was not informed of their having been filed either. The Government's argument is ... that the submissions – the so-called "croquis" ... were filed according to a standing practice which enables the Senior Public Prosecutor to file such a croquis in such cases as he deems appropriate. They suggest that this practice must have been known to the applicant's lawyer who, accordingly, could have enquired whether in the applicant's case a croquis had been filed. If so, he could have requested leave to inspect the file under section 82 of the Code of Criminal Procedure and thus could have commented on it. Section 82, as it is formulated, however, does not seem to grant an unconditional right to inspect the complete file but only the possibility to ask for leave to do so...

The Court notes that the croquis apparently has considerable importance and that the alleged practice requires vigilance and efforts on the part of the defence; against this background, the Court is not satisfied that this practice sufficiently ensures that appellants in whose cases the Senior Public Prosecutor has filed a croquis on which they should comment are aware of such filing.

68. ... An indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution ...

69. The Court therefore concludes that, in the appeal proceedings concerning the defamation case, there was a violation of Article 6 para. 1 ... of the Convention.

▮ *Reinhardt and Slimane-Kaïd v. France*, 23043/93 and 22921/93, 31 March 1998

105. It was common ground that well before the hearing the advocate-general had received the report and draft judgment that had been prepared by the reporting judge. As the Government said, the report was in two parts: the first contained a description of the facts, procedure and grounds of appeal and the second a

legal analysis of the case and an opinion on the merits of the appeal.

Those documents were not communicated to either the applicants or their lawyers. ... Mrs Reinhardt's and Mr Slimane-Kaïd's lawyers could have made oral submissions if they had so requested; at the hearing they would have had the right to address the court after the reporting judge, which would have meant that they would have been able to hear the first part of his report and to comment on it. The second part of the report and the draft judgment – which were legitimately privileged from disclosure as forming part of the deliberations – could not in any event be communicated to them; at best, they would thus have learnt of the recommendation in the reporting judge's report a few days before the hearing.

Conversely, the entire report and the draft judgment were communicated to the advocate-general. The advocate-general is not a member of the court hearing the appeal. His role is to ensure that the law is correctly applied when it is clear and correctly construed when ambiguous. He "advises" the judges on the solution in each individual case and, through the authority of his office, he may influence their decision in a way that is either favourable or runs counter to the case put forward by appellants ...

Given the importance of the reporting judge's report (and in particular the second part thereof), the advocate-general's role and the consequences of the outcome of the proceedings for Mrs Reinhardt and Mr Slimane-Kaïd, the imbalance thus created by the failure to give like disclosure of the report to the applicants' advisers is not reconcilable with the requirements of a fair trial.

106. The fact that the advocate-general's submissions were not communicated to the applicants is likewise questionable ...

107. Consequently, regard being had to the circumstances referred to above, there has been a violation of Article 6 §1.

☰ *Göç v. Turkey* [GC], 36590/97, 11 July 2002

57. ... The Government have contended that the applicant's lawyer should have known that consultation of the case file was possible as a matter of practice. However, the Court considers that to require the applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment on the opinion since he was never made aware of the timetable for the processing of the appeal ... It notes in this connection that the opinion was drawn up on 17 October 1996 and submitted to the competent division on

21 October 1996 along with the case file. The division reached its decision on 7 November 1996.

58. Having regard to the above considerations, the Court, like the Chamber, finds that Article 6 §1 has been violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion.

▣ *Verdu Verdu v. Spain*, 43432/02, 5 February 2007

25. La Cour estime que la question qui se pose en l'espèce est celle de savoir si la non-communication au requérant du mémoire d'adhésion à l'appel du ministère public peut constituer une atteinte à l'équité de la procédure, dans la mesure où le principe du contradictoire implique pour les parties au procès « le droit de se voir communiquer et de discuter toute pièce ou observation présentée au juge » ..., ou bien s'il faut plutôt considérer, comme le Tribunal constitutionnel l'a fait, que ce qui compte en l'occurrence est l'impossibilité ou non pour le requérant de se défendre de façon effective en raison dudit défaut de communication, c'est-à-dire, si la communication du mémoire en question aurait eu, ou non, une incidence sur l'issue du litige.

26. Dans la présente espèce, la Cour relève que le tribunal qui a condamné le requérant en appel s'est limité à donner une qualification juridique différente aux faits déclarés prouvés par la juridiction pénale de première instance, n'étant pas allé au-delà des mémoires de conclusions définitives et d'appel du ministère public, et sans faire référence à aucun élément non inclus dans l'accusation principale.

27. Dans ces circonstances, la Cour constate que la communication du mémoire d'adhésion à l'appel du ministère public et la possibilité pour le requérant de répliquer aussi à ce dernier n'aurait pu avoir aucune incidence sur l'issue du litige devant l'*Audiencia provincial*. En effet, elle ne voit pas en quoi l'absence d'un tel acte pourrait avoir porté atteinte à ses droits ou avoir réduit les chances du requérant de présenter, devant l'*Audiencia provincial*, les arguments qu'il estimait nécessaires à sa défense, alors qu'il a lui-même reconnu dans sa requête que le mémoire d'adhésion du plaignant coïncidaient avec les prétentions de l'appel du ministère public.

28. Dès lors, la condamnation du requérant retenue en l'espèce par l'*Audiencia provincial*, confirmée ensuite par le Tribunal constitutionnel, ne pouvait prêter à aucune discussion de ce point de vue. En conséquence, dans les circonstances particulières de la cause, le requérant ne saurait soutenir que l'impossibilité pour lui de contester le mémoire d'adhésion, faute de lui avoir été communiqué, l'a mis dans l'impossibilité de se défendre, emportant violation de l'article 6 § 1 de la Convention, sauf à lui reconnaître un droit sans réelle portée ni substance ... Le requérant a par ailleurs,

manqué d'indiquer en quoi le défaut de communication du mémoire en cause lui a porté préjudice ...

29. La Cour constate que le droit de se défendre et de contester les arguments des parties est également repris dans la jurisprudence constante du Tribunal constitutionnel concernant le droit de défense. Dans le cas d'espèce, à la lumière des circonstances bien particulières de la cause, la Cour conclut, conformément à son rôle subsidiaire, que la motivation développée par le Tribunal constitutionnel pour justifier la non communication du mémoire d'adhésion n'est ni déraisonnable ni arbitraire ...

#### **Adequate time and facilities**

☞ *Melin v. France*, 12914/87, 22 June 1993

19. ... He maintained that, when the Criminal Division of the Court of Cassation had delivered its judgment on 27 May 1986, he had still been waiting to be sent the text of the Court of Appeal's judgment, a copy of which he had requested. Without knowledge of the Court of Appeal's reasoning he had not been able to draw up his memorial setting out the grounds for his appeal. He had needed a copy of the judgment, despite the fact that he had been present when it was pronounced, because the President had only read out its operative provisions. ...

24. ... Mr Melin had practised as a lawyer and had worked in the chambers of a lawyer of the *Conseil d'État* and Court of Cassation Bar. He therefore knew that in accordance with the legislation in force the authorities were under no obligation to serve on him the judgment delivered on 15 January 1986, whose pronouncement he had attended. ... it was thus not unreasonable to expect him to adopt one of the following three courses of action. First, even though he was under no legal obligation to do so, he could have consulted the original of the judgment in question at the registry of the Versailles Court of Appeal. Secondly, assuming that he did unsuccessfully request a copy as he claimed, he could and should have repeated that request during the four and a half months which followed the pronouncement of the judgment. A final possibility remained open to him; he could have made enquiries at the Court of Cassation's registry as to the date on which the court was to give judgment and sought an adjournment so as to be able to file a memorial in good time and to have the opportunity to present his case. Being well versed in the routines of judicial procedure, he must have known that the latter is subject to relatively short time-limits, especially as the relevant rules were sufficiently coherent and clear ...

25. In conclusion, the applicant cannot claim that the authorities made it impossible for him to produce a memorial. As he had deliberately waived his right to be assisted by a lawyer, he was under a duty to show diligence himself. Accordingly, he did not

suffer any interference with the effective enjoyment of the rights guaranteed under Article 6 ...

▮ *Zoon v. the Netherlands*, 29202/95, 7 December 2000

37. ...Whether or not the applicant's counsel were aware of the said policy, the fact remains that it is not disputed that the judgment in abridged form was available for inspection forty-eight hours after delivery.

38. The Court must therefore conclude that, apart from the fact that the applicant was aware of the operative part of the judgment, it would also have been possible for him and his counsel to take cognisance of the text of the judgment in abridged form well before the expiry of the fourteen-day time-limit for lodging an appeal, so that they would have had sufficient time to file an appeal. The fact that they failed to do so cannot be imputed to the respondent State ...

47. It is true that the items of evidence on which the actual conviction was based are not enumerated in the judgment. However, the applicant never denied having committed the acts charged and never challenged the evidence against him as such. Moreover, the applicant has not claimed, nor does it appear, that his conviction was based on evidence that was neither contained in the case file nor presented at the hearing of the Regional Court.

48. ... in Netherlands criminal procedure an appeal is not directed against the judgment of the first-instance court but against the charge brought against the accused. An appeal procedure thus involves a completely new establishment of the facts and a reassessment of the applicable law. It follows, in the Court's opinion, that the applicant and his counsel would have been able to make an informed assessment of the possible outcome of any appeal in the light of the judgment in abridged form and of the evidence contained in the case file ...

50. In the circumstances of the present case, therefore, it cannot be said that the applicant's defence rights were unduly affected by the absence of a complete judgment or by the absence from the judgment in abridged form of a detailed enumeration of the items of evidence relied on to ground his conviction.

▮ *Husain v. Italy* (dec.), 18913/03, 24 February 2005

The committal warrant indicated the date of the conviction, the sentence that had been imposed, the legal classification of the offences of which the applicant had been found guilty and the references of the relevant provisions of the Criminal Code and of the special legislation that was applicable.

In these circumstances, the Court considers that the applicant received sufficient information concerning the charges and his con-

viction in a language he understood. The applicant was in Italy when the committal warrant was served on him and could have consulted the lawyer who had been assigned to his case, whose name was set out in the committal warrant, or another legal adviser for advice on the procedure for appealing against the Genoa Criminal Court of Appeal's judgment and for preparing his defence to the charges ...

Accordingly, the Court is unable to discern any violation of the right to a fair trial.

☞ *Kremzow v. Austria*, 12350/86, 21 September 1993

48. The Court observes that ... the croquis of forty-nine pages was served on counsel on 9 June 1986, some three weeks before the date fixed for the oral hearing. It considers that this period afforded the applicant and his lawyer sufficient opportunity to formulate their reply in time for the oral hearing of 2 July 1986.

49. It has not been contested by the Government that the Supreme Court did not reply to the requests of 18 September and 2 October 1985 for the communication to the applicant of the croquis which had already been received by the Supreme Court on 2 August 1985 ... However it was open to the applicant's lawyer to request the court for permission to consult the case file with a view to examining the croquis prior to its transmission. There is no record of his ever having done so ... Had such a request been filed there is no reason to suppose that leave would not have been granted.

50. Against this background the Court considers that, although the applicant may have been to some extent disadvantaged in the preparation of his defence, he nevertheless had "adequate time and facilities" to formulate his response to the croquis.

#### **Admissibility of fresh evidence**

☞ *Vaturi v. France*, 75699/01, 13 April 2006

58. En effet, celui-ci ne put, à aucun stade de la procédure, interroger ou faire interroger un quelconque témoin. Malgré la complexité de l'affaire qui tenait à la dimension économique de la prévention et au nombre des personnes morales et physiques ayant eu à connaître du dossier, le Procureur de la République près le tribunal de grande instance de Paris diligenta une simple enquête de police à l'issue de laquelle il décida de faire citer à comparaître le requérant directement devant le tribunal. Ce faisant, aucune information judiciaire ne fut ouverte et aucun juge d'instruction désigné, de sorte que, au stade de l'enquête préliminaire, l'intéressé ne put ni solliciter des mesures d'instruction, ni être confronté aux personnes qui l'accusaient et leur apporter la contradiction. Par la suite, durant la phase de jugement, son unique demande d'audition et de confrontation fut rejetée par la

cour d'appel de Paris, de façon lapidaire. Il en résulte que c'est tout le système de défense adopté par le requérant qui s'est trouvé compromis, lequel reposait sur l'audition, de façon contradictoire et en audience publique, des témoins sollicités, à charge comme à décharge. Dans ces conditions, la Cour n'estime pas devoir spéculer sur le caractère fondamental ou non des auditions requises par le requérant, dans la mesure où elle considère que, en tout état de cause, elles auraient pu contribuer, dans les circonstances de l'espèce, à l'équilibre et à l'égalité qui doivent régner tout au long du procès entre l'accusation et la défense. L'économie générale du procès commandait ainsi d'accorder au requérant la faculté d'interroger ou de faire interroger un témoin de son choix. Au final, le requérant n'a pas disposé d'une occasion adéquate et suffisante pour faire valoir utilement ses droits de la défense.

59. En conclusion, vu l'importance particulière que revêt le respect des droits de la défense dans le procès pénal, la Cour estime que le requérant n'a pas bénéficié d'un procès équitable. Partant, il y a eu violation de l'article 6 §§ 1 et 3 d) de la Convention.

📖 *Oyston v. the United Kingdom* (dec.), 42011/98, 22 January 2002

The Court notes that the applicant was granted leave to appeal by the Court of Appeal on the basis that the evidence, though strictly speaking not admissible, could have been used to attack the victim's credibility and that it should be considered whether it rendered the applicant's conviction unsafe. After hearing the applicant's arguments on appeal, the Court of Appeal confirmed the view that under section 2 of the 1976 Act the evidence concerning this relationship would not have been admitted. However, it commented that it would have been reluctant to allow a technical rule to prevail if the evidence had led it to doubt the victim's credibility. It went on to consider that evidence and concluded for reasons, which appear cogent to this Court, that it had no relevance to the question of whether she had been raped by the applicant.

The applicant argues that the question of J's credibility was crucial as the jury had essentially to decide whether J. or L. was lying. In those circumstances, he argued that it was not for the Court of Appeal to attempt to second-guess what effect this additional evidence would have had on the jury's views of the respective credibility of J. and L. ... In addition, he argues that the Court of Appeal paid no attention to the requirement of fairness in its assessment of whether the conviction was rendered unsafe by the new evidence.



... The Court considers that the facts of the present case are more analogous to those pertaining in *Edwards v. the United Kingdom* where, as in this case, the Court of Appeal had reviewed evidence coming to light after the applicant's trial. There the Court found that the rights of the defence were secured by the proceedings before the Court of Appeal, where the applicant's counsel had every opportunity to seek to persuade the court that the conviction should not stand in light of the new material, and that the Court of Appeal was able to assess for itself the value of the new evidence and to determine whether the availability of the information at trial would have disturbed the jury's verdict.

The Court sees no reason to reach a different conclusion in this application.

#### Examination of witnesses

☞ *Vidal v. Belgium*, 12351/86, 22 April 1992

34. The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses.

To be sure, it is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article 6 ... This is all the more the case as the Brussels Court of Appeal increased the sentence which had been passed on 26 October 1984, by substituting four years for three years and not suspending the sentence as the Liège Court of Appeal had done.

35. In short, the rights of the defence were restricted to such an extent in the present case that the applicant did not have a fair trial. There has consequently been a violation of Article 6 ...

☞ *Destrehem v. France*, 56651/00, 18 May 2004

44. Par ailleurs, la Cour observe que le tribunal correctionnel a considéré que la plupart des éléments autres que les témoignages figurant au dossier, et résultant de l'enquête de police, étaient insuffisants pour déterminer de façon certaine l'identité de l'auteur des faits.

45. Il ressort donc de l'arrêt du 31 mars 1999 que, pour l'essentiel, la cour d'appel a fondé la condamnation du requérant sur une

nouvelle interprétation de témoignages dont elle n'a pas entendu les auteurs, et ce malgré les demandes en ce sens du requérant. Tout s'est passé comme si la cour d'appel, ayant des doutes sur la crédibilité des témoins à décharge, les avait « récusés » a priori sans procéder à leur audition et s'étaient contentée de cette impression, pour prendre le contre-pied du jugement de première instance, qui avait relaxé le requérant sur la base, notamment, des dépositions de ces témoins. Sans doute appartenait-il à la juridiction d'appel d'apprécier les diverses données recueillies, de même que la pertinence de celles dont le requérant souhaitait la production ; il n'en demeure pas moins que le requérant a été reconnu coupable sur la base des témoignages mêmes qui avaient suffisamment fait douter les premiers juges du bien-fondé de l'accusation contre le requérant pour motiver son acquittement en première instance. Dans ces conditions, le refus de la cour d'appel d'entendre ces témoins, en dépit de la demande du requérant en ce sens, avant de le déclarer coupable, a sensiblement réduit les droits de la défense ...

46. Il en va d'autant plus ainsi que la cour d'appel de Reims a infligé au requérant une sanction qu'elle a elle-même qualifiée de « sévère ».

47. Dès lors, compte tenu des circonstances très particulières de l'espèce, la Cour considère que les droits de la défense ont subi une limitation telle que le requérant n'a pas bénéficié d'un procès équitable. Partant, il y a eu violation de l'article 6 §§ 1 et 3 d) de la Convention.

📖 *Borgers v. Belgium*, 12005/86, 30 October 1991

**Equality of arms**

27. In the present case the hearing on 18 June 1985 before the Court of Cassation concluded with the *avocat général's* submissions to the effect that Mr Borger's appeal should not be allowed ... At no time could the latter reply to those submissions: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute. Article 1107 of the Judicial Code prohibits even the lodging of written notes following the intervention of the member of the *procureur général's* department ...

The Court cannot see the justification for such restrictions on the rights of the defence. Once the *avocat général* had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation's jurisdiction is confined to questions of law makes no difference in this respect ...

☞ *Wynen v. Belgium*, 32576/96, 5 November 2002

32. ... The Court notes in the instant case that Article 420 *bis* of the CCP requires those appealing to the Court of Cassation to file any pleadings within two months of the date on which the case is placed on the general list, although the respondent party is not subject to a similar time-limit and in this instance took nearly five months to file its own pleadings.

Furthermore, that had the effect of depriving the applicants of the opportunity to reply in writing to the respondent party's pleadings, since their supplementary pleadings were declared inadmissible as being out of time. However, such an opportunity may be essential, since the right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party ...

The Court is sensitive to the need emphasised by the Government to ensure that proceedings are not prolonged unnecessarily by allowing a succession of written replies to any pleadings filed, but the principle of equality of arms does not prevent the achievement of such an objective, provided that one party is not placed at a clear disadvantage. That condition was not satisfied in the instant case. There has therefore been a violation of Article 6 § 1 of the Convention on that account ...

38. The Court notes that State Counsel's submissions were first made orally at the public hearing in the Court of Cassation ... The parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion. Consequently, no breach of the principle of equality of arms has been made out, since the applicants cannot derive from the right to equality of arms a right to have disclosed to them, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench ...

☞ *M.S. v. Finland*, 46601/99, 22 March 2005

31. The Court observes that in the present case the letter of 26 November 1996 was not communicated to either of the parties in the criminal proceedings, namely the applicant and the public prosecutor. No infringement of equality of arms has been established as none of the parties was placed at a disadvantage *vis-à-vis* the opposing party ...

32. However, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision ...

33. ... the content of the letter of 26 November 1996 was directly linked with the question of reliability of a witness which formed a crucial part of the applicant's defence in the Court of Appeal. It is true that the statement of the applicant's ex-wife was not the sole item of evidence with regard to the applicant's opportunity to commit the acts with which he was charged. The letter of 26 November 1996, relating to the previous statements of the applicant's ex-wife, was however significant as it was clearly capable of influencing the Court of Appeal's decision ...

34. ... only the parties could properly decide whether or not the letter of 26 November 1996 called for their comments. What is particularly at stake here is the confidence of the parties of criminal proceedings in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file ...

36. The Court finds that respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be informed that the Court of Appeal had received the letter of 26 November 1996 from the applicant's ex-wife and that he be given the opportunity to comment on it.


▣ *Corcuff v. France*, 16290/04, 4 October 2007

30. Le requérant estime que la présence au cours de la séance d'information des jurés de l'avocat général en charge des poursuites contre lui l'a placé dans une situation désavantageuse contraire au principe d'égalité des armes ...

32. La Cour estime qu'en l'espèce aucune instruction ne fut donnée aux jurés par les magistrats présents lors de la séance de formation litigieuse ... La neutralité de la séance fut par ailleurs effectivement assurée par le président de la cour d'assises qui l'a dirigée. Ce dernier a, en effet, pour mission de contrôler la nature des informations échangées et veille, en particulier, à ce qu'aucun commentaire relatif à l'affaire, à la personnalité de l'accusé ou à son éventuelle culpabilité, ne soit énoncé. Essentiellement technique, le contenu de cette séance n'a, en outre, visé qu'à informer les jurés du déroulement de la procédure devant la cour d'assises. La Cour insiste à cet égard sur le bénéfice d'une telle information pour les jurés qui ne sont pas des professionnels du droit mais des citoyens ordinaires souvent peu habitués aux arcanes du monde judiciaire. Il serait certes envisageable que ces séances se déroulent en dehors de la présence d'un représentant du ministère public. La Cour estime, cependant, que la présence lors de ces séances d'un membre du parquet, comme d'un représentant du barreau, présente un intérêt certain dans la mesure où acteurs à la procédure, ces derniers sont les mieux à même de répondre aux interrogations des jurés relatives à leurs fonctions respectives. Par ailleurs,

la participation à ces séances d'information de l'ensemble des jurés appelés à siéger lors de la session d'assises rend complexe la désignation d'un membre du parquet qui ne serait amené à requérir dans aucune des différentes affaires examinées au cours de cette session. De la même manière, la présence de tous les avocats appelés à plaider dans chacun de ces procès ne pourrait qu'alourdir une pratique qui ne vise qu'à présenter la procédure et à aborder des questions générales et, en aucune manière, les circonstances spécifiques des différentes affaires, ni la personnalité des accusés. Dès lors, le compromis mis en œuvre par la cour d'assises, consistant à inviter un seul représentant des avocats de la défense, apparaît satisfaisant. Ainsi, la Cour observe que la présence, lors de ces séances d'information, à la fois d'un représentant du ministère public et d'un membre du barreau ménage un juste équilibre s'agissant des informations diffusées aux jurés. Quant au grief tiré du privilège dont bénéficierait le représentant du ministère public, s'agissant de l'exercice de son droit de récusation, rien n'indique que la séance, destinée à fournir des informations sur la procédure, lui donne l'opportunité de se forger une quelconque opinion sur la personnalité des jurés, d'autant qu'au moment où elle se déroule le représentant du ministère public ne sait pas lesquels des jurés présents seront finalement tirés au sort, ni dans quelles affaires ils siégeront. Il n'apparaît donc pas non plus que le ministère public aurait, en l'espèce, bénéficié d'un réel avantage par rapport au requérant quant à l'exercice du droit de récusation.

33. L'ensemble de ces éléments suffit à la Cour pour conclure qu'il n'y a pas eu en l'espèce de rupture du principe de l'égalité des armes ...

 *Botmeh and Alami v. the United Kingdom*, 15187/03, 7 June 2007

42. In the present case, before and during the applicants' trial, the United Kingdom Security Service had in their possession evidence from "an agent source" that a terrorist organisation, unconnected to the applicants, was seeking information about the possibility of bombing the Israeli Embassy. Related intelligence received after the bombing indicated that it had not, in fact, been the work of this terrorist organisation. The document containing this information ("the first document") was not shown to the prosecutors with conduct of the trial against the applicants, and it was not, therefore, presented by the prosecution to the trial judge for his ruling as to whether it was necessary to disclose it. One of two other documents from the same source, which did not, however, refer to the information in the first document was placed before the trial judge during the disclosure hearing.

43. The undisclosed material was first considered by the Court of Appeal in an *ex parte* hearing prior to the grant of leave to appeal. At the commencement of the hearing of the substantive appeal, the Court of Appeal, in a different composition, heard *inter partes* submissions on the procedure to be followed in ruling on the Crown's claim for public interest immunity, before deciding to examine the material in an *ex parte* hearing. The applicants were not represented during this hearing, either by their own counsel or by a specially appointed, security-cleared, counsel ... However, following the disclosure hearing and well in advance of the resumed appeal hearing, the Court of Appeal disclosed to the applicants a summary of the information contained in the first document, as well as an account of the events which had resulted in the fact that the undisclosed material had not been placed before the trial judge. In its judgment of 1 November 2001, the Court of Appeal observed that, save for the material which was given to the applicants in summary form, there was nothing of significance before the court which had not been before the trial judge ... The applicants were given a full opportunity to make submissions on the material which had been disclosed in summary form and on its significance to the issues raised by the case. On the basis of the submissions made, the Court of Appeal concluded that no injustice had been done to the applicants by not having access to the undisclosed matter at trial, since the matter added nothing of significance to what was disclosed at trial and since no attempt had been made by the defence at trial to exploit, by adducing it in any form before the jury, the similar material which had been disclosed at trial.

44. Given the extent of the disclosure to the applicants of the withheld material by the Court of Appeal, the fact that the court was able to consider the impact of the new material on the safety of the applicants' conviction in the light of detailed argument from their defence counsel and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the Court considers that ... the failure to place the undisclosed material before the trial judge was in the particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.

☞ *Poitrimol v. France*, 14032/88, 23 November 1993

35. It is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.

**Legal representation**

The legislature must accordingly be able to discourage unjustified absences. In the instant case, however, it is unnecessary to decide whether it is permissible in principle to punish such absences by ignoring the right to legal assistance, since at all events the suppression of that right was disproportionate in the circumstances. It deprived Mr Poitrimol, who was not entitled to apply to the Court of Appeal to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him ....

37. Under the case-law of the Criminal Division of the Court of Cassation, which was followed in this case, a convicted person who has not surrendered to a judicial warrant for his arrest cannot be represented for the purposes of an appeal on points of law. The applicant could not validly lodge such an appeal without giving himself up at a prison ...

38. The Court considers that the inadmissibility of the appeal on points of law, on grounds connected with the applicant's having absconded, also amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society. Admittedly, the remedy in question was an extraordinary one relating to the application of the law and not to the merits of the case. Nevertheless, in the French system of criminal procedure, whether an accused who does not appear may have arguments of law and fact presented at second instance in respect of the charge against him depends largely on whether he has provided valid excuses for his absence. It is accordingly essential that there should be an opportunity for review of the legal grounds on which a court of appeal has rejected such excuses.

39. In the light of all these considerations, the Court finds that there was a breach of Article 6 ... both in the Court of Appeal and in the Court of Cassation.

☰ *Boner and Maxwell v. the United Kingdom*, 18711/91 and 18949/91, 28 October 1994

41. ... The legal issue in this case may not have been particularly complex. Nevertheless, to attack in appeal proceedings a judge's exercise of discretion in the course of a trial ... requires a certain legal skill and experience. That Mr Boner was able to understand the grounds for his appeal and that counsel was not prepared to represent him ... does not alter the fact that without the services of a legal practitioner he was unable competently to address the court on this legal issue and thus to defend himself effectively ...

Moreover, the appeal court, as stated, had wide powers to dispose of his appeal and its decision was final. Of even greater relevance,

however, the applicant had been sentenced to eight years' imprisonment. For Mr Boner therefore the issue at stake was an extremely important one.

43. ... The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of Article 6 ...

44. Given the nature of the proceedings, the wide powers of the High Court, the limited capacity of an unrepresented appellant to present a legal argument and, above all, the importance of the issue at stake in view of the severity of the sentence, the Court considers that the interests of justice required that the applicant be granted legal aid for representation at the hearing of his appeal.

▣ *Twalib v. Greece*, 24294/94, 9 June 1998

53. An additional factor is the complexity of the cassation procedure. It involved a challenge to the fairness of the trial proceedings which required him to adduce legal arguments which would convince the Court of Cassation that his defence rights had been violated. It is to be noted that the complexity of cassation proceedings is confirmed by the requirement that the parties must be represented by counsel at the hearing before the Court of Cassation ... Further, the preparation of a notice of appeal must also be considered to require legal skills and experience and in particular knowledge of the grounds on which an appeal can be brought. It is noteworthy that the applicant, of foreign origin and unfamiliar with the Greek language and legal system, was unable to indicate any grounds of appeal in his written notice of appeal and that this failure resulted in his appeal being declared inadmissible ...

54. In these circumstances, the Court considers that the interests of justice required that the applicant be granted free legal assistance in connection with his intended appeal to the Court of Cassation ...

55. The Court notes at the outset that under Article 513 §3 of the Code of Criminal Procedure a party appealing on a point of law must be represented by counsel at the hearing before the Court of Cassation ... However ... the Code of Criminal Procedure does not provide for legal aid in connection with such appeals ... Although the Government have submitted that free legal assistance can be granted by the Bar Council to appellants in cassation proceedings under Article 201 §6 of the Code of Lawyers ..., they have not provided any concrete examples of how this scheme operates in practice. In any event, there is nothing to suggest that the availability of this facility was brought to the attention of Mr Twalib or that his request of 8 June 1993 would



have been forwarded to the Bar Council and would have received a favourable follow-up.

56. In these circumstances the Court must conclude that Greek law made no provision for the grant of legal aid to individuals like the applicant in connection with their appeals on points of law. It is accordingly not of relevance in the instant case that the applicant's request for legal aid was made after the expiry of the time-limit for the appeal: it could not have been complied with ...

57. ... there has been a violation of Article 6 §1 taken together with paragraph 3 (c) of the Convention.

☞ *Czekalla v. Portugal*, 38830/97, 10 October 2002

68. ... the decisive point is the officially appointed lawyer's failure to comply with a simple and purely formal rule when lodging the appeal on points of law to the Supreme Court. In the Court's view, that was a "manifest failure" which called for positive measures on the part of the relevant authorities. The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal inadmissible.

70. The Court ... ~~is~~ does not see how the independence of the legal profession could be affected by a mere invitation by the court to rectify a formal mistake. Secondly, it considers that it cannot be said *a priori* that such a situation would inevitably infringe the principle of equality of arms, given that it would be more in the nature of a manifestation of the judge's power to direct the proceedings, exercised with a view to the proper administration of justice .... It would appear that, as matters stand in Portugal at present, a decision like the one taken by the Supreme Court on 10 July 1996 would no longer be possible as a result of that recent ruling of the Constitutional Court.

71. The circumstances of the case therefore imposed on the relevant court the positive obligation to ensure practical and effective respect for the applicant's right to due process. As that was not the case, the Court can only find a failure to comply with the requirements of paragraphs 1 and 3 (c) of Article 6 of the Convention, taken together. There has therefore been a violation of those provisions.

☞ *Hermi v. Italy* [GC], 18114/02, 18 October 2006

97. In the present case, the applicant at no point alerted the authorities to any difficulties encountered in preparing his defence. Furthermore, in the Court's view, the shortcomings of the applicant's counsel were not manifest. The domestic authorities were therefore not obliged to intervene or take steps to ensure that the defendant was adequately represented and defended ...

98. In addition, the Court notes that the Rome Court of Appeal interpreted, in substance, the applicant's omission to request his transfer to the hearing room as an unequivocal, albeit implicit, waiver on his part of the right to participate in the appeal hearing ... In the particular circumstances of the present case, the Court considers that that was a reasonable and non-arbitrary conclusion.

▮ *Bulut v. Austria*, 17358/90, 22 February 1996

42. In the instant case, the Court notes that a public hearing was held at first instance. It further notes that the Supreme Court rejected Mr Bulut's appeal pursuant to Article 285d para. 1 of the Code of Criminal Procedure ... Under this provision the Supreme Court, in summary proceedings, may refuse further consideration of an appeal which it unanimously regards as manifestly lacking any merit. The nature of the review can therefore be compared to that of proceedings for leave to appeal. Moreover, the Court is not satisfied that the grounds of nullity under Article 281 para. 1 (4) and (5) of the Code of Criminal Procedure, as formulated by the applicant ..., raised questions of fact bearing on the assessment of the applicant's guilt or innocence that would have necessitated a hearing. They essentially challenged the trial court's assessment of the available evidence, a challenge which the Supreme Court considered inadmissible.

Accordingly, the Court finds no violation as regards the Supreme Court's failure to hold a hearing.

▮ *Botten v. Norway*, 16206/90, 19 February 1996

49. ... the Court is not persuaded ... that the prosecution appeal raised exclusively questions of law. Although the facts relating to the question of guilt established by the City Court were undisputed and the Supreme Court was bound by them, it had to some extent to make its own assessment for the purposes of determining whether they provided a sufficient basis for convicting the applicant; if they did not it had to quash the City Court's judgment and order a retrial ... This was compounded by the fact that ... the allegation that the applicant had a duty under the relevant rules to use a dory in the rescue operation and that his failure to do so constituted an offence under Article 78 para. 1 raised serious questions ... [which] concerned not only the interpretation of the terms of the applicable instructions but also whether there had been neglect or carelessness in view of the particular conditions obtaining at the site of the rescue operation at the material time ...

50. ... In view of the nature of the offence, sentencing was, whatever the considerations relied on by the Supreme Court,

**Presence of the accused**

capable of raising issues going to such matters as the applicant's personality and character ... However, in deciding on sentence, the Supreme Court did not even have the benefit of having a prior assessment of the question by the lower court which had heard the applicant directly.

51. In addition, bearing in mind the character of the offence in question, the Court sees no reason to doubt that the outcome of the proceedings could have adversely affected the applicant's professional career ... Indeed, criminal conviction and sentence for neglect in the performance of official duties may be a serious matter for any public official.

52. Taking into account what was at stake for the applicant, the Court does not consider that the issues to be determined by the Supreme Court when convicting and sentencing the applicant – and in doing so overturning his acquittal by the City Court – could, as a matter of fair trial, properly have been examined without a direct assessment of the evidence given by the applicant in person.

53. Having regard to the entirety of the proceedings before the Norwegian courts, to the role of the Supreme Court and to the nature of the issues adjudicated on, the Court reaches the conclusion that there were no special features to justify the fact that the Supreme Court did not summon the applicant and hear evidence from him directly before passing judgment under Article 362 para. 2 ... of the Code of Criminal Procedure ...

In short, the Court finds that there has been a violation of Article 6 para. 1 ... of the Convention.

📖 *Tierce and others v. San Marino*, 24954/94, 24971/94 and 24972/94, 25 July 2000

99. In the proceedings against Mr Tierce, the appellate judge had to consider points of both fact and law.

The first applicant maintained that he could not be held criminally liable. It was therefore the appellate judge's task to make a full assessment of the issue of his guilt or innocence. Admittedly, the judge could not increase the penalty imposed at first instance, but the main question for him to examine was whether the first applicant was guilty or innocent. He considered the legal classification of the first applicant's conduct and, without directly assessing evidence adduced by the first applicant in person, confirmed that the applicant's conduct had amounted to fraud and not merely to misappropriation, even though the difference between the two offences lay chiefly in the subjective element (that of intention to deceive). Furthermore, at the complainant's request, the judge even considered a further offence allegedly committed by

the first applicant and subsequently referred the matter to the *Commissario della Legge*. The issue of the preventive attachment of the first applicant's property was also well to the fore in the appeal proceedings.

100. Accordingly, the applicant should have been heard in person by the appellate judge ...

▮ *Hermi v. Italy* [GC], 18114/02, 18 October 2006

92. It is regrettable that the notice did not indicate that it was for the applicant to request, at least five days before the date of the hearing, that he be brought to the hearing room ... However, the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements. It is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights.

93. In the instant case, the applicant was informed of the date of the appeal hearing on 1 September 2000, that is, more than two months in advance of the hearing. The same was true of the lawyer appointed by the applicant .... During that time, the applicant's lawyers did not deem it necessary to get in touch with their client ... There is nothing in the case file to indicate that the applicant attempted to make contact with them ...

101. It is true that, at the appeal hearing, Mr Marini objected to the proceedings being continued in his client's absence ... However, in the Court's view, that objection, made at a late stage and unsupported by any statement from the defendant himself, could not outweigh the attitude adopted by the applicant.

102. In the light of the above, and taking account in particular of the conduct of the applicant's lawyers, the Court considers that the Italian judicial authorities were entitled to conclude that the applicant had waived, tacitly but unequivocally, his right to appear at the hearing of 3 November 2000 before the Rome Court of Appeal. Moreover, the applicant could have asserted that right without the need for excessive formalities.

▮ *Marcello Viola v. Italy*, 45106/04, 5 October 2006

72. ... la Cour estime que la participation du requérant aux audiences d'appel par vidéoconférence poursuivait des buts légitimes à l'égard de la Convention, à savoir la défense de l'ordre public, la prévention du crime, la protection des droits à la vie, à la liberté et à la sûreté des témoins et des victimes des infractions, ainsi que le respect de l'exigence du « délai raisonnable » de durée des procédures judiciaires. Il reste à vérifier si ses modalités de déroulement ont respecté les droits de la défense.

73. La Cour observe que ...le requérant a pu bénéficier d'une liaison audiovisuelle avec la salle d'audience, ce qui lui a permis de voir les personnes qui y étaient présentes et d'entendre ce qui était dit. Il était également vu et entendu par les autres parties, par le juge et par les témoins, et avait le loisir de faire des déclarations à la cour depuis son lieu de détention.

74. Certes, il est possible que, à cause de problèmes de nature technique, la liaison entre la salle d'audience et le lieu de détention ne soit pas idéale, ce qui peut entraîner des difficultés de transmission de la voix ou des images. Cependant, en l'espèce, à aucun moment des débats d'appel le requérant n'essaya, lui-même ou par le truchement de ses défenseurs, d'informer le juge de ses difficultés d'audition ou de vision ...

75. La Cour souligne enfin que le défenseur du requérant avait le droit d'être présent à l'endroit où se trouvait son client et de s'entretenir avec lui de manière confidentielle. Cette possibilité était reconnue également au défenseur présent dans la salle d'audience ... Rien ne démontre qu'en l'espèce le droit du requérant de communiquer avec son avocat hors de portée d'ouïe d'un tiers ait été méconnu.

76. Dans ces conditions, la Cour estime que la participation du requérant aux audiences d'appel de la deuxième procédure pénale par vidéoconférence n'a pas placé la défense dans une position de désavantage substantiel par rapport aux autres parties au procès, et que l'intéressé a eu la possibilité d'exercer les droits et facultés inhérents à la notion de procès équitable, telle que résultant de l'article 6 de la Convention.

77. Il s'ensuit qu'il n'y a pas eu violation de cette disposition.

## Public hearing

☞ *Hermi v. Italy* [GC], 18114/02, 18 October 2006

78. However, the Court observes that the fact that the hearings were not held in public was the result of the adoption of the summary procedure, a simplified procedure which the applicant himself had requested of his own volition. The summary procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence .... On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular with reference to the public nature of the hearings and the possibility of requesting the admission of evidence not contained in the file held by the Public Prosecutor's Office.

79. The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of

realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived ...

80. ... Introduction of the summary procedure by the Italian legislature seems to have been expressly aimed at simplifying and thus expediting criminal proceedings ...

81. In the light of the above considerations, the fact that the hearings at first and second instance were conducted in private, and hence without members of the public being present, cannot be regarded as being in breach of the Convention ...

▣ *Hummatov v. Azerbaijan*, 9852/03 and 13413/04, 29 November 2007

142. The Court notes that, in the present case, there are a number of special circumstances distinguishing it from ordinary criminal proceedings. In particular, the applicant was convicted by the court of first instance ... and there was no right of appeal available to him at the material time. Only after the adoption of the new Code of Criminal Procedure and the transitional law ..., did the applicant obtain a right to appeal ... the Court also cannot accept as a fact that, by the time of the examination of the applicant's case on appeal, the requirement of a public hearing had already been satisfied at the first instance. The primary reason for the re-opening of the applicant's case was to remedy the alleged lack of a fair hearing at the first instance, as the applicant had been recognised as a "political prisoner" upon Azerbaijan's accession to the Council of Europe and Azerbaijan had committed itself to give a "re-trial" to all political prisoners including the applicant. Moreover, the Court of Appeal was a judicial body with full jurisdiction, because it had the competence to examine the case on points of fact and law as well as the power to assess the proportionality of the penalty to the misconduct. For these reasons, the Court considers that a public hearing at the Court of Appeal was needed in the present case in order to satisfy the requirements of Article 6 §1.

143. It is undisputed in the present case that the general public was not formally excluded from the trial at the Court of Appeal. The mere fact that the trial took place in the precincts of Gobustan Prison does not necessarily lead to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain identity and possibly security checks in itself deprive the hearing of its public nature ...

145. It is true that various hearings of the Court of Appeal were indeed attended by a number of spectators, although it is not clear if this was the case at each hearing. However, this fact by itself

does not mean that all the necessary compensatory measures had been taken by the authorities in order to ensure the publicity of the hearings and free access of all potential spectators throughout the entire trial.

146. The Court notes that the appellate proceedings lasted from January 2002 to July 2003 and spanned over more than twenty hearings. As it appears from the trial transcripts, a number of the scheduled hearings were postponed to another date. Although the Government maintained that the public and the media had been duly informed about the time and place of the hearings, they failed to submit any evidence in this regard. The Government failed to elaborate in which manner and by what type and frequency of announcement this information was officially conveyed to the public. Apart from this, there is no indication that the public was ever formally provided with instructions on how to reach Gobustan Prison as well as any explanation of access conditions.

147. ... regardless of the actual distance, it cannot be disputed that the prison was located far from any inhabited area, was not easily accessible by transport and there was no regular public transportation operating in its vicinity ... The Court considers that the fact that it was necessary to arrange costly means of transport and travel to a remote destination, as opposed to attending the Court of Appeal's regular courtroom in Baku, had a clearly discouraging effect on potential spectators wishing to attend the applicant's trial.

148. The Court also has regard to the applicant's submission as well as the credible reports of observers indicating that, at a number of hearings, spectators and journalists were pre-selected or not granted access to hearings ...

149. In sum, the Court finds that the Court of Appeal failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Gobustan Prison had on its public character. Consequently, the trial did not comply with the requirement of publicity laid down in Article 6 §1 of the Convention.

150. ... The mere fact that, at the time of the examination of his appeal, the applicant was already a prisoner serving a life sentence does not, in itself, automatically imply the necessity of relocation of the appellate proceedings from a normal courtroom to the place of the applicant's imprisonment. ... In the present case, it was not shown that there were any ... security concerns. Moreover, even if there were any, the Court of Appeal apparently did not consider them serious enough either to mention them in its interim decisions ... or to necessitate a formal decision ... excluding the

public. In such circumstances, the Court finds no justification for the lack of publicity at the Court of Appeal hearings.

151. The Court also notes that the subsequent hearing of the applicant's cassation appeal by the Supreme Court, even if held in public, was not sufficient to remedy the lack of publicity at the appellate hearings, as the Supreme Court was limited in its competence only to the questions of law and had no jurisdiction to hold a full rehearing of the case ...

152. Accordingly, the Court concludes that there has been a violation of Article 6 §1 of the Convention due to lack of a public hearing, which is one of the essential features of the right to a fair trial.

▣ *Bazo González v. Spain*, 30643/04, 16 December 2008

35. En l'espèce, l'*Audiencia Provincial* de Biscaye avait la possibilité, en tant qu'instance de recours, de rendre un nouveau jugement sur le fond, ce qu'elle a fait le 18 décembre 2002. A cet égard, elle pouvait décider soit de confirmer l'acquittement du requérant soit de déclarer celui-ci coupable, après s'être livrée à une appréciation de la question de la culpabilité ou de l'innocence de l'intéressé.

36. L'étendue de l'examen effectué par l'*Audiencia* en l'espèce amène la Cour à considérer que la tenue d'une audience publique n'était pas indispensable. En effet, la Cour constate que les aspects que l'*Audiencia* a dû analyser pour se prononcer sur la culpabilité du requérant avaient un caractère juridique prédominant : l'arrêt de l'*Audiencia* manifeste expressément qu'il ne lui appartient pas de procéder à une nouvelle appréciation des preuves administrées, tâche relevant du tribunal *a quo*. Dès lors, elle s'est limitée à effectuer une interprétation différente à celle du juge *a quo* quant aux comportements dépenalisés en application de la loi 13/1998, relative au marché du tabac. Par ailleurs, l'*Audiencia* réalise également certaines considérations sur les conditions juridiquement nécessaires pour la validité du procès-verbal de police, sans qu'à aucun moment elle ne se prononce sur des questions de fait. Par conséquent, à la différence d'autres affaires ..., la juridiction de recours n'a pas été amenée à connaître de l'affaire en fait et en droit. Bien au contraire, les aspects analysés par l'*Audiencia Provincial* possédaient un aspect purement juridique, sans que les faits déclarés prouvés en première instance aient été modifiés.

37. S'agissant du grief du requérant d'après lequel il n'aurait pu contester les faits déclarés prouvés en première instance en raison de son acquittement, la Cour confirme que le système national ne prévoyait pas la possibilité pour les acquittés de contester les faits déclarés prouvés. Cependant, elle constate que le procès devant le juge pénal n° 1 de Barakaldo (Biscaye) se déroula avec la tenue d'une audience publique au cours de laquelle le requérant bénéfici-



cia de la possibilité de soulever les arguments qu'il estima nécessaires pour s'opposer aux faits controversés. S'agissant de la procédure d'appel, la Cour note que le requérant se vit communiquer les observations du Ministère Public et de l'Avocat de l'État concernant le recours d'appel et, avec l'assistance d'un avocat, il disposa d'un délai pour y répondre, ce qu'il fit. Ce faisant, le requérant a bénéficié d'une procédure contradictoire conformément à l'article 6 § 1.

38. Ces éléments suffisent à la Cour pour conclure qu'une audience publique n'était pas nécessaire. En effet, eu égard à la nature des questions examinées en appel par l'*Audiencia Provincial* et au fait que le requérant a pu présenter ses arguments par écrit à tout stade de la procédure, l'absence d'audience publique n'a pas porté atteinte au droit du requérant à bénéficier d'un procès équitable.

▮ *Igual Coll v. Spain*, 37496/04, 10 March 2009

33. La Cour constate que le requérant fut acquitté en première instance, après la tenue d'une audience publique pendant laquelle furent administrées plusieurs preuves et où le requérant fut entendu. A l'issue de l'audience, le juge considéra que, malgré l'absence avérée de paiement, il n'était pas prouvé que le requérant eut omis volontairement de s'acquitter de son obligation. Pour parvenir à cette conclusion, le juge se fonda sur l'examen de la situation économique du requérant qui l'empêchait d'y faire face et se référa à sa déclaration comme source principale.

34. De son côté, l'*Audiencia Provincial* parvint à la conclusion opposée et estima que l'accusé non seulement avait sciemment violé son obligation de paiement, dont il pouvait s'acquitter, mais il n'avait pas non plus fait preuve d'une attitude proactive aux fins de se procurer les revenus et ressources financières nécessaires, ceci malgré ses qualifications professionnelles élevées.

35. La Cour constate que l'*Audiencia Provincial* n'a pas seulement pris en compte l'élément objectif du délit, en l'occurrence le non-paiement de la pension mais a également examiné les intentions et le comportement du requérant, ainsi que les possibilités d'obtenir des revenus plus élevés en raison de sa formation professionnelle. Aux yeux de la Cour, un tel examen peut difficilement être considéré comme relevant seulement de questions de droit. En effet, il implique, de par ses caractéristiques, une prise de position sur des faits décisifs pour la détermination de la culpabilité du requérant.

36. L'étendue de l'examen effectué par l'*Audiencia* en l'espèce amène la Cour à considérer que la tenue d'une audience publique était indispensable. En effet, l'*Audiencia* ne s'est pas limitée à effectuer une interprétation différente en droit à celle du juge *a quo*

quant à un ensemble d'éléments objectifs, mais a effectué une nouvelle appréciation des faits estimés prouvés en première instance et les a reconsidérés, question qui s'étend au-delà des considérations strictement juridiques. Par conséquent, la juridiction de recours a été amenée à connaître de l'affaire en fait et en droit ...

37. Dans les circonstances particulières de l'espèce, à savoir l'acquiescement du requérant en première instance après la tenue d'une audience publique, pendant laquelle furent administrées plusieurs preuves, tant documentaires, tels que les relevés bancaires du compte de consignation judiciaire, que personnelles comme la déclaration du requérant, la Cour considère que sa condamnation en appel par l'*Audiencia Provincial*, sans qu'il soit entendu personnellement, n'est pas conforme avec les exigences d'un procès équitable tel que garanti par l'article 6 § 1 de la Convention.

38. Ces éléments suffisent à la Cour pour conclure qu'une audience publique devant la juridiction d'appel était nécessaire en l'espèce.

▮ *Pretto and others v. Italy*, 7984/77, 8 December 1983

27. ... In the opinion of the Court, the object pursued by Article 6 §1 ... in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – is, at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by a reading in open court of a decision dismissing an appeal or quashing a previous judgment, such reading sometimes being limited to the operative provisions.

28. The absence of public pronouncement of the Court of Cassation's judgment therefore did not contravene the Convention in the present case.

▮ *Ernst and others v. Belgium*, 33400/96, 15 July 2003

69. Quant au défaut de prononcé public de l'arrêt de la Cour de cassation, dont les requérants se plaignent sans plus de précision, la Cour rappelle que malgré l'absence de restrictions, l'exigence selon laquelle le jugement doit être rendu publiquement a été interprétée avec une certaine souplesse. Ainsi, elle a estimé qu'il convenait, dans chaque cas, d'apprécier à la lumière des particularités de la procédure dont il s'agit, et en fonction du but et de l'objet de l'article 6 § 1, la forme de publicité du « jugement » prévue par le droit interne de l'Etat en cause :... Dans l'affaire *Sutter c. Suisse* ..., elle a jugé que l'exigence de publicité des jugements ne devait pas nécessairement prendre la forme d'une lecture à haute voix de l'arrêt, et a déclaré que les exigences de l'article 6 avaient été satisfaites car toute personne justifiant d'un intérêt

**Announcement of judgment**

pouvait consulter le texte intégral des arrêts du tribunal militaire de cassation.

70. En l'espèce, quelques jours après le prononcé en chambre du conseil de l'arrêt, les requérants s'en sont procurés le texte par une démarche auprès du greffe. En outre, en l'espèce, l'arrêt de la Cour de cassation du 1<sup>er</sup> avril 1996 a été publié dans le recueil officiel (*Pasicrisie*), accompagné du réquisitoire et des conclusions du procureur général. Cette publication a ainsi rendu possible qu'un certain contrôle du public s'exerce sur la jurisprudence de la Cour de cassation (voir *Sutter c. Suisse*, ...). A défaut de précision de la part des requérants et au vu de la jurisprudence mentionnée ci-dessus, la Cour ne décèle aucune violation de l'exigence de publicité du prononcé de l'arrêt de la Cour de cassation.

71. En conclusion, la Cour considère que les exigences de publicité posées par l'article 6 § 1 de la Convention ont été suffisamment respectées.

See also above, "Access to the court record" on page 306.

## Unfairness

📖 *Wynen v. Belgium*, 32576/96, 5 November 2002

41. The Court reiterates, firstly, that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling ... It is in accordance with the functioning of such a mechanism for the court to verify whether it is empowered or required to refer a preliminary question, first satisfying itself that the question must be answered before it can determine the case before it. However, it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of a fair trial, as set forth in Article 6 §1 of the Convention, in particular where such a refusal appears arbitrary ...

42. The Court considers that that was not so in the present case. The Court of Cassation took due account of the applicants' complaints relating to the unlawfulness or unconstitutionality of section 44 of the Hospitals Act, and of their request for a preliminary question on the matter to be submitted to the Administrative Jurisdiction and Procedure Court. It then ruled on the request in a decision grounded on sufficient reasons which does not appear to have been arbitrary. The Court further observes that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation ....

43. In conclusion, the refusal to refer the preliminary question to the Administrative Jurisdiction and Procedure Court did not breach Article 6 § 1 of the Convention.

☞ *Fera v. Italy*, 45057/98, 21 April 2005

45. Etant arrivée à cette conclusion, la Cour se doit de vérifier si l'erreur d'appréciation de la procédure commise par la cour d'assises d'appel et par la Cour de cassation dans la motivation de leur refus d'accorder la réduction d'un tiers de la peine a pu entacher à elle seule l'équité de la procédure.

La Cour note que la motivation erronée de la cour d'assises d'appel n'a pas été évoquée par le requérant dans son pourvoi à la Cour de cassation ... En tout état de cause, il s'agit d'une erreur qui n'a eu aucune conséquence sur la conclusion de la procédure. Comme la Cour l'a indiqué plus haut, la documentation médicale déposée par le requérant lors de l'audience préliminaire faisait apparaître la nécessité de poursuivre les examens psychiatriques. Par la suite, pendant le procès devant la cour d'assises, le requérant demanda et obtint une expertise médicale afin de contrôler s'il était pénalement responsable. En outre, en appel, il demanda une autre expertise sur une autre question, à savoir l'existence d'une relation de cause à effet entre la manière dont la victime avait été soignée à l'hôpital et son décès. Or, comme déjà rappelé par l'arrêt de la cour d'assises, d'après le droit régissant cette affaire, la procédure abrégée n'était pas admise en présence de pareilles demandes.

Certes, le requérant pourrait alléguer que le fait d'empêcher un accusé de demander une nouvelle expertise pour ne pas perdre le bénéfice de la réduction de la peine liée au refus erroné d'octroyer la procédure abrégée pourrait porter préjudice à l'équité de la procédure telle que celle-ci se déroule devant les juridictions du siège. Cependant, étant donné que le requérant avait demandé l'expertise, cette question d'équité de la procédure ne se pose pas en la présente affaire.

Il s'ensuit que l'équité de la procédure dans son ensemble n'a pas été entachée par l'erreur de motivation survenue pendant le procès d'appel et de cassation.

46. En conclusion, la Cour estime que, considérée dans son ensemble, la procédure litigieuse a revêtu un caractère équitable, au sens de l'article 6 § 1 de la Convention. Il n'y a donc pas eu violation de cette disposition.

☞ *Perlala v. Greece*, 17721/04, 22 February 2007

27. ... la Cour rappelle qu'en vertu de la Constitution hellénique, la Convention forme partie intégrante du système juridique grec et prime sur toute disposition contraire du droit interne ... Bien que le requérant ait invoqué dans son pourvoi en cassation une violation de l'article 6 de la Convention, la Cour de cassation a déclaré ce moyen irrecevable, au motif que cette disposition n'était pas directement applicable en l'espèce et que, pour la prendre en

considération, le requérant aurait dû l'invoquer en combinaison avec un des moyens de cassation prévus de façon limitative par le code de procédure pénale. Or, la Cour estime que cette interprétation verse dans l'artifice et affaiblit à un degré considérable la protection des droits des justiciables devant la haute juridiction nationale. Même si elle reconnaît que les conditions de recevabilité d'un pourvoi en cassation peuvent être plus rigoureuses que pour un appel ..., la Cour estime que prononcer l'irrecevabilité du moyen tiré de l'article 6 de la Convention pour le motif exposé ci-dessus, s'inscrit dans une approche par trop formaliste, qui a empêché le requérant de voir la Cour de cassation considérer la conduite de la procédure sous l'angle de cette disposition.

28. En effet, face au refus de la Cour de cassation d'examiner les griefs du requérant tirés de l'administration des preuves à la lumière de l'article 6 de la Convention, la Cour peut raisonnablement déduire que les garanties prévues par cette disposition n'ont ni été prises en compte ni appliquées en l'espèce. Les observations du Gouvernement, qui se limitent en une analyse exhaustive de la procédure suivie en appel, ne contiennent aucun élément de nature à permettre d'arriver à un constat différent ...

30. Ces éléments suffisent à la Cour pour conclure que la Cour de cassation n'a pas assuré au requérant son droit à un procès équitable ...

### **Need for a reasoned judgment**

☞ *Hadjianastassiou v. Greece*, 12945/87, 16 December 1992

34. In this instance the judgment read out by the President of the Courts-Martial Appeal Court contained no mention of the questions as they appeared in the record of the hearing ... Admittedly it referred to Article 366 et seq. of the Military Criminal Code ... and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court. Question 1 (a), dealing with the communication of "general information concerning the guided missile" which had to be kept secret, appeared for the first time in the proceedings before the appeal court. When, the day after the delivery of the judgment, the applicant sought to obtain the full text of the questions, the registrar allegedly informed him that he would have to wait for the "finalised version" of the judgment .... In his appeal on points of law, filed within the five-day time-limit laid down in Article 425 para. 1 of the Military Criminal Code ..., Mr Hadjianastassiou could rely only on what he had been able to hear or gather during the hearing and could do no more than refer generally to Article 426.

35. In the Government's contention, the applicant could have made further submissions by means of an additional memorial, ...

36. The Court is not persuaded by this argument. When Mr Hadjianastassiou received the record of the hearing, on 10 January 1986, he was barred from expanding upon his appeal on points of law. According to a consistent line of cases, additional submissions may be taken into account only if the initial appeal sets out at least one ground which is found to be admissible and sufficiently substantiated ...

37. In conclusion, the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of paragraph 3 (b) of Article 6, taken in conjunction with paragraph 1 ...

☞ *Kremzow v. Austria*, 12350/86, 21 September 1993

**Scope of ruling**

76. The applicant submitted that by imputing guilt of “financial misdeeds” the Supreme Court had in effect found him guilty of fraud in violation of the presumption of innocence. He pointed out that the jury which had heard all the evidence in the case had been unable to establish a motive on the grounds that there were “too many possibilities” ...

77. The Court recalls that the applicant had already been found guilty of murder and that the Supreme Court’s remarks related solely to the question of his motive for the offence. Moreover, the reference to “financial misdeeds” cannot be construed as a finding that the applicant was guilty of a specific offence. In such circumstances no question of a violation of the presumption of innocence arises.

**Reopening of proceedings**

☞ *Nikitin v. Russia*, 50178/99, 20 July 2004

**Request by prosecution**

46. The Court notes that the Russian legislation in force at the material time permitted a criminal case in which a final decision had been given to be reopened on the grounds of new or newly discovered evidence or a fundamental defect ... This procedure obviously falls within the scope of Article 4 §2 of Protocol No. 7. However, the Court notes that, in addition, a system also existed which allowed the review of a case on the grounds of a judicial error concerning points of law and procedure (supervisory review ...). The subject matter of such proceedings remained the same criminal charge and the validity of its previous determination. If the request was granted and the proceedings were resumed for further consideration, the ultimate effect of supervisory review would be to annul all decisions previously taken by courts and to determine the criminal charge in a new decision. To this extent, the effect of supervisory review is the same as reopening, because both constitute a form of continuation of the previous proceedings. The Court therefore concludes that for the purposes of the

*non bis in idem* principle supervisory review may be regarded as a special type of reopening falling within the scope of Article 4 §2 of Protocol No. 7.

54. ... The mere fact that the institution of supervisory review as applied in the present case was compatible with Article 4 of Protocol No. 7 is not, however, sufficient to establish compliance with Article 6 of the Convention.

58. ... in the applicant's case, the Presidium was indeed only deciding the question whether the case was to be reopened or not. Had it quashed the acquittal, this would necessarily have entailed a separate set of adversarial proceedings on the merits before the competent courts ... The Procurator General's request could itself be criticised as being arbitrary and an abuse of process. However, it had no decisive impact on the fairness of the procedure for reopening as a whole, which was primarily a matter for the Presidium's deliberation ... Accordingly, the arbitrariness of the Procurator General's request for a reopening could not be, and was not, prejudicial for the determination of the criminal charges in the present case.

59. The Court concludes that the authorities conducting the supervisory review in the present case did not fail to strike a fair balance between the interests of the applicant and the need to ensure the proper administration of justice.

☞ *Bujnita v. Moldova*, 36492/02, 16 January 2007

23. The Court notes that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant's actions by the lower instances. The Court observes that the latter had examined all the parties' statements and evidence and their original conclusions do not appear to have been manifestly unreasonable. In the Court's view, the grounds for the request for annulment given by the Deputy Prosecutor General in the present case were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court, therefore considers, as it has found in similar circumstances ..., that the State authorities failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system.

**Most appropriate form of redress**

☞ *Sejdovic v. Italy* [GC], 56581/00, 1 March 2006

126. The Court accordingly considers that where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested,

represents in principle an appropriate way of redressing the violation (see the principles set forth in Recommendation R (2000) 2 of the Committee of Ministers, ...). However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law as cited above ...

127. In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded ... provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence ...



## Trial within a reasonable time

**Determining period**    ☰    *Schumacher v. Luxembourg*, 63286/00, 25 November 2000

27. Se ralliant à la thèse du Gouvernement, la Cour estime que la période à prendre en considération pour apprécier la durée de la procédure au regard de l'exigence du « délai raisonnable » a débuté le 24 octobre 1991, date à laquelle le requérant fut inculqué par le juge d'instruction.

28. Quant au *dies ad quem*, la Cour rappelle sa jurisprudence constante selon laquelle la période à prendre en considération dans l'application de l'article 6 s'étend pour le moins jusqu'à la décision d'acquiescement ou de condamnation, fût-elle rendue en degré d'appel ... En l'espèce, il s'avère qu'aucune juridiction ne trancha le fond de l'affaire, de sorte que le requérant ne fut, en définitive, ni acquitté ni condamné. Or, force est de constater que l'intéressé était dans l'attente quant au sort de son affaire jusqu'à l'ordonnance déclarant éteinte par prescription l'action publique engagée à son encontre. La Cour estime partant que la période à prendre en considération s'est terminée avec la décision datée du 17 novembre 2000.

☰    *Stoianova and Nedelcu v. Romania*, 77517/01 and 77722/01, 4 August 2005

20. The Court notes that the criminal proceedings against the applicants comprised two separate phases. The first began on 14 April 1993, when they were arrested and remanded in custody, and ended on 11 November 1997 when the prosecutor N.O. made an order discontinuing the proceedings. The second phase began on 12 May 1999, when the prosecution ordered the proceedings to be reopened, and ended on 21 April 2005 when the prosecution ordered the proceedings to be discontinued.

21. The Court cannot accept the Government's contention that the first phase should not be taken into account for the purposes of Article 6 §1. It considers that the order discontinuing the proceedings made by the prosecutor N.O. on 11 November 1997 cannot be regarded as having terminated the proceedings against the applicants because it was not a final decision ...

... it was open to the prosecution to reopen the criminal investigation without having to seek leave from any domestic court that would have been obliged to consider the application according to certain criteria, including the fairness of reopening the case and whether an excessive period had passed since the decision discontinuing the investigation ... In that connection the Court cannot disregard the fact that prosecutors in Romania, acting as members of the Procurator-General's Department, did not satisfy the requirement of independence from the executive ... Furthermore, the criminal proceedings were ordered to be reopened on the ground that the initial investigation had been incomplete ... The applicants were not responsible for those shortcomings on the part of the authorities and should not therefore be put at a disadvantage as a result of them.

Lastly, the Government have not in any way shown that resurrecting a charge that had been dropped by an order of the prosecutor was an exceptional step ...

☞ *Vayıç v. Turkey*, 18078/02, 20 June 2006

44. As regards the period to be taken into account, the Court finds that the proceedings commenced on 9 September 1996, the day of the applicant's arrest, and are still pending. They have therefore already lasted more than nine years and eight months for three levels of jurisdiction. However, the Court considers that the applicant cannot rely on the period during which he was a fugitive, when he sought to avoid being brought to justice in his country. The Court is of the opinion that the flight of an accused person has in itself certain repercussions on the scope of the guarantee provided by Article 6 §1 of the Convention as regards the duration of proceedings. When an accused person flees from a State which respects the principle of the rule of law, it may be assumed that he or she is not entitled to complain of the unreasonable duration of proceedings following that flight, unless sufficient reason can be shown to rebut this assumption ... there is nothing to rebut the assumption in the present case ...

☞ *Yağcı and Sargın v. Turkey*, 16419/90 and 16426/90, 8 June 1995

59. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case,

**Considerations relevant to the finding of a violation**

regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities ...

63. The Court notes merely that from 22 January 1990 the National Security Court held twenty hearings, sixteen of which were devoted almost entirely to reading out evidence. That process, even allowing for the quantity of documents, cannot be regarded as complex ...

66. The Court reiterates that Article 6 ... does not require a person charged with a criminal offence to co-operate actively with the judicial authorities ... It notes that the conduct of Mr Yağcı and Mr Sargin and their counsel at the hearings does not seem to have displayed any determination to be obstructive. At all events, the applicants cannot be blamed for having taken full advantage of the resources afforded by national law in their defence. Even if the large number of counsel present at the hearings and their attitude to the security measures slowed down the proceedings to some extent, they are not factors that, taken alone, can explain the length of time in issue.

69. ... between 22 January 1990 and 9 July 1992 ... [the] court held only twenty hearings in the case at regular intervals (less than thirty days), only one of which lasted for longer than half a day.

Moreover, after the Antiterrorist Act of 12 April 1991, repealing Articles 141-43 of the Criminal Code, had come into force ... the National Security Court ...waited nearly six months before acquitting the applicants on the charges based on those provisions.

70. In conclusion, the length of the criminal proceedings in question contravened Article 6 para. 1 ...

▮ *Gelli v. Italy*, 37752/97, 19 October 1999

43. The Court observes at the outset that ... the proceedings at issue were extremely complex; while it may be true that the investigations did not mainly concern the charge of slander, i.e. the one in relation to which the applicant has lodged this application, the Court underlines that the proceedings in relation to this charge have never been severed from the remainder. Nor is it for the Court to say whether they should have ...

44. The Court has not identified any delay in the proceedings, which is attributable to the applicant's conduct, saving for the period of four years and one month during which the applicant absconded from prison, which at any event has not been counted towards the period to be taken into consideration ...

45. As regards the conduct of the State authorities, the Court notes that there appears to have been a very long delay between the decision of 26 March 1985 whereby the Rome District Court

was found to be competent to deal with the case, and the judgment of the Judge for the Preliminary Investigations on commitments for trial on 18 November 1991. The Government did not provide any explanation for this delay.

46. The Court considers that this delay, which covers more than half of the total length of the period under consideration, is of itself sufficient to conclude that the case was not heard within a “reasonable time”.

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

88. The Court agrees that criminal proceedings against the applicant were factually and legally complex. They involved several persons accused of having committed numerous financially related offences during a prolonged period of time ...

91. The Court is not convinced that the applicant’s alleged failure to request the disqualification of the two experts in a timely manner was the source of any delay. It was rather incumbent on the authorities to comply from the outset with the rules of criminal procedure and appoint experts whose impartiality would not be open to doubt. Moreover, when the applicant requested the disqualification of the experts, his request was denied twice by the investigation authorities .... It was only when he raised the matter before the Teteven District Prosecutor’s Office that the experts were replaced ...

92. As regards the need to replace the applicant’s counsel, it does not appear that this was the main reason why the Teteven District Prosecutor’s Office decided to refer the case back to the investigation in July 1998. This had become necessary essentially because certain facts had not been fully elucidated, the investigator had erred in the legal qualification of the offences alleged against the applicant and one of the experts who had prepared an expert financial report needed to be replaced ....

93. Finally, concerning the other delays attributable to the applicant, which amounted in total to approximately two weeks ..., the Court considers that they did not have a significant impact on the length of the proceedings as a whole ...

96. The Court notes that during the entire period to be taken into consideration – more than five years and nine months – the proceedings remained at the preliminary investigation stage. Even taking into account the fact that the case was legally and factually complex, such a time-span appears excessive. The Court further notes that there were lengthy periods during which no activity seems to have taken place. Such gaps occurred between 4 November 1998 and 1 June 1999 ..., between 13 June 1999 and 7

January 2000 ..., between 14 February 2000 and 12 May 2000 ... and between 4 August 2000 and 8 June 2001 ....

Finally, the Court notes that there was apparently poor co-ordination between the various bodies involved in the case, as evidenced by the numerous reformulations of the charges against the applicant ... This, together with the many remittals of the case from the prosecution to the investigation authorities for additional investigation or for the rectification of procedural irregularities ..., was a major factor contributing to the delay ...

97. Having regard to the criteria established in its case-law for assessment of the reasonableness of the length of proceedings, the Court finds that the length of the criminal proceedings against the applicant failed to satisfy the reasonable time requirement of Article 6 §1 of the Convention.

📖 *De Clerck v. Belgium*, 34316/02, 25 September 2007

50. La Cour note que la période à prendre en considération pour apprécier la durée de la procédure au regard de l'exigence du « délai raisonnable », posée à l'article 6 § 1, a commencé le 30 novembre 1990, avec les perquisitions au centre de coordination du groupe, le Centre Beaulieu et la N.V. Beaulieu Wielsbeke. D'après les informations de l'avocat des requérants, non contredites par le Gouvernement, la procédure se trouvait toujours, en date du 7 juin 2007, à la phase de règlement devant la chambre du conseil en application de l'article 127 du code d'instruction criminelle et aurait été remise *sine die* en attendant l'exécution de certaines mesures d'instruction ... Selon ces indications, la procédure serait encore pendante et, à la date de l'adoption du présent arrêt, elle aurait donc atteint la durée de seize ans et dix mois environ.

56. En l'espèce, la Cour ne peut que constater la complexité de l'affaire des requérants. Elle convient avec le Gouvernement que la tâche du juge d'instruction B., dans le dossier principal 427/90, était difficile. L'instruction dans ce dossier a débuté le 8 novembre 1990 et a pris fin le 18 mai 2001, avec la deuxième ordonnance de soit-communié contre le premier requérant. Il ressort des éléments fournis par le Gouvernement que les actes d'instruction se sont succédés sans discontinuer : vingt-six réquisitoires complémentaires, vingt-trois rapports d'expertise, quarante-neuf commissions rogatoires dans dix pays différents, deux cent cinquante mille quatre cent neuf pages de dossier, cinq mille neuf cent cinquante procès-verbaux, six cent quarante-sept auditions, cent quarante-trois perquisitions et six cent onze dépôts au greffe ... A cela s'ajoutent les actes d'instruction accomplis dans les deux dossiers annexes principaux 129/97 et 197/97 ainsi que la décision du procureur du Roi du 14 avril 2005 de joindre à ces trois dos-

siers sept autres dossiers dans d'autres instructions judiciaires menées par d'autres juges d'instruction ...

57. Toutefois, la Cour estime que la complexité évidente de l'affaire ne saurait à elle-seule justifier la longueur de la procédure ...

63. La Cour considère que le comportement des requérants n'a pas contribué au prolongement de la durée de l'instruction ...

66. La Cour note que le 8 mars 2000, le juge d'instruction B. a communiqué le dossier 427/90 au parquet, en application de l'article 127 du code d'instruction criminelle ... Il devait, par conséquent, considérer qu'il avait terminé son travail d'instruction dans ce dossier. Toutefois, pour des raisons qui, semble-t-il, relèvent de la sécurité des dossiers et de la confidentialité de l'instruction, ledit dossier lui fut retourné pour être par la suite communiqué à nouveau le 18 mai 2001 ... Le procureur du Roi a rédigé ses réquisitions finales le 24 avril 2005. Selon que l'on se place à la première ou à la deuxième date, un laps de temps de cinq ans et un mois ou de trois ans et onze mois s'est écoulé pendant lequel l'activité dans ce dossier a été extrêmement limitée ... En effet, le dernier acte mentionné par le Gouvernement serait la deuxième ordonnance de soit communiqué du 18 mai 2001 contre le premier requérant.

67. En outre, la Cour note que, selon les informations fournies par le Gouvernement, le nombre de pages dans les dossiers confiés au juge d'instruction B. dans l'affaire concernant les requérants ... directement ou indirectement, était de 360 012.

68. Enfin, la Cour ne peut que rappeler ce que la chambre des mises en accusation a souligné dans son arrêt du 6 décembre 2005 ..., à savoir, que la prolongation du délai de consultation des dossiers joints le 14 avril 2005 risquait d'entraîner la prescription de l'action, qui était déjà imminente ...

70. La Cour estime qu'une diligence particulière s'imposait aux autorités saisies, compte tenu de l'enjeu financier capital pour les requérants et du fait que ledit enjeu se rapportait à leur activité professionnelle ainsi qu'à celle des sociétés qu'ils dirigent ...

71. La Cour souligne que pendant toute la période à prendre en considération, l'affaire des requérants demeura et demeure encore au stade de l'instruction préparatoire. Le 7 juin 2007, le conseil des requérants signalait à la Cour que l'affaire était encore reportée en attendant l'exécution de certaines mesures d'instruction demandées par un co-défendeur ...

72. Eu égard à l'ensemble des circonstances de la cause, la Cour ne saurait juger « raisonnable » le laps de temps écoulé en l'espèce.



*Kudła v. Poland* [GC], 30210/96, 26 October 2000

156. ... the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for

**Providing an effective remedy**

an alleged breach of the requirement under Article 6 §1 to hear a case within a reasonable time ...

159. The Court notes at the outset that the Government did not claim that there was any specific legal avenue whereby the applicant could complain of the length of the proceedings but submitted that the aggregate of several remedies satisfied the Article 13 requirements. They did not, however, indicate whether and, if so, how the applicant could obtain relief – either preventive or compensatory – by having recourse to those remedies ... It was not suggested that any of the single remedies referred to, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. Nor did the Government supply any example from domestic practice showing that, by using the means in question, it was possible for the applicant to obtain such a relief.

That would in itself demonstrate that the means referred to do not meet the standard of “effectiveness” for the purposes of Article 13 because, as the Court has already said ..., the required remedy must be effective both in law and in practice.

☞ *Caldas Ramírez de Arrellano v. Spain* (dec.), 68874/01, 28 January 2003

2. ... Having regard to the special nature of the Constitutional Court as the final level of jurisdiction in domestic proceedings, itself the safeguard against possible violations of the fundamental rights laid down in the Constitution, the only possible remedy here is an application for compensation providing the applicant with adequate redress for delays that have already occurred ... In the Government’s submission, that remedy is provided for in sections 292 et seq. of the Judicature Act.

... the applicant could, if his application were declared inadmissible by the Court, apply to the Minister of Justice under sections 292 et seq. of the Judicature Act for compensation, with every prospect of success ...

In these circumstances, the Court considers that this part of the application must be dismissed for failure to exhaust domestic remedies ...

☞ *Ohlen v. Denmark*, 63214/00, 24 February 2005

29. In its judgment of 22 May 2003 the High Court stated that upon an overall assessment of the length of the proceedings from the charge was made until passing of the High Court judgment the applicant’s right to a trial within a reasonable time pursuant to Article 6 of the Convention had been violated. In addition, taking into account that the City Court completely had exempted the ap-

plicant from paying costs, the High Court found that DKK 40 000, in the form of a reduction of the fine, constituted an adequate redress for the length of the proceedings, which at that time had lasted almost seven years and nine months ...

30. Since the High Court acknowledged the failure to observe the reasonable time requirement, the applicant's status as a victim depends on whether the redress afforded at domestic level on the basis of the facts about which he complains before the Court was adequate and sufficient having regard to just satisfaction as provided for under Article 41 of the Convention ...

31. Comparing the compensation granted for non-pecuniary damage in the present case with the sums awarded for comparable delays in the Court's case-law, the Court considers that the sum accorded to the applicant cannot be considered as unreasonable ...

33. In these circumstances ... the Court considers that the matter has been resolved within the meaning of Article 37 §1 (b)

...



# Compensation and costs

## Compensation

### Arrest and detention

#### *Requirement of ECHR violation*

☞ *N.C. v. Italy* [GC], 24952/94, 18 December 2002

49. The Court reiterates that Article 5 §5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 ...

61. The ... right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions.

#### *No provision*

☞ *Sakik and others v. Turkey*, 23878/94-23883/94, 26 November 1997

60. ... the Court notes that there is no example in the case file of any litigant obtaining the compensation referred to in Article 5 §5 by relying on one of the provisions mentioned by the Government.

With particular reference to section 1 of Law no. 466, the Court notes ... that with the exception of the situation – which did not obtain in the instant case – where a person is not committed for trial, or is acquitted or discharged after standing trial (subsection 6), all the cases in which compensation is payable under the provision concerned require the deprivation of liberty to have been unlawful. But the detention in issue was in accordance with Turkish law, as the Government conceded.

In conclusion, effective enjoyment of the right guaranteed by Article 5 §5 of the Convention is not ensured with a sufficient degree of certainty ....

61. Consequently, the Court dismisses the second limb of the Government's preliminary objection and concludes that there has been a breach of Article 5 §5.

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

18. The applicant ... complained that he did not have an enforceable right to compensation in this respect within the meaning of Article 5 §5 of the Convention ...

21. The Court accepts the Government's concession that there has been a violation of Article 5 §§3 and 5 of the Convention in the present case, with the consequence that it is empowered to make an award of just satisfaction to the applicant under Article 41 ...

▣ *Chitayev and Chitayev v. Russia*, 59334/00, 18 January 2007

192. The Court reiterates that Article 5 § 5 of the Convention guarantees an enforceable right to compensation for those whose detention is found, either by the domestic authorities or by the Convention organs, to have been in breach of one of the paragraphs of Article 5 of the Convention ... and that this right is, in principle, complied with where it is possible to apply for such compensation ...

193. In the instant case, the Court recalls first of all its above finding of violations of Article 5 §§1 (c), 3 and 4 and notes that Article 5 §5 is therefore applicable.

194. It further observes that under national law a person who has been remanded in custody may seek compensation after the discontinuance of the criminal proceedings for a lack of evidence of that person's involvement in the imputed offences ... In the applicants' case the criminal proceedings against them were discontinued and re-opened on two occasions, namely on 9 October and 23 November 2000, as well as on 20 January 2001 and 29 October 2003, respectively. Moreover, after the latest re-opening, these proceedings appear still to be pending.

195. The Court considers in this connection that the fact that the judicial system in Chechnya was not functioning until at least November 2000, as acknowledged by the Government, and the fact that, in any event, neither of the decisions ordering the discontinuance of the criminal proceedings against the applicants was final, as well as the fact that the criminal proceedings are still pending, have effectively prevented the applicants from seeking

compensation for their detention in the circumstances of the present case.

196. The Court therefore dismisses the Governments' preliminary objection in its relevant part and finds that there has been a violation of Article 5 §5 of the Convention as regards the period of the applicants' detention under review.

*Refusal based on suspicion*

▣ *Sekanina v. Austria*, 13126/87, 25 August 1993

28. ... The Assize Court sitting at the Linz Regional Court acquitted Mr Sekanina on 30 July 1986 by a judgment which became final ...

29. Notwithstanding this decision, on 10 December 1986 the Linz Regional Court rejected the applicant's claim for compensation, pursuant to section 2 (1) (b) of the 1969 Law ... In its view, there remained strong indications of Mr Sekanina's guilt capable of substantiating the suspicions concerning him; it listed them relying on the Assize Court file. The evidence in question could, in its opinion, still constitute an argument for the applicant's guilt. The court inferred from the record of the jury's deliberations that in acquitting the applicant they had given him the benefit of the doubt ...

The Linz Court of Appeal went further in the grounds of its decision of 25 February 1987. It considered that section 2 (1) (b) of the 1969 Law, according to which compensation is confined to persons that have been not only acquitted but also cleared of all suspicion, was in conformity with the Austrian Constitution and Article 6 para. 2 ... of the Convention. In this respect it did not regard itself as bound by the Assize Court's acquittal. On the other hand, it referred to its own decision of 30 April 1986 authorising detention on remand for a year ...; it saw this as confirmation of the gravity of the suspicions concerning the applicant. After having drawn up a comprehensive list of items of evidence against Mr Sekanina, in its view not refuted during the trial, and after having carefully examined the statements of various witnesses, it concluded: "The jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of that suspicion's being dispelled" ...

30. Such affirmations – not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations – left open a doubt both as to the applicant's innocence and as to the correctness of the Assize Court's verdict. Despite the fact that there had been a final decision acquitting Mr Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant's guilt on the basis of the contents of the

Assize Court file. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence.

31. Accordingly, there has been a violation of Article 6 para. 2 ...

▮ *Hibbert v. the Netherlands* (dec.), 38087/97, 26 January 1999

As regards the reasons stated by the Court of Appeal for rejecting the applicant's request under Article 89 of the Code of Criminal Procedure, the Court notes that the Court of Appeal considered that, given the fact that incriminating statements had been made by witnesses as to the applicant's involvement in the punishable facts as charged, his pre-trial detention was fully justified.

The Court is of the opinion that the Court of Appeal's wording can reasonably be interpreted as an indication, as it was required to do in its determination of the applicant's request under Article 89 of the Code of Criminal Procedure for compensation for the time he had spent in pre-trial detention, that there had been reasonable suspicions concerning the applicant. Even if the reference to the findings of the Court of Appeal in the criminal proceedings against the applicant may be regarded as ambiguous or unsatisfactory by the latter, the Court finds that the Court of Appeal confined itself in substance to noting that there had been a "reasonable suspicion" that the applicant had "committed an offence" (Article 5 para. 1 (c) of the Convention).

The Court, therefore, cannot find that the Court of Appeal's decision on the applicant's requests under Article 89 and 591a of the Code of Criminal Procedure respectively offended the presumption of innocence guaranteed to the applicant under Article 6 para. 2 of the Convention.

▮ *Capeau v. Belgium*, 42914/98, 13 January 2005

25. The Court notes that the Appeals Board's refusal was based solely on the fact that the applicant had not supported his compensation claim by adducing evidence of his innocence. Although it was founded on section 28 (1) (b) of the Law of 13 March 1973, which expressly provides that a person against whom proceedings have been discontinued must establish his innocence by adducing factual evidence or submitting legal argument to that effect, such a requirement, without qualification or reservation, casts doubt on the applicant's innocence. It also allows

doubt to attach itself to the correctness of the decisions by the investigating courts, notwithstanding the observation in the Appeals Board's decision that the evidence against the applicant at the time when he appeared before those courts had been judged insufficient to justify committing him for trial. It is true that the voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation ... and that in Belgian law a discontinuation order does not bar the reopening of a case in the event of new evidence or new developments. However, the burden of proof cannot simply be reversed in compensation proceedings brought following a final decision to discontinue proceedings. Requiring a person to establish his or her innocence, which suggests that the court regards that person as guilty, is unreasonable and discloses an infringement of the presumption of innocence.

*Refusal without hearing or reasons*

☰ *Göç v. Turkey* [GC], 36590/97, 11 July 2002

50. It notes that the Karşıyaka Assize Court had a discretion as to the amount of compensation to be awarded to the applicant once it had been established that his case came within one of the grounds contained in section 1 of Law no. 466 ... the Karşıyaka Assize Court took note of all the complaints set out in the petition lodged by the applicant's lawyer and had regard to a series of personal factors, namely the financial and social status of the applicant and, in particular, the extent of the emotional suffering which he endured during the period of his detention ...

51. While it is true that the fact of the applicant's detention and the length of that detention as well as his financial and social status could be established on the basis of the report drawn up by the judge rapporteur and without the need to hear the applicant ..., different considerations must apply to assessment of the emotional suffering which the applicant alleged he endured. In the Court's opinion, the applicant should have been afforded an opportunity to explain orally to the Karşıyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety. The essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation, required that he be heard. It cannot be said that these matters are technical in nature and could have been dealt with properly on the basis of the case file alone. On the contrary, the Court considers that the administration of justice and the accountability of the State would have been better served in the applicant's case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public

scrutiny. In its view, this factor outweighs the considerations of speed and efficiency on which, according to the Government, Law no. 466 is based.

52. For the above reasons, the Court finds that there were no exceptional circumstances that could justify dispensing with an oral hearing and accordingly Article 6 §1 of the Convention has been breached.

▮ *Fedotov v. Russia*, 5140/02, 25 October 2005

86. As the Court established in its decision of 23 November 2004 on the admissibility of the application, the applicant had validly introduced a claim for the damage he incurred as a result of his unlawful detention. However, the domestic courts disregarded it, notwithstanding the oral and written submissions of the applicant and his counsel. What is more, the Basmanniy District Court made arbitrary findings of fact, stating in its judgment that the applicant “had not actually been taken into custody”, despite abundant evidence to the contrary.

87. In these circumstances, the Court finds that the applicant was denied an enforceable right to compensation for unlawful arrest and that there has been a violation of Article 5 §5 of the Convention.

#### Assessment

▮ *Engel and others v. the Netherlands* (Article 50), 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 23 November 1976

10. Mr Engel was deprived of his liberty in conditions at variance with Article 5 para. 1 ...of the Convention and furthermore incompatible, to the extent of between twenty-two and thirty hours ..., with Article 45 of the above-mentioned Act of 27 April 1903. During this period he encountered the disagreeable effects of the regime of strict arrest. He thus suffered moral damage.

In evaluating this damage, the Court cannot overlook the brevity of Mr Engel’s detention. Moreover, he was to a large extent compensated for the damage. In fact, after having been found guilty of the disciplinary offence which had led to his arrest on 20 March 1971, he did not have to serve the two days’ strict arrest awarded shortly afterwards for that offence .... On 5 April 1971, his provisional arrest was set off against this penalty by a decision of the complaints officer which the Supreme Military Court confirmed on 23 June 1971 ... Whilst this does not constitute *restitutio in integrum*, it is nevertheless relevant in the context of Article 50 ... Taking these various factors into account, the Court considers that Mr Engel, in addition to the satisfaction resulting from items 4 and 5 of the operative provisions of the judgment of 8 June

1976, should be afforded a token indemnity of one hundred Dutch guilders.

**Acquittal/discontinuance**

*Refusal based on admission of guilt*

☞ *Aanemersbedrijf Gebroeders van Leeuwen BV v. the Netherlands* (dec.), 32602/96, 25 January 2000

1. ...The Court notes at the outset that in itself the refusal to pay compensation for damage caused by public authority in the course of criminal proceedings which are subsequently discontinued does not amount to a penalty or a measure that can be equated with a penalty ... Moreover, neither Article 6 §2 nor any other provision of the Convention and its Protocols obliges the Contracting States, where a prosecution has been discontinued, to indemnify a person “charged with a criminal offence” for any detriment he may have suffered ...

... the Court notes that the applicant company sued the Netherlands State in tort, claiming compensation for damage caused by measures taken in the course of the criminal proceedings against it. In refusing to award such compensation the Court of Appeal had regard to the unequivocal admission of the use of forged invoices which members of the applicant company’s management had made during the criminal investigation. This clear admission of guilt in itself rebutted the presumption of innocence and provides sufficient justification for the Court of Appeal’s reliance on this admission. In the circumstances, therefore, the Court finds no issue under Article 6 §2 of the Convention.

*Refusal based on suspicion*

☞ *O. v. Norway*, 29327/95, 11 February 2003

39. ... It observes that, in its decision of 25 January 1995, the High Court summarised the charges of sexual abuse brought against the applicant in the criminal trial, as well as reiterating the jury’s verdict and his acquittal by the judges. Then it went on to examine whether the conditions for awarding compensation under Article 444 were fulfilled. Referring to evidence from the criminal case, the High Court found it probable that the applicant’s daughter had been subjected to sexual abuse and, “[c]onsidering the case as a whole, ... [did] not find it shown on the balance of probabilities that [he] did not engage in sexual intercourse with [her]” ... he view of the Court, the High Court’s reasoning clearly amounted to the voicing of suspicion against the applicant regarding the charges of sexual abuse on which he had been acquitted.

40. The Court is mindful of the fact that, in upholding the High Court’s decision, the Appeals Leave Committee of the Supreme Court had regard to and quoted its previous interpretation of Article 444 in a 1994 decision, in which it had been held

that the refusal of a compensation claim did not undermine or cast doubt on the earlier acquittal ... The Court appreciates that a deliberate effort was made to avoid any conflict with Article 6 §2 in the interpretation of the statutory provision concerned. However, it is not convinced that, even if presented together with such a cautionary statement, the impugned affirmations were not capable of calling into doubt the correctness of the applicant's acquittal, in a manner incompatible with the presumption of innocence.

41. ... Accordingly, there has been a violation of Article 6 §2 of the Convention.

▣ *Puig Panella v. Spain*, 1483/02, 25 April 2006

55. La Cour constate que le refus du ministère de la Justice se fondait uniquement sur l'absence de preuve de la non-participation du requérant aux faits qui lui étaient reprochés. Il ressort clairement de la motivation de la décision du ministère de la Justice que c'est en raison de la culpabilité supposée (ou de l'absence de « certitude totale quant à l'innocence ») du requérant que sa demande fut rejetée. Bien qu'elle repose sur l'article 294 §1 de la LOPJ, qui prévoit que seules ont droit à une indemnisation les personnes ayant été acquittées ou ayant fait l'objet d'un non-lieu définitif en raison de l'inexistence (objective et subjective) des faits qui leur étaient reprochés, pareille exigence, sans nuance ni réserve, dans les circonstances de l'affaire, laisse planer un doute sur l'innocence du requérant. Il est vrai que le requérant n'a pas été appelé à démontrer son innocence dans le cadre de sa demande auprès du ministère de la Justice ni de la procédure contentieuse-administrative ultérieure (voir *Capeau c. Belgique* ...). Cependant, les décisions du ministère et des juridictions administratives sont fondées sur le fait que le Tribunal constitutionnel, dans son arrêt d'*amparo*, avait annulé les condamnations pour non-respect du principe de la présomption d'innocence sans constater pour autant l'absence de participation du requérant aux faits pour lesquels il avait été poursuivi.

56. ... la Cour note que le requérant, qui n'avait invoqué aucune disposition précise de ladite loi dans sa réclamation auprès du ministère, fit état, dans le cadre de son recours d'*amparo*, de l'impossibilité d'appliquer l'article 294 étant donné qu'il se plaignait de la peine de prison ferme qu'il avait purgée et non de la détention provisoire. Elle observe aussi que le Tribunal constitutionnel affirma, erronément, que la réclamation du requérant était fondée sur le cas de figure prévu à l'article 294 de la LOPJ, à savoir l'indemnisation pour détention provisoire. Or, il semble que les autorités nationales aient fait preuve d'une sévérité excessive en choisissant d'appliquer cet article, étant donné que le requérant ne se plaignait



pas de sa détention provisoire et qu'il n'y avait eu ni acquittement ni non-lieu. En effet, c'est l'application par analogie de cet article, au lieu de l'article 292, qui vise des situations plus générales (erreur judiciaire ou mauvais fonctionnement de la justice), qui a amené le ministère et les juridictions internes à examiner si l'absence de participation du requérant avait été suffisamment établie et, de ce fait, à rejeter sa demande.

57. Ce raisonnement fait peser un doute sur l'innocence du requérant malgré l'arrêt du Tribunal constitutionnel qui octroya l'*amparo* à l'intéressé en rétablissant son droit à la présomption d'innocence. L'expression de soupçons sur l'innocence d'un accusé se conçoit tant que la clôture des poursuites pénales n'emporte pas décision sur le bien-fondé de l'accusation, mais on ne saurait s'appuyer à bon droit sur de tels soupçons après un acquittement devenu définitif ... Cela vaut *a fortiori* pour la présente affaire, où le ministère de la Justice se fonda sur l'absence de certitude totale quant à l'innocence du requérant pour rejeter sa demande d'indemnisation, malgré l'existence d'un arrêt du Tribunal constitutionnel qui avait rétabli son droit à la présomption d'innocence. Dans ces conditions, le raisonnement du ministère de la Justice, confirmé ultérieurement par les juridictions internes saisies, se révèle incompatible avec le respect de la présomption d'innocence.

58. Par ailleurs, la Cour attache du poids au fait que, comme le reconnaît le Gouvernement, la condamnation du requérant figure depuis plus de treize ans sur le casier judiciaire, bien qu'elle ait été définitivement annulée par le Tribunal constitutionnel.

59. Partant, il y a eu violation de l'article 6 § 2 de la Convention.

☞ *Taliadorou and Stylianou v. Cyprus*, 39627/05 and 39631/05, 16 October 2008

26. The Court notes that the second set of proceedings before the domestic courts was brought by the applicants, who claimed compensation in respect of an annulled administrative decision which had imputed to them responsibility for acts of torture and ordered their dismissal. The administrative decision had been annulled by the Supreme Court because, *inter alia*, it violated the presumption of innocence as guaranteed in the Constitution and Article 6 §2 of the Convention. Given that the second set of proceedings concerned the claim for compensation as a remedy for an act that ran counter to the guarantee of Article 6 §2, the Court agrees with the parties that this provision is applicable ... It reiterates in this connection that one of the functions of Article 6 §2 is to protect an acquitted person's reputation from statements or acts that follow an acquittal which would seem to undermine it.

27. However, the Court notes that the Supreme Court did not make any express or implied indication which undermined the applicants' innocence and acquittal. Although it did reverse the moral damages award made by the District Court, the Supreme Court did not link that reversal to any suspicion that the applicants had in fact been guilty of the offences of which they had been acquitted, but instead based itself conclusively on the issue of causation ...

28. Accordingly, the Court finds that there has been no violation of Article 6 §2 of the Convention.

▣ *Barberà, Messegue and Jabardo v. Spain*, 10590/83 (Article 50), 13 June 1994

**Wrongful conviction**

16. ... the applicants were kept in prison as a direct consequence of the trial found by the Court to be in violation of the Convention. Moreover, in the light of the final judgment of the Audiencia Nacional of 30 October 1993 ..., it cannot be assumed that even if the first trial had been conducted in compliance with the Convention the outcome would not have been more favourable to the applicants. In any event, they suffered a real loss of opportunity to defend themselves in accordance with the requirements of Article 6 ... and thereby to secure a more favourable outcome. There was thus, in the opinion of the Court, a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In the nature of things the subsequent release and acquittal of the applicants could not in themselves afford *restitutio in integrum* or complete reparation for damage derived from their detention...

18. As regards the amounts claimed in respect of loss of earnings and of career prospects, the Court cannot accept the method of calculation put forward by the applicants in 1993 based on allowances claimed in Spain in cases of incapacity for work ..., because such a method has no connection with the circumstances of the case. Despite the lack of supporting documents and the contradictions in the statements made by the applicants regarding their alleged occupations prior to their imprisonment ... the Court considers that it should award them compensation under this head on the basis of the figures submitted by them in 1987.

19. Like the finding of a violation of the Convention by the European Court, the decisions of the Spanish courts subsequent to the principal judgment afforded the applicants a measure of reparation for non-pecuniary damage. They cannot, however, fully redress the damage sustained in this respect.

20. Making an assessment on an equitable basis in accordance with Article 50 ... and having regard to the circumstances referred to above, the Court awards Mr Barberà 8 000 000 pesetas,

Mr Messegué 8 000 000 pesetas and Mr Jabardo 4 000 000 pesetas, to cover all the heads of damage claimed.

☰ *Shilyayev v. Russia*, 9647/02, 6 October 2005

19. The applicant complained that the court award of 20 July 2001 was insufficient. He relied on Article 5 of the Convention and Article 3 of Protocol No. 7 ...

20. The Court recalls that the above provisions provide for a right to compensation of those whose detention was found in breach of one of the paragraphs of Article 5 of the Convention ... and a right to compensation for miscarriages of justice, when an applicant has been convicted of a criminal offence by a final decision and suffered consequential punishment ... These Convention provisions do not however prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach, nor do they actually refer to any specific amounts ...

21. On the facts, the Court observes that the domestic authorities recognised the miscarriage of justice in the applicant's criminal case, quashed his conviction of 24 October 1997, as upheld on appeal on 19 February 1998, as unlawful and granted him damages of RUR 70 000 (approximately 2 740 euros) in this connection. This award does not appear arbitrary or unreasonable as the courts at two instances carefully examined all relevant circumstances of the applicant's personal situation including the nature of the criminal case against him, total length of his detention and personal after-effects and reached reasoned conclusions as to the amount of the award. The applicant was fully able to take part in this procedure and the amount of the award does not appear disproportionate even in the domestic terms.

22. Having regard to the above, the Court considers this part of the application manifestly ill-founded within the meaning of Article 35 §3 of the Convention.

☰ *Matveyev v. Russia*, 26601/02, 3 July 2008

40. ... the applicant was convicted by a final decision of 25 September 1981 and sentenced to two years' imprisonment, which he subsequently served. His conviction was quashed under the supervisory review procedure on 6 October 1999 by the Presidium of the Arkhangelsk Regional Court. Having regard to the Explanatory Report to Article 3 of Protocol No. 7, the Court points out that it is immaterial which procedure was applied by the domestic courts for the purpose of reversing the judgment.

41. The Court further notes that the parties disagreed as to whether the applicant's conviction was reversed on the ground of "a new or newly discovered fact". The applicant argued that Price

List no. 125 “Postal Rates and Services”, which constituted the basis of the quashing of his conviction by the Presidium of the Arkhangelsk Regional Court on 6 October 1999, had not been available at the time of his conviction either to the parties or to the courts. The Government disagreed and averred that not only had the Price List been available, but it had been expressly referred to in the judgment of the Lomonosovskiy District Court of 11 August 1981.

42. The Court observes that Price List no. 125 “Postal Rates and Services” was referred to by the applicant himself in the proceedings before the Lomonosovskiy District Court. The applicant argued that he could not have used the postal stamp because according to the Price List it had become invalid. The District Court dismissed the applicant’s argument, having found that at the time of the theft the applicant had not been aware of the Price List and had had the intent to use the postal stamp unlawfully. It follows that at the time of the proceedings both the District Court and the applicant were aware of the contents of the Price List.

43. The Court further notes that on 6 October 1999 the Presidium of the Arkhangelsk Regional Court quashed the applicant’s conviction on the ground that according to the Price List the postal stamp had no longer been valid at the material time and could not have been used to obtain profit unlawfully. Accordingly, the conviction was not quashed with regard to “a new or newly discovered fact”, but due to reassessment by the Presidium of the evidence that had been used in the criminal proceedings against the applicant.

44. Having regard to the foregoing and to the Explanatory Report to Article 3 of Protocol No. 7, the Court considers that the conditions of applicability of Article 3 of Protocol No. 7 have not been complied with.

## Reimbursement of costs

▣ *Masson and Van Zon v. the Netherlands*, 15346/89 and 15379/89, 28 September 1995

**No general right**

49. In view of the status of the Convention within the legal order of the Netherlands, the Court observes firstly that the Convention does not grant to a person “charged with a criminal offence” but subsequently acquitted a right either to reimbursement of costs incurred in the course of criminal proceedings against him, however necessary these costs might have been, or to compensation for lawful restrictions on his liberty. Such a right can be derived neither from Article 6 para. 2 ... nor from any other provision of the Convention or its protocols. It follows that the ques-

tion whether such a right can be said in any particular case to exist must be answered solely with reference to domestic law.

**Refusal and the presumption of innocence**

📖 *Leutscher v. the Netherlands*, 17314/90, 26 March 1996

29. The Court notes that it was common ground that Article 6 para. 2 ... does not confer on a person “charged with a criminal offence” a right to reimbursement of his legal costs where proceedings taken against him are discontinued ...

The Court... would also recall its established case-law to the effect that in itself the refusal to order the reimbursement to the former accused of his necessary costs and expenses following the discontinuation of criminal proceedings against him does not amount to a penalty or a measure that can be equated with a penalty ...

Nevertheless, such a decision may raise an issue under Article 6 para. 2 ... if supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the guilt of the former accused without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence ...

31. Under Article 591a para. 2 CCP taken together with Article 90 CCP the Court of Appeal was empowered to order that the applicant’s costs should be paid out of public funds only if it found that there were “reasons in equity” for such reimbursement. In the exercise of the wide measure of discretion conferred upon it under these provisions, the Court of Appeal was – both under the Convention and under Netherlands law – entitled to take into account the suspicion which still weighed against the applicant as a result of the fact that his conviction had been quashed on appeal only because the prosecution was found to have been time-barred when the case was brought to trial. It made clear that it did so by stating that “neither the file of the criminal investigation nor that relating to the present request [gave] any cause to doubt that this conviction [had been] correct” ...

The Court of Appeal, when applying Article 591a para. 2 CCP, was not called upon to reassess the applicant’s guilt or express a view as to whether his conviction would have been upheld on appeal. Nor, when seen in the context of that provision, as it must be, can its decision of 16 March 1990 be construed as a finding to that effect.

32. No violation of Article 6 para. 2 ... can therefore be found on the facts of the present case.

▮ *Baars v. the Netherlands*, 44320/98, 28 October 2003

28. The similarity of the present case with the *Lutz* case is that the criminal proceedings in both cases ended without any decision on the merits because the prosecution was time-barred. In the subsequent proceedings in the *Lutz* case concerning reimbursement of costs and expenses, the German first-instance court noted ...

The Court concluded that the German courts thereby meant to indicate, as they were required to do for the purposes of the decision, that there were still strong suspicions concerning the applicant. It added that, even if the terms used might appear ambiguous and unsatisfactory, the national courts had confined themselves in substance to noting the existence of “reasonable suspicion” that the defendant had “committed an offence”. On the basis of the evidence, in particular Mr Lutz’s earlier statements, the decisions described a “state of suspicion” and did not contain any finding of guilt. In this respect the Court found that there was a contrast with the more substantial, detailed decisions which the Court had considered in the aforementioned *Minelli* case.

29. In the present case, however, the Court of Appeal based its decision not to make any award to the applicant, who had been charged with forgery, on its view that “[the] receipt [had been] forged by the applicant” and enumerated in detail the elements from which this followed.

30. In these circumstances, it cannot be said that the Court of Appeal merely indicated that there were still strong suspicions concerning the applicant.

31. The reasoning of the Court of Appeal amounts in substance to a determination of the applicant’s guilt without the applicant having been “found guilty according to law”. It was based on findings in proceedings against another person, Mr B. The applicant participated in these other proceedings only as a witness, without the protection that Article 6 affords the defence.

32. The Court therefore finds that there has been a violation of Article 6 §2 of the Convention.

▮ *Wolfmeyer v. Austria*, 5263/03, 26 May 2005

24. The applicant complained about Article 209 of the Criminal Code and about the conduct of criminal proceedings against him under this provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

**Refusal where  
offence contrary to  
ECHR**

31. The Court ... observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to being discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention ... and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress ... This is all the more so as the Court itself has awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that the trial during which details of the applicants' most intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives ...

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

## Child-related issues

### Detention on remand

▣ *Assenov v. Bulgaria*, 24760/94, 28 October 1998

155. The Court recalls that on the two occasions when the legality of Mr Assenov's detention was reviewed by a court, his release was refused on the grounds that he was charged with a number of serious crimes and that his criminal activity had been persistent, giving rise to a danger that he would reoffend if released ...

156. ... In these circumstances, the Court considers that the national authorities were not unreasonable in fearing that the applicant might reoffend if released.

157. However, the Court recalls that the applicant was a minor and thus, according to Bulgarian law, should have been detained on remand only in exceptional circumstances ... It was, therefore, more than usually important that the authorities displayed special diligence in ensuring that he was brought to trial within a reasonable time.

The Government have submitted that it took two years for the case to come to trial because it was particularly complex, requiring a lengthy investigation. However, it would appear from the information available to the Court that during one of those years, September 1995 to September 1996, virtually no action was taken in connection with the investigation: no new evidence was collected and Mr Assenov was questioned only once, on 21 March 1996 ... Moreover, given the importance of the right to liberty, and the possibility, for example, of copying the relevant documents rather than sending the original file to the authority concerned on each occasion, the applicant's many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial ...



158. Against this background, the Court finds that Mr Assenov was denied a “trial within a reasonable time”, in violation of Article 5 §3.

☰ *Bouamar v. Belgium*, 9106/80, 29 February 1988

50. ... The Court notes that the confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (d) ... even if it is not in itself such as to provide for the person’s “educational supervision”. As is apparent from the words “for the purpose of” (“pour”), the “detention” referred to in the text is a means of ensuring that the person concerned is placed under “educational supervision”, but the placement does not necessarily have to be an immediate one. Just as Article 5 §1 recognises – in sub-paragraphs (c) and (a) ... – the distinction between pre-trial detention and detention after conviction, so sub-paragraph (d) ... does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.

51. In the instant case the applicant was, as it were, shuttled to and fro between the remand prison at Lantin and his family. In 1980 alone, the juvenile courts ordered his detention nine times and then released him on or before the expiry of the statutory limit of fifteen days; in all, he was thus deprived of his liberty for 119 days during the period of 291 days from 18 January to 4 November 1980 ...

52. ... The Belgian State chose the system of educational supervision with a view to carrying out its policy on juvenile delinquency. Consequently it was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the 1965 Act, in order to be able to satisfy the requirements of Article 5 §1 (d) ... of the Convention ...

Nothing in the evidence, however, shows that this was the case. At the time of the events in issue, Belgium did not have – at least in the French-speaking region in which the applicant lived – any closed institution able to accommodate highly disturbed juveniles ... The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim ....

53. The Court accordingly concludes that the nine placement orders, taken together, were not compatible with sub-paragraph (d) ... Their fruitless repetition had the effect of making them less

and less “lawful” under sub-paragraph (d) ..., especially as Crown Counsel never instituted criminal proceedings against the applicant in respect of the offences alleged against him.

▮ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,  
13178/03, 12 October 2006

99. The second applicant was placed in detention pursuant to section 74-5 of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980, initially pending a decision on her application for asylum and subsequently pending her deportation. At that time, the Act did not contain any provisions specific to minors. Thus, the fact that the alien concerned was a minor was of no relevance to the application of the provisions governing his or her detention.

100. The Court does not agree with the second applicant’s submission that paragraph (d) of Article 5 §1 of the Convention is the only provision which permits the detention of a minor. It in fact contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of their educational supervision or for the purpose of bringing them before the competent legal authority to decide.

101. In the instant case, the ground for the second applicant’s detention was that she had entered the country illegally as she did not have the necessary documents. Her detention therefore came within paragraph (f) of Article 5 §1 of the Convention which permits “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

102. However, the fact that the second applicant’s detention came within paragraph (f) of Article 5 §1 does not necessarily mean that it was lawful within the meaning of this provision, as the Court’s case-law requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention ...

103. The Court notes that the second applicant was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor.

104. In these circumstances, the Court considers that the Belgian legal system at the time and as it functioned in this instance did not sufficiently protect the second applicant’s right to liberty.

☰ *Nart v. Turkey*, 20817/04, 6 May 2008

30. In the present case, the Court notes that the period to be taken into consideration began on 28 November 2003 with the applicant's arrest and ended on 16 January 2004 with his release during the first hearing before the Izmir Juvenile Court. It thus lasted forty eight days.

31. In examining this case, the Court has taken into account the wealth of important international texts referred to above ... and recalls that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.

32. The Court observes that, when the applicant objected to his detention on remand, the Izmir Assize Court rejected his motion on the basis of the contents of the case file, the nature of the offence and the state of evidence ... Although, in general, the expression "the state of evidence" may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it cannot alone justify the length of the detention of which the applicant complains ...

33. It is also noted that, although the applicant's lawyer brought to the attention of the authorities the fact that the applicant was a minor, it appears that the authorities never took the applicant's age into consideration when ordering his detention. Furthermore, the case file reveals that, during his detention, the applicant was kept in a prison together with adults ...

34. In the light of the foregoing, and especially having regard to the fact that the applicant was a minor at the time, the Court finds that the length of the applicant's pre-trial detention contravened Article 5 §3 of the Convention.

☰ *Güveç v. Turkey*, 70337/01, 20 January 2009

106. The Government argued that there had been a genuine requirement of public interest for the continued detention of the applicant who had been charged with a serious offence. There had also been a high risk of him escaping or destroying the evidence against him ...

108. The Court observes that the Government, beyond arguing that the applicant's detention was justified on account of the offence with which he was charged, did not argue that alternative methods had been considered first and that his detention had been used only as a measure of last resort, in compliance with their obligations under both domestic law and a number of international ... Neither are there any documents in the file to suggest that the trial court, which ordered the applicant's continued de-

tion on many occasions, at any time displayed concern about the length of the applicant's detention. Indeed, the lack of any such concern by the national authorities in Turkey as regards the detention of minors is evident in the reports of the international organisations cited above ....

109. In at least three judgments concerning Turkey, the Court has expressed its misgivings about the practice of detaining children in pre-trial detention ... and found violations of Article 5 §3 of the Convention for considerably shorter periods than that spent by the applicant in the present case ... In the present case, the applicant was detained from the age of fifteen and was kept in pre-trial detention for a period in excess of four and a half years.

110. In the light of the foregoing, the Court considers that the length of the applicant's detention on remand was excessive and in violation of Article 5 §3 of the Convention.

☞ *X v. the Federal Republic of Germany*, 8819/79, 19 March 1981, DR 24, 158

**Interrogation**

... however regrettable and unsuitable the police action in question may have been, it does not in itself amount to inhuman or degrading treatment. Although minors are not criminally responsible before reaching a certain age (usually fourteen), it is justified in the interest of a proper administration of justice and the protection of the rights of others to subject them to investigation measures, such as interrogations by the police, in cases where there is well-founded suspicion of their being involved in activities which would be punishable if they were criminally responsible.

It is of course necessary that interrogations of children be carried out in a manner respecting their age and susceptibility. The present applicant has not alleged any irregularities with regard to the police interrogation. She only complains that she was held for a short time in an unlocked cell. However, there is nothing to show that this particularly affected the applicant. The Commission also takes into account that the applicant was in the company of two fellow pupils ...

... this part of the application is manifestly ill-founded ...

☞ *Panovits v. Cyprus*, 4268/04, 11 December 2008

84. Turning to the facts of the present case, the Court repeats its findings of a violation of the applicant's rights of defence at the pre-trial stage of the proceedings due to the fact that, whilst being a minor, his questioning had taken place in the absence of his guardian and without him being sufficiently informed of his right to receive legal representation or of his right to remain silent. The Court notes that the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's

case against him that substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings.

85. The Court notes that in addition to the applicant's confession his conviction was supported by his second statement admitting that he had kicked the victim, a testimony reporting the applicant's statement that he had been involved in a serious fight with the victim and various testimonies confirming that the applicant had been drinking with the victim on the evening the victim died and that his clothes had been covered in mud in the early hours of the following morning. There was also medical evidence confirming that the cause of the victim's death was multiple and violent blows. While it is not the Court's role to examine whether the evidence in the present case was correctly assessed by the national courts, the Court considers that the conviction was based to a decisive extent on the applicant's confession, corroborated largely by his second statement. It considers that the extent to which the second statement made by the applicant was tainted by the breach of his rights of defence due to the circumstances in which the confession had been taken was not addressed by the trial court and remains unclear. Moreover, the Court observes that having regard to the Assize Court's acceptance of the applicant's first statement, it appears that it would have been futile for him to contest the admissibility of his second statement.

86. In the light of the above considerations, the Court concludes that there has been a violation of Article 6 of the Convention because of the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process and thus irreparably undermined his rights of defence.

See also above, "Right to assistance of a lawyer" on page 137 and "Confessions made without the assistance of a lawyer" on page 219.

See above, "Retention of evidence after completion of investigation/prosecution" on page 135.

**Retention of evidence**

**Securing a fair trial**

☞ *T. v. the United Kingdom* [GC], 24724/94, 16 December 1999

86. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the

raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence ...

87. ...it is noteworthy that Dr Vizard found in her report of 5 November 1993 that the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had limited his ability to instruct his lawyers and testify adequately in his own defence ... Moreover, the applicant in his memorial states that due to the conditions in which he was put on trial, he was unable to follow the trial or take decisions in his own best interests ...

88. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 §1 that the applicant was represented by skilled and experienced lawyers. This case is different from that of *Stanford* ..., where the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial, in view of the fact that his counsel, who could hear all that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses. Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of co-operating with his lawyers and giving them information for the purposes of his defence.

89. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 §1.

▮ *S.C. v. the United Kingdom*, 60958/00, 15 June 2004

30. ... although the applicant was tried in public ... steps were taken to ensure that the procedure was as informal as possible; for example, the legal professionals did not wear wigs and gowns and the applicant was allowed to sit next to his social worker. In contrast to the situation in *T. ... v. the United Kingdom*, cited above, the applicant's arrest and trial were not the subject of high levels of

public and media interest and animosity and there is no evidence that the atmosphere in the courtroom was particularly tense or intimidating ...

32. The Court considers it noteworthy, however, that the two experts who assessed the applicant before the hearing formed the view that he had a very low intellectual level for his age ... Dr Brennan ... recommended that the court process should be explained carefully in a manner commensurate with the applicant's learning difficulties.

33. While this appears to have been done, at least by the social worker who was with the applicant in the Crown Court, the former recounts in his statement that "[d]espite my efforts to explain the situation to him [the applicant] did not comprehend the situation he was in" ... Thus, the applicant seems to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, he does not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father.

34. In the light of this evidence, the Court cannot conclude that the applicant was capable of participating effectively in his trial, in the sense set out in paragraph 29 above.

35. The Court considers that, when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.

36. It is true that it was not contended on behalf of the applicant during the domestic proceedings that he was unfit to plead. ... The Court is not, however, convinced, in the circumstances of the present case, that it follows that the applicant was capable of participating effectively in his trial to the extent required by Article 6 §1 of the Convention.

*See also above, "Confessions made without the assistance of a lawyer" on page 219.*

#### **Impact of the trial process**

☞ *T. v. the United Kingdom* [GC], 24724/94, 16 December 1999

73. The second part of the applicant's complaint under Article 3 concerning the trial relates to the fact that the criminal

proceedings took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published ...

76. The Court recognises that the criminal proceedings against the applicant were not motivated by any intention on the part of the State authorities to humiliate him or cause him suffering. Indeed, special measures were taken to modify the Crown Court procedure in order to attenuate the rigours of an adult trial in view of the defendants' young age ...

77. Even if there is evidence that proceedings such as those applied to the applicant could be expected to have a harmful effect on an eleven-year-old child ... the Court considers that any proceedings or inquiry to determine the circumstances of the acts committed by V. and the applicant, whether such inquiry had been carried out in public or in private, attended by the formality of the Crown Court or informally in the Youth Court, would have provoked in the applicant feelings of guilt, distress, anguish and fear. The evidence of Dr Vizard shows that before the trial commenced T. showed the signs of post-traumatic stress disorder, involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping patterns ... Whilst the public nature of the proceedings may have exacerbated to a certain extent these feelings in the applicant, the Court is not convinced that the particular features of the trial process as applied to him caused, to a significant degree, suffering going beyond that which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following the commission by him of the offence in question ...

78. In conclusion, therefore, the Court does not consider that the applicant's trial gave rise to a violation of Article 3 of the Convention.



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This handbook is intended to assist judges, lawyers and prosecutors take account of the many requirements of the European Convention on Human Rights – both explicit and implicit – for the criminal process when interpreting and applying Codes of Criminal Procedure and comparable or related legislation.

It does so through extracts from key rulings of the European Court of Human Rights and the former European Commission of Human Rights dealing with complaints about violations of Convention rights and freedoms in the course of the investigation, prosecution and trial of alleged offences, as well as in the course of appellate and various other proceedings linked to the criminal process.

The extracts are significant not only because the mere text of the Convention is insufficient to indicate the scope of what is entailed by it but also because the circumstances of the cases selected give a sense of how to apply the requirements in concrete situations.



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