

Uniformity of Practice & Lawfulness of Domestic Decisions as Relevant Aspects of Article 6 ECHR

Dovydas Vitkauskas
Vilnius
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1. Key Approaches and Methods of Interpretation: Article 6

- ❖ **Teleological (purposive) interpretation** (*Sakhnovskiy v. Russia*)
- ❖ **'Living organism'/New rights added** (*Golder v. UK, Hornsby v. Greece, Brumarescu v. Romania*)
- ❖ **Autonomy from/overriding domestic law** (*Fogarty v. UK*)
- ❖ **Subsidiarity/No 4th instance** (*Khan v. UK*), **no rules on admissibility of evidence** (*Schenk v. Switzerland*)
- ❖ **Quality of proceedings rather than quality of decision** (*Karalevicius v. Lithuania*)
- ❖ **Fairness 'as a whole' (but focus on certain crucial moments)** (*Imbrioscia v. Switzerland*)
- ❖ **Absolute or qualified right?** (*O'Halloran and Francis v. U.K*)

2. 'Fairness' and Court Decision: 'Reasoned Decision'

- ❖ **Protection from arbitrariness** (*Ruiz Torija v. Spain*)
- ❖ **Every decision should be 'clear' and allow party to grasp court's position** (*Seryavin v. Ukraine*)
- ❖ **One of grounds for this right – to give basis for appeal** (*Suominen v. Finland*)
- ❖ **Appeal can also remedy lack of reasons at 1st instance** (*Hirvisaari v. Finland*)
- ❖ **Quantitative rather qualitative approach to what is 'reasoned decision'** (*Garcia Ruiz v. Spain*)

3. 'Fairness' and Court Decision: Unreliable Criminal Evidence

- ❖ **'Crucial', 'key' or 'decisive evidence' test to allow inquiry** (*Doorson v. Netherlands*; but see *Al Khawaja v. UK*)
- ❖ **Breach of another Convention Article (i.e. 8) does not necessarily give rise to breach of Article 6** (*Khan v. UK, Bykov v. Russia*)
- ❖ **Where serious doubts exist as to quality of evidence, focus is placed on procedural safeguards surrounding *handling* of evidence rather than its *assessment*** (*Cornelis v. Netherlands*)
- ❖ **'Totally unreliable' evidence test** (*Lisica v. Croatia; Laska and Lika v. Albania*)

4. 'Fairness' and Court Decision: Uniformity of Practice (1)

- ❖ **Article 6 is essentially concerned with whether applicant was afforded ample opportunities to 'state his case' and 'contest evidence' that he considered false, and not with whether domestic court reached 'right' or 'wrong' decision (*Karalevičius v. Lithuania*)**
- ❖ **It is not Article 6 role to dictate *content* of domestic law, including whether there should be any particular defence available to accused (*G. v. UK*)**
- ❖ **'Profound and long-standing nature of divergences' in national court position incompatible with principle of legal certainty (*Tudor Tudor, Ștefănică v. Romania*) BUT**
- ❖ **Achieving consistency of practice 'may take time', and periods of conflicting case-law may therefore be tolerated without undermining legal certainty (*Albu v. Romania*) AND**
- ❖ **It is not role of Article 6 to 'compare different decisions' of national courts save in cases of 'evident arbitrariness' (*Nejdet Şahin and Perihan Şahin v. Turkey [GC], §§59-96*).**

4. 'Fairness' and Court Decision: Uniformity of Practice (2)

- ❖ **Existence of several Supreme Courts - not subject to any common judicial hierarchy in given legal system - cannot demand implementation of *vertical review mechanism* of possibly different legal approaches those courts have chosen to take – and any intervention under Article 6 should remain 'exceptional' (*Nejdet Şahin and Perihan Şahin v. Turkey*)**
- ❖ **Divergence in practice cannot be considered as breaching Article 6 if effective method of settling them is promptly (i.e. within one year) employed by court of higher instance to unify diverging practice (*Albu v. Romania*)**
- ❖ **'Profound and long-standing variations' in practice of highest domestic court may in itself be contrary to principle of legal certainty, which constitutes one of basic elements of rule of law (*Vrabec v. Slovakia*) BUT**
- ❖ **When two national courts each within its own area of jurisdiction - reach divergent but nevertheless '*rational and reasoned conclusions*' regarding the same legal issue raised in similar factual circumstances - are inevitable and, as such, do not violate Article 6 of the Convention (*Stoilkovska v. Macedonia*)**

4. Uniformity of Practice: Violation

- ❖ **Persistence of conflicting court decisions on same *legal* issue made within single court of appeal (*Tudor Tudor v. Romania*), or by different district courts ruling on appeal (*Ștefănică v. Romania*)**
- ❖ **In context of restitution of nationalised property - lack of legislative coherence and conflicting case-law on interpretation of certain aspects of legislation in court of last resort, creating ‘*general climate of lack of legal certainty*’; absence of mechanisms before Supreme Court to resolve conflict between decisions of lower courts (*Tudor Tudor v. Romania*)**
- ❖ **Failure by Constitutional Court to address applicant’s arguments regarding inconsistency of *Supreme Court jurisprudence* in cases concerning restitution of property, where Constitutional Court had means to settle such divergent practice (*Vrabec v. Slovakia*)**

4. Uniformity of Practice: No Violation

- ❖ **High Court assessing matter regarding allowances to public servants ‘promptly’ (i.e. within one year) and giving unequivocal guidelines on correct interpretation of statute, effectively removing divergence between lower courts’ interpretation of law (*Albu v. Romania*)**
- ❖ **Supreme Administrative Court and Supreme Military Court (highest instance courts in administrative and military court systems co-existing in Turkey and not sharing common court of last resort) passing different judgments in similar cases, given that procedures before were fair and decisions not arbitrary (*Nejdet Şahin and Perihan Şahin v. Turkey*)**

✿ Thank You!

✿ dovydas.vitkauskas@yahoo.com