

**Seminar on Human Rights and Access to  
Justice in the EU,  
Vilnius, 14-15 May 2015  
European Judicial Training Network**

**Assoc. Prof. Danutė Jočienė**

**Justice of the Constitutional Court of Lithuania**

**Former Judge of the European Convention on Human Rights (2004-2013)**

**[danute.jociene@lrkt.lt](mailto:danute.jociene@lrkt.lt)**

# Art. 6 of the European Convention on Human Rights (the Convention)- the right to a *fair* trial

- the right to a *fair* trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 restrictively (*Perez v. France* case [GC], No. 47287/99, judgment of 2004 02 12);
- **many applications to the European Court of Human Rights concern Art. 6 from different aspects** (i.e., *fair* trial requirement, the right to a court/access; defence rights, the „adversarial“ proceedings, equality of arms, admission of evidence, etc.);
- Art. 6 guarantees the right to a court, procedural rights of the parties to civil proceedings (Art. 6 § 1), and also the rights of the defendant in criminal proceedings (Art. 6 §§ 1-3).

# Admissibility of evidence:

**Article 6 of the Convention did not lay down any rules on the admissibility of evidence;**

The ECtHR went to distinguish between **questions of admissibility of evidence**, which was primarily the task for national courts, on the one hand, and **fairness of a trial as whole**, on the other.

# General aspects of the Convention system:

- **A delicate question** – the functioning of national courts and the interrelationship between the European Court of Human Rights and national courts;
- **The European system of the protection of human rights is based upon the fundamental principle of subsidiarity:** supranational control done by the ECHR is *supplementary (subsidiary)* to the national system.
- **Art. 19 of the Convention:**
- **the Court's sole duty is** “to ensure the observance of the engagements undertaken by the High Contracting parties in the present Convention” (*Sisojeva and Others v. Latvia* [GC], 15 January 2007, § 89-90).

## Subsidiarity and the Role of the European Court:

- *In particular, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (**García Ruiz v. Spain** [GC], no. 30544/96, §§ 28-29, ECHR 1999-I).*

# The Role of the ECtHR (The Court):

- in the first place it is for the national authorities, **notably the courts**, to interpret and apply domestic law and to resolve problems of its interpretation (*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013);
- **the role of the Court is limited to verify whether such application are compatible with the Convention** (*Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I).

# The Role of the Court:

- **The ECHR is not an appellate court** (or so-called *the fourth instance court*);
- Article 6 of the Convention does not allow the Court to act as a court of fourth instance; it **cannot replace national courts** (*Bykov v. Russia* [GC], 10/03/ 2009, § 88);
- **Article 6 establishes a very strong presumption of facts as found by domestic courts** unless the domestic proceedings breached the essence of the Art. 6 requirements.
- The Interlaken Conference (2010) invited the Court to avoid reconsidering questions of fact or national law **that have already been decided by national authorities, and are in line with its case-law.**

# *Fair trial guarantees under Art. 6.*

- Article 6 guarantees the right to a *fair trial*: ***it has an open-ended, residual quality*** (Harris, O'Boyle and Warbrick);
- „Fairness“ within Article 6 – the applicants should be afforded sufficient opportunities to state their case and contest the evidence they consider false;
- „Fairness“ under Article 6 includes such implied procedural requirements in criminal and civil cases:
  - - adversarial proceedings;
  - - equality of arms,
  - - presence.
- In criminal cases there are more implied specific requirements under Art. 6 §§ 2-3.



# Article 6/ Evidence:

- **Article 6 of the Convention does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law**

(*Jalloh v. Germany* [GC], no. [54810/00](#), §§ 94-96, ECHR 2006-IX);

- **the Role of the Court is NOT to determine, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not.**

# *Fair trial guarantees under Art. 6.*

## Evidence

- the question which must be answered is:
- - whether the proceedings as a whole, including the way in which the evidence was obtained, were *fair*/evaluation of the overall *fairness* of the proceedings

(*Taxquet v. Belgium* [GC], no. 926/05; *Salduz v. Turkey* [GC], no. 36391/02, § 50).

## *Fairness* requirement in all cases:

- A common requirement - equality of arms as well as the adversarial proceedings - should be ensured;
- according to the ECHR case-law, the principle of equality of arms – one of the elements of the broader concept of a *fair* hearing – requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place the litigant at a substantial disadvantage vis-à-vis the opponent (see, among many other authorities, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

## Equality of arms/the adversarial proceedings:

- It also implies, in principle,
- the opportunity for the parties to have knowledge of and
- discuss all evidence adduced or observations filed
- with a view to influencing the court's decision

(see *Fretté v. France*, no. [36515/97](#), § 47, ECHR 2002-I).

# Equality of arms/the adversarial proceedings:

- Question – whether the both notions have an independent existence in the Court's case-law or not?
- **Equality of arms** – equal procedural ability to state the case;
- **The Adversarial proceedings** – to have an access and a possibility to comment at trial on the observations filed or evidence adduced by the other party;
- **Both requirements - Equality of arms and The Adversarial proceedings – Are OVERLAPPING in the case-law of Article 6 of the Convention as regards the right to a *fair* trial.**

# *Fair proceedings/use of evidence:*

- In determining whether the proceedings as a whole were *fair*, regard must be had to whether the rights of the defence were respected;
- also to the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. [22978/05](#), § 175, ECHR 2010) and,
- the applicants should have the opportunity of challenging the authenticity of the evidence and of opposing its use (*Schenk, Khan cases*);

## Evidence requirement:

- **the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy;**
- **where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (Khan, §§ 35 and 37, and Allan, § 43).**

# Disclosure of evidence:

- the entitlement to disclosure of relevant evidence **is not an absolute right.**
- in any court proceedings there may be competing interests (i.e., national security, the need to protect witnesses, keep secret police methods of investigation of crime or to safeguard an important public interest, etc.) which must be weighed against the rights of the defence.



# Disclosure of evidence:

- However, only such measures restricting the rights of the defence **which are strictly necessary are permissible under Article 6 § 1.**
- in order to ensure a fair trial, any difficulties caused to the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities

(*Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000).

## Case *Pocius v. Lithuania* (No. 35601/04, judgment of 6 July 2010):

- “civil right” aspect under Article 6 of the Convention used, VIOLATION of Art. 6 § 1:
- The decision-making procedure **did not comply with the requirements of adversarial proceedings or equality of arms**, and did not incorporate adequate safeguards to protect the interests of the applicant [...].
- The applicant’s name had been listed in the operational records file (without the applicant’s knowledge), the police urged him to hand in his firearms as his licence to keep firearms was revoked.

## *Case Pocius v. Lithuania:*

- **The applicant's complaints:**
- the restriction on his having access to the operational records file had not been proportionate;
- **The domestic courts had based their decisions on classified information which had not been disclosed to him;**
- Instead of evidence, the applicant had been presented with mere assumptions [...]

## *Case Pocius v. Lithuania:*

- the content of the operational file was never disclosed to him during the administrative proceedings;
- the data in the operational file were of decisive importance to the applicant's case (see, albeit with regard to criminal proceedings, *Lucà v. Italy*, no. [33354/96](#), § 40, ECHR 2001-II).
- on numerous occasions the applicant asked for the information to be disclosed to him, however, it was denied;
- moreover, Lithuanian judges did examine, behind closed doors, the operational records file and relied on it in their decisions;
- it was not, therefore, possible for the applicant to have been apprised of the evidence against him or to have had the opportunity to respond to it, unlike the police who had effectively exercised such rights.

## Case *Pocius v. Lithuania*:

- 53. [...] where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, **as a general rule, it is for the national courts to assess the evidence before them;**
- where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure [...];
- **it must therefore scrutinise the decision-making procedure to ensure that the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.**

*Luca v. Italy case* (no. [33354/96](#), § 40, ECHR 2001-II)-  
balancing of *fair trial* with failure to examine key witness  
[in the court]

- **The applicant's complaints:**
- the criminal proceedings against him had been unfair [...] [as] **he had been convicted on the basis of statements made to the public prosecutor, without being given an opportunity to examine the maker of the statements, N., or to have him examined.**
- He relied on Article 6 §§ 1 and 3 (d) of the Convention.

## *Luca v. Italy:*

- “If the defendant has been given an adequate and proper opportunity to challenge the depositions made at investigation stage [...], **their admission in evidence *will not in itself* contravene Article 6 §§ 1 and 3 (d);**
- However, **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 (viol. of Art. 6 §§ 1 and 3 (d)).

## Conclusion on the sole or decisive evidence:

- **where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1;**
- **in such cases, the Court must subject the proceedings to the most searching scrutiny;**
- **proportionality and necessity test should be performed as regards the need to restrict the defence rights to such extend;**
- **because of the dangers of the admission of such evidence, it would constitute a very important **factor to balance in the scales** [...];**
- **[this] would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.**



# *Perry v. the United Kingdom* (dec.), 63737/00, 26 September 2002:

- the police had covertly videotaped the applicant for identification purposes in violation of domestic procedure. The tape, along with other evidence, was used for conviction of robbery (NOT SOLE evidence).
- As in *Schenk and Khan*, the Court put emphasis on the existence of *fair procedures to examine the admissibility and test the reliability of the disputed evidence*. It stated:
- *"... the use at trial of material obtained without a proper legal basis or through unlawful means will not generally offend the standard of fairness of Article 6 § 1:*
  - 1) where proper procedural safeguards are in place and*
  - 2) 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 (see P.G. and J.H. v. the UK, no. 44787/98, ECHR 2001-IX)*
- *(for the recent entrapment case – see *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008-...).*

## Zhukovskiy v. Ukraine (no. 31240/03):

- The applicant, Andrey Zhukovskiy, is a Ukrainian national who was born in 1979 and is currently serving a prison sentence for murder in Ukraine.
- Relying in particular on Article 6 §§ 1 and 3 (d) (right to a *fair* trial), he complained that the criminal proceedings against him had been unfair and that the courts had based his conviction on the testimony of witnesses whom he had not been allowed to question;
- Violation of Article 6 §§ 1 and 3 (d) established.

The Al-Khawaja case (GC – 15 to 2 Votes): NO VIOL. – Decisive evidence, admitted, no cross-examination at the trial, BUT some procedural safeguards were offered to the applicant at the trial stage [...].

- ECtHR - the testimony of S.T. was the sole or decisive evidence in respect of Mr Al-Khawaja;
- the interests of justice were obviously in favour of admitting in evidence the statement of S.T., which was recorded by the police in proper form.
- there were strong similarities between S.T.'s description of the alleged assault and that of the other complainant, V.U.

# Al-Khawaja case:

- applicant's inability to cross-examine S.T. [...]
- [BUT] the evidence offered by the prosecution in support of S.T.'s statement, the Court considers that the jury was able to conduct a fair and proper assessment of the reliability of S.T.'s allegations against the first applicant.
- 158. [...] viewing the fairness of the proceedings as a whole, the Court considers [...] there were sufficient counterbalancing factors to conclude that the admission in evidence of S.T.'s statement did not result in a breach of Article 6 § 1 of the Convention read in conjunction with Article 6 § 3 (d).

## *The Tahery case - Violation of Art. 6 (GC – unan.):*

- The Court – it should be determined whether there were objective grounds for T.'s fear.
- The trial judge heard evidence from both T. and a police officer as to that fear. The trial judge was also satisfied that special measures, such as testifying behind a screen, would not allay T.'s fears. [...] **the conclusion of the trial judge that T. had a genuine fear of giving oral evidence** and was not prepared to do so even if special measures were introduced in the trial proceedings **provides a sufficient justification for admitting T.'s statement.**
- He was the only witness who had claimed to see the stabbing [after two days of events];
- **Such untested evidence weighs heavily in the balance and requires sufficient counterbalancing factors to compensate difficulties caused to the defence by its admission.**

# Tahery case:

- 165. The Court therefore considers that **the decisive nature of T.'s statement in the absence of any strong corroborative evidence** in the case meant the jury in this case was unable to conduct a fair and proper assessment of the reliability of T.'s evidence (???).
- Examining **the fairness of the proceedings as a whole**, the Court concludes that **there were not sufficient counterbalancing factors to compensate for the difficulties to the defence** which resulted from the admission of T.'s statement.
- It therefore finds a violation of Article 6 § 1 of read in conjunction with Article 6 § 3 (d).

# Conclusions as regards the admission of evidence:

- the admissibility of evidence as such, is primarily a matter for regulation under national law;
- it's a function of the national judge to decide on the admissibility of [a particular] evidence;
- the Role of the ECtHR is to determine whether the proceedings as a whole were *fair*, regard must be had to the rights of defence [...];
- the defendant should have an opportunity of challenging the authenticity of the evidence admitted and of opposing its use/to benefit from a cross-examination;
- only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (necessity and proportionality test);
- sufficient counterbalancing factors are required to compensate difficulties caused to the defence by admission of an untested evidence.

# Art. 8 violations and the right to a *fair* trial:

- Issues of a breach of the *fairness* of a trial under Article 6 of the Convention have typically arisen in the context of Articles 8 and 3 of the Convention;
- admission in evidence of information obtained in breach of Article 8 has so far been found by the European Court not to conflict with the requirements of *fairness* under Article 6;
- Indeed, the Court has drawn a distinction between the issues arising under Article 8, on the one hand, and the questions relating to the *fairness* of proceedings under Article 6, on the other.



Case *Gulijev v. Lithuania*, No. 10425/03, 16  
December 2008

- **The applicant's complaints:**
- the decision not to grant him a new temporary residence permit and the resulting expulsion order infringed Article 8 of the Convention;
- that decision was based solely on the allegation that he posed a "threat to national security" contained in the file provided by the State Security Department and classified as "secret";
- However, he was never informed of the contents of that file.
- The applicant stressed that from 1993 he had lived in Lithuania with SG, a Lithuanian citizen, whom he had married in 2001 and with whom he had two children (Lithuanian citizens) [...]

## Case *Gulijev v. Lithuania*:

- procedural violation of Article 8 (“family life” aspect) in the deportation proceedings;
- Art. 6 of the Convention not applicable;
- administrative courts of Lithuania relied upon the mentioned report, which was classified as “secret” and drafted by the State Security Department, indicating that the applicant posed a threat to national security and public order;
- the content of the report was never disclosed to the applicant during the administrative proceedings, thus restricting his defence rights;

## Case *Gulijev v. Lithuania*:

- the aforesaid report was the sole basis for the Migration Department's refusal of the applicant's request for a temporary residence permit and his subsequent deportation from Lithuania;
- The ECHR paid attention to the practice of the domestic administrative courts which provided that, as a rule, factual data which constitutes a State secret may not be used as evidence in an administrative case until it has been declassified [...]. However, admin. courts of Lithuania did not follow this clear procedural rule;
- in the case file, there were no documents allowing the Court to conclude that the applicant posed a threat to national security;
- the applicant was deported and until 2099 is prohibited from re-entering Lithuania, where his two children and wife, all of whom were Lithuanian citizens, live, which is also an important element for the Court to take into account when assessing the necessity of the interference and its proportionality.

## Violation of Article 3 (prohibition of torture and inhuman or degrading treatment) and admission of evidence:

- **Violation of Article 3 is subject to different considerations than evidence gathered by a violation of Art. 8;**
- **the use of evidence obtained in violation of Article 3 in criminal proceedings raises in itself serious issues as to the fairness of such proceedings, even if the admission of such evidence was not decisive in securing the conviction;**
- Article 3 of the Convention - an absolute right, permitting no exceptions or derogations;
- **in particular, the use of evidence obtained as a result of torture renders a trial automatically unfair (*Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007-...)).**

## Violation of Article 3/ impact to Art. 6 – *fairness*:

- The suggestion that the admission of evidence obtained by any form of ill-treatment is unacceptable under Article 6 appears already in the *Gôçmen v. Turkey case* (no. 72000/01, 17 October 2006).
- Recent developments suggest that this may also be the case **with other forms of ill-treatment** (see *Jalloh v. Germany* case [GC]), although [there] the Court has **based its conclusions on a combination of factors and has taken into account the facts of a particular case [...]**.

(see also *Gäfgen v. Germany* [GC], no. [22978/05](#), ECHR 2010, Viol. of Art. 3, BUT NO viol. of Art. 6).

# Conclusions: relationship between Art. 3, 6, and 8:

- It appears that admission in evidence of information obtained in breach of Article 8 has so far [in principle] been found *not to be in conflict with the requirements of fairness under Article 6*;
- indeed, the Court has drawn a distinction between the issues arising under Article 8, on the one hand, and the questions relating to the *fairness* of proceedings under Article 6, on the other;
- *the same position* concerning the relationship between an Article 8 violation and Article 6 was approved by the ECtHR in the Grand Chamber case *Bykov v. Russia*, no. 4378/02, judgment of 10 March 2009 (Art. 6 : 11 votes to 6 for no viol., see also the Dissenting Op.).

# Violation of Article 3/ impact to Art. 6 – fairness:

- **Violation of Article 3 is subject to different considerations than evidence gathered by a violation of Art. 8;**
- **the use of evidence obtained in violation of Article 3 in criminal proceedings raises in itself serious issues as to the *fairness* of such proceedings;**
- **in particular, the use of evidence obtained as a result of torture renders a trial automatically *unfair*.**
- *See also ECtHR position in the case *Gäfgen v. Germany* [GC], no. [22978/05](#), ECHR 2010;*
- FOR DISCUSSION – is this case in line with the Court's traditional case-law or not? (Art. 6: no viol. - 11 to 6 votes, see also the DO).

## *Gäfgen v. Germany: NO VIOL. of 6 §§ 1 and 3 of the Convention.*

- 187. The Court concludes that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence in a murder criminal case, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence.
- As the applicant's defence rights and his right not to incriminate himself have likewise been respected, his trial as a whole must be considered to have been fair.
- 188. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.