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Adversarial Proceedings & Equality Of Arms

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European Convention on Human Rights
ARTICLE 6
Right to a fair trial

« 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (...)»
Charter of Fundamental Rights of the European Union
Article 47
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
EU Charter of Fundamental Rights

The Charter is consistent with the European Convention on Human Rights adopted in the framework of the Council of Europe, and when the Charter contains rights that derive from the Convention their meaning and scope are the same – the guarantees afforded by the European Convention on Human Rights apply in a similar way to the Union.

The Court of Justice has repeatedly ruled that according to the Community law “a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known”.

Fair Hearing: Civil rights and obligations

• The requirements inherent in the concept of FAIR HEARING are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge.

• This is confirmed by the absence of detailed provisions such as paragraphs 2 and 3 of article 6 that apply to criminal cases. Although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have a greater latitude when dealing with civil cases.
Equality of arms

• Rights of defence and equality of arms are features of the wider concept of a FAIR TRIAL.
• It requires a “fair balance between the parties”

It demands that each party to the proceedings is given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.
Equality of arms

Doctrine of Appearances

• The principle of equality of arms has suffered a considerable evolution regarding the importance attached to APPEARANCES.

  After all: Justice must not only be done, but must also be seen as being done

• An increased sensitivity of the public to the administration of justice – a stricter public scrutiny – determined important developments in the way the Court construed the concept.
Equality of arms

Doctrine of Appearances

- In the case *Borgers v. Belgium* the Strasbourg Court found a violation of article 6, §1, because the applicant was legally prevented from replying to the submissions presented by the *Avocat-Général* before the Court of Cassation, in a case where he was charged with a criminal offence.

- **No justification** was found for such restrictions on the rights of defence, and a breach of the principle of equality of arms was found having regard to the role of appearances.
After all, according to the ECHR the procureur-général’s opinion cannot be regarded as neutral from the point of view of the parties to the cassation proceedings.

By recommending the dismissal or the acceptance of the accused’s appeal he becomes “objectively speaking his ally or his opponent”.
But after the *Borgers* case, a number of similar cases was brought before the ECHR, regarding both civil and criminal cases, and the Strasbourg Court has slightly altered its reasoning.

These cases, where the lack of prior disclosure of the opinion of an *avocat-général* (or other independent member of national legal service) was at stake, the ECHR found that there was a breach of the adversarial proceedings (rather than a breach of equality of arms).

The reason being that such officers are not parties to the proceedings, and the lack of prior disclosure affects all parties to the proceedings equally (unless one of them has access to or prior knowledge of the submissions or opinions in question).
Right to Adversarial Proceedings

The right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on ALL EVIDENCE ADDUCED or OBSERVATIONS FILED, even by an independent member of the national legal service, with a view of influencing the Court’s decision”.

• It is for the court to take the initiative to inform the parties to the proceedings that such evidence or observations exist and have been submitted.
• The fact that the material is on file at the court for the parties to consult is not enough.
Right to Adversarial Proceedings

But, the right to adversarial proceedings is not absolute. The adversarial principle does not require that each party (in civil cases) must transmit to its opponent documents which, as in the instant case, have not been presented to the court either.

However, a party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if necessary obtaining an adjournment.

Case Yvon v. France, judgment of 24 April 2003
Attorney-General’s participation

Despite widespread national consensus on the role and participation of Attorney-General’s departments (or other similar officers) in proceedings before the Supreme Courts regard must be paid to the actual part these officials play during proceedings and deliberations.

Notwithstanding their independence, their objectivity and impartiality – which are seldom questioned – the fact is that they can be regarded by the parties to the proceedings as taking sides with one or the other, hence being viewed as an ally or an adversary.

Q: But is this category of members of the national legal service actually a “party” to the proceedings? And is this argument valid?
In this case, there were two clearly defined parties to the proceedings: the applicant [as plaintiff] and Petrogal (a public limited company) his former employer [as defendant]. The dispute in question related to social rights (the amount of the plaintiffs retirement pension).

A Deputy Attorney-General at the Supreme Court delivered an opinion in which he recommended that the appeal should be dismissed. This opinion was not communicated to the applicant.

According to the Government the objective function of the Attorney-General’s department at the Supreme Court was that of AMICUS CURIAE, he acted as guarantor of the consistency of the Supreme Court’s case-law and as protector of the public interest.
Case Lobo Machado v. Portugal [GC], judgment 20 February 1996

• Yet, according to the ECHR “great importance must be attached to the part actually played in the proceedings by the member of the Attorney-General’s department, particularly to the CONTENT and EFFECTS of his observations”.

• The ECHR stressed that: “Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Supreme Court”.

• Regarding what was at stake for the applicant, the fact that it was impossible for him to obtain a copy of that opinion and reply to it before the judgment was given infringed his right to adversarial proceedings.
This breach was **aggravated** by the **presence of the deputy attorney-general at the Supreme Court’s private sitting**, even though he had no kind of saying, whether advisory or other, since it afforded him an **additional opportunity to bolster his opinion in private, without fear of contradiction.**
Case **Kress v. France**, judgment 7 June 2001

SPECIAL CHARACTER OF THE ADMINISTRATIVE PROCEEDINGS

- This case concerns the “sui generis” institution of the “Government Commissioner” (*Commissaire du Gouvernement*) that is peculiar to the organisation of the administrative-court proceedings in France. They exist at all stages of the administrative proceedings, at all instances of the French administrative Courts.

- Government Commissioners established themselves as judicial officers totally independent of the parties. Traditionally they play a very important role in the creation of administrative case-law, and major judicial innovations come about as a result of celebrated submissions by the Government Commissioner.

- They are members of the *Conseil d’Etat* who attend the sitting at which the cases are prepared for trial. The Government Commissioner prepares submissions for trail, which are generally exclusively oral ones and are NOT COMMUNICATED either to the parties or to the reporting judge or to the members of the trial bench.
Case **Kress v. France**, judgment 7 June 2001

- It is customary for the Government Commissioner to attend the deliberations, but he has no vote.
- As general rule, at deliberations he may only intervene to give technical assistance, to answer any specific questions that may be put to him by the judges, since he is the member of the Court who has seen the case file more recently and therefore may have a more detailed knowledge of it.
• According to the ECHR: “No one has ever cast doubt on the independence and impartiality of the Government Commissioner and the ECHR considers that his existence and institutional status are not in question. HOWEVER, the Commissioner’s independence and the fact that he is not responsible to any hierarchical superior are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a Fair trial”.

• Great importance must be attached to the part actually played in the proceedings by the Government Commissioner, and to the content and effects of his submissions.
Case *Kress v. France*, judgment 7 June 2001

- Although the **equality of arms** requires a “fair balance between the parties”, **in the instant case**, the applicant cannot derive from this principle a **right to have disclosed to her 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.**

- HOWEVER, the right to a fair trial **also means**, in principle, the opportunity for the parties to **have knowledge of and to comment on** all evidence adduced or observations filed – right to **adversarial proceedings**.
Case **Kress v. France**, judgment 7 June 2001

- In the present case it is undisputed that the parties:
  - Could have asked the Government Commissioner, before the hearing, to indicate the general tenor of his submissions;
  - Could have replied to the Government Commissioner’s submissions by means of a “memorandum for the deliberations”.

  a practice – and this is vital in the ECHR’s view – which helps ensure compliance with the **adversarial principle**.

- Furthermore, in the event of the Government Commissioner raising orally at the hearing a ground not raised by the parties, the **presiding judge would adjourn** the case to enable the parties to present arguments on that point.

- The procedure followed in the *Conseil d’Etat* affords litigants **sufficient safeguards**, and **no problem arises** regarding the compliance with the principle of **adversarial procedure**.
Case **Kress v. France**, judgment 7 June 2001

**The presence of the Government Commissioner at the Conseil d’Etat deliberations** and the **Doctrine of Appearances**

- “The benefit for the trial bench of the purely technical assistance eventually provided by the Government Commissioner at the deliberations must be weighed against the higher interest of the litigant, who must have a guarantee that the Government Commissioner will not be able, through his presence at the deliberations, to influence their outcome. That guarantee is not afforded by the current French system.”

- Based on the **theory of appearances**, the Court found a violation of article 6, §1, of the Convention.
Case **Martinie v. France [GC]**, judgment 12 April 2006

In the implementation of the *Kress* judgment two directions were issued (in 2001 and 2002) according to which the Government Commissioner could be present at deliberations but could not address the Court. He would be a “*silent witness*”.

According to the ECHR the mere presence of the Government Commissioner at the deliberations, be it “active” or “passive” is deemed to be a violation. The Court sees no reason to depart from its decision. Therefore, in the present case there has been a breach of article 6, §1 of the Convention, on the account of the presence of the Government Commissioner at deliberations of the bench of the *Conseil d’État*. 
In this case the observations filed by Cantonal Court’s and transmitted to the Federal Court (in appeal) were not communicated to either of the parties to the dispute.

For the ECHR: “The Cantonal Court, which is an independent tribunal” could “not be regarded as the opponent of either of the parties. Accordingly, there has not been any infringement of the equality of arms”.

However, the concept of FAIR TRIAL also implies the principle of ADVERSARIAL PROCEEDINGS.

And even if the observations in question ran to only one page they nevertheless constituted a reasoned opinion on the merits of the appeal and explicitly called for it to be dismissed.
• The fact that the observations did not present any new fact or argument that had not already appeared in the impugned decision was not relevant.

• What was at stake was the litigant’s confidence in the workings of justice, which is based, *inter alia*, on the knowledge that they had the opportunity to express their views on every document in the file.

• Article 6, §1, is intended to secure the interests of the parties and those of the proper administration of justice.
• The applicant complained of the failure to communicate to him a number of documents in the proceedings regarding his visitation rights and access to his child. Those documents were submitted by the prosecution service and included, also, a note sent by the judge of the District Court (transmitted to the Court of Appeal).

• In the documents submitted by the prosecution service, are addressed important substantive as well as procedural issues. However, the prosecution service could not be said to have been a party to the proceedings.

• But for the ECHR it is irrelevant whether the prosecutor is not regarded as a “PARTY”, since he is in a position – above all by virtue of the authority conferred by his functions – to influence the court’s decision in a manner that may be unfavourable to the applicant.
Regarding the judge’s note, he commented on the merits of the appeal lodged by the applicant, suggesting – if only implicitly – that it should be dismissed by the higher court.

Admittedly the note did not set out any new facts which had not already appeared in the impugned decision, but it was aimed at influencing the Court of Appeal.

The effect that note actually had on the judges of the Court of appeal is of little consequence, for it is only for the parties to the dispute to decide whether or not those documents (that particular note) call for their comments.
Equality of arms - Adducing Evidence

• This principle may be impaired and the fairness of proceedings may be questioned in cases where one of the parties is placed at a clear disadvantage when offering evidence.

• That happened in the case *Hentrich v. France* where the applicant was prevented from challenging effectively the Revenue’s (administrative) decision of pre-emption, for she was denied the opportunity to present her arguments and adduce evidence to prove that the price agreed between the parties for the property in question was not underestimated, that actually corresponded to the real market value, and that she had acted in good faith.

Case *Hentrich v. France*, judgment 22 September 1994
Equality of arms - Adducing Evidence

• Similarly, in the case De Haas and Gijsels v. Belgium, the outright rejection of the journalists application for the production of documentary evidence, put them at a substantial disadvantage vis-à-vis the plaintiffs in the defamation proceedings. There was a breach of the principle of equality of arms.

Case De Haas and Gijsels v. Belgium, judgment 24 February 1997
The case
The Facts

• Following the non-payment by professional football clubs of amounts due to the tax authorities, the applicant association [Liga Portuguesa de Futebol Profissional], as organiser of professional football championships and representative of all those football clubs signed, in February 1999, together with de Portuguese Football Federation, an agreement with the Treasury regarding the schedule, the instalments and the terms of payment of the football clubs huge tax debts.

• According to one of the clauses of that agreement, if the amounts paid by the clubs to the tax authorities were insufficient to cover half of the amounts owed by those clubs, after an assessment to be made in 2004, the applicant association and the Portuguese Football Federation would be liable to pay the outstanding amount.
• After the above mentioned midterm assessment, the tax authorities informed the applicant association, in December 2004, that it was liable to pay approximately twenty million euros.

• In April 2005 the applicant association brought an action against the Treasury/tax authorities before the Central Administrative Court requesting the annulment of that particular clause of the agreement by which it became liable (together with the Portuguese Football Federation) for the remaining amounts owed.

• The applicant association’s claims were rejected in November 2006 by the Central Administrative Court.

• The applicant association appealed to the Supreme Administrative Court.
• In March 2007 a member of the Attorney-General’s Department at the Supreme Administrative Court submitted his opinion, which concluded that the appeal was ill-founded.
• The applicant was not notified of the opinion.
• In May 2007 the Supreme Administrative Court rejected the appeal.
• On learning from the Supreme Court’s judgment of the existence of the opinion of the Attorney General’s Department, the applicant association lodged an application for the judgment to be set aside on the grounds that there had been a violation of the principle of a fair trial.
• The application was rejected, as was the ensuing appeal to the Constitutional Court.
“The Attorney-General’s Department considers, in the defence of the particularly relevant public interests at stake in the instant case, that the appealed judgment should be confirmed, because it correctly applies and interprets the law (...).
Relevant Domestic Law

• Whenever the Attorney-General’s Department at the Supreme Administrative Court is not a party in the proceedings, it is nevertheless informed that the appeal has been lodged. When appropriate, it may issue an opinion on the merits of the appeal for the defence of the fundamental rights at stake or of particularly relevant public interests.

• According to the Code of Procedure before the Administrative Courts (Law nº 15/2002) – article 146, §2 – if an opinion is submitted by the Attorney-General’s Department a copy shall be communicated to the parties, so that they can reply within a period of 10 days.

• In the present case the parties in the proceedings were not informed nor received a copy of such an opinion.
Applicant’s claims

- At the Supreme Administrative Court a member of the Attorney-General’s Department submitted a legal opinion commenting on the merits of the appeal, suggesting that the impugned judgment should be confirmed and, therefore, that the appeal should be dismissed. The Supreme Court failed to communicate that opinion to the applicant. The Supreme Administrative judgment was in line with the Attorney-General’s opinion by rejecting the appeal.

- The applicant association argues the breach of its right to a fair trial within the meaning of article 6 §1 as interpreted by the ECHR case-law.
Quid juris?
Questions raised by the ECHR

1. Whether the application should be declared inadmissible pursuant to article 35, § 3, b), of the Convention (no significant disadvantage);

2. Whether the application should be declared inadmissible on the ground of its incompatibility *ratione materiae* vis-à-vis article 6, § 1 of the Convention (civil rights and obligations);

3. Whether there has been a violation of article 6, §1, of the Convention (right to a fair trial).
Article 35, § 3, b) of the Convention

Protocol nº 14 to the Convention amended article 35, § 3, adding to the admissibility criteria therein a new item b), under whose provision the ECHR may declare an application inadmissible based on the principle “de minimis non curat praetor”.

Hence, according to the first part of this new criterion the ECHR shall not pursue a case and shall deem the application inadmissible where the claimant/applicant has not suffered a “significant disadvantage”.
ARTICLE 35
Admissibility criteria

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
   (a) (...)
   (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal (*).

(*) This provision was amended by Protocol 15 to the Convention. According to its article 5, in Article 35, paragraph 3, sub-paragraph b of the Convention, the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted. Protocol 15 has not yet entered into force.
Inadmissibility decision

*Liga Portuguesa de Futebol Profissional v. Portugal (dec.) - 49639/09*

Decision 3.4.2012 [Section II]

- The sum claimed by the tax authorities and giving rise to the proceedings could not be deemed to constitute a “disadvantage” within the meaning of Article 35 § 3 (b). The question was whether the failure to communicate the opinion of the representative of the Attorney-General’s Department at the Supreme Administrative Court could have caused the applicant association a potentially significant disadvantage.

- That succinct opinion had merely considered that the decision at issue had correctly interpreted the applicable law. No new issue that might have called for comments by the applicant association had been raised. The applicant association had not been able to demonstrate that it would have been able to provide any new and relevant elements in response to the opinion for the purposes of consideration of the case. In those circumstances, the applicant association had not suffered a “significant disadvantage” in the exercise of its right to participate adequately in the proceedings at issue.
Inadmissibility decision

• The respondent State had taken general measures to ensure that parties were provided with opinions of the Attorney-General’s Department. In those circumstances, and given that the Court had on various occasions ruled on the issue raised in this case, it could not be held that the application raised serious issues concerning the application or interpretation of the Convention, or serious issues of domestic law. Consequently, respect for human rights did not require an examination of the application.

• The applicant association’s objections concerning the rights and obligations arising out of the implementation of the order at issue in respect of it had been raised in three domestic courts. Furthermore, the requirement that the case be “duly examined” could not be interpreted as strictly as the requirement that the proceedings be fair, since Article 35 § 3 (b) did not contain the term “examined fairly”. Therefore, the applicant’s case had been duly examined.

Liga Portuguesa de Futebol Profissional v. Portugal (dec.) - 49639/09
Decision 3.4.2012 [Section II]