Seminar on „Human Rights and Access to Justice in the EU“
Split, Croatia, 20-21 October 2016

European Judicial Training Network
Administrative Law Project
Evidence Standards as a part of a *fair* trial

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Art. 6 of the European Convention on Human Rights (the Convention or the ECHR): the right to a court and 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);

- **Art. 6:** very often invoked before the European Court of Human Rights (the Court or the ECtHR) (i.e., *fair* trial requirement, access to a court; defence rights, the „adversarial“ proceedings, equality of arms, admission of evidence, etc.).
**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. Law of the European Convention on Human rights. Second Ed., Oxford University Press, 2009);
- „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.
Admissibility of evidence:

Article 6 of the Convention does 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 a whole, on the other.
Subsidiarity of the Convention system

• Interrelationship between the ECtHR and national courts:

• the Convention system is based upon the fundamental principle of subsidiarity: supranational control done by the ECHR is supplementary (subsidiary) to the national system.
The Role of the ECtHR

• 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);

• 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*); 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.
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*;
  - the overall *fairness* of the proceedings at domestic level should be evaluated

(*Taxquet v. Belgium* [GC], no. 926/05; *Salduz v. Turkey* [GC], no. 36391/02, § 50).
Evidence Standards as a part of a *fair trial*

- 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).
- the applicants should have the opportunity of challenging the authenticity of the evidence and of opposing its use (Schenk, Khan cases).
Disclosure of evidence:

• The entitlement to disclosure of relevant evidence is not an absolute right;
• There may be competing interests (i.e., national security, the need to protect witnesses, etc.) which must be weighed against the rights of the defence;
• In such cases, adequate procedural safeguards should be afforded to the defence.
Case *Pocius v. Lithuania* (No. 35601/04, judgment of 6 July 2010, administrative case at domestic level):

- “Civil right”, 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 as a main evidence in the administrative case had not been proportionate;
  - **Merits** - the content of the operational records file was never disclosed to the applicant during the administrative proceedings;
  - The domestic courts had exclusively 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 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 relied on it in their decisions*;
- *it was not, therefore, possible for the applicant to respond to it*, unlike the police who had effectively exercised such rights.
Case *Pocius v. Lithuania*:

- The decision-making procedure should guarantee
- adversarial proceedings
- and equality of arms
- and
- incorporate adequate safeguards to protect the interests of the accused.
Luca v. Italy case (No. 33354/96, § 40, ECHR 2001-II)- fair trial/failure to examine key witness/criminal case

- The applicant’s complaints under Article 6 §§ 1 and 3 (d) of the Convention:
- 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.
Luca v. Italy case:

- 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 examine the need to restrict the defence rights to such extend;
- [this] would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.
Zhukovskiy v. Ukraine (no. 31240/03), criminal case:

- 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] - NO VIOL. - Decisive evidence, admitted, no cross-examination at the trial, BUT procedural safeguards offered at the trial

- 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.
The Tahery case - Violation of Art. 6 (GC – una.):

• The European 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 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].
Tahery case:

• 165. [...] the decisive nature of T.’s statement in the absence of any strong corroborative 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.

• a violation of Article 6 § 1 of read in conjunction with Article 6 § 3 (d).
Conclusions/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.
Case *Gulijev v. Lithuania*, No. 10425/03, 16 December 2008 (administrative case at domestic level)

- Complaints under Art. 8 (procedural aspect) in the deportation proceedings. *Art. 6 of the Convention not applicable.*
- the decision was adopted **not to grant** a new temporary residence permit which resulted in the expulsion;
- 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”;
- he was never informed of the contents of that file.
- The applicant from 1993 had lived in Lithuania with SG, a Lithuanian citizen, with whom he had two children (Lithuanian citizens)
Case Gulijev v. 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 an important element for the Court 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-...)).
Conclusions: relationship between Art. 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;

• Such position approved by the ECtHR in the case Bykov v. Russia [GC], no. 4378/02, 10/03/2009 (Art. 6 : 11 votes to 6 for no Viol., see 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. No viol. of Article 6 §§ 1 and 3 of the Convention.