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**Standards regarding Evidence in Court Proceedings
according to Article 6 of the European Convention on
Human Rights**

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Document for Distribution.

**European Convention on Human Rights in Article 6
establishes the right to a court in civil and criminal cases and
explicitly provides the right to a *fair* trial.**

I. ARTICLE 6 – RIGHT TO A *FAIR TRIAL* (TEXT OF THE CONVENTION)

- 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 [...] or [...] in special circumstances where publicity would prejudice the interests of justice.
- Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- **Everyone charged with a criminal offence has the following minimum rights:**
 - to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - to have adequate time and facilities for the preparation of his defence;
 - 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;
 - to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 § 1 – *fair trial* requirement, applicable to all proceedings falling under Article 6: civil, criminal (including administrative and disciplinary proceedings).

II. FOR CIVIL PROCEEDINGS – A COMMON REQUIREMENT - EQUALITY OF ARMS - SHOULD BE ENSURED

Definition of „Civil Right“:

Under the case-law of the ECHR (see, for instance, *Kerojärvi v. Finland*, 19 July 1995, § 32, Series A no. 322; *Gülmez v. Turkey*, no. [16330/02](#), § 28, 20 May 2008), **it must first ascertain whether there was a dispute (“contestation”) over a “right”** which can be said, at least on arguable grounds, to be recognized under domestic law, irrespective of whether they are also protected under the Convention.

The dispute must be genuine and serious; it may relate not only to the **existence of a right but also to its scope** and the manner of its exercise; and the **outcome of the proceedings must be directly decisive** for the right in question.

The Court may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

See one of the newest examples – the case *Eskelinen v. Finland* (GC, No. 63235/00, judgment of 19 April 2007 as regards the enlarged right of the civil servants to apply to a court and applicable procedural guarantees under Art. 6)

The principle of equality of arms:

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).

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).

III. CASES OF THE ECHR FOR DISCUSSION

A. **Case *Pocius v. Lithuania* (No. 35601/04, judgment of 6 July 2010) (“civil right” under Article 6 of the Convention, 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, the police urged him to hand in his firearms as his licence to keep firearms was revoked.

- the applicant complained that his name had been listed in an operational records file without a proper reason;
- the content of the operational records file was never disclosed to him during the trial (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, the domestic authorities - the police and the courts - denied his requests; 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.

B. Case *Gulijev v. Lithuania*, No. 10425/03, 16 December 2008, 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 a report, 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;
- 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 - attention was paid 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 [...].

IV. ARTICLE 6 §§ 2-3(A-E) OF THE CONVENTION: PROCEDURAL GUARANTEES IN CRIMINAL CASES

Definition of „Criminal Charge“:

The Court’s established case-law sets out three criteria, sometimes referred to as the “**Engel criteria**” (most recently affirmed by the Grand Chamber in *Ezeh and Connors v. the United Kingdom* ([GC] nos. [39665/98](#) and [40086/98](#), § 82, ECHR 2003-X as regards the disciplinary sanctions while in prisons):

- **Domestic classification of the offences** (whether the provision(s) defining the offence is [are] attributed to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point);
- **The nature of the charge;**
- **The nature and severity of the penalty.**

V. CASES FALLING OUTSIDE THE CIVIL AND CRIMINAL HEADS OF ARTICLE 6 § 1 OF THE CONVENTION

- **The assessment of tax** (*Ferrazzini v. Italy* ([GC], no. [44759/98](#), ECHR 2001-VII);

- **Matters of asylum, nationality and residence in a country** (*Maaouia v. France* [GC], no. 39652/98, ECHR 2000-X; *Üner v. the Netherlands* ([GC], no. [46410/99](#), §§ 57-58, ECHR 2006-XII);
- **The adjudication of election disputes in respect of members of parliament** (*Pierre-Bloch v. France*, judgment of 21 October 1997; *Paksas v. Lithuania* [GC], no. 34932/04, judgment of 6 January 2011).

VI. THE RIGHT TO A *FAIR TRIAL*/ADMISSION OF EVIDENCE IN CRIMINAL CASES

- 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** (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX);
- **the role of the ECHR is to determine, whether the proceedings as a whole, including the way in which the evidence was obtained, were fair, i.e.**, evaluation of the overall fairness of the criminal proceedings (*Taxquet v. Belgium* [GC], no. [926/05](#); *Salduz v. Turkey* [GC], no. [36391/02](#), § 50);
- in determining whether the proceedings as a whole were **fair**, regard must be had to whether the rights of the defence were respected;
- **Article 6 § 3 (d)** - all evidence against the accused must normally be produced in his presence **at a public hearing** with a view to **adversarial argument**;
- The accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. [33354/96](#), ECHR 2001-II);
- The interests of the public and the victims that crime is properly prosecuted should be adequately taken into account (see *Gäfgen v. Germany* [GC], no. [22978/05](#), § 175, ECHR 2010) and, where necessary, the rights of witnesses should be regarded;
- **the applicants should have the opportunity of challenging the authenticity of the evidence and of opposing its use (Schenk, Khan cases)**;
- 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**;
- at the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, **the ECHR must subject the proceedings to the most searching scrutiny**;
- 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** (see the case *Al-Khawaja and Tahery v. the UK* ([GC] Appl. Nos. [26766/05](#) and [22228/06](#)), 15 December 2011);

- the entitlement to disclosure of relevant evidence is not an absolute right;
- in any court proceedings there may be competing interests, such as national security or the need to protect witnesses or keep secret police methods of investigation of crime, **which must be weighed against the rights of the defence;**
- The decision-making procedure must ensure that, as far as possible, the procedure complied with the requirements to **provide adversarial proceedings and equality of arms and incorporated adequate safeguards** to protect the interests of all persons involved.

VII. USE OF UNLAWFULLY OBTAINED EVIDENCE IN CRIMINAL TRIALS UNDER ARTICLE 6 OF THE CONVENTION

- Origin - in the *Schenk v. Switzerland* case of 12 July 1988 (Series A, no. 140);
- the ECHR - Article 6 of the Convention did not lay down any rules on the admissibility of evidence;
- issues of a breach of the *fairness* of a trial under Article 6 have typically arisen in the context of Article 8 (mostly, as regards the “private life” aspect, i.e., in secret interception and recording of conversations) and Article 3 (torture or ill-treatment used to press to confess) of the Convention;
- **admission in evidence of information obtained in breach of Article 8 has so far been found not to conflict with the requirements of fairness under Article 6;** this position was approved by the ECtHR in the case *Bykov v. Russia*, [GC] no. 4378/02, judgment of 10 March 2009 (Art. 6 : 11 votes to 6 for no viol., see also the Dissenting Op.);
- indeed, the ECHR has drawn a clear distinction as regards evidence obtained in violation of fundamental rights enshrined in Article 3 of the Convention;
- **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.**
- **the use of evidence obtained as a result of torture renders a trial automatically unfair** (see *Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007, where the applicants' confession statements had been obtained by torture);
- Recent developments of the ECHR case-law suggests that this may also be the case with other forms of ill-treatment, although in the particular circumstances of the cases where this was at issue, the ECHR **has based its conclusions on a combination of factors** (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010, where the ECHR reached a different conclusion - evidence obtained in violation of Article 3 was regarded as being in line with the requirement of *fairness* under Article 6 of the ECHR).

C. CASES FOR DISCUSSIONS (ADMISSION OF EVIDENCE):

1. *Bykov v. Russia*, [GC] no. 4378/02, judgment of 10 March 2009;
2. *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010;
3. *Al-Khawaja and Tahery v. the UK* ([GC] nos. 26766/05 and 22228/06), 15 December 2011).

Thank you for your attention.