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Fair Trial Guarantees in the Jurisprudence of the European Court of Human Rights

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(extracts with references)

1. Article 6(1) of the ECHR:

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 /.../ or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. The autonomous concept of “civil right and obligation”:

There must be a “dispute” over a right at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the ECHR. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play. Article 6(1) does not guarantee any particular content for “civil rights and obligations” in the substantive law of the Contracting States; the Court may not create by way of interpretation of this article a substantive right which has no legal basis in the State concerned. In order to decide whether the right in question has a basis in domestic law, the starting-point must be the provisions of the relevant law and their interpretation by the domestic courts. It is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the ECtHR’s role is confined to ascertaining

whether the effects of that interpretation are compatible with the ECHR.¹ In some cases, national law, while not necessarily recognizing that an individual has a subjective right, confers the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities.²

3.Examples of applicability of Article 6 ECHR:

/employee dismissal by a private firm / social security benefits (even on a non-contributory basis / welfare assistance and accommodation / compulsory social-security contributions / disputes concerning public servants including judges (ordinary labour disputes) under the Vilho Eskelinen test/ permission to sell land / permission in respect of requirements for carrying occupation / licence for serving alcoholic beverages / payment of compensation for work related illness or accident / revoking a building permit on environmental grounds / ban on fishing in the applicant's waters / proceedings for awarding a tender in which non-discrimination is at stake / proceedings challenging inclusion of a name in police files / withdrawal of security clearance / certain disciplinary sanctions before professional bodies (lawyers) / access to administrative documents / access to a file on an investigation / right to continue education studies / right to access to public information / proceedings for interim measures / leave to appeal proceedings / constitutional disputes / execution of court proceedings and foreign judgments / procedural bars on issuance of foreign work permit /

4.Expulsion of aliens does not concern civil rights - Maaouia v. France, [GC] 39652/98, 5.10.2000 (paras. 37-39):

By adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6(1) ECHR. Orders excluding aliens from French territory do not concern the determination of a civil or criminal charge. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the ECHR.

5.Guarantees for foreigners under “procedural dimension” of Article 3 ECHR:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

- For the concept of procedural dimension of Article 3 ECHR see: Ilias and Ahmed v. Hungary,

¹Grzęda v. Poland, [GC] 43572/18 15.3.2022, para.

² Denisov v. Ukraine, [GC], App. no. 76639/11, 25.9.2018, para. 46.

47287/15, paras. 151-165; M.K. and others v. Poland, 40503/17, 42902/17 and 43643/17, para. 178; M.S. v. Slovakia and Ukraine, 17189/11, para. 121.

- For basic standards/procedural guarantees under Article 3 ECHR, see: J.K. and others v. Sweden, [GC], 59166/12, paras. 77-123.

6. Fair trial guarantees (*lex specialis*) in particular type of disputes:

- detention: right to liberty and security (detention): Article 5 (2), (3) and (4) ECHR;
- expulsion, deportation of illegally staying alien: procedural dimension of Article 3 ECHR and Article 13 ECHR;
- expulsion of lawfully resident alien: Article 1(1) Protocol no. 7 ECHR.

7. Procedural safeguards relating to expulsion of lawfully resident alien – Article 1(1) Protocol no. 7 ECHR:

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

8. Right to access to a court (in a narrow sense) and examples of limitations of that right:

- The right to access to court means the right to start proceedings before courts in case of interference with the exercise of applicant's civil right and the right to obtain a determination of the dispute by a court. This right can be limited to the extent that the very essence of the right is not impaired.
- (Dis)proportionate limitations of access to court: excessive court fees; time limits; delay by authorities in examining applications; excessively restrictive interpretations of rules on jurisdiction; rigid burden of proof; review available solely on compliance with external formalities without examining of the merits; e-justice; (un)foreseeability of restrictions on access to a court; excessive formalism; regulation of conditions for admissibility enjoys a certain margin of appreciation; a legal representation requirement; a requirement to attempt a friendly settlement before bringing a claim for damages; State immunity; etc.³

9. Right to access to a court - how many instances?

Article 6 § 1 does not compel the Contracting States to set up courts of appeal or of cassation. A State

³Guide on Article 6, pp. 30-42.

which does institute such courts is required to ensure that persons amenable to the law enjoy before these courts the fundamental guarantees contained in Article 6(1) ECHR. Account must be taken of the entirety of the proceedings conducted in the domestic legal order (see, for example: *Zubac v. Croatia* [GC], 2018, paras. 80, 82).

10.Right to a court and concept of “full jurisdiction” (“sufficient review”):

Either first instance authorities themselves comply with the requirements of Article 6(1) ECHR, or first instance authorities must be subject to subsequent review by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1) ECHR (see more on this: *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], paras. 176-186).

11.Right to prompt implementation of a final and binding judicial decision:

Article 6(1) protects the implementation of final, binding judicial decisions as distinct from the implementation of decisions which may be subject to review by a higher court. A person who has obtained judgment against the State at the end of legal proceedings may not be expected to bring separate enforcement proceedings. A successful litigant may be required to undertake certain procedural steps in order to allow or speed up the execution of a judgment. A State has a positive obligation to organise a system for enforcement of final decisions that is effective in law and in practice (Guide on Article 6, paras. 204, 219, 220, 228; see also: *Brumdrescu v. Romania* [GC], para. 61; *Agrokompleks v. Ukraine*, para. 148).

12.Mutual recognition and execution of judgments of foreign courts:

A decision to enforce a foreign judgment is not compatible with the requirements of Article 6(1) if it was taken without any opportunity being afforded of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed (Guide on Article 6, para. 241).

13.Right to a court established by law - composition of the bench in each case (“assignment”):

The assignment of a case to a particular judge or court falls within their margin of appreciation enjoyed by the domestic authorities. There is a wide range of factors, such as, resources available, qualification of judges, conflict of interests, accessibility of the place of hearings for the parties and so forth, which the authorities must take into account when assigning a case. However, to be compatible with Article 6(1), a decision on composition of the court must comply with the requirements of independence and impartiality (*Pasquini v. San Marino*, para. 103). The judge assigned to a case must be independent of the executive, and the assignment cannot be solely

dependent on the discretion of the judicial authorities (ibid. para. 110). The case-law has made a distinction between assignment and reassignment of a case (ibid. para. 107). The test of compatibility with Article 6(1) for assignment of judges to a particular case is absence of flagrant violation of domestic law or test of arbitrariness (ibid. paras. 108, 112).

14. Right to a court established by law - “reassignment” of case(s) to another court:

The importance of judicial independence and legal certainty for the rule of law calls for particular clarity of the rules applied in any one case and for clear safeguards to ensure objectivity and transparency, and, above all, to avoid any appearance of arbitrariness in the assignment of particular cases to judges (Miracle Europe KFT, v Hungary, 2016, para. 57). Where the assignment of a case is discretionary in the sense that the modalities thereof are not prescribed by law, that situation puts at risk the appearance of impartiality, by allowing speculation about the influence of political or other forces on the assignee court and the judge in charge, even where the assignment of the case to the specific judge in itself follows transparent criteria (ibid. para. 58).

15. Fairness of court proceedings - general principles:

- a.) ECHR is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective.
- b.) The ECtHR is not a fourth instance (principle of subsidiarity). Its task is not to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors are manifest and infringed rights and freedoms protected by the Convention (Guide on Article 6, paras. 375-382);
- c.) Article 6 - civil limb draws inspiration from its approach to criminal-law matters. States have greater latitude when dealing with civil cases than they have when dealing with criminal cases.
- d.) The requirement of fairness applies to proceedings in their entirety.
- e.) Article 6 does not prevent a person from voluntarily waiving the guarantees expressly or tacitly, subject to certain conditions (Guide on Article 6, paras. 319, 323-326).

16. Specific standards of fairness:

- a.) requirement to communicate the documents ex officio;
- b.) necessary time to submit further arguments and evidence (Guide on Article 6, para. 329); eventual contribution of the applicant to the procedural errors due to his/her inaction and lack of due diligence is relevant (ibid. para. 341-342);
- c.) civil proceedings conducted in absentia (ibid. para. 351);
- d.) the parties must be able to comment on the observations submitted by the court to the appellate court manifestly aimed at influencing its decisions, irrespective of their actual effect on the court, and

even if the observations do not present any fact or argument which has not already appeared in the impugned decision in the opinion of the appellate court (ibid. para. 353;

e.) for other aspects of equality of arms, the so called “significant/substantial disadvantage test” is used (ibid. paras. 370-374);

f.) the right to adversarial proceedings means in principle the opportunity for the parties 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 to influencing the court’s decision; it is for the parties to a dispute alone to decide whether a document produced by the other party or evidence given by witnesses calls for their comments, however, this right is not absolute (ibid. para. 396-399);

g.) equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a “substantial disadvantage” *vis-à-vis* the other party (ibid. paras. 401-406);

h.) Article 6(1) does not regulate administration of evidence for example: admissibility of evidence, disclosure of evidence, burden of proof, probative value of evidence, presumptions of facts or law, the right to have (expert) witnesses called; but, the ECtHR's task is to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken (ibid. paras. 407-425.)

i.) refusal by a court to grant a request for preliminary ruling under Article 267 TFEU may infringe the fairness, if the refusal is arbitrary or was not duly reasoned (para. 356-361);

j.) The reasons given must be such as to enable the parties to make effective use of any existing right of appeal, but this can not be understood as requiring a detailed answer to every argument. However, where the party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply. The extent to which duty to give reasons applies may vary according to the nature of the decision (ibid. paras. 426-438);

k.) changes in well-established domestic case law require substantial reasoning justifying departure from previous case-law (para. 362);

l.) importance of putting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case law and to avoid “profound and long-standing differences in case law (ibid. para. 79; see also: paras. 386-392);

m.) incorrect (grossly arbitrary) interpretation of judgment of the ECtHR is violation of Article 6 ECHR (Bochan v. Ukraine [GC], 2015, para. 63-65; Guide on Article 6, para. 365);

n.) Article 6 ECHR precludes any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, except of compelling grounds of the general interest (Scordino v. Italy [GC], para. 126; see more on this: Guide on Article 6, paras. 366);

o.) public hearing (see: Ramos Nunes de Carvalho E Sá v Portugal [GC], paras. 190-191; Guide on

Article 6, paras. 439-465);

p.) the right to public pronouncement of judgment (ibid. paras. 466-472);

r.) length of proceedings (ibid. paras. 473-514).

17. The right to effective legal “remedy” (Art. 13 ECHR):

Article 13 ECHR: *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

18. Effective remedy under Article 13 and relation to Article 6(1) ECHR:

Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights in whatever form they might happen to be secured in the domestic legal order. Article 13 has no independent existence; it merely complements the other substantive clauses of the Convention and its Protocols. It can only be applied in combination with, or in the light of, one or more Articles of the Convention or the Protocols thereto of which a violation has been alleged⁴ The remedy must encompass the merits of the complaints as submitted by the applicant. The term “effective” means that the remedy must be sufficient and accessible, fulfilling the obligation of promptness.⁵ The aggregate of remedies provided for under domestic law may meet the requirements of Article 13, even where no single remedy may itself entirely satisfy them.⁶ Article 6(1), which guarantees *inter alia* a right of access to a court provides for more stringent safeguards than those of the effective remedy under Article 13. Article 6(1) is more strict than Article 13 and it absorbs Article 13.⁷ There is, however, no overlap and hence no absorption where the alleged Convention violation that the individual wishes to bring before a “national authority” is a violation of the right to trial within a reasonable time, contrary to Article 6 (1) ECHR.⁸ Requirements of Article 13 are to be seen as reinforcing those of Article 6(1), rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings. (ibid. para. 147).

⁴ Guide on Article 13 of the ECHR, Updated on 31 august 2022, para. 11.

⁵ Ibid. paras. 34, 37.

⁶ Ibid. para. 53.

⁷ Ibid. para. 143.

⁸ Ibid. para. 145.

