

# European Standards on Criminal Defence Rights: ECtHR Jurisprudence

APRIL 2013

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DIGEST OF KEY JURISPRUDENCE on effective criminal defence rights from the European Court of Human Rights under Article 5 and Article 6 (liberty, detention and fair trial) of the European Convention on Human Rights. Produced by lawyers at the Open Society Justice Initiative, in order to bring the decisions of global human rights tribunals to the widest possible audience.

# Contents

<b>CONTENTS</b> .....	<b>2</b>
<b>HOW TO USE THIS DIGEST</b> .....	<b>3</b>
<b>1. LEGAL FRAMEWORK: THE EUROPEAN CONVENTION ON HUMAN RIGHTS</b> .....	<b>4</b>
ARTICLE 5.....	4
ARTICLE 6.....	4
<b>2. THE RIGHT TO INFORMATION</b> .....	<b>6</b>
2.1 INFORMATION REGARDING RIGHTS.....	6
2.2 INFORMATION ABOUT ARREST, THE NATURE AND CAUSE OF THE ACCUSATION, AND CHARGE .....	7
2.3 INFORMATION REGARDING MATERIAL EVIDENCE AND THE CASE FILE .....	9
<b>3. THE RIGHT TO DEFENCE</b> .....	<b>14</b>
3.1 THE RIGHT TO SELF-REPRESENTATION.....	14
3.2 THE RIGHT TO LEGAL ASSISTANCE FROM THE OUTSET OF THE INVESTIGATION .....	15
3.3 THE RIGHT TO PRIVATE CONSULTATION WITH A LAWYER.....	19
3.4 THE RIGHT TO HAVE ADEQUATE TIME AND FACILITIES TO PREPARE THE DEFENCE.....	22
3.5 WAIVING THE RIGHTS TO LEGAL ASSISTANCE .....	24
<b>4. THE RIGHT TO LEGAL AID</b> .....	<b>26</b>
4.1 SCOPE OF THE RIGHT TO LEGAL AID.....	26
4.1.1 <i>Applying the financial criterion</i> .....	26
4.1.2 <i>Applying the “interests of justice” criterion</i> .....	27
4.2 QUALITY OF LEGAL AID.....	31
4.3 CHOICE OF A LEGAL AID LAWYER .....	33
<b>5. THE RIGHT TO BE PRESUMED INNOCENT AND THE RIGHT TO SILENCE</b> .....	<b>35</b>
5.1 THE PRESUMPTION OF INNOCENCE.....	35
5.2 THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE RIGHT TO SILENCE .....	37
<b>6. PROCEDURAL RIGHTS AT TRIAL</b> .....	<b>40</b>
6.1 THE RIGHT TO RELEASE FROM CUSTODY PENDING TRIAL.....	40
6.2 THE RIGHT TO BE TRIED IN PRESENCE AND PARTICIPATE IN PROCESS .....	43
6.3 THE RIGHT TO EQUALITY OF ARMS IN CALLING AND EXAMINING WITNESSES .....	46
6.4 THE RIGHT TO REASONED DECISIONS.....	49
6.5 THE RIGHT TO APPEAL .....	50
<b>7. THE RIGHT TO FREE INTERPRETATION AND TRANSLATION OF DOCUMENTS</b> .....	<b>51</b>
<b>LIST OF DECISIONS</b> .....	<b>54</b>

## How to use this Digest

Each year millions of people in Europe are arrested or detained by the police or other law enforcement agents. There is wide variation across countries in terms of recognition and implementation of the rights essential to a person's ability to defend his or herself. Many countries fail to provide the essential components of effective criminal defence, leaving suspects and accused persons in a vulnerable position: without legal assistance, without knowledge of the case against them, and without the ability to apply for pretrial release. This can have catastrophic impacts on a person's life.

This digest first sets out the legal framework of effective criminal defence rights, with excerpts from the European Convention on Human Rights. Each section in the body of the digest presents a short summary and explanation of the right in a shaded text box, followed by digests of all of the key case law from the European Court of Human Rights setting down the minimum standards for effective criminal defence. The digest covers all of the core procedural rights that underpin access to justice and a fair trial:

- the right to information about rights and charges, and access to evidence;
- the right to self-representation or legal assistance from the earliest stages of the investigation, the right to have adequate time and facilities to prepare a defence; and the waiver of the rights to legal assistance;
- the right to legal aid;
- the right to be presumed innocent and the right to silence;
- the right to bail, to be released from custody pending trial;
- the right to participate in your trial, to call witnesses, to be given reasoned decisions, and to appeal;
- the right to free interpretation and translation of documents.

The digest is intended to be a reference for criminal lawyers, prosecutors, judges, and police – all those actors who play a role in ensuring that European justice systems are fair and uphold the minimum standards of the European Court of Human Rights. The Justice Initiative encourages use of the case law in this digest to advocate or litigate for reform on arrest rights in the many European countries where improvement is greatly needed.

The digest is a part of the *Arrest Rights Toolkit*, a package of resources to assist lawyers, police, and judges to advocate for reform of arrest rights in countries across Europe, available at [osf.to/arrestrightstoolkit](https://osf.to/arrestrightstoolkit).

The Justice Initiative has gone to every effort to ensure our information is accurate. However, this digest is provided for information purposes only and does not constitute legal advice. If you have any questions or feedback about the digest or would like to keep the Justice Initiative informed about reforms in your country, please contact:

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# 1. Legal framework: The European Convention on Human Rights

## Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

## Article 6

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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) 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;

(d) 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;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## 2. The right to information

People who have been arrested or questioned by the police on suspicion of involvement in a criminal activity often find themselves in a vulnerable position. This vulnerability is heightened when people are not given information about why they have been detained, what accusations and evidence exist against them, and what their rights are. Knowledge is power, and one of the key factors in ensuring fair proceedings is whether suspects have a sufficiently detailed understanding of their situation and their rights.

This section includes case law on the right to information about what rights suspects and accused persons have, the right to information about arrest and charges, and the right to material evidence and the case file.

### 2.1 Information regarding rights

The right to a fair trial can only be realized in a practical and effective manner if people are informed of what their rights are, as a person who is not aware of their rights will be unable to exercise them. In order to protect the fundamental rights of fair trial, judicial authorities must take all reasonable steps to ensure that suspects are fully aware of their defence rights from the earliest point of the criminal justice proceedings. The authorities must actively ensure that the accused understands his right to legal assistance and legal aid and his right to remain silent.

#### Padalov v. Bulgaria

10 August 2006, ECtHR, App no 54784/00

*Violation of Article 6(3)(c)*

The applicant complained that he was not provided free legal assistance during the police questioning. The Court found that the applicant was informed only about his defence rights listed in the Criminal Procedure Code, which did not include a right to legal aid. The Government contended that if interpreted in light of the Supreme Court jurisprudence, the Code provided for a right to free legal assistance, but the applicant failed to request it. The ECtHR explained that the applicant was not legally trained and thus could not be expected to know or even inquire about interpretative jurisprudence (para. 53). The authorities remained passive and failed to ensure that the applicant had a sufficient understanding of his right to have a legal aid lawyer (para. 54). A failure to act on the part of the State amounted to a violation of Article 6(3)(c) (para. 56).

#### Panovits v. Cyprus

11 December 2008, ECtHR, App no 4268/04

*Violation of Article 6 in conjunction with Article 6(3)(c)*

The applicant, a minor, was arrested on suspicion of a murder and robbery. While in the custody, he confessed to committing a crime, although later stated that the confession was extracted under duress. Before the ECtHR the applicant complained that neither he, nor his father was adequately informed of the right to legal representation (para. 70). The Court considered that given the young applicant's age it was unlikely that that he was aware of being entitled to legal representation. It was not enough for the authorities to wait until the applicant requested a lawyer; they had a positive obligation to act proactively and "to furnish the applicant with the necessary information enabling him to access legal representation" (para. 72).<sup>1</sup>

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<sup>1</sup> See also: *Talat Tunc v. Turkey*, ECtHR, Judgment of 27 March 2007, at para. 61.

Plonka v. Poland

31 March 2009, ECtHR, App no 20310/02

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant, who had been suffering from alcohol problems for the last 20 years, was arrested on suspicion of homicide (para. 6). She claimed that she had not been properly informed about the possibility to obtain legal assistance during questioning. The ECtHR found that given the applicant's particular vulnerability a pre-printed declaration form signed by the applicant acknowledging that she had been reminded of her right to remain silent or to be assisted by a lawyer could not be considered reliable (para. 37). The position of the applicant should have been taken into account during questioning and in particular when apprising her of her procedural rights (para. 38).

## 2.2 Information about arrest, the nature and cause of the accusation, and charge

All people who are arrested have a fundamental right to understand why they are being deprived of their liberty. Under Article 5(2) of the ECHR a person deprived of his liberty must be informed of the reasons for his detention and of any charge against him. The information should be provided as soon as practicable after the person is deprived of their liberty, although some short delays are permitted if the special circumstances of the case require it. The information must be conveyed in a way the person understands using simple, non-technical language. Sufficient detail about the legal and factual grounds for the arrest must be provided so as to enable the person to request a prompt decision on the lawfulness of his detention by a competent judicial authority.

When a person has been charged with a criminal offence, a further obligation arises for the authorities to take active steps to provide that person with detailed information about the accusation against him and ensure he understands it. Under Article 6(3)(a) of the ECHR any person who is charged with a criminal offence must be promptly provided with detailed information about the nature and cause of the charge or accusation against them. This obligation cannot be complied with passively; it is a positive duty that requires active steps from the prosecutor or police. The information should be comprehensive in order to ensure the person fully understands the extent of the charges and to allow the person to prepare an adequate defence.

Campbell and Fell v. the United Kingdom

28 June 1984, ECtHR, App nos 7819/77 and 7878/77

*No violation of Article 6(3)(a)*

The applicants were charged with disciplinary offences by the Prison Board of Visitors. The first applicant complained that the authorities failed to provide sufficient information on the charges against him. The Court found no violation of Article 6(3)(a) as, prior to the Board's hearing, the applicant received a "notice of report" setting out the charges against him and the chairman of the Board visited him before the Board sat. In addition, the Court found that the applicant could have obtained further information on the charges by attending the Board's hearing, which he voluntarily chose not to do (para. 96).

Fox, Campbell, and Hartley v. the United Kingdom

30 August 1990, ECtHR, App nos 12244/86, 12245/86 and 12383/86

*No violation of Article 5(2)*

The applicants were only told that they were arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists. The ECtHR stated that it was insufficient for an arresting officer to simply tell the suspects that they were arrested under a particular law. Instead, they must be informed of "the reasons why they were suspected of

being terrorists” and of “their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations.” The Court also held that such information must be conveyed in way that the person can understand, using “simple, non-technical language” (para. 40). It did not find a violation of Article 5(2), because the applicants were provided with the details on the charge “promptly,” i.e. seven hours after the arrest (paras. 41-42).

#### Pelissier and Sassi v. France

25 March 1999, ECtHR [Grand Chamber], App no 25444/94

*Violation of Article 6(1) in conjunction with Article 6(3)(a) and (b)*

The applicants complained that the trial court reclassified the charges against them without an adjournment of the proceedings and thus they had no opportunity to prepare their defence on a new charge. The Court clarified that the suspect has to be provided information both on the cause – acts allegedly committed – and the nature – “the legal characterisation given to those acts” – of the accusation (para. 51). The scope of Article 6(3)(a) must be assessed in the light of a more general right to a fair hearing (para. 52)<sup>2</sup> and the accused’s right to prepare his defence (para. 54). Applying these principles to the facts of the case, the Court found that domestic courts failed to afford the applicants the possibility of exercising their defence rights in a practical and effective manner and in good time (para. 62).

#### Shamayev and Others v. Georgia and Russia

12 April 2005, ECtHR, App no 36378/02

*Violation of Article 5(2)*

The applicants were informed about the extradition proceedings against them four days after they were detained (paras. 415-416). The ECtHR explained that a right to be informed about arrest and reasons for detention is an elemental safeguard against arbitrary treatment and an integral part of the scheme of protection afforded by Article 5 (para. 413). According to the Court, “[a]nyone entitled to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he or she is promptly and adequately informed of the reasons relied on to deprive him of his liberty” (para. 413).<sup>3</sup> It found that “in the specific context of the present case an interval of four days must be deemed incompatible with the constraints of time imposed by the notion of promptness in Article 5(2)” (para. 416).

#### Saadi v. the United Kingdom

29 January 2008, ECtHR [Grand Chamber], App no 13229/03

*Violation of Article 5(2)*

The applicant was informed through his representative about the real reason for his detention after 76 hours in custody. The Court found such delay incompatible “with the requirement of the provision that such reasons should be given “promptly” (para. 84).

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<sup>2</sup> See also: *Deweert v. Belgium*, ECtHR, Judgment of 27 February 1980, at para. 56; *Artico v. Italy*, ECtHR, Judgment of 13 May 1980, at para. 32; *Goddi v. Italy*, ECtHR, Judgment of 9 April 1984, at para. 28; and *Colozza v. Italy* ECtHR, Judgment of 12 February 1985, at para. 26.

<sup>3</sup> See also: *Van der Leer v. the Netherlands*, ECtHR, Judgment of 21 February 1990, at para. 28; *X v. the United Kingdom*, ECtHR, Judgment of 5 November 1981, at para. 66.

### Kaboulov v. Ukraine

19 November 2009, ECtHR, App no 41015/04

#### *Violation of Article 5(2)*

The Government submitted that the applicant was informed about the reasons for his detention some forty minutes after the arrest (para. 146). The Government provided only a detention record which did not record the time or date of the applicant's signature. Such a short period of time, according to the Court, “would not, *prima facie*, raise an issue under Article 5(2)”. A violation of Article 5 was nevertheless found because the Government failed to provide any reliable indication of whether, and if so when the applicant was informed that his detention was with a view towards extraditing him (para. 147).

### Savenkova v. Russia

4 March 2010, ECtHR, App no 30930/02

#### *Violation of Article 5(3)*

The applicant complained that her pre-trial detention had been repeatedly extended without any indication of relevant and sufficient reasons (para. 71). The Court held that State authorities cannot merely recite the reasons that initially justified detention; rather, they must explain why these reasons continue to apply, with reference to specific facts concerning the detainee's behavior and personal circumstances (para. 84).<sup>4</sup> In the present case, the authorities failed to adduce relevant and sufficient reasons to justify extending the applicant's detention pending trial to one year, one month and twenty-five days (para. 89).

### D.M.T. and D.K.I. v. Bulgaria

24 July 2012, ECtHR, App no 29476/06

#### *Violation of Article 6(1) in conjunction with Article 6(3)(a) and (b)*

The first applicant was arrested on suspicion of soliciting bribes and sentenced to 20 years' imprisonment. The appellate court upheld the conviction, but the Supreme Court of Cassation found that the acts in question amounted to fraud. The applicant was convicted of fraud and sentenced to seven years' imprisonment. The applicant complained that he was not notified in advance about the reclassification of the charges against him and thus had no adequate time to prepare his defence. The ECtHR found that pursuant to Article 6(3)(a) a defendant has a right to be informed not only of the acts he is alleged to have committed, but also the legal characterization given to those acts (para. 73). Full, detailed information concerning factual and legal basis of the charges against a defendant provided in a timely manner is an essential prerequisite for the fairness of the proceedings (para. 74-75). Had the applicant been properly informed about factual and legal basis for the charges, his choice of defence arguments would have been different, especially given that the constituent elements of the offences of soliciting bribes and fraud were not comparable (para. 82). The Supreme Court of Cassation should have afforded the applicant the opportunity to submit a position on the new charges of fraud (para. 83).

## 2.3 Information regarding material evidence and the case file

Under the principle of equality of arms, suspects in the early stages of criminal proceedings have the right to access the evidence in the case-file that will allow them to challenge the lawfulness of their detention. The right of an accused or suspected person to access evidence on the case-file during the pretrial stage of criminal justice proceedings has been implied into the Convention by the Court, derived from a combination of Articles

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<sup>4</sup> See also: *Clooth v. Belgium*, ECtHR, Judgment of 5 March 1998, at para. 41.

5(4) and 6(3)(b) of the ECHR, the fundamental principle of equality of arms, and the jurisprudence of the ECtHR. This right will be satisfied by granting the accused's lawyer access to the case-file—personal access by the accused is not necessary.

#### Kamasinski v. Austria

19 December 1989, ECtHR, App no 9783/82

##### *No violation of Article 6(3)(b)*

The applicant complained about a violation of his right to prepare his defence on the grounds that he was denied access to a case-file. The ECtHR found that it was acceptable to provide such access to only the lawyer, but not the suspect personally. The applicant's lawyer was able to not only access the case file, but also to obtain copies; the lawyer was also found to have adequate facilities within which to consult with his client (para. 88).<sup>5</sup>

#### Garcia Alva v. Germany

13 February 2001, ECtHR, App no 23541/94

##### *Violation of Article 5(4)*

The Public Prosecutor's Office dismissed the lawyer's request for consultation of the investigation files on the ground that it would endanger the purpose of the investigation (para. 40). The contents of the files played a key role in the court's decision to prolong the applicant's detention (para. 41). The ECtHR explained that the right for suspected or accused persons to access evidence in their case-files is drawn from the right to an adversarial trial as laid down in Article 6. The Court further stated that "both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party" (para. 39). While in particular circumstances the information collected during investigations may be kept secret "in order to prevent suspects from tampering with evidence and undermining the course of justice," these legitimate goals "cannot be pursued at the expense of substantial restrictions on the rights of the defence." Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to a suspect's lawyer (para. 42).

#### Schöps v. Germany

13 February 2001, ECtHR, App no 25116/94

##### *Violation of Article 5(4)*

The Government argued that the applicant failed to request to inspect the files in a timely manner, and, once submitted, his request could not be satisfied as the duplicate files had already been sent to the court for the purposes of the review proceedings, and the original files were still needed for further investigation of the case (para. 42). It noted that authorities must organize their procedure to facilitate the consultation of the case-file by the defence without undue delay and should not be overly-formalistic in doing so (para. 52).

#### Lietzow v. Germany

13 February 2001, ECtHR, App no 24479/94

##### *Violation of Article 5(4)*

Although the applicant was provided with a summary of facts underlying the charges against him, he was denied access to the statement of the witnesses which were key in the decision to prolong his pre-trial detention (para. 45). The ECtHR reiterated that "[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention" (para. 44). It held that information which was essential for the assessment of the lawfulness

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<sup>5</sup> See also: *Kremzow v. Austria*, ECtHR, Judgment of 21 September 1993, at para. 52.

of a detention must be made available in an appropriate manner to the suspect's lawyer, even in cases where the national authorities were concerned about collusion and interference with evidence (para. 47).

### Shishkov v. Bulgaria

9 January 2003, ECtHR, App no 38822/97

#### *Violation of Article 5(4)*

The applicant challenged a restriction on his right to access the case-file during the preliminary investigation. The ECtHR emphasized that criminal proceedings “must always ensure equality of arms between the parties, the prosecutor and the detained person,” and in finding a breach of Article 5(4) explained that “[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client’s detention” (para. 77).<sup>6</sup> The Court observed that at the relevant time it was the domestic court’s prevailing practice to refuse access to case files in appeals against detention pending trial, while the supervising prosecutor had a full knowledge of the file. The Court held that such a situation was incompatible with the equality-of-arms requirement (para. 80).

### Dowsett v. the United Kingdom

24 June 2003, ECtHR, App no 39482/98

#### *Violation of Article 6(1) in conjunction with Article 6(3)(b)*

The applicant alleged that his right to a fair trial was violated when the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds, *inter alia*, of public interest immunity (para 44). The ECtHR reiterated that the entitlement to disclosure of relevant evidence is not an absolute right, and in any criminal proceedings there may be competing interests, such as national security, or the need to protect witnesses at risk of reprisals, or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused. However, such measures should be strictly necessary (para. 42). In addition, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (para. 42). The Court found that a procedure, whereby the prosecution itself attempted to assess the importance of concealed information for the defence and weigh this against the public interest in keeping the information secret, did not comply with Article 6(1) (para. 44).

### Ocalan v. Turkey

12 April 2005, ECtHR [Grand Chamber], App no 46221/99

#### *Violation of Article 6(1) in conjunction with Article 6(3)(b)*

The applicant was allowed only restricted access to his lawyers who were not allowed to provide him with a copy of the documents in the case file, other than the indictment. It was not until the actual hearing that the court gave the applicant permission to consult the case file under the supervision of two registrars and authorised his lawyers to provide him with a copy of certain documents. The applicant had twenty days in which to examine a case file containing some 17,000 pages. The ECtHR reiterated that “respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions” (para. 140).<sup>7</sup> It found that had the applicant been permitted to study the prosecution evidence directly for a sufficient period, he would have been able to identify additional arguments relevant to his defence (para. 143).

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<sup>6</sup> See also: *Lamy v. Belgium*, ECtHR, Judgment of 30 March 1989, at para. 29; and *Nikolova v. Bulgaria*, ECtHR [GC], Judgment of 25 March 1999, at para. 58.

<sup>7</sup> See also: *Bulut v. Austria*, ECtHR, Judgment 22 February 1996, at para. 47.

## Shamayev and Others v. Georgia and Russia

12 April 2005, ECtHR, App no 36378/02

### *Violation of Article 5(2)*

The applicants' lawyers were denied access to the extradition files, because, as the Government argued, "the employees of the [Georgian] Procurator-General's Office themselves needed to carry out a detailed examination of the documents submitted by the Russian authorities". The ECtHR stated that although there was no rule that the entire case-file should be made available to the suspects or their legal representative, "they must nonetheless receive sufficient information so as to be able to apply to a court for the review" of the lawfulness of their detention under Article 5(4) (para. 427).<sup>8</sup>

## Moiseyev v. Russia

9 October 2008, ECtHR, App no 62936/00

### *Violation of Article 6(1)*

The government submitted that the applicant's access to the case-file was restricted on the basis of national security concerns. The ECtHR held that any restrictions on access to a case-file must be limited in scope, appropriate, and justified by the law. It found that "national security considerations may, in certain circumstances, call for procedural restrictions to be imposed in the cases involving State secrets. Nevertheless, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights, such as the right to a fair trial, should have a lawful basis and should be appropriate to achieve their protective function" (paras. 215-217).<sup>9</sup>

## Mooren v. Germany

9 July 2009, ECtHR [Grand Chamber], App no 11364/03

### *Violation of Article 5(4)*

The applicant complained that in the initial stage of the proceedings he was not provided full access to a case file. The ECtHR held that a four-page summary of the case-file did not satisfy the prosecution's disclosure obligations, as it unfairly restricted the applicant's ability to challenge his detention. Similarly, an oral account of facts and evidence in the case-file failed to comply with the requirements of equality of arms (paras. 121-125). The Court also noted that the fact that the domestic court later acknowledged that the applicant's procedural rights had been curtailed by the lack of access to the case-file and allowed his lawyer to inspect the file at a later date, did not remedy the procedural shortcomings that had occurred in the earlier stages of the proceedings (para. 121).

## Gregacevic v. Croatia

10 July 2012, ECtHR, App no 58331/09

### *Violation of Article 6(1) and 6(3)(b)*

The applicant was convicted for fraud (para. 16). During the first instance trial, the defence was not informed about a number of documents held by the police; the documents were only presented to them at the final hearing. The applicant's lawyer expressly asked for an adjournment of the hearing for a short period to study new evidence and prepare a response, but the court dismissed his request (para. 15). The ECtHR found that a fair hearing implied, *inter alia*, the right to adversarial proceedings, according to which the parties must have

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<sup>8</sup> See also: *Fox, Campbell and Hartley v. the United Kingdom*, ECtHR, Judgment of 30 August 1990, at para. 40; and *Čonka v. Belgium*, ECtHR, Judgment of 5 February 2002, at para. 50.

<sup>9</sup> See also: *Matyjek v. Poland*, ECtHR, Judgment of 24 September 2007, at para. 59.

knowledge of, and an opportunity to comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (para. 50). The trial court twice ordered the police to submit the documents; thus the information held by the police was capable of influencing the outcome of the proceedings. In respect to such influential information, the trial court was obliged to provide the accused with an opportunity to organise his defence in an appropriate way (para. 57). By informing the defence only briefly of the substance of the documents submitted by the police at the final hearing in a complex fraud case, the domestic court failed to comply with fair trial guarantees (para. 58).

## 3. The right to defence

Article 6(3)(c) explicitly states that all people suspected or accused of a criminal charge have the right to defend themselves in person or through a lawyer of their choosing. The decision to allow an accused to defend himself in person or to assign him a lawyer falls within the margin of appreciation of the States.

The right to a lawyer is a key aspect of the procedural rights of suspected and accused persons. A suspect who is assisted by an effective lawyer is in a better position with regards to the enforcement of all of their other rights, because they will be better informed of those rights, and because the lawyer is able to assist them in ensuring that their rights are respected.

### 3.1 The right to self-representation

The decision to allow an accused to defend himself in person or to assign him a lawyer falls within the margin of appreciation of the States. A wish to defend oneself can be overridden when there are relevant and sufficient grounds for holding that it is necessary to appoint a lawyer in the interests of justice. Where an accused is represented by a lawyer he must generally exercise his procedural rights through his lawyer.

#### X. v. Austria

5 July 1977, European Commission of Human Rights (decision), App no 7138/75

*No violation of Article 6(3)(b) and (c)*

The applicant complained that he could exercise his procedural rights, e.g. to access a case-file, only through the lawyers, which prevented him from defending himself in person. The Commission held that the choice between the two possibilities referred to in Article 6(3)(c), that is, whether the applicant will defend himself in person or be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, is a matter for the competent authorities to decide. Where an accused person is represented by a lawyer he must generally exercise his procedural rights through his lawyer. It makes no difference in this respect whether the lawyer in question is of the party's own choice, or an *ex officio* or legal aid counsel. In the present case, the applicant was represented by a lawyer who was given access to the file, thus there was no violation of Article 6(3)(b) and (c).

#### Croissant v. Germany

25 September 1992, ECtHR, App no 13611/88

*No violation of Article 6(3)(c)*

German criminal procedure law provided that mandatory legal assistance should be given to a defendant at all stages of the Regional Court's proceedings; the accused would bear the costs of the assistance only if he was convicted (para. 27). The applicant argued that the nomination of a third defence lawyer in his case was unnecessary, lacked relevant and sufficient justification, and prevented him from defending himself. The Court pointed out that the requirement that a defendant be assisted by a lawyer and the appointment of more than one defence lawyer were not inherently inconsistent with the Convention (para. 27). When appointing a defence lawyer the national courts must have regard to the defendant's wishes, however, the wishes can be overridden "when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice" (para. 29).<sup>10</sup> Given the subject-matter of the trial, the complexity of the factual and legal issues involved, and the applicant's personality, the appointment of the third defence lawyer was justified (para. 30).

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<sup>10</sup> See also: *Lagerblom v. Sweden*, ECtHR, Judgment of 14 January 2003, at para. 54.

### Correia de Matos v. Portugal

15 November 2011, ECtHR (decision), App no 48188/99

*Claim under Article 6(1) and 6(3)(c) inadmissible as manifestly ill-founded*

The applicant, a lawyer by profession, complained that he was prevented from defending himself because the judge assigned him a lawyer against his wishes. The ECtHR considered that the decision to allow an accused to defend himself in person or to assign him a lawyer fell within the margin of appreciation of the Contracting States. The domestic courts are entitled to consider that the interests of justice require the compulsory appointment of a lawyer. In the present case the authorities did not exceed their margin of appreciation and the applicant's defence was conducted effectively.

## 3.2 The right to legal assistance from the outset of the investigation

The ECtHR has for many years taken the view that the right to legal assistance arises immediately on arrest. Since 2008 a series of judgments from the ECtHR have developed and clarified the scope of this right. Under this recent jurisprudence, described in detail below, a person must have access to legal assistance when they are placed in custody or their position is significantly affected by the circumstances, which may even be before a formal arrest takes place. In particular, no one should be interrogated or required or invited to participate in investigative or procedural acts without the right of access to legal assistance. This right applies to all suspects and accused persons regardless of their formal legal status. Suspects have the right to access the full range of services inherent in legal advice, such as discussion of the case, organization of the defence, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention, from the moment the person's right to an attorney attaches.

### Imbrioscia v. Switzerland

24 November 1993, ECtHR, App no 13972/88

*No violation of Article 6(1) and 6(3)(c)*

The applicant, an Italian national, was arrested on suspicion of drug trafficking in Switzerland. He complained that he had not been assisted by a lawyer during several interrogations by the police and Swiss prosecutors, despite requesting legal assistance. The Court held that the "primary purpose" of Article 6 of the ECHR is to ensure a "fair trial," however the Article also applies to pre-trial proceedings (para. 36). Article 6, and in particular paragraph Article 6(3), "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions" (para. 36). In the case at hand, the Court did not find a violation of Article 6(3) because immediately after the applicant was arrested he took steps to instruct a lawyer of his own choosing (para. 39). The lawyer had not been invited to attend several interviews because the domestic legislation did not require her to be present and she failed to request to attend (paras. 41-42).

### John Murray v. the United Kingdom

8 February 1996, ECtHR [Grand Chamber], App no 18731/91

*Violation of Article 6(1) and 6(3)(c)*

The applicant was arrested, taken into police custody and denied access to a lawyer for forty-eight hours, because authorities believed such access would interfere with police operations against terrorism. The applicant was interviewed by police twelve times and at the outset of each interview he was informed that adverse inferences may be drawn against him if he refused to answer questions. The ECtHR held "[u]nder such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the

assistance of a lawyer already at the initial stages of police interrogation.” The Court found that denying the accused access to a lawyer for forty-eight hours of police interrogations—whatever the justification—violated Article 6(1) in conjunction with Article 6(3) (para. 66).

#### Salduz v. Turkey

27 November 2008, ECtHR [Grand Chamber], App no 36391/02

*Violation of Article 6(3)(c) in conjunction with Article 6(1)*

The applicant, a minor, was arrested, made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber found that the applicant’s lack of access to legal assistance while he was in police custody violated Article 6(1) and 6(3)(c). Neither the subsequent assistance of a lawyer nor the ability to challenge the statement during the following proceedings could cure the defects which had occurred during police custody (para. 58). The ECtHR underlined the importance of the investigation stage for the preparation of the criminal proceedings and observed that “in order for the right to a fair trial to remain sufficiently ‘practical and effective’ Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police” (paras. 54-55).

#### Shabelnik v. Ukraine

19 February 2009, ECtHR, App no 16404/03

*Violation of Article 6(1)*

The applicant was called to testify about witnessing a crime, but during the first interview confessed of committing it (para. 57). The ECtHR held that the right to access a lawyer arises at the point that the person’s position is significantly affected, even if he is not formally taken into custody as a suspect. The Court explained that a person’s position will be significantly affected as soon as the suspicion against him is seriously investigated and the prosecution’s case compiled (para. 57).

#### Plonka v. Poland

30 June 2009, ECtHR, App no 20310/02

*Violation of Articles 6(1) in conjunction with Article 6(3)(c)*

The applicant, an alcoholic, had been arrested for killing a colleague but was not provided with a lawyer at the initial stage of the criminal proceedings. The Government submitted that the applicant had been informed of her right to be assisted by a lawyer and had signed a form to that effect. The Government argued that she had therefore not been deprived of access to a lawyer because she could have requested one during the initial period of detention. The applicant conceded that she had been informed of her right to a lawyer, but complained that she was neither offered any help in appointing one, nor asked whether she could afford the cost of legal assistance. The Court held unanimously that the authorities should have taken into account her vulnerable status when apprising her of the right to be assisted by a lawyer and that there had not been a clear and unequivocal waiver of her right to a lawyer. The subsequent reliance upon admissions made in the interview to convict her was therefore unfair, even though she was represented at trial. The Court concluded that Poland violated Articles 6(1) in conjunction with Article 6(3)(c) by failing to give the applicant access to lawyer from the initial stages of proceedings (paras. 40-42).

#### Pishchalnikov v. Russia

24 September 2009, ECtHR, App no 7025/04

*Violation of Article 6(3)(c) in conjunction with Article 6(1)*

The applicant was arrested on suspicion of aggravated robbery. He was interrogated—both on the day of his arrest and immediately on the following day—in the absence of a lawyer, although he had clearly indicated a defence lawyer whom he wanted to represent him. The confession extracted during the interrogation was used against him in the subsequent proceedings (para. 90). The Court found that a lack of legal assistance to the applicant at the initial stages of police questioning had irreversibly affected his defence rights and undermined the possibility of him receiving a fair trial.

#### Dayanan v. Turkey

13 October 2009, ECtHR, App no 7377/03

*Violation of Article 6(3)(c) in conjunction with Article 6(1)*

The applicant was arrested during the 2001 operations against the Hezbollah, an illegal armed organization in Turkey. He was informed of his right to remain silent and to see a lawyer only at the end of his police custody, but he remained silent throughout the questioning. The ECtHR stated that a suspect must have the opportunity to obtain legal assistance as soon as he or she is taken into custody, whether or not they are questioned by the police (paras. 30-31). The Court stressed that this early access to a lawyer was meant to ensure that a suspect could obtain the whole range of services inherent to legal advice, such as discussion of the case, organization of the defence, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention (para. 32).

#### Kuralic v. Slovakia

15 October 2009, ECtHR, App no 50700/07

*No violation of Article 6(1) and 6(3)*

In his statement to the police the applicant confessed to murdering his wife. He complained that he was not legally represented during the police interview and that the confession was extracted under duress. The ECtHR reiterated that Article 6(3) “may be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.” However, the Court did not find a violation of Article 6(1) and 6(3) since the applicant's statement given during the police interviews was excluded from the case-file on the ground that he had not been legally represented and that it carried no weight in the criminal proceedings against the applicant (paras. 6 and 45).

#### Zaichenko v. Russia

18 February 2010, ECtHR, App no 39660/02

*No violation of Article 6(3)(c)*

The applicant was not formally arrested or interrogated in police custody but was simply stopped for a road check and answered questions relating to the search of his car. Since his freedom of action was not significantly curtailed, the Court held that the absence of legal representation at that point did not violate the applicant's right to legal assistance under Article 6(3)(c) (para. 48).

#### Brusco v. France

14 October 2010, ECtHR, App no 1466/07

*Violation of Article 6(1) and 6(3)*

The applicant was arrested for attempted murder and placed in police custody. The following day, he was put under oath and interrogated without a lawyer. During this interrogation, he confessed to involvement in criminal activities. The applicant was allowed to see a lawyer immediately after the interrogation. The Court reiterated that the right to legal assistance includes having a lawyer during interrogations, including early, pre-trial investigation stages of criminal proceedings and the *garde à vue* process (paras. 44-47). In the present case the

lawyer could have informed the suspect of his right to silence and privilege against self-incrimination, and could have provided assistance during the interrogations (para. 54).

*Nechiporuk and Yonkalo v. Ukraine*

21 April 2011, ECtHR, App no 42310/04

*Violation of Article 6(3)(c)*

The applicant was suspected of murder, but the police arrested him for a lesser drug offence and formally placed him in “administrative detention,” and deprived him of a lawyer. The first applicant confessed several times to assault and murder at the early stage of his interrogation when he was not assisted by lawyer. The Court held that despite his formal designation, he had in fact been treated as a criminal suspect and should have been given the rights granted by Article 6, including unimpeded access to legal representation. The Court explained that “[a]ny exception to the enjoyment of [the right to a lawyer] should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies” (para. 263). The ECtHR concluded that depriving the applicant of access to a lawyer during the initial stages of investigation violated Article 6(3)(c) (paras. 264-267).

*Stojkovic v. France and Belgium*

27 October 2011, ECtHR, App no 25303/08

*Violation of Article 6(3)(c) in conjunction with Article 6(1)*

A French investigating judge issued an international letter of request asking Belgian police to question the applicant in relation to an armed robbery which took place in France (para. 10). During the interview, the applicant was simultaneously notified of the provisions of Belgian law, which did not provide for legal assistance, and of his French status as “legally assisted witness,” which allowed him to be assisted by a lawyer. Relying on Article 6(3)(c), the applicant complained that he was not provided with legal assistance. The ECtHR found that the applicant must have been understandably confused by contradicting information provided to him. His choice to make a confession thus could not be regarded as informed (paras. 53-54). The Court acknowledged that it had been for the French criminal authorities to ensure that the acts carried out in Belgium were not in breach of the rights of the defence and to verify the fairness of the proceedings under France's supervision. There was thus a violation of Article 6 in respect to France (paras. 55-56); the complaint against Belgium was inadmissible due to the six-month rule (paras. 38-40).

*Demir v. Turkey*

24 July 2012, ECtHR, App no 2091/07

*Violation of Article 6(3)(c) in conjunction with Article 6(1)*

The applicant was arrested on suspicion of membership of Hezbollah. During police questioning he was compelled to sign incriminating statements in the absence of a lawyer (para. 7). The ECtHR found that the restriction imposed on the applicant's right of access to a lawyer was in fact systemic and affected anyone held in custody in connection with an offence falling under the jurisdiction of the State Security Courts (para. 49). Article 6(1) required, as a rule, access to a lawyer starting from the first interrogation of a suspect by the police—unless it is demonstrated in the specific circumstances of the case that there are compelling reasons to restrict this right. Even though the applicant had the opportunity to challenge the evidence against him at trial and subsequently on appeal, the denial of pre-trial legal assistance irremediably affected his defence rights and therefore violated Article 6(3)(c) (para. 50).

*Stanca v. Romania*

24 July 2012, ECtHR, App no 34116/04

*Claim under Articles 6(1) and 6(3)(c) inadmissible as manifestly ill-founded*

During the interrogation on suspicion of corruption, the applicant made a statement denying the allegations; no lawyer was present. On the same day, the applicant made another statement, admitting the allegations of corruption; his lawyer was present during this statement (para. 15-17). The court sentenced the applicant to five years imprisonment for the crime of aiding and abetting bribery. The applicant complained that he was not assisted by a lawyer from the outset of police custody and was compelled to make incriminating statements. The ECtHR found that although the applicant made his initial statement without a lawyer present, he had not confessed committing a crime, but rather denied the allegations. Domestic courts in their judgments did not refer to the initial statement; they based the decisions on the applicant's confession, which was made in the presence of the lawyer of his own choice. In addition, there was no legal restrictions which would have prevented the applicant benefiting from legal assistance. He made a confession in the presence of a defence lawyer, who did not raise any objections as to the manner of the interrogation (para. 67).

### Simons v. Belgium

28 August 2012, ECtHR (decision), App no 71407/10

*Claim under Article 5(1), 6(1) and (3)(c) inadmissible as manifestly ill-founded*

On 13 March 2010 the applicant was arrested on suspicion of stabbing her boyfriend. During interrogation without assistance of a lawyer, she admitted committing a crime (para. 4). The next day, the applicant appeared before the investigating judge, where she confirmed her statement made to the police. Again, no lawyer was present. The judge issued a warrant of detention, informing the applicant that that she was accused of attempted murder and had a right to choose a lawyer (para. 5). From that moment on, a privately retained lawyer represented the applicant in domestic proceedings which are still pending. Before the ECtHR, the applicant complained that she was not informed of her right to a lawyer and had no legal assistance from the moment of her arrest until the hearing in the first instance court (para. 21). The ECtHR found the complaint under Article 6 inadmissible because an accused person could not be regarded as a victim of a violation of her fair trial rights in the absence of a conviction; in this case the investigation was ongoing (para. 18). As to the complaint under Article 5, the general principles inherent in the right to liberty and security are the principles of the rule of law, legal certainty, proportionality, and protection against arbitrary interference. The right to legal assistance is a principle specific to a fair trial and cannot be considered a "general principle" implicit in the Convention (para. 32). Although restrictions on the access to a lawyer from the outset of detention affect the fairness of the criminal proceedings, in itself it does not lead to a breach of Article 5(1) (para. 33).

### Titarenko v. Ukraine

20 September 2012, ECtHR, App no 31720/02

*Violation of Article 6(1) and 6(3)(c)*

The applicant was invited to meet police officers "for a confidential talk," where he confessed to murder. After being officially presented with charges, he repeated his confession with his lawyer present (paras. 13-14). Relying on *Salduz* the Court held that Article 6 required assistance of a lawyer at the initial stages of police interrogation (para. 86). Any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterized as "informal questioning," as claimed by the domestic courts. After being questioned without legal assistance the applicant confessed to a very serious crime. The fact that he repeated his confession in the presence of the lawyer did not undermine the conclusion that the applicant's defence rights were irretrievably prejudiced at the very outset of the proceedings. The domestic courts did not react to this procedural flaw in an appropriate manner, which would be to exclude such statements from the evidentiary basis for the applicant's conviction (para. 87).

## 3.3 The right to private consultation with a lawyer

An accused's right to communicate with his lawyer out of hearing of a third person is part of the basic requirements of a fair trial. If a lawyer is unable to confer with his client and receive confidential instructions

from him without surveillance, his assistance loses much of its usefulness. Written correspondence with lawyers is always privileged and the reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, for example when the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.

### Schönenberger and Durmaz v. Switzerland

10 June 1988, ECtHR, App no 11368/85

#### *Violation of Article 8*

The public prosecutor stopped a letter addressed by a lawyer to a person on remand (second applicant). In the letter the lawyer sought to inform the second applicant of his right "to refuse to make any statement," advising him that to exercise it would be to his "advantage." At that time the lawyer was instructed not by the second applicant, but by his wife. The ECtHR considered that by stopping a letter the prosecutor interfered with the applicants' Article 8 rights. The Government asserted that such interference was in accordance with the law and pursued a legitimate aim, "the prevention of disorder or crime" (paras. 24-25). The Court, however, found that the interference was not necessary in a democratic society, because in the letter the lawyer simply advised a client to adopt a certain tactic, lawful in itself. According to the Court, "advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution" (para. 28). The ECtHR noted that "the fact that Mr. Schönenberger had not been formally appointed is therefore of little consequence" (para. 29).

### Campbell v. the United Kingdom

25 March 1992, ECtHR, App no 13590/88

#### *Violation of Article 8*

The applicant complained that correspondence to and from his lawyer was opened and read by the prison authorities in breach of Article 8. The ECtHR found that such actions of prison authorities amounted to interference with the applicant's right to respect for correspondence (paras. 33-34). Even though the Court acknowledged that the interference was "in accordance with the law" (para. 38) and pursued a legitimate aim of "the prevention of disorder or crime" (para. 41) it still held that the interference was not necessary in a democratic society. The ECtHR found that that correspondence with lawyers, whatever its purpose, is always privileged and that the reading of a prisoner's mail to and from a lawyer is only permissible in exceptional circumstances, when the authorities have reasonable cause to believe that the privilege is being abused, in that the contents of the letter endangered prison security or the safety of others or are otherwise of a criminal nature (para. 48). In the present case, there was no pressing social need for the opening and reading of the applicant's correspondence with his lawyer (para. 53).

### Brennan v. the United Kingdom

16 October 2001, ECtHR, App no 39846/98

#### *Violation of Article 6(3)(c) taken together with Article 6(1)*

The applicant submitted that his right under Article 6(3)(c) was violated by the presence of a police officer attending within sight and hearing the consultation with a lawyer (para. 56). According to the Government, the restriction on private communication served the purpose "of preventing information being passed on to suspects still at large" (para. 59). The ECtHR found no allegation that the lawyer was in fact likely to collaborate in such an attempt and thus there was no compelling reason to impose the restriction (para. 59). According to the Court, "the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him" (para. 63).

### Ocalan v. Turkey

12 April 2005, ECtHR [Grand Chamber], App no 46221/99

*Violation of Article 6(1) in conjunction with Article 6(3)(b)*

For seven days from the day of the arrest the applicant was questioned without a lawyer being present. The applicant's first visit from his lawyers took place under the supervision and within sight and hearing of members of the security forces and a judge, all of whom were present in the same room. The security forces restricted the visit to twenty minutes. The record of the visit was sent to the National Security Court. The subsequent meetings also took place within hearing of members of the security forces, even though the security officers concerned were not in the meeting room (para. 132). The Court reiterated that “an accused's right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) (...) If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness.” The Court also noted that restrictions may be imposed on an accused's access to his lawyer if good cause exists. In the present case, the inevitable consequence of the restriction was to prevent the applicant from conversing openly with his lawyers and asking them questions that might prove important to the preparation of his defence. The rights of the defence were thus significantly affected (para. 133).

### Moiseyev v. Russia

9 October 2008, ECtHR, App no 62936/00

*Violation of Article 6(1) taken in conjunction with Article 6(3)(b) and (c)*

The applicant complained that the contacts between him and his lawyers were only possible on the basis of permits issued by the authority in charge of the case, and, in addition to that, they were required to obtain special permission from the remand centre administration for any documents they wished to pass to each other (paras. 202 and 208). The ECtHR found that “the need to apply for an individual permit for every visit created considerable practical difficulties in the exercise of the rights of the defence because it detracted time and effort from pursuing the defence team’s substantive mission” (para. 205). Moreover, this arrangement put the defence in a position of dependence on, and subordination to, the discretion of the prosecution and therefore destroyed the appearance of the equality of arms (para. 205). The Court also held that the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent. It concluded that “[t]his flagrant breach of confidentiality of the client-attorney relationship could not but adversely affect the applicant’s right to defence and deprive the legal assistance he received of much of its usefulness” (para. 211). Consequently, the ECtHR found a violation of the principle of equality of arms (paras. 207 and 212).

### Sakhnovskiy v. Russia

2 November 2010, ECtHR [Grand Chamber], App no 21272/03

*Violation of Article 6(1) taken in conjunction with Article 6(3)(c)*

The applicant, sentenced to eighteen years imprisonment for murder, was able to communicate with the legal aid lawyer in the appellate proceedings only by a video link. The ECtHR reiterated that a defendant had a right to communicate with the lawyer in private and “without the risk of being overheard by a third party” as a basic requirements of a fair trial (paras. 99-107). Given the complexity of the issues raised before the appellate court, the Court found it questionable whether communication by video link “installed and operated by the State” offered sufficient privacy (para. 104). The ECtHR found that nothing prevented appointing a local lawyer to visit the applicant in the detention center and to be with him during the hearing (para. 106). The ECtHR concluded that the arrangements made by the Supreme Court were insufficient and did not secure effective legal assistance to the applicant during the second set of appeal proceedings (para. 107).

### 3.4 The right to have adequate time and facilities to prepare the defence

A lawyer's ability to effectively provide legal assistance is dependent upon the circumstances in which they can meet or communicate with accused persons. Suspects and accused persons must therefore be able to meet with their lawyer for an adequate period of time, in order for this right to be meaningful. The defence must be given additional time after certain occurrences in the proceedings in order to adjust their position, prepare a request, and lodge an appeal. Such "occurrences" may include, for instance, changes in the indictment, introduction of new evidence by the prosecution, or a sudden and drastic change in the opinion of an expert during the trial. A determination of what is adequate time to obtain legal assistance must be made on the basis of the individual circumstances of the case, including the complexity of the case.

#### Ensslin, Baader, and Raspe v. Germany

8 July 1978, European Commission of Human Rights (decision), App nos 7572/76, 7586/76 and 7587/76

*No violation of Article 6(3)(b) and (c)*

The applicants complained that the limits placed by law on the number of defence lawyers (three for each defendant) and exclusion of certain of those lawyers from the proceeding violated the right to have adequate facilities for the preparation of the defence and to defend oneself through legal assistance of the own choosing (para. 17). The Commission explained that the right to legal assistance does not guarantee a right to an unlimited number of defence lawyers; the purpose of Article 6(3)(c) is to ensure that "both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional" (para. 19). Thus the limitation on the number of lawyer did not violate Article 6. As to the exclusion of some of the defence lawyers, the Commission pointed out that the State had a "right to make the appearance of barristers before the courts subject to regulations"; moreover the defence lawyers were obliged "not to transgress certain principles of professional ethics" (para. 20). In the present case, certain lawyers were excluded because they were suspected of supporting the criminal association of the accused. Thus, such a limitation pursued an interest of "procedural order" (para. 20).

#### Bonzi v. Switzerland

12 July 1978, European Commission of Human Rights (decision), App no 7854/77

*Claim under Article 6(3) inadmissible*

The applicant alleged a violation of his right to communicate with his lawyer based on the fact that during pre-trial investigation, he was placed in solitary confinement for almost a month. The Commission found that the right "to confer with one's counsel and exchange confidential instructions or information with him," implicit in Article 6(3), was not absolute. In the present case, while the lawyer's visits were forbidden, the applicant was free to communicate with him in writing. Moreover, prior to the placement in solitary confinement, the applicant was able to confer with his lawyer without impediment during a period of nine months. Therefore, the relative and temporary limitations on contact between the applicant and his lawyer did not violate the applicant's right to have adequate time and facilities to prepare for his defence (para. 2).

#### Albert and Le Compte v. Belgium

10 February 1983, ECtHR, App nos 7299/75 7496/76

*No violation of Article 6(3)*

Under Article 6(3) the applicant asserted that he was not informed in detail of the accusations against him and that he did not have adequate time for the preparation of his defence. The ECtHR found that the letter to the applicant inviting to appear before the Bureau of the Council specified the nature and cause of the complaints made against him, namely the charge of having improperly issued certificates of unfitness for work. The Court

considered the fifteen day time-limit to prepare the defence in a professional disciplinary proceeding was reasonable and therefore did not violate Article 6(3) (para. 41).

### Borisova v. Bulgaria

21 December 2006, ECtHR, App no 56891/00

*Violation of Article 6(1) in conjunction with Article 6(3)(a) and (b)*

After an incident in the Employment Office, the applicant was arrested and escorted to the police station, where she spent several hours in a cell. After a few hours, the applicant was taken to court where the hearing of her case began. The applicant was charged with and, as a result of a trial, found guilty of the administrative offence of minor hooliganism. The applicant contended, and the Government disputed, that she was informed of the assessment and the accusations against her only just before being presented for trial (para. 42). The ECtHR found that in any event the time afforded to the applicant to prepare her defence could not have been more than a couple of hours, during which time she was either in transit to the court or was being held in a cell at the police station (para. 43). In addition, given the expedited nature of the proceedings, the applicant did not have the time and facilities to contact a lawyer or a next of kin prior to the start of the hearing (para. 44). The Court concluded that the applicant's right to have adequate time and facilities for the preparation of her defence were therefore infringed (para. 45).

### Tsonyo Tsonev v. Bulgaria (no. 2)

14 January 2010, ECtHR, App no 2376/03

*No violation of Article 6(1), (3)(b) and (c)*

The applicant alleged that the Regional Court appointed a lawyer for him with such short notice before the hearing that she had been unable to defend him effectively (para. 29). Once the state-appointed lawyer failed to show up to the trial hearing, the Regional Court appointed a new lawyer on the day of the hearing (para. 34). The applicant expressly stated that the new lawyer was acquainted with the case; neither the applicant nor his lawyer sought an adjournment in order for the lawyer to be able to prepare more thoroughly for the hearing (para. 35). The ECtHR found that it amounted to an effective waiver of the right to additional time for the preparation of their defence (para. 36).

### Luchaninova v. Ukraine

9 June 2011, ECtHR, App no 16347/02

*Violation of Article 6(3)(b) and (c)*

The case against the applicant concerned the theft of a small number of labels which belonged to her employer. The applicant became aware of the charges only when the employer's report was filed with the trial court, approximately two months before the hearing (para. 65). She was not informed of the hearing until the day it was held (para. 66). The ECtHR reiterated that Article 6 of the Convention, read as a whole, guaranteed the right of an accused to participate effectively in a criminal trial (para. 61),<sup>11</sup> which included a right to organise a defence in an appropriate way and a right to put all relevant defence arguments before the trial court (para. 62).<sup>12</sup> In the present case the Court found that the applicant's rights under Article 6(3)(b) and (c) were breached (para. 67). She did not receive a notice of the hearing in time for her to prepare to participate in it. Moreover, although her request for free legal assistance was granted, she was not informed of that decision before the hearing (para. 66).

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<sup>11</sup> See also: *Rowe and Davis v. the United Kingdom* [GC], ECtHR, Judgment of 16 February 2000, at para. 60.

<sup>12</sup> See also: *Kornev and Karpenko*, ECtHR, Judgment of 21 October 2010, at para. 66.

Miminoshvili v. Russia

28 June 2011, ECtHR, App no 20197/03

*No violation of Article 6(3)(b)*

The applicant was found guilty of extortion and sentenced to seven years' imprisonment. Before the national courts the applicant was represented by three lawyers. He complained that the defence had only been given twenty minutes to prepare their final submissions. The hearing of final submissions started almost immediately after several intense hearings on the merits. The ECtHR found that the defence must be given additional time after certain occurrences in the proceedings in order to adjust their position, prepare a request, and lodge an appeal. Such "occurrences" may include, for instance, changes in the indictment,<sup>13</sup> introduction of new evidence by the prosecution,<sup>14</sup> or a sudden and drastic change in the opinion of an expert during the trial (para. 141).<sup>15</sup> In such situations the amount of time to be given to the defence cannot be defined *in abstracto*, but should be decided in light of relevant circumstances of the case (para. 142). In the present case the applicant was represented by three professional lawyers who were familiar with the case and should have known that they were expected to make oral submissions. Moreover, the investigation in the case continued for over one year, and court hearings were held on several occasions; thus, "the applicant had sufficient time, after being served with the decision to charge him, for the preparation of his defence" (paras. 141-142).

### 3.5 Waiving the rights to legal assistance

Given the fundamental importance of the right to legal assistance, it may only be waived by the suspected or accused person in limited circumstances. The ECtHR has drawn tight restrictions around what will be considered an effective waiver, and has emphasized the importance of providing safeguards in respect to waivers. The waiver must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived the right to a lawyer, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.

Padalov v. Bulgaria

10 August 2006, ECtHR, App no 54784/00

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained about a violation of his right to legal assistance. The government submitted that the applicant had tacitly waived his right to free legal assistance since he had never expressly requested the appointment of an *ex officio* lawyer (para. 48). The ECtHR pointed out that any waiver of the right had to be unequivocal and could not run contrary to an "important public interest" (para. 47). Although the applicant did not specifically request the lawyer, he informed the authorities about lack of sufficient means to retain a private lawyer (para. 48). Given the complexity of the applicable law at that time, the authorities should have made sure that the applicant was fully aware of a possibility to be assisted by a legal aid lawyer (para. 54).

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<sup>13</sup> See also: *Pélissier and Sassi v. France* [GC], ECtHR, Judgment of 25 March 1999, at para. 60.

<sup>14</sup> See also: *G.B. v. France*, ECtHR, Judgment of 2 February 2001, at para. 60.

<sup>15</sup> See also: *G.B. v. France*, ECtHR, Judgment of 2 February 2001, at para. 64.

### Galstyan v. Armenia

15 November 2007, ECtHR, App no 26986/03

*No violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained that the police tricked him into refusing a lawyer (para. 54). The Court found that all case materials indicated that the applicant expressly waived his right to be represented by a lawyer both before and during the court hearing, namely in the record of an administrative offence, the applicant put his signature in the section certifying that he was made aware of his procedural rights and in the section marked as “other information relevant for the determination of the case”, he also added “I do not wish to have a lawyer” (para. 14). There were no evidence that the applicant's choice to be self-represented was the result of any threats or physical violence and no evidence to support the applicant's allegation that he was “tricked” into refusing a lawyer (para. 91).

### Pishchalnikov v. Russia

24 September 2009, ECtHR, App no 7025/04

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained that he was denied access to a lawyer during the first few days of his police custody, while the Government argued that he waived his right to a lawyer. The ECtHR found that a waiver “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be” (para. 77). The Court considered that the right to a lawyer, “being a fundamental right among those which constitute the notion of fair trial” was a prime example of those rights which require the special protection of the knowing and intelligent waiver standard (para. 78). A valid waiver of that right to a lawyer could not be implied from the fact that, being reminded of his right to silence, the applicant gave replies to the investigator's questions (para. 79).

## 4. The right to legal aid

One of the fundamental procedural rights of all people accused or suspected of crimes, is the right to legal assistance at all stages of the criminal process. It is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied. Accordingly, people charged with crimes should have access to free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves. This ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied their right to a fair trial because of their financial circumstances. The right to legal aid is established explicitly in Article 6(3) of the European Convention of Human Rights.

### 4.1 Scope of the right to legal aid

States are not required to provide free legal aid to every person who requests it. Article 6(3)(c) of the ECHR specifically sets out that a person has the right to free legal aid if two conditions are met. First, if he does not have sufficient means to pay for legal assistance (the “means test”), and second when the interests of justice so require (the “merits test”).

#### 4.1.1 Applying the financial criterion

If a person does not have sufficient means to pay for his own lawyer, he will satisfy the first condition set forth in Article 6(3) of the ECHR. The ECtHR has not provided a definition of “sufficient means.” Instead, the ECtHR takes all of the particular circumstances of each case into account when determining if the defendant’s financial circumstances should have justified granting legal aid.

In the appellate stage, the ECtHR applies the means test in the same way as at other stages of proceedings, with the additional factor of looking at whether the court provided the applicant with a lawyer in the proceedings prior to the appeal and whether his financial situation has improved since then.

#### Pakelli v. Germany

28 May 1983, ECtHR, App no 8398/78

*Violation of Article 6(3)(c)*

The applicant complained of the refusal of the Federal Court, in proceedings concerning an appeal on points of law, to appoint a legal aid lawyer for the hearings before that court (para. 29). The Government contested, *inter alia*, the fact that the applicant was unable to pay for his legal assistance (para. 32). The Court held that although it was impossible to prove “beyond all doubt” that the applicant was indigent at the relevant time, his statement of income supplied to the domestic courts, showed “some indications” of his financial hardship (para. 34). According to the Court, as long as there were no “clear indications to the contrary” the first of the two conditions contained in Article 6(3)(c) – the means test – was satisfied (para. 34).

#### Croissant v. Germany

25 September 1992, ECtHR, App no 13611/88

*No violation of Article 6(3)(c)*

Under German law the Regional Court provides mandatory legal aid to defendants at all stages of the court’s proceedings; the accused is only responsible for the costs of the assistance if he is convicted (para. 27). The applicant complained that the German reimbursement order violated his rights under Article 6. The Court found that such a system would not be compatible with Article 6 “if it adversely affected the fairness of the proceedings.” According to the national practice, a costs debtor who had a source of income would be granted a

remission of costs only after he has made some payment towards them; where the costs are high, the greater part of them will often be remitted. The Court found that the applicant had a burden to prove the lack of sufficient means which in turn would mitigate his obligation to cover in full the costs of legal representation (para. 37).

#### Twalib v. Greece

9 June 1998, App no 24294/94, ECtHR

##### *Violation of Article 6(3)(c)*

The applicant, a Tanzanian national convicted for drug-related offences, complained of the absence of a legal aid lawyer during cassation proceedings (para. 44). The ECtHR found that the applicant was represented by a court-appointed lawyer at trial and by a lawyer provided by a humanitarian organization on appeal. Taken together with the fact that he had been in prison for the previous three years, this was sufficient indication that he lacked the financial means to pay for legal assistance at the cassation proceedings (para. 51).

#### Morris v. the United Kingdom

26 February 2002, ECtHR, App no 38784/97

##### *No violation of Article 6(3)(c)*

The applicant argued that he was entitled to legal representation at the court-martial proceedings but that this was denied him due to the unfairness of the army's legal-aid system. The Court recalled that there is no violation of Article 6(3)(c) where an individual is required to pay a contribution to the cost of legal assistance and has sufficient means to pay (para. 88). It found that the applicant was offered legal aid subject to a contribution of GBP 240. Bearing in mind the applicant's net salary levels at the time and regardless of whether or not he was given the option of paying by way of installments, the Court did not find such terms of the offer to be arbitrary or unreasonable (para. 89).

#### Maksimenko v. Ukraine

20 December 2011, ECtHR, App no 39488/07

##### *Violation of Article 6(3)(c)*

The applicant was found guilty and convicted of murder. Although represented during the pre-trial investigation and the proceedings before the first-instance court, he was denied free legal aid to lodge a cassation appeal (para. 14). The Government argued that the domestic courts had acted in compliance with the criminal procedure legislation, which did not provide for obligatory legal representation in the cassation proceedings (para. 23). The Court took into account the fact that the applicant did not have any source of income, that he was provided with a lawyer before and that the applicant expressly stated that he could not afford to retain a lawyer in his appeal in cassation to the Supreme Court (para. 26). Accordingly, the Court concluded that the applicant indeed lacked sufficient means to pay for his legal representation (para. 26).

### 4.1.2 Applying the “interests of justice” criterion

The ECtHR has identified three factors that should be taken into account when determining if the “interests of justice” necessitate free legal aid. The three factors are: the seriousness of the offence and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the defendant. All three factors should be considered together, but they do not necessarily need to be cumulative; any one of the three can warrant the need for the provision of free legal aid.

In addition to these three factors, in the appellate stage the ECtHR has considered some additional factors: the nature of the proceedings; the capacity of an unrepresented appellant to present a particular legal argument; and the severity of the sentence imposed by the lower courts.

### Pakelli v. Germany

28 May 1983, ECtHR, App no 8398/78

#### *Violation of Article 6(3)(c)*

The applicant complained of the refusal of the Federal Court, in proceedings concerning an appeal on points of law, to appoint a legal aid lawyer for the hearings before that court (para. 29). At the outset, the ECtHR noted that this was one of the rare cases in which the Federal Court held a hearing, which showed that the hearing could have been of importance for the forthcoming decision. Because of the importance of the hearing, it was necessary to comply with the rule that both parties should participate in the oral proceedings in order to ensure a fair trial (para. 36). The applicant was, however, absent from the hearing; but even if he was present, according to the Court, it would not have compensated for the absence of his lawyer: without the services of a legal practitioner, the applicant could not have made a useful contribution to the examination of the complex legal issues at stake (para. 38). Therefore the interests of justice did require that the applicant be granted legal assistance for the oral hearing (para. 40).

### Monnell and Morris v. the United Kingdom

2 March 1987, ECtHR, App nos 9562/81 and 9818/82

#### *No violation of Article 6(3)(c)*

The applicants complained that they were not provided a legal aid lawyer to represent them in the oral proceedings before the appellate court (para. 63). The Court noted that in fact they had benefited from legal aid advice on appeal because the lawyer who had represented them at the trial advised that there were no reasonable prospects of successfully appealing, but both applicants ignored his advice (para. 63). The Court found that the refusal of legal aid at the appeal stage may be compatible with the interests of justice, as long as a consideration of reasonable prospect (objective likelihood) of success was carried out by the authority deciding on the legal aid (para. 67).

### Quaranta v. Switzerland

24 May 1991, ECtHR, App no 12744/87

#### *Violation of Article 6(3)(c)*

The applicant complained that he was not provided free legal assistance in the proceedings before the investigating judge and the first instance court in relation to drug use and drug trafficking offences (para. 26). The Court found that a right to free legal assistance under Article 6(3)(c) is subject to two conditions. First, the applicant must lack sufficient means to pay for legal assistance. Second, the “interests of justice” must require that legal aid be granted.<sup>16</sup> With respect to the second condition, the Court explained that this was to be judged by reference to the facts of the case as a whole, taking into consideration, *inter alia*, the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the accused (paras. 32-36). In the present case, a lack of free legal aid, in view of accumulation of the facts—the case involved a young foreigner from an underprivileged background who lacked means, had a history of drug-use (para. 35), and faced a real sentence of three years’ imprisonment (para. 33)—violated his right under Article 6(3)(c).

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<sup>16</sup> See also: *Pham Hoang v. France*, ECtHR, Judgment of 25 September 1992, at para. 39.

### Benham v. the United Kingdom

10 June 1996, ECtHR [Grand Chamber], 10 June 1996

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained about lack of legal representation in the proceedings for committal to prison for non-payment of the community charge before the magistrates (para. 53). The Court found that the applicant was charged with a criminal offence for the purpose of Article 6 (para. 56). It further elaborated that where deprivation of liberty was at stake, the interests of justice called for legal representation (para. 59). In this case the applicant faced a maximum term of three months' imprisonment (para. 61). In view of the severity of the penalty and the complexity of the applicable law, the Court considered that the interests of justice demanded that the applicant ought to have benefited from free legal representation (para. 64).

### Biba v. Greece

26 September 2000, ECtHR, App no 33170/96

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant, an Albanian national who had entered Greek territory illegally, was accused of homicide and sentenced to life imprisonment (paras. 9-10). He was unable to lodge a cassation appeal, because the Greek legislation did not provide for legal aid for that purpose (para. 30). The Court found that the complexity of the cassation proceedings, coupled with the fact that the applicant was a foreign national and did not speak Greek, meant that “interests of justice” required granting him legal assistance (para. 29).

### Berlinski v. Poland

20 June 2002, ECtHR, App no 27715/95 and 30209/96

*Violation of Article 6(3)(c)*

The applicants complained that when appealing against the bail order, they both had requested a legal aid lawyer, but the prosecutor had not replied to the request (para. 73). The Court observed that the applicants lacked means to hire a private lawyer and thus had no one representing them for more than a year. Given that a number of procedural acts, including questioning of the applicants and their medical examinations, were carried out during that period, there was no justification to deprive them of the right under Article 6(3)(c) (para. 77).

### Barsom and Varli v. Sweden

4 January 2008, ECtHR (decision), App nos 40766/06 and 40831/06

*Claim under Article 6(3)(c) inadmissible as manifestly ill-founded*

The applicants claimed that the national courts violated their right to free legal assistance by refusing their request for legal aid in the proceedings involving tax surcharges. The Court reiterated that the imposition of tax surcharges involved the determination of a “criminal charge” within the meaning of Article 6, although such surcharges did not belong to criminal law under the Swedish legal system. However, in the present case, the interest of justice did not require appointing a legal aid lawyer since the applicants never faced a risk of being deprived of their liberty and the case did not include complex legal questions. Moreover, the Swedish administrative courts were in position to give directions to the parties to supplement the case-file with the requisite information.

### Timergaliyev v. Russia

14 October 2008, ECtHR, App no 40631/02

#### *Violation of Article 6(3)(c)*

The applicant suffering from a hearing impairment complained about a lack of hearing aid and legal assistance before the appellate court (para. 48). The Court reiterated that under Article 6(3)(c) the accused is entitled to have a lawyer assigned by the court of its own motion “when the interests of justice so require,”<sup>17</sup> The Court found that since the applicant’s hearing impairment undermined his ability to participate effectively in the proceedings, the interests of justice demanded the domestic court to appoint him a legal representative (para. 59).

### Wersel v. Poland

13 September 2011, ECtHR, App no 30358/04

#### *Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained about the court’s refusal to grant him legal assistance to prepare a cassation appeal (para. 38). The Court pointed out that “interests of justice” requires guaranteeing a fair procedure before the courts. Among other things, it imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire trial. In the context of cassation proceedings, the interests of justice require giving an accused the opportunity to put his case before the cassation court in a concrete and effective way (para. 50). Domestic law required the cassation appeal to be prepared by a lawyer; thus the applicant couldn’t access the court himself. It was, therefore, incumbent on that domestic court to handle the applicant’s request for legal assistance in a way that would have enabled him to prepare his cassation appeal properly (para. 52). The domestic court failed to grant the applicant legal aid, and also communicated its first refusal to him two days before the expiry of the time-limit for the submission of his cassation appeal (para. 52). In the Court’s view, the shortness of the time left to the applicant for appointing a lawyer of his choice and for preparing the intended cassation appeal did not give him a realistic opportunity of having his case brought to and defended in the cassation court in a “concrete and effective way” and thus amounted to a violation of his right under Article 6(1) in conjunction with Article 6(3)(c) (para. 53-54).

### Maksimenko v. Ukraine

20 December 2011, ECtHR, App no 39488/07

#### *Violation of Article 6(3)(c)*

The applicant was found guilty and convicted of murder. Although represented during the pre-trial investigation and the proceedings before the first-instance court, he was denied free legal aid to lodge a cassation appeal (para. 14). After finding that the applicant lacked sufficient means to pay for his legal representation, the Court pointed out that he was facing life imprisonment as the maximum possible penalty and that the assessment of the cassation court concerned not only questions of law, but also reexamination of factual circumstances of the case (paras. 28-29). Therefore “the interests of justice” required that the free legal assistance, which had been provided to the applicant until then, be retained for him during the proceedings before the Supreme Court (para. 27).

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<sup>17</sup> See also: *Vaudelle v. France*, ECtHR, Judgment of 30 January 2001, at para. 59; and *Padalov v. Bulgaria*, ECtHR, Judgment of 10 August 2006, at paras. 54 and 55.

Tsonyo Tsonev v. Bulgaria (no. 3)

16 October 2012, ECtHR, App no 21124/04

*Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained that the Supreme Court of Cassation had turned down his request for the appointment of a lawyer (para. 46). The ECtHR reiterated that the right to free legal assistance for those charged with criminal offences was an element, among others, incumbent in the concept of a fair trial in criminal proceedings. The Court noted that the right was subject to two conditions: the persons concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that they be granted such assistance (para. 50). With regard to the first condition, the Court noted that the applicant was unemployed and his financial declarations proved that he had no means to hire a private lawyer (para. 51). As to the second condition, the Court pointed out that the lower courts had found him guilty and had sentenced him to two years and nine months' imprisonment; it also noted the complexity of the cassation procedure and the fact that a qualified lawyer would have been able to clarify the grounds set out by the applicant in his appeal and effectively counter the pleadings of the public prosecutor at the hearing,<sup>18</sup> thus ensuring respect for the principle of equality of arms (para. 52).

## 4.2 Quality of legal aid

Mere appointment of a lawyer is not enough to fulfill the State's obligation to provide effective legal assistance. If the legal aid lawyer fails to provide effective representation, and this is manifest or is brought to the State authority's attention, then the State is under an obligation to intervene and rectify the failure.

In situations where the failure is objectively manifest, the defendant does not need to actively complain or bring the failure to the State's attention. Absenteeism, silence, failure to undertake basic functions, and acting under a conflict of interest are usually manifest failures warranting State intervention. Mere dissatisfaction with the manner in which the lawyer runs the case, or minor errors or defects in the lawyer's work, are unlikely to lead to a situation in which the State is obliged to intervene.

Artico v. Italy

13 May 1980, ECtHR, App no 6694/74

*Violation of Article 6(3)(c)*

The applicant alleged that he did not receive effective assistance before the Court of Cassation because the state-appointed lawyer declined to represent him from the very outset. The lawyer firstly invoked the existence of other commitments and subsequently his state of health. Despite that, the Government failed to substitute the appointed lawyer with another legal representative (para. 33). The Court found that the interest of justice required the provision of legal aid to the applicant (para. 34). Moreover mere "nomination" of a lawyer did not ensure effective assistance. When an appointed lawyer is prevented from performing his duties and authorities are notified of the situation, they have an obligation of either to replace him or to make sure he fulfills his duties (para. 33).

Tripodi v. Italy

22 February 1994, ECtHR, App no 13743/88

*No violation of Article 6(3)(c)*

The applicant complained that his legal aid lawyer could not attend the oral hearing before the Cassation Court owing to sickness, but the court made no reasonable efforts to replace her. The ECtHR ruled that not every

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<sup>18</sup> See also: *Granger v. the United Kingdom*, ECtHR, Judgment of 28 March 1990, at para. 47.

shortcoming on the part of the lawyer called for the State's responsibility (para. 29). It was crucial in the present case that the cassation proceedings were essentially written and at the hearing the applicant's lawyer could only present the argument in relation to the submission which was already made (para. 28).

#### Daud v. Portugal

21 April 1998, ECtHR, App no 22600/93

##### *Violation of Article 6 in conjunction with Article 6(3)(c)*

The applicant complained about ineffective legal representation, as the first legal aid lawyer had not taken any steps to defend him, while the second was appointed only three days before the beginning of the trial, and thus she did not have the time to study the file, visit her client in prison if necessary and prepare his defence (para. 39). The Court reiterated that "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes (...) It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed (...).[T]he competent national authorities are required under Article 6(3)(c) intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way" (para. 38). Despite this qualifying language, the Court found that, the time between notification of the replacement of the lawyer and the hearing was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence, and therefore the applicant had been denied the right to effective counsel (para. 39).

#### Czekalla v. Portugal

10 October 2002, ECtHR, App no 38830/97

##### *Violation of Article 6 in conjunction with Article 6(3)(c)*

The officially appointed defence lawyer lodged an appeal before the Supreme Court without explaining "in what way the legal provisions whose breach it alleged should have been interpreted and applied" (para. 28). As a result, the appeal was dismissed. The Court found that although it could not be said that the lawyer failed to lend her assistance to the applicant, it had to be determined whether the way in which she performed her duty amounted to a "manifest failure" (para. 62). It further pointed out that "in certain circumstances negligent failure to comply with a purely formal condition cannot be equated with an injudicious line of defence or a mere defect of argumentation. That is so when as a result of such negligence a defendant is deprived of a remedy without the situation being put right by a higher court" (para. 65). In the Court's view, a lawyer's failure to comply with "a purely formal rule" was a "manifest failure" which called for positive measures on the part of the relevant authorities. The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal inadmissible (para. 68).

#### Bogumil v. Portugal

7 October 2008, ECtHR, App no 35228/03

##### *Violation of Article 6 in conjunction with Article 6(3)(c)*

The applicant was convicted for drug-trafficking and sentenced to four years and ten months' imprisonment and ordered exclusion from Portugal (para. 28). The applicant was represented by a legal aid lawyer who took no action in the proceedings other than to ask to be released from the case three days before the trial. A replacement lawyer was assigned on the day the trial began and had only five hours in which to study the case file (para. 27). The ECtHR held that when a problem with legal representation is evident, the courts must take the initiative and solve it, for example, by ordering an adjournment to allow a newly appointed lawyer to acquaint himself with the case-file (para. 49). In the present case, the period of a little over five hours the lawyer had to prepare the defence was clearly too short (para. 48), thus the Lisbon Criminal Court had not taken steps to ensure "practical and effective" exercise of the applicant's defence rights (para. 49).

### Orlov v. Russia

21 June 2011, ECtHR, App no 29652/04

#### *Violation of Article 6(3)(c)*

The applicant argued that he was not aware of the appointment of a legal aid lawyer and met him only at the trial hearing in the second set of appeal proceedings (para. 23). The lawyer failed to lodge any statement of appeal or motions or, at least, study the case file in any adequate manner (para. 109). The Court noted that the first set of appeal proceedings fell short of Article 6(3)(c) and thus the assistance of a lawyer was essential for the applicant in the second set (para. 103). The Court also noted that instead of being brought to the hearing, the applicant participated in it by video and audio link from a remand centre (para. 105). It further held that the State had to make steps which “sufficiently compensated for the limitations of the applicant’s rights” (para. 107). The Court acknowledged that in some cases the State objectively could not facilitate such relationships, for instance, when there were inherent time and place constraints on meetings between a detained person and his lawyer. Nevertheless, any limitation of such kind “whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled” (para. 106). Given the lack of the applicant’s contact with the lawyer, the arrangements made were insufficient and did not secure effective legal assistance to the applicant (para. 115).

### Moldoveanu v. Romania

19 June 2012, ECtHR, App no 4238/03

#### *Violation of Article 6(3)(c)*

In the hearing before the Supreme Court three co-defendants were represented by the same State appointed lawyer despite the fact that they had contradictory interests—two of them confessed, while the applicant pleaded not guilty (para. 74)—and despite the Supreme Court’s explicit order to appoint a lawyer for each co-defendant in the proceedings. The ECtHR noted the gravity of the crimes the applicant was charged with (murder, robbery, drug use) (para. 72). Although the applicant did not complain about the ineffective legal aid, that did not relieve the authorities from their duty to ensure effective legal assistance and, given the shortcomings of the proceedings and ineffective representation on the part of the defence lawyer, the State was obligated to intervene (para. 75).

### Falcao dos Santos v. Portugal

3 July 2012, ECtHR, App no 50002/08

#### *Violation of Article 6(1) taken together with Article 6(3)(b), (c) and (d)*

The applicant was convicted for making malicious accusations (paras. 20-26). He complained that during the hearing before the first instance court the State-appointed legal aid lawyer remained silent, did not cross-examine witnesses or intervene on the applicant’s behalf (paras. 12-18). As a result the applicant was found guilty and ordered to pay a fine (paras. 20-26). The ECtHR found that the applicant was left without effective legal assistance before the first instance court, which is a crucial phase in the proceedings (para. 44). He repeatedly alerted authorities about poor legal representation and thus they had a duty to intervene (para. 45). Therefore, the authorities failed to guarantee real “assistance”, not mere “appointment” of the lawyer (para. 46).

## 4.3 Choice of a legal aid lawyer

People who are given free legal aid do not always get to choose which lawyer is appointed to them. The right to be defended by a lawyer of one’s own choosing can be subject to limitations when the interests of justice require. Whilst the wishes of the applicant should not be ignored, the choice of lawyer is ultimately for the State.

### Van Ulden v. the Netherlands

12 May 1997, European Commission of Human Rights (decision), App no 24588/94

*Claim under Article 6 (3)(c) inadmissible as manifestly ill-founded*

The applicant complained that authorities failed to satisfy his request and replace a state-appointed lawyer, Mr. W., by another legal aid lawyer, Ms. Hegeman. The request was not based on an alleged lack of quality of Mr. W.'s professional activities, but on the applicant's preference to be represented by Ms. Hegeman who was his defence lawyer in two other criminal proceedings. The Commission reiterated that Article 6 did not confer an absolute right to be defended by a lawyer of the defendants' own choosing. The Commission further stated that "in view of the general [in the eyes of the State] desirability of limiting the total costs of legal aid" it was not unreasonable to deny replacement of a legal aid lawyer once he was assigned to a case and undertook certain activities.

### Krempovskij v. Lithuania

20 April 1999, ECtHR (decision), App no 37193/9720

*Claim under Article 6(3)(c) inadmissible*

The applicant complained that during pre-trial investigation he was not assisted by a legal aid lawyer of his own choosing. The Court found that the applicant did not substantiate any way that the officially appointed representative at the pre-trial investigation failed to perform his functions satisfactorily. Moreover, at the appellate trial, when the case was reheard in full, the applicant was represented by a lawyer of his choice (para. 7).

### Erdem v. Germany

9 December 1999, ECtHR (decision), App no 38321/97

*Claim under Article 6 (3)(c) inadmissible as manifestly ill-founded*

The applicant complained about a refusal of the Federal Court of Justice to replace the appointed lawyer with a legal aid lawyer of his own choosing. The applicant alleged that a state-appointed lawyer had not taken any defence measures throughout the entire first instance proceedings. The ECtHR recalled that Article 6(3)(c) did not guarantee the right to choose or change state-appointed defence lawyer.<sup>19</sup> In this case, the refusal to replace the legal aid lawyer was justified on the grounds that the appointed lawyer had attended the entire first-instance proceedings and therefore was not less qualified to represent the applicant than the proposed lawyer (para. 3(e)).

### Lagerblom v. Sweden

14 January 2003, ECtHR, App no 26891/95

*No violation of Article 6(3)(c)*

The applicant, whose mother tongue is Finnish, resided in Sweden. He complained that in the proceedings for aggravated drunken driving he was represented by a state-appointed lawyer with whom he could communicate only through the interpreter (para. 40). The applicant described his language proficiency as "street Swedish" therefore he was so handicapped that he could not at all communicate with the legal aid lawyer or understand him. The Court noted that the applicant did not complain before the domestic courts about ineffective legal assistance on the part of a state-appointed lawyer; equally there was no manifest failure in the lawyer's work which would have led the domestic courts to intervene (para. 60). Moreover the interpretation assistance provided for the applicant was adequate (para. 62).

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<sup>19</sup> See also: *Östergren v. Sweden*, EComHR, Decision of 1 March 1991.

## 5. The right to be presumed innocent and the right to silence

The accused's right to remain silent and the privilege against self-incrimination lie at the core of the concept of a fair trial under Article 6. The presumption of innocence in essence means that a person charged with a criminal offence must be treated and considered as not having committed an offence until found guilty with a definitive verdict by an independent and impartial tribunal. This principle also comes into play when the accused refuses to enter a plea of guilty or not guilty and thus declines to declare his innocence or guilt. The prohibition on compelling an accused to testify against herself or confess guilt is closely related to the prohibition of torture and inhuman, cruel, or degrading treatment.

### 5.1 The presumption of innocence

The presumption of innocence enshrined in Article 6(2) is one of the elements of a fair criminal trial required by Article 6(1). The burden to prove the guilt is on the prosecution, and any doubt should benefit the accused. It means that the members of a court should not start the trial with the preconceived idea that the accused has committed the offence charged. The presumption of innocence may be violated when a statement of a public official – a judge, court, prosecutor or others – reflects an opinion that a person charged with a criminal offence is guilty before it has been proved so.

*Barbera, Messegue, and Jabardo v. Spain*

6 December 1988, ECtHR, App no 10590/83

*No violation of Article 6(2)*

The applicants claimed to be victims of a failure to apply the presumption of innocence, stating that they were convicted solely on the basis of their confessions to the police and that the court showed signs of bias against them. The ECtHR pointed out that “the presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty” (para. 91).<sup>20</sup> It also added that “when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused” (para. 77). There was no evidence of the court’s bias in the present case (para. 91).

*Daktaras v. Lithuania*

10 October 2000, ECtHR, App no 42095/98

*No violation of Article 6(2)*

The applicant complained that when the prosecutor dismissed the applicant’s request to discontinue the prosecution, he declared that “[a]fter having access to the case file, [the applicant] ... submitted [requests] to discontinue the criminal case on the ground that he had not committed the offences alleged ... and that his guilt ... had not been proved. [These] allegations must be dismissed as ill-founded because it has been established from the evidence collected in the course of the pre-trial investigation that the applicant is guilty of [these] crimes” (para. 13). The Court recalled that the presumption of innocence enshrined in Article 6(2) was one of the elements of a fair criminal trial required by Article 6(1). An accused’s right to the presumption of his innocence is violated if a statement of a public official—a judge, court, prosecutor or others - concerning a person charged with a criminal offence reflects an opinion that he was guilty before it has been proved so.

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<sup>20</sup> See also: *Minelli v. Switzerland*, ECtHR, Judgment of 25 March 1983, at para. 37.

According to the Court “[i]t suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty,” therefore “the choice of words by public officials in their statements before a person has been tried and found guilty of an offence” is important (paras. 41-42). The prosecutor’s statements were made in the context of the criminal proceedings, and, although “the use of the term ‘proved’ [was] unfortunate,” it did not suggest that the applicant’s guilt had been established by the evidence (para. 44).

#### Telfner v. Austria

20 March 2001, ECtHR, App no 33501/96

##### *Violation of Article 6(2)*

The applicant asserted that the criminal courts failed to treat him with the presumption of innocence required by Article 6(2) by basing his conviction for negligent injury in a car accident solely on a report of the local police. The entirety of the evidence presented in the report was that the applicant was the main user of the car and that he had not been home on the night of the accident. The ECtHR reasoned that these pieces of evidence, which were not corroborated by evidence given at the trial in an adversarial manner, were not sufficient to constitute a case against the accused and that the burden of proof was shifted unjustly from the prosecution to the defence (paras. 18-19).

#### Phillips v. the United Kingdom

5 July 2001, ECtHR, App no 41087/98

##### *Article 6(2) not applicable*

The applicant, who was found guilty and convicted for a drug-trafficking offence, alleged that the statutory assumption, applied by the court when calculating the amount of the confiscation order, breached his right to the presumption of innocence (paras. 27-28). The ECtHR found that confiscation orders were part of the sentencing process—the purpose of this procedure was not a conviction or an acquittal, but a determination of the amount of a fine (para. 34). According to the Court, the right to be presumed innocent arises only in connection with the particular offence “charged.” Article 6(2) does not apply to allegations made about the accused’s character and conduct as part of the sentencing process, unless the accusations were of such a nature and degree as to amount to the bringing of a new “charge” (para. 35).

#### Butkevicius v. Lithuania

26 March 2002, ECtHR, App no 48297/99

##### *Violation of Article 6(2)*

In the interviews to the national press, the Chairman of the Parliament stated with no doubt that the applicant, who was suspected of corruption at that time, had accepted a bribe, that he had taken money “while promising criminal services”, and that he was a “bribe-taker” (para. 53). The ECtHR noted that the statements were made in a context independent of the criminal proceedings (para. 50) by a representative of the body which had lifted the applicant’s parliamentary immunity to enable criminal proceedings to be instituted against him (para. 53). In the Court’s opinion, the statements amounted to declarations of the applicant’s guilt, “which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority” (para. 53).

#### Falk v. the Netherlands

19 October 2004, ECtHR (decision), App no 66273/01

##### *Claim under Article 6 (2) inadmissible as manifestly ill-founded*

National law regarding traffic offences stipulated an impugned liability rule, according to which a registered car owner was to assume the responsibility for traffic offences, detected by technical or other means and committed by a driver whose identity could not be established at the material time. The applicant argued that the imposition of the fine for the offence he did not commit violated the principle of the presumption of innocence. The Court explained that a right to be presumed innocent was not absolute,<sup>21</sup> but “in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim pursued.”<sup>22</sup> The Court considered that the principle of proportionality was observed in this case because the impugned liability rule aimed at securing effective road safety and a person fined had an opportunity to challenge the fine before the courts.

## 5.2 The privilege against self-incrimination and the right to silence

Article 6(1) prohibits compelling anyone charged with a criminal offence to testify against himself. However, this right is not absolute and the government may sometimes be justified in drawing adverse inferences from an accused’s silence. In such situations, the Court will give particular attention to the degree of compulsion inherent in the situation and the weight attached to the evidence by the national courts. The Court extends the right against self-incrimination to documents and testimony which are on their face non-incriminating, but which are in fact used to support the prosecution’s case.

### Funke v. France

25 February 1993, ECtHR, App no 10828/84

#### *Violation of Article 6(1)*

The applicant was convicted for a failure to disclose documents asked for by customs authorities. The applicant argued that customs was unwilling to procure the documents by some other means and thus attempted to compel him to provide evidence of offences he had allegedly committed (para. 44). The Court found a violation of Article 6(1) holding that there was an infringement of the right of anyone “charged with a criminal offence” to remain silent and not contribute to incriminating himself (para. 44).

### John Murray v. the United Kingdom

8 February 1996, ECtHR [Grand Chamber], App no 18731/91

#### *No violation of Article 6(1) and 6(2)*

The applicant was arrested under the Prevention of Terrorism Act (Act), convicted, and sentenced to eight years’ imprisonment. The judge, sitting without a jury, drew adverse inferences from the applicant’s failure to offer an explanation for his presence during the police raid and his silence during the trial. The Court reiterated that the right to remain silent and the privilege against self-incrimination were “generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6” (para. 45). However, a right to silence was not absolute (para. 47). Whether the drawing of adverse inferences from an accused’s silence infringed Article 6 had to be determined in light of all the circumstances of the case, giving particular attention to the degree of compulsion inherent in the situation and the weight attached to the evidence by the national courts (para. 47).

In the present case, regarding the degree of compulsion, the applicant’s silence did not amount to a criminal offence or an indication of guilt (para. 48). Although repeatedly warning an accused (who was without legal

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<sup>21</sup> See also: *Salabiaku v. France*, ECtHR, Judgment of 7 October 1988, at para. 28.

<sup>22</sup> See also: *Västberga Taxi Aktiebolag and Vulic v. Sweden*, ECtHR, Judgment of 23 July 2002, at para. 113.

assistance) that adverse interferences may be drawn from his silence could involve a certain level of compulsion, it was not decisive in this case, because the applicant was not in fact compelled to testify (para. 50). Drawing an inference under the UK's rules of evidence was subject to important procedural safeguards, such as a warning, the obligation on the prosecutor to establish a *prima facie* case against the accused, judicial discretion to draw interferences and obligation to draw only "common-sense" interferences (para. 51). The ECtHR held that in "regard to the weight of the evidence against the applicant (...) the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances" (para. 54).

### Saunders v. the United Kingdom

17 December 1996, ECtHR [Grand Chamber], App no 19187/91

#### *Violation of Article 6(1)*

The applicant was convicted of multiple counts in a corporate fraud case. In the course of the pre-trial investigation, he was legally obligated to answer the inspectors' questions; a refusal to do so could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two year. It was no defence to such a refusal that the questions were of an incriminating nature (para. 70). The applicant complained that statements he made under compulsion to the inspectors were admitted as evidence against him at his subsequent criminal trial (para. 60). The Court explained that "the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating" (para. 71). Even where the statement appears "on its face to be of a non-incriminating nature" it may still be deployed in criminal proceedings in support of the prosecution's case, "to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility" (para. 71). In the present case, a part of the interview's transcript was read to the jury despite the applicant's objections, thus suggesting the weight attributed to them by the prosecution (para. 72). Neither the complexity of the corporate fraud case nor the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure from one of the basic principles of a fair procedure (para. 74). The Court concluded that the statements were obtained through compulsion and "used in the course of the proceedings in a manner which sought to incriminate the applicant" (para. 72) in violation of the right not to incriminate oneself (para. 76).

### Heaney and McGuinness v. Ireland

21 December 2000, ECtHR, App no 34720/97

#### *Violation of Article 6(1) and 6(2)*

The applicants were arrested on suspicion of membership in the unlawful paramilitary organization and of involvement in bombing. They were subsequently acquitted on the charge of membership in an unlawful organisation, but each was convicted of failing to provide an account of their movements prior to and during the day of the bombing in violation of section 52 of the Offences against the State Act 1939. The applicants argued that their conviction amounted to a violation of the right against self-incrimination. The Court noted that during the questioning the applicants were provided with conflicting information: they were informed of their right to remain silent, but when attempting to exercise it, cautioned that a failure to provide an account of their movements would result in conviction (para. 53). Thus, the "degree of compulsion" imposed on the applicants by the application of section 52 of the 1939 Act "in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent" (para. 55). The Court emphasized that the security and public order concerns relied on by the Government could not justify "a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6(1)" (para. 58).

### Shabelnik v. Ukraine

19 February 2009, ECtHR, App no 16404/03

*Violation of Article 6(1)*

The applicant was called to testify about witnessing a crime, but during the first interview confessed to committing it. During the interview, he was warned about criminal liability for refusing to testify and at the same time was informed about his right not to testify against himself. In the trial proceedings, the confession was used as evidence against him and, as a result, led to his conviction (para. 59). The Court noted that although the applicant failed to substantiate any physical coercion by the investigators, his confession was “received in unclear circumstances”: the applicant was not properly informed about his right to remain silent, he did not have legal assistance in the course of questioning, and he retracted his testimonies during the court hearing (para. 59). The Court concluded that the applicant was therefore denied a fair trial.

Zaichenko v. Russia

18 February 2010, ECtHR, App no 39660/02

*Violation of Article 6(1)*

The applicant’s car was stopped and inspected by the police. Although the applicant was not formally arrested, he answered questions and effectively confessed to taking diesel from a company vehicle for personal use. The Government maintained that the applicant had waived his right not to testify against himself (para. 53). The Court noted the applicant was apprised of the right to remain silent after he had already made a self-incriminating statement in the inspection record (para. 53). The Court further pointed out that “being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis for his prosecution for a criminal offence of theft.” Consequently, the applicant did not validly waive the privilege against self-incrimination before or during the drawing of the inspection record (para.55).

## 6. Procedural rights at trial

During the trial and appeals stage of criminal proceedings, the principles of a fair trial and due process require defendants to have access to effective criminal defence, which involves a series of interconnected procedural rights. Those rights include, but are not limited to: the right to be released from custody pending the trial; the right to appear in person before the court; the right to equality of arms in bringing evidence and examining witnesses; the right to reasoned decisions and to appeal an unfavorable judgment.

### 6.1 The right to release from custody pending trial

A person charged with an offence should be released pending trial unless the State can show that there are relevant and sufficient reasons to justify his continuing detention. The Court invokes four basic acceptable reasons for refusing release on bail: the risk of absconding, the risk of prejudice to the administration of justice, the risk of committing further offences, and the risk of causing public disorder. The gravity of the charges cannot by itself serve to justify long periods of detention. There exists a presumption in favour of release, thus the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial.

If monetary bail is set it should be assessed in relation to the person concerned and his assets to ensure it is an appropriate and sufficient deterrent to absconding.

#### Neumeister v. Austria

27 June 1968, ECtHR, App no 1936/63

##### *Violation of Article 5(3)*

The applicant was subjected to two periods of detention on remand, lasting in total around 2,5 years (para. 6). The authorities justified their rejection of the applications for release on the reason that the applicant would abscond and thereby avoid appearing before the court (para. 9). In the Court's opinion, the danger of absconding was no longer so great as to justify dismissing the applicant's repeated requests for release on bail (para. 12). When the domestic court finally fixed bail, the amount was set at the amount of the loss imputed to the applicant in the criminal proceedings—which was very high (para. 14). The Court considered that such calculation was not in conformity with Article 5(3), and that when setting bail, courts should assess its amount in relation “to the person concerned [and] his assets (...) in other words to the degree of confidence that is possible that the prospect of loss of security in the event of his non-appearance at a trial will act as a sufficient deterrent to dispel any wish on his part to abscond” (para. 14). Thus, the applicant's continued detention constituted a violation of Article 5(3).

#### I.A. v. France

23 September 1988, ECtHR, App no 28213/95

##### *Violation of Article 5(3)*

From 1991 to 1995, the domestic courts extended the applicant's detention on remand fifty-seven times at first instance and five times on appeal (para. 103). The grounds for their decisions differed, but the need to ensure that the applicant remained at the disposal of the judicial authorities and preserve public order appeared in practically every decision (para. 103). The ECtHR noted that a deprivation of liberty for such a considerable length of time should have been based on particularly convincing justifications; however the arguments adduced by the courts showed at the very least that the initial relevance of the legal grounds for detention did not stand

the test of time (para. 111). For example, detention based on “the need to preserve public order from the disturbance caused by the offence” could only be legitimate if public order actually remained threatened; the continuation of the detention could not be used to anticipate a custodial sentence (para. 104).<sup>23</sup> The ECtHR accepted that in some cases the safety of a person under investigation required his continued detention, but in the present case “the need to protect the applicant” was cited as a ground intermittently by the judicial authorities, “as if the dangers threatening the applicant regularly disappeared and reappeared” (para. 108).

### Brogan and Others v. the United Kingdom

29 November 1988, ECtHR, App nos 11209/84, 11234/84, 11266/84 and 11386/85

#### *Violation of Article 5(3)*

The applicants were arrested under the Prevention of Terrorism Act, initially for forty-eight hours. Later their detention was extended up to five days. None of them were brought before a judge or other officer authorised by law to exercise judicial power. The applicants asserted a violation of Article 5(3). The ECtHR found that “the scope for flexibility in interpreting and applying the notion of ‘promptness’ is very limited.” Even four days and a few hours spent in police custody, fell outside the strict constraints as to time permitted by the first part of Article 5(3). To interpret the right under Article 5(3) otherwise would lead to, according to the Court, “a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.” The Court concluded that none of the applicants was either brought “promptly” before a judicial authority or released “promptly” following his arrest. The fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community from terrorism was not on its own sufficient to ensure compliance with the specific requirements of Article 5(3) (para. 62).

### Smirnova v. Russia

24 July 2003, ECtHR, App nos 46133/99 and 48183/99

#### *Violation of Article 5(1) in conjunction with Article 5(3)*

The applicants were charged with large-scale concerted fraud. They were detained four times; in total, the first applicant spent more than 4 years in custody, the second applicant—more than 1,5 years (para. 66). The Court reiterated four basic acceptable reasons for refusing bail: the risk that the accused will fail to appear for trial;<sup>24</sup> the risk that the accused, if released, would take action to prejudice the administration of justice,<sup>25</sup> commit further offences,<sup>26</sup> or cause public disorder (para. 59).<sup>27</sup> However, the Court noted that arguments for and against release must not be “general and abstract” (para. 63).<sup>28</sup> The Court found that in the present case the decisions of the national courts were “remarkably terse” and did not describe in detail characteristics of the applicants' situation. They referred to the applicants’ “character” without explaining what the character actually was and why it made the detention necessary. In other cases, without giving specific details or considering any alternative measures of restraint, the detention was ordered because the applicants had persistently failed to appear for trial (para. 70). The Court concluded that “the repeated re-detaining of the applicants in the course of one criminal investigation on the basis of insufficiently reasoned decisions” amounted to a violation of Article 5(1) and (3) (para. 71).

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<sup>23</sup> See also: *Letellier v. France*, ECtHR, Judgment of 26 June 1991, at para. 51.

<sup>24</sup> See also: *Stögmüller v. Austria*, ECtHR, Judgment of 10 November 1969, at para. 15.

<sup>25</sup> See also: *Wemhoff v. Germany*, ECtHR, Judgment of 27 June 1968, at para. 14.

<sup>26</sup> See also: *Matznetter v. Austria*, ECtHR, Judgment of 10 November 1969, at para. 9.

<sup>27</sup> See also: *Letellier v. France*, ECtHR, Judgment of 26 June 1991, at para. 51.

<sup>28</sup> See also: *Clooth v. Belgium*, ECtHR, Judgment of 12 December 1991, at para. 44.

### McKay v. the United Kingdom

3 October 2006, ECtHR [Grand Chamber], App no 543/03

#### *No violation of Article 5(3)*

The applicant was arrested on 6 January 2001 on suspicion of having carried out a robbery of a petrol station and was charged the next day. On 8 January 2001 the applicant made his first appearance in the magistrates' court which remanded him to custody; on 9 January 2001 the High Court ordered his release. The applicant complained that he was not released on bail on 8 January. The Court found that the question of release pending trial was a distinct and separate matter which logically only became relevant after the establishment of the existence of a lawful basis and a ground for detention. In the present case, this matter was dealt with on 9 January (para. 49). The Court emphasized that although it was "highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention also has the competence to consider release on bail. It is not, however, a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time frame" (para. 47). If the magistrate had the power to release on bail, the applicant would have been released one day earlier, but considering that the procedure was conducted with due expedition, the Court did not find a violation of Article 5(3) (para. 50).

### Makarov v. Russia

12 March 2009, ECtHR, App no 15217/07

#### *Violation of Article 5(3)*

The applicant had been held in pre-trial detention over two years. Since 6 December 2006 the domestic courts extended his detention a number of times consistently relying on the gravity of the charges (aiding and abetting aggravated extortion) as the main factor and on the applicant's potential to abscond, pervert the course of justice, and reoffend (para. 121). The ECtHR reiterated that "the gravity of the charges cannot by itself serve to justify long periods of detention" (para. 122).<sup>29</sup> The persistence of a reasonable suspicion that the person arrested has committed an offence is a necessary condition for the lawfulness of the continued detention, but after a certain lapse of time it is no longer sufficient (para. 120). Regarding "the danger of absconding ground", the Court noted that the mere lack of a fixed residence did not create a danger of absconding (para. 128),<sup>30</sup> and that the courts had failed to analyze the applicant's personal situation in sufficient detail (para. 127).<sup>31</sup> The Court further pointed out that during the entire period the authorities failed to consider the possibility of ensuring the applicant's attendance by the use of other "preventive measures"—such as a written undertaking or bail—provided in the national law (para. 138). In sum, the decisions were not based on an analysis of all the pertinent facts in violation of Article 5(3) (paras. 140-142).

### Borotyuk v. Ukraine

16 December 2010, ECtHR, App no 33579/04

#### *Violation of Article 5(3)*

The applicant whose pre-trial detention lasted for a total of two years and almost eleven months complained about the rejections of his requests for release on bail (paras. 55 and 59). The Court emphasized that under the second element of Article 5(3), "a person charged with an offence must always be released pending trial unless the State can show that there are 'relevant and sufficient' reasons to justify his continuing detention."<sup>32</sup> The national judicial authorities must examine all the arguments for and against release, and must set out the

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<sup>29</sup> See also: *Panchenko v. Russia*, ECtHR, Judgment of 8 February 2005, at para. 102; *Goral v. Poland*, ECtHR, Judgment of October 2003, at para. 68; and *Ilijkov v. Bulgaria*, ECtHR, Judgment of 26 July 2011, at para. 81.

<sup>30</sup> See also: *Pshevecherskiy v. Russia*, ECtHR, Judgment of 24 May 2007, at para. 68.

<sup>31</sup> See also: *Musuc v. Moldova*, ECtHR, Judgment of 6 November 2007, at para. 45.

<sup>32</sup> See also: *Yağcı and Sargın v. Turkey*, ECtHR, Judgment of 8 June 1995, at para. 52.

arguments in their decisions dismissing the applications for release (para. 60). Although a reasonable suspicion that a criminal offence has been committed can suffice to warrant initial detention, the gravity of the charge alone cannot serve to justify long periods of detention pending trial (para. 61).<sup>33</sup> Whenever the danger of absconding can be avoided by bail or other guarantees the accused must be released (para. 62).<sup>34</sup> In the present case the domestic courts extended the applicant's pre-trial detention "relying essentially on the gravity of the charges against him and using stereotyped formulae without addressing the specific facts of the case" (para. 63). That reasoning did not evolve with the passage of time and failed to take into consideration any developments in the investigation (para. 63), thus the applicant's continued pre-trial detention was not based on relevant and sufficient reasons (para. 64).

#### Michalko v. Slovakia

21 December 2010, ECtHR, App no 35377/05

##### *Violation of Article 5(3)*

The applicant contended that he was arbitrarily denied release pending trial because the courts had refused to consider his offer of a pledge that he would live in accordance with the law, and the prosecutor's request for extension of his detention lacked adequate reasoning (para. 128). The Court reiterated that Article 5(3) encompassed a right to release pending trial, with or without conditions (para. 147). There exists a presumption in favour of release, thus the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial (para. 145). The Court further pointed out that continued detention can only be justified if, notwithstanding the presumption of innocence, there are specific indications that the public interest genuinely requires it, and outweighs Article 5's rule of respect for individual liberty (para. 149).<sup>35</sup> In the present case, the domestic courts did not consider some of the arguments the applicant made in the interlocutory appeal, and the conclusions reached by the courts were abstract, stereotyped, and lacked reference to concrete facts and analysis (para. 153). Thus, the reasons given by the domestic courts for denying the applicant release could not be considered "relevant" and "sufficient" (para. 154).

## 6.2 The right to be tried in presence and participate in process

In the interests of a fair and just criminal process it is crucially important that the accused appears at his trial both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim and of the witnesses. However, proceedings that take place in the accused's absence are not of themselves incompatible with the Convention if the accused may subsequently obtain a fresh determination of the merits of the charge. Even when an accused is physically present at her trial, the Court may still find that she was denied the right to participate in the trial process if the trial proceedings were especially hostile and the defendant's psychological state was particularly vulnerable. While it is possible to infer a defendant's waiver of the right to be present and participate in her trial, the Court will not infer a waiver easily.

#### Winterwerp v. the Netherlands

24 October 1979, ECtHR, App no 6301/73

##### *Violation of Article 5(4)*

Since 1968, except for a few periods of interruption, the applicant has been deprived of his liberty pursuant to the Mentally Ill Persons Act. He was never notified of the proceedings leading to the various detention orders

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<sup>33</sup> See also: *Ječius v. Lithuania*, ECtHR, Judgment of 31 July 2000, at para. 94.

<sup>34</sup> See also: *Vrenčev v. Serbia*, ECtHR, Judgment of 23 September 2008, at para. 76.

<sup>35</sup> See also: *Kudla v. Poland*, ECtHR [GC], Judgment of 6 October 2000, at para. 110 et seq.

made against him; neither was he heard by the courts or given the opportunity to argue his case (para. 61). The ECtHR held that the judicial proceedings referred to in Article 5(4) need not always be attended by the same guarantees as those required under Article 6(1). Nonetheless, it was essential that the person concerned had access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The applicant was not afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty." Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right (para. 60).

#### Colozza v. Italy

12 February 1985, ECtHR, App no 9024/80

##### *Violation of Article 6(1)*

After unsuccessful attempts to locate the applicant, he was regarded as "latitante," i.e. a person willfully evading the execution of a warrant issued by a court (para. 12). From the status of "latitante" the Italian authorities inferred that the applicant waived his right to appear at trial and defend himself (para 28), thus he was convicted *in absentia*. The ECtHR found that the presumption relied upon by the national authorities was insufficient to establish a waiver. Moreover, the attempts to trace the applicant were inadequate (para. 28). Furthermore, it was not established that the applicant was at all aware of the proceedings instituted against him (para. 32). The Court further pointed out that a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure* (para. 30).

#### Poitrimol v. France

23 November 1993, ECtHR, App no 14032/88

##### *Violation of Article 6*

The applicant complained that he was convicted *in absentia* without his lawyer being able to present the case for the defence (para. 28). The applicant's appeal on the points of law was declared inadmissible by the Court of Cassation on the grounds that a convicted person, who had not surrendered to a warrant issued for his arrest, was not entitled to instruct a lawyer to represent him and lodge an appeal on his behalf. The ECtHR found that although the legislature must be able to discourage unjustified absences, the suppression of the right to appeal was disproportionate in the circumstances—it deprived the applicant of the only chance to have his arguments presented (para. 35).

#### Lala v. the Netherlands

22 September 1994, ECtHR, App no 14861/89

##### *Violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant complained that the Court of Appeal decided the case without his lawyer, whom he charged to conduct the defence. The applicant did not intend to attend the trial personally and, moreover, under the Netherlands law the accused was, as a rule, not under an obligation to attend his trial (para. 32). The Court reiterated that "in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial" and be adequately defended both at first instance and on appeal (para. 33). The Court concluded that a failure of a defendant to appear cannot justify depriving him of his right to be defended by a lawyer (para. 33).

### Botten v. Norway

19 February 1996, ECtHR, App no 16206/90

#### *Violation of Article 6(1)*

The applicant complained that the Supreme Court, without having summoned him and without having heard him in person, rendered a new judgment overturning his acquittal by the lower court (para. 37). The ECtHR reiterated that “[w]here a public hearing has been held at first instance, the absence of such a hearing may be justified at the appeal stage by the special features of the proceedings at issue, having regard to the nature of the domestic appeal system, the scope of the appellate court's powers and to the manner in which the applicant's interests were actually presented and protected before the court of appeal, particularly in the light of the nature of the issues to be decided by it” (para. 39).<sup>36</sup> In the present case, the Supreme Court had full jurisdiction to examine questions of fact and of law (para. 50). Taking into account what was at stake for the applicant, the case could not be properly examined without a direct assessment of the evidence given by the applicant in person (para. 52). Thus, the Supreme Court was under a duty to take positive measures to hear the applicant in person, notwithstanding the fact that the applicant neither attended the hearing, nor asked for leave to address the court, nor objected through his a lawyer to a new judgment (para. 53).

### T. v. the United Kingdom

16 December 1999, ECtHR [Grand Chamber], App no 24724/94

#### *Violation of Article 6(1)*

The applicant, a child of eleven, was tried for and subsequently convicted of murder and abduction (para. 14). He complained about a violation of his right to participate effectively in the case, particularly because his post-traumatic stress disorder limited his ability to instruct his lawyers and testify adequately in his own defence (para. 80). The ECtHR noted the applicant's trial “generated extremely high levels of press and public interest, both inside and outside the courtroom” (para. 86). Given the tense atmosphere created in the courtroom it was highly unlikely, according to the Court, that the applicant “would have felt sufficiently uninhibited (...) to have consulted with [his lawyers] during the trial”. Moreover, his immaturity and disturbed emotional state did not allow him to cooperate with the lawyers outside the courtroom (para. 88).

### Medenica v. Switzerland

14 June 2001, ECtHR, App no 20491/92

#### *No violation of Article 6(1) in conjunction with Article 6(3)(c)*

The applicant was convicted *in absentia* and sentenced to four years' imprisonment. He was represented at the trial by two lawyers of his own choosing (para. 56). The applicant's request to have the conviction quashed was dismissed, on the grounds that he had failed to show good cause for his absence (para. 57). The ECtHR reiterated that it was “of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.” However, proceedings that take place in the accused's absence are not of themselves incompatible with the Convention if the accused may subsequently obtain a fresh determination of the merits of the charge. The ECtHR noted that, in the present case, the applicant largely contributed to bringing about a situation that prevented him from appearing before the domestic court (para. 58). Acknowledging the margin of appreciation allowed to the Swiss authorities, the Court concluded that the applicant's conviction *in absentia* and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty (para. 59).

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<sup>36</sup> See also: *Fejde v. Sweden*, ECtHR, Judgment of 29 October 1991, at paras. 27 and 31; *Kremzow v. Austria*, ECtHR, Judgment of 21 September 1993, at paras. 58-59.

## Sejdovic v. Italy

1 March 2006, ECtHR [Grand Chamber], App no 56581/00

### *Violation of Article 6*

The applicant complained that he was convicted *in absentia* without presenting his defence before the Italian courts, while the Government argued that he waived his right to appear at the trial. The ECtHR reiterated that the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, was “flagrant denial of justice” rendering the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein” (para. 84). Where an accused had not been notified in person of the charge, it could not be inferred merely from his status as a “fugitive” that he had waived his right to appear at the trial and defend himself (para. 87). In the present case, it was not shown that the applicant had sufficient knowledge of his prosecution and of the charges against him, thus he could not waive his right to participate at the trial (para. 101).

## 6.3 The right to equality of arms in calling and examining witnesses

The right to call witnesses is not absolute and can be limited in the interests of the proper administration of justice. An applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that the refusal to call that witness was prejudicial to the defence.

The courts should take positive steps to enable the accused to examine witnesses against him. A conviction should not be based either solely or to a decisive extent on statements which the defence was not able to challenge. The Court has created a three-part test to determine if the lack of opportunity to examine a witness results in a breach of Article 6(3)(d): first, there must be a good reason for the non-attendance of a witness; second the testimony of the absent witness must not be the sole or decisive evidence against the defendant; and third sufficient counterbalancing factors should be in place, including measures to conduct a fair and proper assessment of the reliability of that evidence.

## Isgrò v. Italy

19 February 1991, ECtHR, App no 11339/85

### *No violation of Article 6(3)(d) in conjunction with Article 6(1)*

The applicant complained that he was not able to question the witness at the trial stage. The ECtHR found that the non-appearance of a witness at a certain moment of the trial did not necessarily breach Article 6(3)(d), provided that the witness had been questioned earlier with the participation of the defence (paras. 30-37). During a face-to-face confrontation at the pre-trial stage, the applicant was able to question the witness directly and discuss the statements (para. 35). The fact that the applicant's lawyer was not present at that confrontation did not negate the applicant's successful exercise of his right to question the witness (para. 36).

## Van Mechelen and Others v. the Netherlands

23 April 1997, ECtHR, App nos 21363/93, 21364/93, 21427/93 and 22056/93

### *Violation of Article 6(1) in conjunction with Article 6(3)(d)*

The applicants complained that their conviction was based essentially on the evidence of police officers whose identity was not disclosed to them and who were not heard in their presence (para. 46). The ECtHR reiterated that the use of statements made by anonymous witnesses was not incompatible under all circumstances with the

Convention (para. 52).<sup>37</sup> However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, in such cases the judicial authorities must follow procedures to counterbalance the handicaps of the defence (para. 54). In any case, a balancing exercise must be carried out under Article 6(3)(d). In the present case, the domestic courts failed to make sufficient effort to assess the threat of reprisals against the police officers or their families (para. 61). Although the anonymous police officers were interrogated before an investigating judge, this could not substitute for giving the defence the opportunity to question the witnesses (para. 62). Finally, the conviction of the applicants was based "to a decisive extent" on these anonymous statements (para. 63). The ECtHR concluded that in light of these circumstances the proceedings against the applicants, taken as a whole, were not fair (para. 65).

#### Balsyte-Lideikiene v. Lithuania

4 November 2008, ECtHR, App no 72596/01

##### *Violation of Article 6(1)*

The applicant submitted that the first-instance court failed to summon the experts, even though their conclusions were essential to the determination of the merits of the case. Since some of the experts' conclusions were controversial, the applicant should have been given the opportunity to examine the experts at a hearing (para. 46). The ECtHR noted that Article 6(3)(d) related to witnesses, not experts, but that the applicant's complaint could nevertheless be examined under Article 6(1) (para. 63). It further pointed out that when finding the applicant guilty, the national courts of both instances extensively quoted the experts' conclusions (para. 64). The applicant asked the court to postpone the hearing when the experts did not appear for the third time in a row, but the court rejected her request noting that, under the circumstances of the case, her inability to question the experts did not violate any of the procedural legal norms (para. 65). The ECtHR concluded that the refusal to entertain the applicant's request to examine the experts in open court failed to meet the requirements of Article 6(1) (para. 66).

#### Polyakov v. Russia

29 January 2009, ECtHR, App no 77018/01

##### *Violation of Article 6(3)(d)*

The applicant complained that the domestic courts had arbitrarily rejected his requests to examine several witnesses whose testimony would confirm his alibi (para. 27). The ECtHR pointed out that the right to call witnesses was not absolute and could be limited in the interest of the proper administration of justice (para. 31). An applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that the refusal to call that witness was prejudicial to the defence (para. 31).<sup>38</sup> In the present case, the applicant's request for defence witnesses was not vexatious, was sufficiently reasoned, relevant to the subject-matter of the accusation and could arguably have strengthened the defence position or even led to the applicant's acquittal (para. 34). The Court found that in circumstances where the applicant's conviction was based primarily on the assumption that he was in a particular place at a particular time, he should be afforded a reasonable opportunity to challenge this assumption effectively, *inter alia*, through examination of witnesses (para. 36).

#### Kornev and Karpenko v. Ukraine

21 October 2010, ECtHR, App no 17444/04

##### *Violation of Article 6(3)(d)*

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<sup>37</sup> See also: *Doorson v the Netherlands*, ECtHR, Judgment of 26 March 1996, at para. 69.

<sup>38</sup> See also: *Guillouy v. France*, ECtHR, Judgment of June 2006, at para. 55.

The first applicant complained that his conviction for selling drugs was mainly based on statements by the principal prosecution witness, which she had given at the investigative stage. The applicant did not have a chance to question that witness (para. 51). The ECtHR reiterated that a conviction should not be based either solely or to a decisive extent on statements which the defence had not been able to challenge (para. 54). In the present case, the principal witness for the prosecution was placed in the witness protection programme and did not appear before the domestic courts at all. The statements of this victim were “essential for the proceedings in question, given that she was the only person who had directly participated in buying drugs from the first applicant” (para. 56). The applicant and his lawyers did not have an opportunity to cross-examine this witness, even as an anonymous witness. Nevertheless the domestic courts based their conclusions on her written statements given at the pre-trial investigation stage. In concluding that the applicants’ right to examine a witness against them had been violated, the Court also noted that the authorities had also failed to claim that there was a need to balance the interests of various persons concerned, in particular the witness (para. 56).

### Al-Khawaja and Tahery v. the United Kingdom

15 December 2011, ECtHR [Grand Chamber], App nos 26766/05 and 22228/06

*No violation of Article 6 (first applicant), violation of Article 6 (second applicant)*

The first applicant, Mr. Al-Khawaja, a physician, was convicted in 2004 for indecent assault on two female patients. One of the patients died before the trial, but had made a statement to the police prior to her death which was read to the jury. In its judgment, the domestic court relied on statements given by the friends of the deceased patient and evidence from the other complainant, whom the defence was able to cross-examine at trial. The second applicant, Mr. Tahery, was charged with involvement in a gangland stabbing. Two days later witness T., who was present in the crime scene, made a statement implicating the second applicant. Witness T. was too frightened to appear at court, and the trial judge allowed his statement to be read out during a hearing; no cross-examination took place. The second applicant was convicted in 2005. Both applicants lodged applications with the ECtHR complaining that their convictions were based to a decisive degree on statements from witnesses they were unable to cross-examine.

The Grand Chamber partly overruled the Chamber’s judgment, which found a violation of Article 6(1) in conjunction with Article 6(3)(d) for both applicants. The Chamber had based that decision on prior reasoning that whatever the reason for a defendant’s inability to examine a witness, the starting point was that it was inconsistent with a defendant’s Article 6 rights for a conviction to be based solely or to a decisive degree on the evidence of that witness (para. 90). The Grand Chamber took a different approach and introduced a new three-part test:

1. First, there must be a good reason for the non-attendance of a witness. Admitting a statement of a witness who has not previously been examined in lieu of live evidence must be a measure of last resort. There would be a good reason where the witness had died, but absence owing to fear called for closer examination. Where fear is due to threats from the defendant, it would be appropriate to admit the evidence of the absent witness even if it were the sole or decisive evidence; whereas if it is a more general fear of what would happen if the witness testifies, the court would have to determine whether there are objective grounds, supported by evidence, for that fear (paras. 122-125).
2. Second, it has to be determined whether the evidence of the absent witness is the sole or decisive evidence against the defendant. The admission of a statement of an absent witness that is the sole or decisive evidence against a defendant would not automatically result in a breach of Article 6; but such proceedings should be subject to the most searching scrutiny (para. 147).
3. Third, sufficient counterbalancing factors should be in place, including measures to conduct a fair and proper assessment of the reliability of that evidence (para. 147).

In applying this new test to the cases before it, the Court held that, in principle, such safeguards were contained in the domestic law. In *Al-Khawaja*, a witness died before the trial, but her testimony was supported by that of her friends and the second victim, and therefore there was no breach of Article 6 (paras. 153-158). In *Tahery*, a witness refused to testify due to fear not attributable to the applicant, and his evidence was both uncorroborated

and decisive. There were insufficient counterbalancing factors to compensate for the difficulties caused to the applicant by the admission of that witness's statement, and therefore Article 6 was violated (paras. 159-165).

#### Kononenko v. Russia

17 February 2011, ECtHR, App no 33780/04

##### *Violation of Article 6(1) and 6(3)(d)*

The applicant complained that at no stage of the criminal proceedings was he afforded an opportunity to examine the key prosecution witness (para. 47). The ECtHR reiterated that the authorities should make “every reasonable effort” to secure the appearance of a witness for direct examination before the trial court. Positive steps should be taken to enable the accused to examine witnesses against him (para. 64). In the present case, the domestic courts based their finding of the applicant's guilt to a decisive extent on the statements by the key witness (para. 67), thus, in view of the importance of witness's testimony to the proceedings, the authorities should have made a particular effort to obtain his attendance (para. 68). Since the authorities had not made every reasonable effort to secure the appearance of that witness in court, the defence rights were restricted in violation of Article 6(1) and (3)(d) (para. 69).

## 6.4 The right to reasoned decisions

Article 6(1) obliges courts to give reasons for their judgments in order to demonstrate to the parties that they have been heard and to create an opportunity for appeal against an unfavorable judgment. However, the Convention does not require a detailed answer to every argument. The level of detail varies depending on the circumstances of the case, including the diversity of the submissions that a litigant may bring before the courts, and the differences in States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.

#### Suominen v. Finland

1 July 2003, ECtHR, App no 37801/97

##### *Violation of Article 6(1)*

The applicant complained that the first instance court failed to admit all evidence she submitted and gave no reasons for its decision (para. 36). The ECtHR explained that while Article 6(1) obliged the courts to give reasons for their judgments, it could not be understood as requiring a detailed answer to every argument.<sup>39</sup> The level of detail would vary depending on the circumstances of the case.<sup>40</sup> The factors that the Court would take into account are “diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments” (para. 34). The function of a reasoned decision is two-fold: to demonstrate to the parties that they have been heard and to afford a possibility to appeal against it (para. 37). In the present case, the lack of reasoned decisions hindered the applicant from pursuing the appeal as the appellate court rejected “the request to consider the evidence on the ground that it should have been adduced in the District Court” (para. 38).

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<sup>39</sup> See also: *Ruiz Torija v. Spain*, ECtHR, Judgment of 9 December 1994, at para. 29; *Van de Hurk v. the Netherlands*, ECtHR, Judgment of 19 April 1994, at paras. 59 and 61.

<sup>40</sup> See also: *Hiro Balani v. Spain*, judgments of 9 December 1994, at para. 27; *Helle v. Finland*, ECtHR, Judgment of 19 December 1997, at para. 55.

### Gradinar v. Moldova

8 May 2008, ECtHR, App no 2007170/02

#### *Violation of Article 6(1)*

The applicant complained about unfair criminal proceedings resulting in her husband's conviction *post mortem*. The ECtHR noted that a number of pieces of "decisive evidence" accepted by the higher domestic courts were in fact obtained unlawfully (the accused made self-incriminating statements under duress and without procedural guarantees) or fabricated by the police (witness statements) (paras. 111-113). While accepting such evidence, "the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder" (para. 114). The ECtHR concluded that "[i]n the light of the above observations and taking into account the proceedings as a whole (...) the domestic courts failed to give sufficient reasons for convicting [the applicant] and thus did not satisfy the requirements of fairness as required by Article 6" (para. 115).

## 6.5 The right to appeal

Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State that does create such courts is required to ensure that people before these courts have the fundamental guarantees contained in Article 6.

### Khalfaoui v. France

14 December 1999, ECtHR, App no 34791/97

#### *Violation of Article 6(1)*

The case concerned a systematic problem, namely the automatic inadmissibility of appeals on points of law lodged by appellants who had failed to surrender to custody.<sup>41</sup> The Court reiterated that "Article 6 of the Convention does not (...) compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6" (para. 37).<sup>42</sup> It noted the importance of the final review carried out by the Court of Cassation in criminal matters, particularly to those who may have been sentenced to long terms of imprisonment (para. 47), and found that the applicant and the appellants alike "suffered an excessive restriction on [the] right of access to a court, and therefore on [the] right to a fair trial" (para. 54).

### Krombach v. France

13 February 2001, ECtHR, App no 29731/96

#### *Violation of Article 2 of Protocol No. 7*

The applicant complained that he had no right of appeal to the Court of Cassation regarding defects in a trial *in absentia* procedure. The Court acknowledged a wide margin of appreciation of the States to determine the exercise of Article 2, Protocol No. 7 rights; however any restriction on the right to appeal must pursue a legitimate aim and not infringe the very essence of that right (para. 96). In the present case "the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer (...), and, on the other, was unable to appeal to the Court of Cassation as he was a defendant in absentia. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court" (para. 100).

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<sup>41</sup> See also: *Poitrimol v. France*, ECtHR, Judgment of 23 November 1993, at para. 38; *Omar and Guérin v. France*, ECtHR, Judgment of 29 July 1998, at para. 40; *Papon v. France*, ECtHR, Judgment of 25 July 2002, at para. 90.

<sup>42</sup> See also: *Delcourt v. Belgium*, ECtHR, Judgment of 17 January 1970, at para. 25.

## 7. The right to free interpretation and translation of documents

Under article 6(3)(e), all persons have the right to the free assistance of an interpreter if he cannot understand or speak the language used in court. This applies not only to oral statements made during the trial but also to documentary material and pre-trial proceedings. While it does not require a written translation of all items of written evidence or official documents in the proceedings, the interpretation assistance has to be sufficient to enable the defendant to have knowledge of the case against him and to defend himself by being able to advance his version of the events. “Free” assistance means complete exemption or exoneration for the costs of interpretation or translation; thus it is not acceptable to order the accused to pay for the interpretation after the trial has ended.

### Brozicek v. Italy

19 December 1989, ECtHR, App no 10964/84

#### *Violation of Article 6(3)(a)*

The applicant, a German national, was convicted *in absentia* by Italian courts. He alleged a violation of his rights under Article 6(3)(a) as a notification of the charges he received was drafted in Italian, a language he could not understand, and was not translated into German as the applicant requested. The Court found that where a foreign national requests translation of a charge, the authorities should comply with the request unless they are in a position to establish that the accused in fact has sufficient knowledge of the court’s language. In this case, the Italian authorities failed to respond to the applicant’s request and there was no evidence in the case that he in fact understood the Italian language (para. 41).

### Kamasinski v. Austria

19 December 1989, ECtHR, App no 9783/82

#### *No violation of Article 6(3)(a)*

The applicant, an American citizen, complained that the indictment which was served on him in Austria was not translated into the English language. The ECtHR reiterated that Article 6(3)(e) applies “not only to oral statements” made during the trial but also to “documentary material and the pre-trial proceedings” (para. 74). While it does not require a “written translation of all items of written evidence or official documents in the procedure,” the interpretation assistance has to be sufficient to “enable the defendant to have knowledge of the case against him and defend himself by being able to advance his version of the events” (para. 74). The Court held that, as a result of the oral explanations given to him in English, the applicant had been sufficiently informed of “the nature and cause of the accusation against him” (para. 81). Given that the charges were not complex in regards to the facts and the law and that the applicant had been questioned at length and in the presence of interpreters about the suspected offences (para. 80), the absence of a written translation of the indictment neither prevented him from defending himself nor denied him a fair trial (para. 81).

### Conka v. Belgium

5 February 2002, ECtHR, App no 51564/99

#### *Violation of Article 5(1)*

The applicants, together with a large number of other Roma families, were summoned to a police station where they were served with both an order to leave the territory of the country and a judicial decision authorizing their removal to Slovakia; they were then arrested to effectuate their removal. Upon their arrival at the police station, the applicants were handed information on the available remedies which was printed in tiny characters and in a language they did not understand. Moreover, only one interpreter was available to assist the large number of

Roma families in understanding the verbal and written communications addressed to them and, although the interpreter was present at the police station, he did not come to the closed centre where they were later taken. The ECtHR found that in these circumstances, the applicants had little prospect of being able to contact a lawyer from the police station and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services. The Court therefore found a violation of Article 5(1).

### Cuscani v. the United Kingdom

24 September 2002, ECtHR, App no 32771/96

*Violation of Article 6(1) in conjunction with Article 6(3)(e)*

The applicant, an Italian national, was convicted for various tax-related offences. He argued that although about the judge knew of his “very poor” command of English, the judge failed to ensure an interpreter’s assistance at the trial hearing (paras. 34-37). During the trial, the judge learned that the applicant’s brother spoke both Italian and English and, without consulting the applicant, decided to make use of the brother’s assistance if need be. The applicant’s brother was never requested to translate any statement during the course of the hearing (para. 18). The Court found that in light of the fact that the applicant pleaded guilty to serious charges and faced a heavy prison sentence, such arrangement violated Article 6(1) (para. 38). The judge had been apprised of the real difficulties which the absence of interpretation might create for the applicant, and had a duty treat the accused’s interest with “scrupulous care” (para. 38).

### Hermi v. Italy

18 October 2006, ECtHR [Grand Chamber], App no 18114/02

*No violation of Article 6*

The applicant, a Tunisian national, appealed his conviction for drug-related offences, but failed to notify the court about his wish to participate in the hearing. In a summary proceeding the appellate court upheld his conviction. The applicant argued a violation of his fair trial rights on the grounds, *inter alia*, that the notice of the date of the hearing had been written in Italian, a language which he did not understand (para. 39). The ECtHR reiterated Article 6(3)(a) “does not go so far as to require a written translation of all items of written evidence or official documents in the procedure, and that “oral linguistic assistance may satisfy the requirements of the Convention” (para. 70). It also pointed out that “in the context of the application of paragraph 3 (e), the issue of the defendant’s linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court” (para. 71). In the present case, the Court found that “the applicant had sufficient command of Italian to grasp the meaning of the notice,” particularly because at the first-instance hearing the applicant asserted that he could speak Italian and his statement was not disputed later. Moreover, he had been living in Italy for 10 years; at the time of the arrest was able to respond to police questioning (para. 90); and he did not inform the prison authorities of any difficulties in understanding the notice (para. 91).

### Galliani v. Romania

10 June 2008, ECtHR, App no 69273/01

*No violation of Article 5(2)*

The applicant, an Italian national living in Romania, was informed that she was going to be taken into custody. The reasons for the arrest—repatriation in the absence of a valid residence permit—were communicated to her upon arrival to the police centre (para. 51). The applicant asserted that she was not provided with an interpreter or a lawyer while in custody (para. 52). The ECtHR found that while the applicant was not assisted by an interpreter or counsel, she could engage in dialogue with the police officers and had no difficulty in

understanding what was said to her and expected from her. Thus, the information provided to the applicant satisfied the requirements of Article 5(2).

Luedicke, Belkacem and Koç v. Germany

28 November 1978, ECtHR, App nos 6210/73, 6877/75 and 7132/75

*Violation of Article 6(3)(e)*

The three applicants were charged before the German courts with the commission of various criminal offences. Since they were not sufficiently familiar with the language of the country, they were assisted by an interpreter in accordance with the German law. After conviction, they were ordered, amongst other things, to pay the costs of the proceedings, including interpretation costs. They considered that the inclusion of this latter item was contrary to, *inter alia*, Article 6(3)(e). The ECtHR explained that “free assistance” meant “neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration [from the costs]” (para. 40). It further pointed out that a right to provisional exemption from payment would disadvantage the accused that did not understand and speak the language in comparison with those who were familiar with the language. It also could have repercussions on the exercise of the right to a fair trial (para. 42).

## List of Decisions

1. [\*Albert and Le Compte v. Belgium\*](#), Judgment of 10 February 1983
2. [\*Al-Khawaja and Tahery v. the United Kingdom\*](#) [GC], Judgment of 15 December 2011
3. [\*Amer v. Turkey\*](#), Judgment of 13 January 2009
4. [\*Artico v. Italy\*](#), Judgment of 13 May 1980
5. [\*Balsyte-Lideikiene v. Lithuania\*](#), Judgment of 4 November 2008
6. [\*Barberà, Messegue and Jabardo v. Spain\*](#), Judgment of 6 December 1988
7. [\*Barsom and Varli v. Sweden\*](#) (dec.), Decision of 4 January 2008
8. [\*Benham v. the United Kingdom\*](#) [GC], Judgment of 10 June 1996
9. [\*Berlinski v. Poland\*](#), Judgment of 20 June 2002
10. [\*Biba v. Greece\*](#), Judgment of 26 September 2000
11. [\*Bogumil v. Portugal\*](#), Judgment of 7 October 2008
12. [\*Bonzi v. Switzerland\*](#) (dec.), Decision of 12 July 1978
13. [\*Borisova v. Bulgaria\*](#), Judgment of 21 December 2006
14. [\*Borotyuk v. Ukraine\*](#), Judgment of 16 December 2010
15. [\*Botten v. Norway\*](#), Judgment of 19 February 1996
16. [\*Brennan v. the United Kingdom\*](#), Judgment of 16 October 2001
17. [\*Brogan and Others v. the United Kingdom\*](#), Judgment of 29 November 1988
18. [\*Brozicek v. Italy\*](#), Judgment of 19 December 1989
19. [\*Brusco v. France\*](#), Judgment of 14 October 2010
20. [\*Butkevicius v. Lithuania\*](#), Judgment of 26 March 2002
21. [\*Campbell and Fell v. the United Kingdom\*](#), Judgment of 28 June 1984
22. [\*Campbell v. the United Kingdom\*](#), Judgment of 25 March 1992
23. [\*Colozza v. Italy\*](#), Judgment of 12 February 1985
24. [\*Conka v. Belgium\*](#), Judgment of 5 February 2002
25. [\*Correia de Matos v. Portugal\*](#) (dec.), Judgment of 15 November 2011
26. [\*Croissant v. Germany\*](#), Judgment of 25 September 1992
27. [\*Cuscani v. the United Kingdom\*](#), Judgment of 24 September 2002
28. [\*Czekalla v. Portugal\*](#), Judgment of 10 October 2002
29. [\*D.M.T. and D.K.I. v. Bulgaria\*](#), Judgment of 24 July 2012
30. [\*Daktaras v. Lithuania\*](#), Judgment of 10 October 2000
31. [\*Daud v. Portugal\*](#), Judgment of 21 April 1998
32. [\*Dayanan v. Turkey\*](#), Judgment of 13 October 2009
33. [\*Demir v. Turkey\*](#), Judgment of 24 July 2012

34. [\*Dowsett v. the United Kingdom\*](#), Judgment of 24 June 2003
35. [\*Ensslin, Baader and Raspe v. Germany\*](#), Decision of 8 July 1978
36. [\*Erdem v. Germany\*](#), Judgment of 9 December 1999
37. [\*Falcao dos Santos v. Portugal\*](#), Judgment of 3 July 2012
38. [\*Falk v. the Netherlands\*](#) (dec.), Decision of 19 October 2004
39. [\*Fox, Campbell and Hartley v. the United Kingdom\*](#), Judgment of 30 August 1990
40. [\*Funke v. France\*](#), Judgment of 25 February 1993
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42. [\*Galstyan v. Armenia\*](#), Judgment of 15 November 2007
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