



# Breaking THE BARRIERS

## HUMAN RIGHTS BACKGROUND -KEY POINTS

### The right to be advised, defended and represented in criminal proceedings

---Article 6 (3) (c) of the ECHR and Article 48 (2) of the EU Charter of Fundamental Rights explicitly guarantee **the right to legal assistance** in criminal matters.

---Article 6 (3) (b) of the ECHR sets out **the right to adequate time and facilities to prepare one's defence**. This is closely linked to Article 6 (3) (c) because adequate time and facilities are required to make effective the right to legal assistance.

#### ---The right to legal assistance

1) applies to the entire proceedings (police investigation, representation in court, conclusion of the appeal). Access to a lawyer in the early stages of proceedings is particularly important because adverse inferences may be drawn at any case from an accused or suspected person's silence especially when the case comes to the jury court. The ECtHR confirmed that, **for the right to a fair trial to remain "practical and effective", access to a lawyer had to be provided from the first police interrogation**. Suspects are particularly vulnerable at the investigation stage and that evidence gathered may determine the outcome of their case. Early access to a lawyer protects the privilege against self-incrimination and is a fundamental safeguard against ill-treatment. Any exception to this right must be clearly circumscribed and time-limited. Even where compelling reasons arise, restrictions must not unduly prejudice the rights of the accused. (Salduz v. Turkey).

2) may be subject to restrictions, provided that the restrictions do not undermine the essence of the right.

3) requires the provision of effective representation and not just the mere presence of a lawyer.

4) is of such fundamental importance that the accused or suspected person may only waive it in limited circumstances.

Persons can waive fair trial guarantees of their own free will, either expressly or tacitly. **For safeguards to be effective, waiver of the right must: (i) be established in an unequivocal manner; (ii) be attended by minimum safeguards commensurate to its importance; (iii) be voluntary and (iv) constitute a knowing and intelligent relinquishment of a right and (v) if implicit from the accused's conduct, it must be shown that the accused could reasonably have foreseen the consequences of his/ her conduct**. It must also be shown that the defendant could reasonably have foreseen the consequences of his/her conduct (ECtHR leading case: Pishchalnikov v. Russia: no valid waiver of the right, the Court considered it unlikely that the applicant could reasonably have appreciated the consequences of being questioned without legal assistance) **===States have discretion to choose how to secure the right to legal assistance in their judicial systems.**

===Access to a lawyer has to be **effective and practical**.

For instance, individuals in police custody have to be formally acquainted with their defence rights, including their right to free legal assistance subject to certain conditions, but the police also has to provide them with practical means of contacting and communicating with their defence counsel. Where laws systematically prevent persons charged with a criminal offence from accessing legal assistance in police custody, Article 6 is violated, even when persons charged with a criminal offence remain silent. The lawfulness of restrictions on the right to legal assistance during the initial stages of police interrogation should be considered in light of their overall impact on the right to a fair hearing.

===**The right to speak to a lawyer in confidence**

===**The right to legal assistance is a right to effective assistance and representation.**

The presence of a lawyer, who has no opportunity to intervene to ensure respect for the accused or suspected person's rights, is of no benefit to the accused or suspected person.

Example: In *Aras v. Turkey*, the ECtHR stated that **the "mere presence" of the lawyer was not sufficient to make effective the right under Article 6 (3) (c)**. The applicant should have had access to a lawyer from the first questioning. The applicant's lawyer's passive presence in the hearing room could not be considered to have been sufficient by ECHR standards.

Notwithstanding the importance of a relationship of confidence between lawyer and client, **the right to a lawyer of one's own choosing is not absolute.**

It is necessarily subject to regulation where free legal aid is concerned because the state controls the criteria and financing for legal assistance. The right may also be subject to restrictions by way of professional regulation; for example, different qualifications may be required for different levels of jurisdiction.

Example: In *Lagerblom v. Sweden*, the applicant, who was from Finland, requested a replacement for his legal aid lawyer. He wanted a lawyer who also spoke Finnish. The domestic courts rejected his request. He argued that this was a breach of Article 6 (3) (c) of the ECHR. The ECtHR noted that Article 6 (3) (c) entitles an accused to be defended by counsel "of his own choosing" but that the right cannot be considered absolute. **When appointing defence counsel, courts must have regard to the accused's wishes, but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.** The applicant had sufficient proficiency in Swedish to communicate with his lawyer and was able to participate effectively in his trial. The courts were entitled to refuse him the lawyer of his choice. There was no violation of Article 6 of the ECHR.

===MINORS

Appropriate procedural guarantees and effective legal representation are of vital legal importance when the suspects or accused persons are minors as they are immature to defend themselves adequately and therefore vulnerable.

Examples:

1) Case *ADAMKIEWICZ v. POLAND* (2010)

The ECtHR found a **violation of Article 6§3(c) of the ECHR in conjunction with Article 6§1** on account of the lack of adequate assistance by a lawyer during the preliminary investigation and in respect of the use of the child's confession, obtained in the absence of his lawyer, as a basis for the conviction.

2) Case *PANOVITS v. CYPRUS* (2008)

The ECtHR held that there had been a **violation of Article 6§1 and 3 of the ECHR** on account of the failure to inform the child of his right to consult a lawyer prior to the first police questioning. It also held that there had been a **violation of Article 6§1 of the ECHR** due to the use in trial of the child's confession, obtained in circumstances which breached his right to due process.

3) Case *BLOKHIN v. RUSSIA*

The ECtHR found a **violation of Article 6§1 and 3 of the Convention** in respect of the lack of adequate procedural guarantees in the proceeding leading to his placement. In particular, the police did not assist the child in obtaining legal representation and did not inform him of his right to have a lawyer (passive approach adopted by the police). The absence of legal assistance during the child's questioning by the

police is contrary to the basic principles set out in international sources requiring minors to be guaranteed legal, or other appropriate, assistance. Also children under the age of criminal responsibility have the right to be assisted by a lawyer when interviewed by the police.

Furthermore, the ECtHR found a **violation of Article 6 § 1 and 3 of the ECHR** due to the use of the confession, made by the child in the absence of a lawyer, as the basis for his detention and also on account of the child's inability to cross-examine witnesses which was contrary to the principle of equality of arms.

## **PRESUMPTION OF INNOCENCE**

-a fundamental right and key element at the heart of fair trial rights protection.

-Article 6 of the European Convention of Human Rights ('ECHR')

-Article 48 of the European Charter of Fundamental Rights, as well as in the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and a number of other international treaties and covenants.

## **WHEN IS THE PRESUMPTION OF INNOCENCE VIOLATED ?**

--- if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law.

--- leading case of Minelli v Switzerland (ECtHR 1983)

Mr Minelli complained that while the Swiss Court had discontinued the proceedings against the accused due to the expiration of time limitations to prosecute an offence, it held that Mr Minelli should bear two-thirds of the cost of the proceedings because in the absence of such time limitation, the existing evidence would "very probably have led to the conviction" of the accused. The applicant complained that these statements violated his presumption of innocence. The ECtHR agreed that, **by including this statement in the reasoning of the decision, the Swiss Court had shown that it was satisfied of the guilt of Mr Minelli.** Specifically, the ECtHR held that **"notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology ('in all probability', 'very probably'), the Chamber proceeded to make appraisals that were incompatible with respect for the presumption of innocence"**

---The criteria set out by the ECtHR, establishes that **a fundamental distinction must be made between statements that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question.**

---Allen v the United Kingdom ECHR 2013

The ECtHR, stated that "examination of the Court's case-law under Article 6(2) [shows] that **there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings, which follow the conclusion of criminal proceedings.** As illustrated by the ECtHR's existing case-law, **much will depend on the nature and context of the proceedings in which the impugned decision was adopted.**". Specifically, the ECtHR held that "although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued." Secondly, the ECtHR did not consider the language used by the domestic courts to have treated the applicant in a manner inconsistent with her innocence. Moreover the ECtHR established that **"even the use of some unfortunate language may not be decisive when regard is had to the nature and context of the particular proceedings"**. Therefore, as it follows from the above, in order to determine whether a statement of a public authority constitutes a mere expression of a suspicion or a clear declaration that an individual has committed the crime in question, **the ECtHR will analyse the context of the particular circumstances in which the impugned statement was made.**

--Khuzhin and Others v Russia, 2008

A man was detained and accused of a crime of kidnapping and torture. A few days before the opening of the trial, a State television channel broadcasted a talk show with the lead investigator of the case and the prosecutor. The participants discussed the details of the case and made several statements about the accused's violent character and gave details of his

criminal record. They referred to the circumstances, in which the criminal acts took place as something that the accused would do. **The prosecutor specifically said that the only choice, the trial court would have had to make, was that of a sentence of an appropriate length.**

The ECtHR found that the lead investigator and the prosecutor made statements that went **beyond a mere description of the pending proceedings or a state of suspicion.** Those statements unequivocally suggested that the accused was guilty and prejudged the assessment of the facts by the competent judicial authority. Given the high-profile of the two participants, their statements had the effect of encouraging the public to believe the accused to be guilty before he had been convicted according to law. Therefore, the ECtHR found that there had been a breach of the accused's presumption of innocence.

---Case Borovský v Slovakia, 2009.

In this case, the ECtHR found a violation of Article 6(2) ECHR as a result of the dissemination to the media of specific details in the police file that described the accused as guilty. The applicant's claims referred to the publication of statements by the deputy director of the Office of the Finance Police in a daily magazine. In particular, the police officer stated that "the action of the accused, if considered in its entirety, was a "premeditated fraudulent action" aimed at transferring the property of the company concerned to different companies.". In the ECtHR's view, that statement was not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicant, but gave an assessment of the position as if it were an established fact, qualifying the accused persons' action as "fraudulent" and as having been "premeditated", without any reservation. That statement implied that the accused had committed the crime and therefore there was found to be a violation of Article 6(2) ECHR.

#### **Last but not least the recent judgement of the Supreme Court of Greece in Plenary (4/2020).**

Although the case has not to do with safeguards and rights in criminal proceedings, this judgement shows clearly the legal influence of the presumption of innocence.

More specifically the Supreme Court emphasizes that without the respect of the presumption of innocence, there can be no fair trial. To the question if the presumption of innocence is violated when the accused is acquitted by a criminal court and yet is obliged by a civil court to pay damages based on the same facts, that constitute a tort and at the same time a criminal offence, the Court found no violation as the judgement of the criminal court is not binding for the civil court. Nevertheless the civil court must take that into consideration and has the discretion to judge otherwise under the precondition that its judgement is fully justified and the justification does not put the correctness of the acquittal in question.

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