

RIGHT TO A FAIR TRIAL IN CRIMINAL MATTERS
UNDER ARTICLE 6 E.C.H.R.

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I. INTRODUCTION

Not only is Article 6, which guarantees the right to a fair trial in civil and criminal matters, one of the few provisions in the European Convention on Human Rights (“ECHR”) which goes into some detail as to the scope of the safeguard afforded (in particular, the rights of the defence in criminal proceedings), but it is the subject of an exceptionally rich case-law. One could almost draft a code of criminal procedure on the basis of the E.C.H.R. case-law. The text of Article 6 reads:

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:

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- (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.”

For a national judge in a country where the ECHR is part of domestic law, Article 6 under its criminal head is most likely to come into the picture:

- during the trial and its preparatory proceedings, whenever a procedural motion is made (to hear witnesses, to exclude evidence, for an adjournment, and so on) or, generally, whenever a procedural issue arises;
- on appeal when the appeal court is called on to rule on alleged procedural deficiencies at first instance.

The following descriptive survey is intended to give a brief indication of the main principles, together with a few illustrative examples of the voluminous case-law under the “criminal” limb of Article 6.

II. SCOPE OF THE RIGHT TO A FAIR TRIAL IN CRIMINAL MATTERS

A. *From 'Charge' to 'Determination'*

The shield of procedural protection afforded by Article 6 comes into play as soon as a “criminal charge” is brought against an individual; and it remains in place until the charge is “determined”, that is until the sentence has been fixed or an appeal decided. But Article 6’s requirements of judicial procedure do not cover the pre-“charge” phase of a prosecution, and in particular the process of criminal investigation prior to charging. This was confirmed in the recent case of *Escoubet v. Belgium*¹ which concerned the immediate but temporary withdrawal of the driving licence of a motorist who, following a road accident, was suspected by the police of drunken driving. (Preventive) measures that come before the laying of a “charge” and measures taken outside the “determination” of a “criminal charge” - such as arrest on suspicion of commission of a criminal offence or public-safety measures like the one in *Escoubet* - are not capable of attracting the procedural safeguards set out in Article 6. In short, the due process guaranteed by Article 6 is due only if the individual is already subject to a “criminal charge” (or “charged with a criminal offence” in the terminology of Article 6 (2) and (3) and then applicable only to the procedure for the “determination” of that charge.

B. *'Criminal Charge' is an Autonomous Concept*

What is a “criminal charge” is defined differently from one legal system to another. Yet it would be inequitable and discriminatory if the availability of procedural safeguards of due process that are meant to be universal depended solely on the accident of the domestic-law definition.

The *Dutch Soldiers' case*² brought by conscript soldiers in the Netherlands punished for a variety of military disciplinary offences, held that, whilst (a) the classification of the offence under the domestic legal system provides an initial indicator, (b) the nature of the offence and/or (c) the nature and degree of severity of the penalty

¹ [1999] E.C.H.R. 26780/95.

² *Engel and Others v. Netherlands* (1979-80) 1 E.H.R.R. 647.

imposable may render an offence “criminal” for purposes of the Convention even though it is classified as merely “disciplinary” under the applicable domestic law, for example military law or prison rules. As was stated by the Court in a 1984 case against the United Kingdom, “justice cannot stop at the prison gate”.³ As far as the nature of the offence is concerned (criterion (b)), misconduct merely involving questions of internal discipline, such as reporting late from leave, would not turn a disciplinary offence into a “criminal” one, whereas acts such as gross personal violence and mutiny could be said to be inherently “criminal” in nature. As to criterion (c) (the nature of the penalty), lengthy deprivation of liberty for a serviceman⁴ and serious loss of remission for a prisoner⁵ are examples for of the kind of penalty that will bring a disciplinary procedure within the “criminal” sphere protected by Article 6 E.C.H.R. The imposition under French administrative law of tax surcharges where the taxpayer had not acted in good faith were judged by the Court to entail punishment not compensation; and in the event of non-payment of the surcharge the taxpayer was liable to be committed to prison. In these circumstances it was held that the proceedings in question involved the determination of a “criminal charge”.⁶ Two German cases in the 1980s raised the issue whether what had hitherto been criminal offences could be removed from the sphere of application of Article 6 ECHR by being reclassified as merely “regulatory” offences under legislation enacted with the praiseworthy aim of decriminalising minor road traffic offences. The Strasbourg Court concluded however that, since the offence in question, although petty, retained characteristics that were typical of a criminal offence, Article 6 E.C.H.R. and its requirement of judicial process remained applicable (criterion (b)). Criteria (b) and (c) being alternative, not cumulative, the lack of severity of the penalty risked by the offending motorist was judged to be immaterial. If not satisfied with the outcome of the regulatory procedure, the person charged was therefore entitled, by virtue of Article 6 (1), to have a full court hearing.⁷ More recently, the possibility of imprisonment

³ *Campbell and Fell v. UK* (1984) 4 E.H.R.R. 293 at para. 69.

⁴ Three months’ committal in a disciplinary unit (“criminal”) as compared with two days’ strict arrest (disciplinary): *Engel and Others v. Netherlands* (1979-80) 1 E.H.R.R. 647.

⁵ 6 months’ loss of remission (“criminal”): *Campbell and Fell v. United Kingdom* (1984), Series A no. 60.

⁶ *Bendenoun v. France* (1994) 18 E.H.R.R. 54.

⁷ *Öztürk v. Germany* (1984) 6 E.H.R.R. 409; *Lutz v. Germany* (1988) 10 E.H.R.R. 182; [1987] E.C.H.R.9912/82.

(maximum 3 months) for failure to pay poll tax in the United Kingdom rendered the enforcement proceedings “criminal” for the purposes of E.C.H.R. although they were regarded rather as civil under domestic law (criterion (c)).⁸

What is a “charge” for the purposes of Article 6 E.C.H.R. is discussed below in the context of the guarantee of trial within a reasonable time.

III. GENERAL CHARACTERISTICS

Standards of procedural fairness. Para. 1 of Article 6 E.C.H.R. enunciates the principle of a fair trial in criminal (as well as civil) proceedings. This is a generic notion covering also the more specific guarantees set out in paragraphs 2 and 3 (which detail specific rights of the defence in criminal proceedings). Conversely, paragraphs 2 and 3 do not exhaust the notion of a fair trial in criminal proceedings: they are constituent elements, amongst others. In order to determine whether the standard of “fairness” has been respected, the “trial” must be taken as a whole, so that an admitted shortcoming may be cured by subsequent measures, for example on appeal. On the other hand, the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, may compromise the person’s right to a fair trial.⁹

IV. FAIR TRIAL

A. General

The hundredth judgment delivered by the Strasbourg Court had at its origin a complaint by a Viennese butcher convicted of an offence under the Austrian Food Hygiene Code after a finding that smoked meat produced by his company contained excessive quantities of water and a cancer-provoking substance.¹⁰ The convicting court in Austria had appointed as an expert the very same person who had drafted for the food hygiene inspector - that is the prosecutor - the report which had set in motion the criminal

⁸ *Benham v. United Kingdom* (1996) 22 E.H.R.R. 293.

⁹ *Barberà, Messegué and Jabardo v. Spain* [1994] E.C.H.R. 10588/83 - “overall unfair proceedings” (criminal).

¹⁰ *Bönisch v. Austria* (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79.

proceedings against the complainant. The Strasbourg Court referred to the principle of equality of arms, which is inherent in the concept of a fair trial. It held that there had been unequal treatment of prosecution and defence and thus an unfair hearing. In the context of criminal proceedings what the principle of equality of arms means is that the defendant must have “a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis [the prosecution]”.

Parallel to this, though primarily in relation to civil suits, the Strasbourg case-law has developed the principle of “adversarial proceedings”: a party should have the opportunity to have knowledge of, and then to comment on, any material which is submitted to a court with the intention of influencing its decision - whatever the source of the material, whether it be submitted by the opposing party or by a source independent of the parties, such as the *procureur general* (procurator-general) in some continental systems.¹¹

B. Evidence

Article 6 (1) does not require the adoption of any particular rules of evidence: this is a matter for domestic law. It is, for example, not excluded that unlawfully obtained evidence may be treated as admissible without rendering the trial unfair; subject the recognised unacceptability of allowing reliance on evidence obtained by entrapment (see below), there is no strict doctrine of “the fruit of the poisoned tree” embodied in Article 6. What Article 6 requires is that in all the circumstances of the case, including the way in which evidence was obtained, the proceedings taken as a whole should be fair.

In the recent case of *Khan v. United Kingdom*¹² the accused had been convicted of drug-dealing on the basis of evidence obtained by a secret listening device installed by the police. The recording of conversations had not been unlawful in the sense of being contrary to domestic criminal law, but had been contrary to Article 8 E.C.H.R. (right to respect for one’s private life, home and

¹¹ For example *J.J. v. Netherlands* (1999) 28 E.H.R.R. 168 (criminal case); *Van Orshoven v. Belgium* (1998) 26 E.H.R.R. 55; [1997] E.C.H.R. 2122/92.

¹² (2001) 31 E.H.R.R. 45; (2000) 8 B.H.R.C. 310.

correspondence) as at the time in the United Kingdom there had existed no statutory system to regulate the use of covert listening devices by the police (the resultant interference with the Article 8 E.C.H.R. right had not been “in accordance with the law” as required by Article 8 (2) E.C.H.R.). The Strasbourg Court noted that the accused had had ample opportunity to challenge both the authenticity and the use of the recording, and had indeed challenged its use, although not its authenticity; at each level of jurisdiction (trial court, Court of Appeal, House of Lords) the domestic courts had assessed the effect of the admission of this evidence on the fairness of the trial and discussed the non-statutory basis for the surveillance. This being so, the use at the trial of the secretly taped material did not, it was held, conflict with the requirements of fairness under Article 6 (1).

What the Strasbourg Court has read into Article 6 (1) (as following from the “equality of arms” principle) is that the prosecution should normally disclose to the defence all material evidence in their possession for or against the defence.

Difficulties caused to the defence by limitations on defence rights in relation to evidence - for example where evidence is withheld from the defence on the ground of public-interest immunity (in order to protect the identity of informers or under-cover police agents) - must be sufficiently counterbalanced by the procedures followed by the judicial authorities. This was established in the British cases, *Rowe and Davis v. United Kingdom*¹³ and *Fitt v. United Kingdom*.¹⁴ In the first case, in accordance with the law as it then stood, it was the prosecution, without the knowledge or approval of the trial judge, who decided that the evidence in question should not be disclosed. This the Strasbourg Court held not to be compatible with the right to a fair trial, despite the fact that the Court of Appeal had subsequently considered the withheld material and found the conviction to be safe. The international and national tests of fairness of the trial and soundness of the conviction thus led to different conclusions. In the second case the law had changed and the prosecution were required to make an application to the trial judge

¹³ (2000) 30 E.H.R.R. 1.

¹⁴ (2000) 30 E.H.R.R. 480.

for authority not to disclose the evidence in question. The Strasbourg Court was satisfied that the defence had been kept informed as far as was possible without revealing the material which the prosecution sought to keep secret on public-interest grounds. In circumstances where the trial judge was in a position to apply the standards of fairness required by Article 6 (1) as regards the disclosure of evidence to the defence, no violation was found (by the narrow majority of 9 to 8).

C. Entrapment

The 1998 case of *Teixeira de Castro v. Portugal*¹⁵ established the principle that where undercover police agents have gone beyond an essentially passive investigation of a suspect's criminal activity and exercised an influence such as to commit an offence, the defendant will be deprived of a fair trial. Public interest in securing convictions for commission of serious criminal offences such as drug trafficking cannot justify use of evidence obtained as a result of police incitement.

D. Anonymous witnesses

In *Windisch v. Austria*¹⁶ the conviction was based to a large extent on statements by two anonymous witnesses heard, in the absence of the accused and with no counsel present, only by the police but not by the trial court. The result was that the applicant had not had a fair trial since he had been denied the opportunity to challenge the witnesses' credibility. The other side of the coin - namely witness anonymity being compatible with fairness - is illustrated by the Dutch case of *Doorson v. Netherlands*¹⁷ which concerned the criminal trial of a person charged with drug-dealing. In convicting him the trial court had placed reliance on anonymous evidence by his clients who were afraid of reprisals. Fair trial, said the Strasbourg Court, is not an absolute notion. The criminal system also has to protect witnesses. But there must be proper safeguards to counterbalance the resulting disadvantages for the defence if evidence is taken from an anonymous witness; for example, it should

¹⁵ (1999) 28 E.H.R.R. 101; 4 B.H.R.C. 533.

¹⁶ (1990) 13 E.H.R.R. 281

¹⁷ (1996) 22 E.H.R.R. 330; [1996] 20524/92.

not be the only or decisive evidence to ground the conviction. In the particular circumstances, there were found to have been adequate safeguards for the defence.

V. PUBLIC HEARING

A. *General principle*

The right of an accused to appear in person before a trial court, so that he/she can participate effectively in the conduct of the case, is inherent in the notion of a “fair hearing” in criminal cases. This right may be waived, provided the waiver is clear and unequivocal. Hearings *in camera* are expressly permitted, on listed grounds.

B. *Children*

In the recent British cases of *T. and V. v. United Kingdom*¹⁸ the issue was raised how this principle should apply to children, and in particular whether procedural elements which are generally considered to safeguard rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation. The applicants were two boys convicted of the abduction and horrific murder of another two-year old boy. They were aged ten at the time of the offence and eleven at the time of their trial, which, although attended by a number of special measures taken in view of their age, was essentially an adult trial: in public, with the public gallery full of journalists and onlookers and the two boys sitting in the dock, separated from their bewigged barristers. The Strasbourg Court (including the British *ad hoc* judge, Lord Reed of the Scottish Court of Session) took the view that the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven. It concluded that the two boys had been denied a fair hearing in breach of Article 6 (1).

C. *Appeal Proceedings*

Although Article 6 does not guarantee a right of appeal, appeal

¹⁸ (2000) 30 E.H.R.R. 121; 7 B.H.R.C. 659.

proceedings, if possible under domestic law, will be treated as an extension of the trial process and therefore subject to Article 6. But the requirements of fairness may not be the same on appeal as at first instance. This is particularly well illustrated by the cases concerning hearings.

Leave-to-appeal proceedings before the English Court of Appeal are determined without the accused being present or represented by counsel; the prosecution is likewise unrepresented. In finding no violation of Article 6 (1) E.C.H.R. in this system, the Strasbourg Court took account of the proceedings in their entirety and of the role of the appellate court in the criminal process.¹⁹

The Swedish case of *Ekbatani*²⁰ confirmed that the absence of a public hearing before a second or third instance may be justified by the special features of the appeal or review proceedings. On the facts, there had, as in the British case, been equality of arms (between defence and prosecution) before appeal court. But the appeal court had been called on to examine afresh both facts and law. The main issue to be decided - namely whether the accused had committed the act - meant that a fair determination of guilt was impossible without a hearing. Unlike the British case, therefore, a violation was found.

VI. INDEPENDENT AND IMPARTIAL TRIBUNAL

A. Tribunal

Article 6 E.C.H.R. embodies no guarantee either of trial by jury, or of fully professional courts. In other words, recourse to lay judges is compatible with Article 6 ECHR.

To qualify as a “tribunal” within the meaning of Article 6 (1), the body concerned must have the power of decision. This was found not to be the case with courts martial in United Kingdom, where decisions were not effective until ratified by the “convening officer”.²¹

B. Independence

The adjective “independent” has been interpreted as meaning

¹⁹ *Monnell and Morris v. United Kingdom* (1988) 10 E.H.R.R. 205; [1987] E.H.R.C. 9562/81.

²⁰ (1991) 13 E.H.R.R. 504; [1988] E.C.H.R. 10563/83.

²¹ *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221.

independent of the executive and of the legislature. Relevant factors for determining whether this requirement is met include the manner of appointment of the adjudicators, the duration of their term of office, the guarantees against outside pressures and the appearance of independence. Being independent of the parties is rather to be analysed as a question of impartiality. An instructive case is *Findlay v. United Kingdom*²² where it was held that a court-martial convened pursuant to the Army Act, 1955 did not meet requirements of independence and impartiality set by Article 6 (1) in view, in particular, of the central role played in the prosecution by the “convening officer”: he was responsible for convening the court-martial and for appointing its members and the prosecuting officer, but was closely linked to the prosecuting authorities (he had the final decision on the nature and detail of the charges to be brought) and was superior in rank to the members of the court martial.

C. Impartiality

The issue of impartiality was first addressed by the Strasbourg Court in 1982 in *Piersack v. Belgium*.²³ The personal impartiality of the judge (what is often referred to as the subjective aspect) was not called into question. His functional impartiality (the objective aspect) was however challenged: the trial judge had previously served, when the prosecution was launched, as senior deputy public prosecutor in charge of the section of the public prosecutors’ department responsible for the accused’s case. For this reason, the Strasbourg Court concluded, his impartiality was capable of appearing open to doubt. The test is whether this is so, not to the accused who will often be disgruntled, but to the reasonable onlooker. A violation of the impartiality requirement in Article 6 (1) was therefore found. A similar finding was made in *De Cubber v. Belgium*²⁴ where there had occurred successive exercise of the functions of investigating judge (building up evidence against the accused, committing for trial) and first-instance judge by the same person in a criminal case. In *Hauschildt v. Denmark*²⁵ the trial judge had also made pre-trial decisions concerning detention on remand,

²² (1997) 24 E.H.R.R. 221.

²³ (1983) 5 E.H.R.R. 169; [1982] E.C.H.R. 8692/79.

²⁴ (1985) 7 E.H.R.R. 236; [1984] E.C.H.R. 9186/80.

²⁵ (1990) 12 E.H.R.R. 266; [1989] E.C.H.R. 10486/83.

which required a “particularly confirmed suspicion”. A violation was likewise found on the basis of a reasonable “appearance” of partiality.

The doctrine of appearances applies also to juries, as illustrated by the British case of *Pullar v. United Kingdom*.²⁶ A local-authority elected representative and a town-council official were prosecuted on corruption charges of attempting to get an architect to pay a bribe for public contracts. The architect appeared as a witness for prosecution. One of the jurors had worked for the architect in a junior position in his office for a while before being declared redundant. The juror so notified the court officials, but the judge was not informed and the juror was not discharged. No violation was found, however, mainly because it was accepted that the juror did not know anything of the facts of case.²⁷ In *Remli v. France*²⁸ the accused was a North African. A juror was overheard in the corridor outside the courtroom saying, “I’m a racist. I don’t like Arabs.” A sworn statement was submitted to the trial court; but the court ruled that it had no power under French law to take this sort of thing into account and that the jury had to stay as it was. A violation of the impartiality requirement of Article 6 § 1 on the ground of appearances was found. A State’s legal system must be able to cope with such well substantiated doubts as to the impartiality of a court, including the jury. In other words, it was the French system - the French law in so far as it prevented the courts from remedying such situations - not the particular court that tried Mr. Remli or the individual judges, which was condemned by the Strasbourg Court. *Remli* is to be compared with *Gregory v. United Kingdom*.²⁹ A note was sent from jury to judge saying: “Jury showing racial overtones.” A “firmly worded”, clear, detailed warning was thereupon given by the judge to the jury, after submission from both counsel. The accused was convicted by a 10:2 vote of the jury. The risk of prejudice, the Strasbourg Court was satisfied, had been neutralised by the judge’s warning. No violation was found. In the subsequent case of *Sanders v. United Kingdom*³⁰ however, the Strasbourg Court’s decision went the other way. The redirection of the jury by the judge

²⁶ (1996) 22 E.H.R.R. 391; [1996] E.C.H.R. 22399/93.

²⁷ One unspoken consideration prompting such an approach might be that in small communities, if members of a jury always had to be complete strangers to witnesses and so on, it would never be possible to organise a trial.

²⁸ (1996) 22 E.H.R.R. 253; [1996] E.C.H.R. 16839/90.

²⁹ (1997) 25 EHRR 577.

³⁰ [2000] E.C.H.R. 34129/96; 8 B.H.R.C. 279.

in that case was not sufficient to have dispelled legitimate doubts as to the impartiality of the court. The two cases of *Gregory* and *Sanders* thus show the importance of the wording used in the direction to the jury in such circumstances.

VII. WITHIN A REASONABLE TIME

Although there is a huge number of cases on this point, the applicable principles are rather simple.

A. Identifying the Opening and Closing Dates of the Period to be taken into Consideration

The “time” that must be “reasonable” is the period between the laying of the “charge” and the imposition of the sentence. There are however differences in criminal procedure between countries, notably as to when the “charge” is formally laid. According to well established E.C.H.R. case-law, the “charge” in its autonomous sense for the purposes of Article 6 is the official notification given to the individual by the competent authority of an allegation that he/she has committed a criminal offence³¹. The running of the period does not begin with the arrest for questioning (placement under *garde à vue*), since this will generally precede the laying of the “charge”, even in its “autonomous” meaning. As regards the end of the period, the “time” covers the whole of the proceedings in issue, including appeal proceedings. In other words, there is no “determination” of a “charge” as long as sentence has not been definitively fixed, for example through pronouncement of cumulative sentences.³²

B. Assessing the Reasonableness of the Length of the Proceedings

The reasonableness of the length of the proceedings is to be assessed according to the particular circumstances of the case and with reference notably to the complexity of the case, the conduct of the defendant and the conduct of the (prosecuting and judicial) authorities. Where there are inordinate delays, it falls to the respondent State to come forward with explanations. A more

³¹ *Foti v. Italy* (1983) 5 E.H.R.R. 313; [1982] E.C.H.R. 7604/76.

³² *Eckle v. Germany* (1983) 5 E.H.R.R. 1; [1982] E.C.H.R. 8130/78.

rigorous standard applies if the accused is in custody. This therefore is an aspect of Article 6 to be borne in mind by domestic courts when deciding whether to grant adjournments of a trial.

VIII. SPECIFIC RIGHTS OF THE DEFENCE IN CRIMINAL TRIALS

A. Presumption of Innocence (Article 6 (2))

1. Trial

The presumption of innocence represents first of all a procedural guarantee for the conduct of the criminal trial itself: courts are not to proceed on the assumption that the accused committed the act charged. The presumption of the accused's innocence is crucial for the evidence-taking process, in that it places the burden of proof on the prosecution and allows the accused the benefit of the doubt.

2. Treatment by public authorities

But the presumption of innocence has a wider application: it is a fundamental principle protecting an accused against being treated by public officials as guilty of an offence before this has been established by a court. The applicant in *Adolf v. Austria*³³ was reported to the police for a throwing bunch of keys at a woman. The resultant criminal proceedings terminated at first instance by a court decision whose reasoning was capable of being understood as a finding of guilt. The District Court stated that the "fault" of the accused was "insignificant". Subsequently, however, the Supreme Court cleared him of any finding of guilt, preferring to reason that the conduct held against him was only a "trivial matter" not meriting prosecution. No violation of the presumption of innocence was found. It will thus depend very much on the wording of the particular national decision whether the supporting reasoning amounts in substance to a determination of the accused's guilt without an offence having been established by a court and in particular without his having had the opportunity to exercise the rights of the defence.

³³ (1982) 4 E.H.R.R. 313; [1982] E.C.H.R. 8269/78. Similar findings in *Englert, Lutz and Nölkenbockhoff v. Germany* (1991) 13 E.H.R.R. 392; [1987] E.C.H.R. 10282/83.

There is however no need for there to be a formal finding of guilt, as shown by the case of *Minelli v. Switzerland*.³⁴ A private prosecution against journalist for defamation ended with a court decision declaring the criminal action extinguished on account of limitation (time-barred), but ordering the accused to bear certain court costs and to pay compensation to the private prosecutors in respect of their expenses. The domestic court decision reflected an opinion that he was guilty: “the incidence of costs and expenses should depend on the judgment that would have been delivered”, the newspaper article complained of would “very probably have led to conviction”. The appeal court judgment did not alter the meaning or scope of the first-instance court’s reasoning. The measures ordered against the accused were therefore incompatible with the presumption of innocence under Article 6 (2).

The case of *Allenet de Ribemont v. France*³⁵ concerned the high-profile murder of a well-known personality connected to political circles. Following intense press coverage, a suspect was arrested. The Minister of Interior and the Chief of Police gave an interview on T.V. and to journalists announcing that the murderer, namely Mr. Allenet de Ribemont, had been found and was in custody. This, the Strasbourg Court held, amounted to a breach of the presumption of innocence by public authorities labelling him as a murderer without trial. In fact, applicant was subsequently released and the police never proceeded with the charges.

The presumption of innocence does not imply however any reimbursement of costs if an accused is subsequently acquitted or criminal proceedings are discontinued³⁶.

3. *Right to silence and not to incriminate oneself*

The right to silence is an inherent facet of the presumption of innocence. The criminal law may not oblige an accused to answer questions (during the investigation) or to testify (in court). In *Saunders v. United Kingdom*³⁷ evidence (not incriminating as such) had been admitted at the applicant’s trial of transcripts of his interviews with inspectors of the Department of Trade and Industry,

³⁴ (1983) 5 E.H.R.R. 554; [1983] E.C.H.R. 8660/79.

³⁵ (1995) 20 E.H.R.R. 557; [1995] E.C.H.R. 15175/89.

³⁶ *Masson and Van Zon v. Netherlands* (1996) 22 E.H.R.R. 491; [1995] E.C.H.R. 15346/89.

³⁷ (1997) 23 E.H.R.R. 313; [1996] E.C.H.R. 19187/91.

in order to show that he was contradicting himself. At the time of his interrogation by the inspectors he was under a duty under the Companies Act to reply to the inspectors' questions on pain of contempt proceedings. The Strasbourg Court considered that the notion of a fair procedure under Article 6 (1) presupposed that the prosecution must prove its case without resort to evidence obtained through methods of coercion in defiance of the will of the accused. A violation of Article 6 (1) was found, it being recognised that the privilege against self-incrimination was "closely linked" to the presumption of innocence.

Adverse inferences: But that does not stop the law or a court from drawing adverse inferences from silence. The right to silence cannot be considered an absolute right. A British statute, as construed by the courts, provided that where conduct of the accused called for an answer, "common sense" inferences could be drawn from the accused's silence in assessing the persuasiveness of the prosecution evidence, but could not be the primary ground for conviction. This was held to be compatible with Article 6 (2) in *John Murray v. United Kingdom*³⁸ a Northern Ireland case concerning the applicant's conviction under anti-terrorism legislation. *John Murray* is to be compared with the Irish case of *Heaney and McGuinness v. Ireland*.³⁹ The applicants were arrested on suspicion of serious terrorist offences. After being cautioned by the police, they were requested under section 52 of the Offences Against the State Act, 1939 to give details about their movements at the time of the relevant offences. Each refused to answer and was convicted for this refusal. The Strasbourg Court held that the degree of compulsion imposed by the operation of section 52 in effect destroyed the very essence of the privilege against self-incrimination and the right to remain silent, despite the safeguards provided under Irish law and the security and public-order concerns invoked by the Government. This gave rise to a violation of Article 6 (1) as well as Article 6 (2).

Article 6 (1) or Article 6 (2)? Given that the right to silence is considered to lie at the heart of the notion of a fair procedure guaranteed by Article 6, cases concerning the drawing of adverse

³⁸ (1996) 22 E.H.R.R. 29; [1996] E.C.H.R. 18731/91.

³⁹ (2001) 33 E.H.R.R. 12.

inferences from silence are often dealt with by the Court solely under the general guarantee embodied in paragraph 1 rather than under the specific right to the presumption of innocence spelt out in para. 2. A recent example is *Condrón v. United Kingdom*.⁴⁰ The accused, who were heroin addicts charged with supplying and possession, were silent during police interviews. They declared at their trial in 1995 that they had been acting on the advice of their solicitor that, because of heroin withdrawal symptoms, they were not in a fit state to reply. The Strasbourg Court, considering that the inadequate direction to jury by trial judge could not be remedied on appeal, held that there had been an unfair trial in violation of Article 6 (1). The British Court of Appeal, although finding the trial judge's direction to the jury on the question of the defendant's silence deficient, had nonetheless been satisfied that the convictions were safe. In the future, in post Human-Rights-Act cases, one is likely to see the Court of Appeal having regard also to considerations going to the fairness of the trial.

Statutory presumptions: (a) At trial: Presumptions of law or fact operating against the accused, or rules shifting the burden of proof, may be compatible with E.C.H.R., in particular Article 6 (2), provided that they remain within reasonable limits. This the Strasbourg Court held in *Salabiaku v. France*.⁴¹ There was a statutory presumption - under the French customs code - that a person in possession of prohibited goods was "deemed liable" for the offence of smuggling. No violation of Article 6 (2) was found. (b) On sentencing: The Strasbourg Court has also been called on to analyse statutory assumptions that come into play at the sentencing stage. By virtue of s. 4(3) of the United Kingdom Drug Trafficking Act, 1994, a court is empowered to assume that all property held by a person convicted of a drug-trafficking offence within the preceding six years represented the proceeds of drug trafficking. A confiscation order for over £90,000 was made against the convicted applicant in *Phillips v. United Kingdom*⁴² who was liable to serve an additional period of imprisonment in the event of failure to pay. The Strasbourg Court noted that the statutory assumption served the purpose, not of

⁴⁰ (2001) 31 E.H.R.R. 1; 8 B.H.R.C. 290.

⁴¹ (1988) 13 E.H.R.R. 379.

⁴² [2001] E.C.H.R. 41087/98.

facilitating a finding of guilt, but, instead, of enabling the national court to fix the sentence. It therefore situated the facts under Article 6 (1), and not Article 6 (2). Overall it was satisfied that the application to the complainant of s. 4 (3) of the Act was confined within reasonable limits and that, in view of the attendant safeguards, the rights of the defence were fully respected. The Court did not therefore find that the statutory assumption deprived the complainant of a fair hearing in the confiscation procedure.

The privilege against self-incrimination does not apply to the production of blood, hair or other physical or objective specimens used in forensic analysis, or, as a recent British case has established, to voice samples which do not include incriminating statements but which are relied on to prove the identity of a speaker in a recording, for example a *Khan*-type recording obtained during a covert surveillance operation.⁴³

B. Right to be Informed of Charges (Article 6 (3) (a))

In *T. v. Italy*⁴⁴ the applicant was declared untraceable and then convicted of rape. There had been no proper investigation as to his whereabouts. As a result, through no fault of his own, he had received no proper notification of the prosecution. Vague and informal knowledge on his part was held to be insufficient to satisfy the requirements of the ECHR.

The basic principles attaching to the right to be informed of the charges were enunciated in another Italian case, *Brozicek v. Italy*.⁴⁵ The information given to the accused - which must be prompt and intelligible - should cover both the actual facts and their legal classification. Such notification is essential for preparing an informed defence. The relevant information must be given in a language that the accused understands. In *Brozicek* the applicant was not of Italian origin and did not reside in Italy. A letter in Italian was sent to him from the Public Prosecutor's Office. The applicant replied in German saying that he did not understand Italian and asking for information in German. He received no response from the Italian authorities. He subsequently changed address and was then

⁴³ *P.G. and J.H. v. U.K.* [2001] E.C.H.R. 44787/98.

⁴⁴ [1992] E.C.H.R. 14104/88.

⁴⁵ (1990) 12 E.H.R.R. 371.

declared untraceable. There was no evidence that Italian authorities had established that he in fact knew sufficient Italian.

In *Kamasinski v. Austria*⁴⁶ where the accused was likewise a foreigner who did not understand the language of the country, oral explanations as to the content and import of the written charges were held to be sufficient.

C. Right to Prepare One's Defence (Article 6 (3)(b))

There exists little case-law in relation to Article 6 § 3 (b), which enshrines the right to prepare one's defence. The *Kamasinski* case established that access to the official trial-court file may legitimately be restricted to the accused's lawyer (that is to say, may be denied to the accused himself).

D. Right to an Adequate Defence (Article 6 (3) (c))

1. Defendant's choice?

The wording of the clause granting the right to an adequate defence (Article 6 (3) (c)) gives rise to a problem of ambiguity, in that the use of the disjunctive "or" might suggest that the defendant has an entitlement to a choice: a right to defend oneself in person "or" through a lawyer. It is accepted, however, (and current in many continental legal systems) that in some circumstances defence by a lawyer may be made mandatory, so that the accused is deprived of the option of defending himself/herself. Nonetheless, by virtue of Article 6 (3) (c), the authorities cannot force an officially appointed counsel on an accused who can procure legal assistance for himself/herself.

2. Free communication with defence lawyer

*S. v. Switzerland*⁴⁷ established that the right for a detained person charged with a criminal offence to communicate with his/her lawyer out of hearing of other persons is inherent in Article 6 (3) (c). This has been confirmed in a recent British case, *Brennan v. United Kingdom*.⁴⁸ The applicant, an Irish national, was arrested in connection with the murder of a former member of the Ulster

⁴⁶ (1991) 13 E.H.R.R. 36.

⁴⁷ (1991), Series A, No. 220.

⁴⁸ [2001] E.C.H.R. 39846/98.

Defence Regiment. He saw his solicitor for the first time two days after his arrest, during which meeting a police officer was present. By this time he had also made a number of admissions to the police. He was ultimately found guilty of murder. On the facts, the Strasbourg Court found no fault attributable to the national authorities as regards either the delay in the accused's access to his lawyer or the circumstances in which the confession evidence had been obtained during the police interviews. But it did find that the presence of the police officer within hearing during the applicant's first consultation with his solicitor had infringed his right to an effective exercise of his defence rights, in violation of Article 6 (3)(c) read together with Article 6 (1).

3. Free legal assistance

Article 6 (3) (c) lays down two conditions for free legal assistance: (1) insufficient means and (2) the interests of justice. The criteria for establishing the interests of justice were spelt out in *Quaranta v. Switzerland*⁴⁹: (i) the seriousness of offence and the severity of the sentence risked (in the particular case, these were traffic in drugs and 3 years' imprisonment), (ii) the complexity of the case (the facts, the law, the outcome - for example where, as in *Quaranta's* case, the defendant was already on probation), (iii) the personal situation of the accused (Quaranta was young, of foreign origin, had no qualifications, and was a drug addict). The request for legal aid at first instance was refused. Quaranta's personal appearance at his trial was held insufficient by the Strasbourg Court. In other words, its assessment of the "interests of justice" differed from that of the national authorities. In *Benham v. United Kingdom*⁵⁰ the poll-tax case, the Strasbourg Court's judgment contains the dictum that where immediate deprivation of liberty is at stake, the interests of justice in principle call for legal representation.

Practical and effective assistance: The facts in *Artico v. Italy*⁵¹ were that a legal aid lawyer had been nominated but did not provide any services at all. The rights protected in the E.C.H.R. are not theoretical or illusory, but are to be interpreted and applied so that they

⁴⁹ [1991] E.C.H.R. 12744/87.

⁵⁰ (1996) 22 E.H.R.R. 293.

⁵¹ (1981) 3 E.H.R.R. 1.

are practical and effective, the Strasbourg Court declared. The accused had received no effective “assistance”. The proceedings in question were Court of Cassation proceedings, where the interests of justice required the assistance of lawyer. The responsibility of the public authorities was engaged because the failure by the legal aid lawyer was “manifest or sufficiently brought to their attention”. A violation was found. (Contrast with the *Kamasinski* judgment which expressly recognises that the public authorities cannot be held responsible for every shortcoming of a legal aid lawyer). In *Goddi v. Italy*⁵² the responsibility of the judicial authorities was more obviously engaged: by a failure to notify the officially appointed lawyer of the date of the trial hearing. The applicant, who was in custody in another connection, was convicted *in absentia*. The failure by the Italian judicial authorities, the Strasbourg Court held, deprived applicant of a “practical and effective defence”, with the consequence that Article 6 (3) (c) had been violated.

Appeal proceedings: The subject-matter of complaint in *Pakelli v. Germany*⁵³ was the refusal by the Federal Court to appoint official defence counsel to assist the accused at a hearing in an appeal on points of law. Without a lawyer, the accused was unable to make any useful contribution at the oral stage of the proceedings. He had thereby been denied proper enjoyment of his right under Article 6 (3) (c). The background to *Granger v. United Kingdom*⁵⁴ was the absence of any leave-to-appeal screening in Scotland - any accused could appeal. Granger was refused legal aid for the hearing of his appeal against conviction because the appeal was judged by the legal aid authorities - and doubtless rightly so - to be “wholly without substance”. Nonetheless, the applicant, presenting his own case, was unable fully to comprehend the arguments - whereas the other side, the Crown, was represented by counsel. The grounds of appeal were complex and he ran the risk of a heavy sentence. In these unequal circumstances, the Strasbourg Court found a violation. The upshot, not unsurprisingly, was not to make free legal aid available to anyone who chose to appeal, but that the unconditional right of appeal was removed.

⁵² (1984) 6 E.H.R.R. 457; [1984] E.C.H.R. 8966/80.

⁵³ (1984) 6 E.H.R.R.; [1983] E.C.H.R. 8398/78.

⁵⁴ (1990) 12 E.H.R.R. 469; [1990] E.C.H.R. 11932/86. Confirmed in *Maxwell v. U.K.* (1995) 19 E.H.R.R. 97; [1994] E.C.H.R. 18949/91 and *Boner v. U.K.* (1995) 19 E.H.R.R. 246; [1994] E.C.H.R. 18711/91.

E. Right to Examination of Witnesses (Article 6 (3) (d))

As stated earlier, the E.C.H.R. does not lay down for the national courts any specific rules on the taking or admissibility of evidence. What it does is to impose an overall requirement of fairness, including equality of arms, as illustrated by the Viennese butcher's case referred to above.⁵⁵

F. Right to Free Assistance of an Interpreter (Article 6 3 (e))

Just how far the right to the free assistance of an interpreter extends was an issue to come before the Strasbourg Court in one of its earliest cases, *Luedicke, Belkacem and Koç v. Germany*⁵⁶ the defendants were ordered by the German courts to pay prosecution costs, including interpretation, once convicted. The Strasbourg Court had to determine the meaning of "free". The German courts had taken the approach that the interpretation had been free as long as the applicants were "accused", but that, once convicted, they ceased to benefit from the protection of Article 6 (3) (e). The Strasbourg Court took a less sophisticated line: "free" means free; Article 6 (3) (e) grants neither a conditional remission, nor a temporary exemption, nor a suspension, but a once-and-for-all exemption or exoneration. Otherwise there is a risk, on the part of the accused, of declining interpretation for fear of financial consequences in the event of conviction.

The *Kamasinski* judgment established that entitlement is not limited to oral proceedings at the trial, but extends to interpretation or translation of all documents or statements which are necessary for the accused to understand in order to have a fair trial; in other words, it covers the pre-trial phase as well.

IX. CONCLUSION

As can be seen from the foregoing simplified survey of the Strasbourg case-law, there is nothing in Article 6 that is alien to the Irish legal tradition. Nonetheless, if the British experience is to be taken as a comparable guide for Ireland, Article 6 cannot simply be

⁵⁵ *Bönisch v. Austria* (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79.

⁵⁶ (1980) 2 E.H.R.R. 433; [1980] E.C.H.R. 6210/73.

slotted into domestic law on criminal procedure without some adaptation of the existing rules. The governing principle of Article 6, which has to be integrated into the domestic law of criminal procedure, is of a fair hearing; whereas in the United Kingdom, up till the entry into force of the Human Rights Act, the yardstick applied by appeal courts for overturning or not a conviction was whether the conviction was safe. The two logics are very similar and overlapping but they may not necessarily coincide 100 per cent, as evidenced by some of the recent British cases to come to Strasbourg.

The basic conclusion is therefore that the absorption of Article 6 E.C.H.R. (under its criminal head) into Irish law should not pose any great problems, in principle or in practice, for Irish courts.