



Uniwersytet
Wrocławski

EU Criminal Law

Lecture **Criminal Procedure and Courts 4**

Dr hab. Wojciech Jasiński
Department of Criminal Procedure
Faculty of Law, Administration and Economics
University of Wrocław

Right to a fair trial

Article 6 par. 3 c

Right of the suspect and accused to:

- 1) defend in person or**
- 2) through legal assistance of his own choosing or,**
- 3) if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require**



Right to a fair trial

- ❑ Article 6 para. 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain **whether the method they have chosen is consistent with the requirements of a fair trial**. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that **assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused**.
- ❑ Applicable at every stage of proceedings (not exclusively at trial in court)

Right to a fair trial

- The guarantees of Article 6 are applicable from the moment that a “criminal charge” exists within the meaning of this Court’s case-law (see paragraph 249) and may therefore be relevant **during pre-trial proceedings** if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them. The investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial and national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings.

Right to a fair trial

- ❑ An accused may therefore find himself in a particularly vulnerable position at that stage of the proceedings, the effect of which may be amplified by increasingly complex legislation on criminal procedure, notably with respect to the rules governing the gathering and use of evidence.
- ❑ The manner in which Article 6 paras. 1 and 3 (c) is to be applied **during the preliminary investigation** depends on the special features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case

Right to a fair trial

❑ Right to defend oneself

Article 6 §§ 1 and 3 (c) thus guarantees that proceedings against the accused will not take place without adequate representation for the defence, but it **does not necessarily give the accused the right to decide himself in what manner his defence should be assured**. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, **depends upon the applicable legislation or rules of court**.

Right to a fair trial

❑ Right to defend oneself

The decision whether to allow an accused to defend himself or herself in person without the assistance of a lawyer or instead to assign a lawyer to represent him or her falls within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.

Right to a fair trial

❑ Right to defend oneself

Requiring compulsory representation by a registered lawyer is a measure taken in the interests of the accused, and is designed to ensure the proper defence of his or her interests in the criminal proceedings. The domestic courts are therefore entitled to consider that **the interests of justice require the compulsory appointment of a lawyer. In coming to that conclusion, the Court has regard to the margin of appreciation** and may also take into account the terms of the relevant domestic legislation, which may empower or oblige the competent court to appoint a lawyer, even against the accused's wishes (if there are justified grounds e.g. complexity of the case, gravity of charges)

Right to a fair trial

❑ Right to defend oneself

The object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraphs (c) and (d) of paragraph 3 guarantee to “everyone charged with a criminal offence” the right “to defend himself in person” and “to examine or have examined witnesses”, and **it is difficult to see how these rights could be exercised without the person concerned being present.**

Right to a fair trial

❑ Right to defend oneself

Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him in accordance with the requirements of Article 6 a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself.

Right to a fair trial

❑ Right of access to a lawyer

The right of everyone “charged with a criminal offence” to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is **one of the fundamental features of a fair trial**.

The protections afforded by Article 6 §§ 1 and 3 (c), which lie at the heart of the present case, apply to a person subject to a “criminal charge”, within the autonomous Convention meaning of that term. A “criminal charge” exists **from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.**

Right to a fair trial

❑ Right of access to a lawyer

The aims pursued by the right of access to a lawyer include the following:

- ✓ prevention of a miscarriage of justice
- ✓ equality of arms between the investigating or prosecuting authorities and the accused;
- ✓ counterweight to the vulnerability of suspects in police custody;
- ✓ fundamental safeguard against coercion and ill-treatment of suspects by the police;
- ✓ ensuring respect for the right of an accused not to incriminate him/herself and to remain silent,
- ✓ access to information about procedural rights



Right to a fair trial

❑ Right of access to a lawyer

Early access to a lawyer as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting **the particular vulnerability of an accused at the early stages of the proceedings, when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved.** Any exception to the enjoyment of this right 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.**

Right to a fair trial

❑ Right of access to a lawyer

Suspects must be able to **enter into contact with a lawyer from the time when they are taken into custody**. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview. The lawyer must be able to confer with his or her client in private and receive confidential instructions.

Suspects have **the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings**. Such physical presence must enable the lawyer to provide assistance that is effective and practical rather than merely abstract. and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced.



Right to a fair trial

❑ Right of access to a lawyer

Having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, **restrictions on access to a lawyer are permitted:**

- only in exceptional circumstances,
- must be of a temporary nature and
- must be based on an individual assessment of the particular circumstances of the case.

A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. **The fact that there is a general and mandatory restriction on the right of access to a lawyer, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.**



Right to a fair trial

❑ Right of access to a lawyer

Where a respondent Government have convincingly demonstrated the existence of an **urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case**, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention.

The absence of compelling reasons did not lead in itself to a finding of a violation of Article 6. Whether or not there are compelling reasons, it is necessary in each case to view the proceedings as a whole.



Right to a fair trial

❑ Right of access to a lawyer

When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, should, where appropriate, be taken into account:

- (a) whether the applicant was particularly vulnerable, for example by reason of age or mental capacity;
- (b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;
- (c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;



Right to a fair trial

❑ Right of access to a lawyer

- (d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
- (e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
- (f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
- (g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;



Right to a fair trial

❑ Right of access to a lawyer

- (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter;
- (i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
- (j) other relevant procedural safeguards afforded by domestic law and practice.



Right to a fair trial

❑ Right of access to a lawyer

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from **waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.**

However, such a waiver must, if it is to be effective for Convention purposes, be:

- established in an unequivocal manner;
- it must not run counter to any important public interest,
- it must be attended by minimum safeguards commensurate with its importance.



Right to a fair trial

❑ Right of access to a lawyer

The right to counsel, being a fundamental right among those which constitute the notion of a fair trial and ensuring the effectiveness of the rest of the guarantees set forth in Article 6 of the Convention, is **a prime example of those rights which require the special protection of the “knowing and intelligent waiver” standard established in the Court’s case-law.**

In applying this standard, it is implicit that suspects must be aware of their rights, including the right of access to a lawyer.

A suspect cannot be found to have waived one’s right to legal assistance if one has not promptly received information about this right after arrest.



Right to a fair trial

- ☐ **Right of access to a lawyer**

Leading cases:

Salduz v. Turkey

Ibrahim and Others v. the United Kingdom

Simeonovi v. Bulgaria

Beuze v. Belgium

Doyle v. Ireland



Right to a fair trial

❑ Right to a lawyer of one's own choosing

Although, as a general rule, the accused's choice of lawyer should be respected, **the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.**

For instance, the special nature of the proceedings, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations.

(e.g. special lawyers representing accused person in front of Cassation Court in France)



Right to a fair trial

❑ Right to a lawyer of one's own choosing

Relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, **it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (avoiding abuse of trial rights, promoting speedy resolution of a case).**



Right to a fair trial

❑ Right to a lawyer of one's own choosing

The first step should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation.

Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including:

- the nature of the proceedings and the application of certain professional requirements;



Right to a fair trial

❑ Right to a lawyer of one's own choosing

- the circumstances surrounding the designation of counsel and the existence of opportunities for challenging this;
- the effectiveness of counsel's assistance;
- whether the accused's privilege against self-incrimination has been respected;
- the accused's age;
- the trial court's use of any statements given by the accused at the material time).



Right to a fair trial

❑ Legal aid

The right to legal aid, is subject to two conditions, which are to be considered cumulatively:

- the accused must show that he lacks sufficient means to pay for legal assistance,
- the Contracting States are under an obligation to provide legal aid only “where the interests of justice so require” – criteria: e.g. the seriousness of the offence and the severity of the penalty at stake, personal situation of the accused (possibility of undertaking effective defence).



Further reading:

Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) – p. 78-87

<https://prawo.uni.wroc.pl/node/45303>