

The right to fair proceedings

PARTICULAR ASPECTS OF THE RIGHT TO A FAIR TRIAL - PART II

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RIGHT TO AN 'ORAL HEARING'

The ECtHR has consistently stated that in proceedings before a court of first instance where there is no opportunity to appeal, the right to a 'public hearing' implies a right to an 'oral hearing,' except when special and exceptional circumstances justify such a hearing not being held.

(See, *ex multis*, *Fischer v. Austria*, Judgment of 26 April 1995; *Salomonsson v. Sweden*, Judgment of 12 November 2002)

RIGHT TO AN 'ORAL HEARING'

- ✘ For example, in cases concerning social security schemes, where the issues in dispute are technical, the ECtHR held that that the dispute may be better decided by written proceedings, and that regularly holding oral hearings could even represent an obstacle to the efficacy of justice in such cases

(Fexler v. Sweden, Judgment of 13 October 2011)

RIGHT TO AN 'ORAL HEARING'

The right to a public and oral hearing can also be waived by the concerned party, provided that the waiver is unequivocal. This principle has been repeated by the ECtHR in several decisions.

(See, for example, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993)

ADMISSION AND ASSESSMENT OF EVIDENCE

“It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 para.”

(*Mantovanelli v. France*, Judgment of 18 March 1997, paragraph 34)

ADMISSION AND ASSESSMENT OF EVIDENCE

- ✘ In *Kerojärvi v. Finland* (Judgment of 19 July 1995) concerning a request by the applicant for compensation for injuries the ECtHR found that Article 6(1) had been violated because the applicant had not been given the possibility to examine certain documents in the case file.

ADMISSION AND ASSESSMENT OF EVIDENCE

Most of the ECtHR case law on evidence and fair trial concern criminal cases (for example, in matter of illegal conversations interception and recording, right to silence and to not incriminate oneself, evidence collected through coercion or violence, etc.)

RIGHT TO A JUDGMENT PRONOUNCED PUBLICLY

Unlike the right to an oral hearing, which may be subject to some exceptions, the right to a judgment pronounced publicly has – according to the ECtHR, no exception.

(Campbell and Fell v. The United Kingdom, Judgment of 28 June 1984)

RIGHT TO A JUDGMENT PRONOUNCED PUBLICLY

In any case, according to the Court, ‘pronounced publicly’ does not necessarily imply that a judgment must be ‘read aloud’ and delivered in a courtroom. Indeed, the principle of ‘publicity’ is meant to protect litigants against the administration of justice in secret.

RIGHT TO A JUDGMENT PRONOUNCED PUBLICLY

Depending on the specific characteristics of the proceedings, in order to respect such principle it is sufficient that courts' decisions are made available to the public by any other means; for example, by depositing them in the court registry.

(See *Pretto v. Italy*, Judgment of 8 December 1983)*

* The applicants complained that the judgment of 19 October 1976 of the Italian Court of Cassation had not been pronounced publicly

RIGHT TO A JUDGMENT PRONOUNCED PUBLICLY

Unlike criminal proceedings, where all final judgments are read in public, in many countries civil proceedings are finalized with a judgment which is deposited with the Registry, and then served on the parties.

EQUALITY OF ARMS

Each party to the proceedings ‘shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent.’

(Ankerl v. Switzerland, Judgment of 23 October 1996, para 38)

EQUALITY OF ARMS

- ✘ The principle of equality of arms is, therefore, strongly connected with the right to adversarial proceedings, according to which each party must be granted the possibility to have knowledge and comment on the evidence adduced and on the observation filed by the other party.

EQUALITY OF ARMS

- ✘ In *Dombo Beheer v. The Netherlands* (Judgment of 27 October 1993), the ECtHR pointed out that the requirements of a fair hearing are not necessarily the same in civil cases and in criminal cases, due to the absence of specific provisions for civil cases, such as paragraphs 2 and 3 of Article 6.

EQUALITY OF ARMS

In this case, the applicant complained that his right to a fair trial had been impaired by the domestic court not allowing him to call as witness in a civil case his former managing director, while the other party was permitted to call as witness the branch manager of the bank.

The ECtHR concluded that Article 6 was violated.

EQUALITY OF ARMS AND LEGAL AID

- ✘ In *Steel and Morris v. The United Kingdom* (Judgment of 15 February 2005), the ECtHR, while confirming the established jurisprudence according to which there is no general obligation on States to grant legal aid, affirmed that in some cases its lack can lead to the infringement of the principle of equality of arms.

EQUALITY OF ARMS AND LEGAL AID

“the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald’s (...) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.

(Steel and Morris v. The United Kingdom, Judgment of 15 February 2005, para 69)

EQUALITY OF ARMS AND LEGAL AID

“The denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald’s.”

(Steel and Morris v. The United Kingdom, Judgment of 15 February 2005, para 72)

ADVERSARIAL PROCEEDINGS

- ✘ Although this principle is mainly examined by the ECtHR with regard to criminal proceedings (for example: disclosure of evidence by prosecution office), there can be also found interesting cases relating to civil proceedings.

ADVERSARIAL PROCEEDINGS

- ✘ In *Krcmar and Others v. The Czech Republic* (Judgment of 3 March 2000), concerning a lawsuit filed against the State for restitution of nationalized property, the applicants filed a claim against the Ministry for Administration of National Property and its Privatization for the restitution of a Company.

ADVERSARIAL PROCEEDINGS

- ✘ The applicants' claim was rejected by the Prague 1 District Court (obvodní soud), then dismissed by the Prague Municipal Court (me.stský soud) and by the High Court (Vrchní soud).
- ✘ Then the applicants filed a constitutional appeal, alleging the violation of the Charter of Fundamental Rights and Freedoms and challenging the decision of the ordinary courts.

ADVERSARIAL PROCEEDINGS

- ✘ On 2 October 1996, the Constitutional Court, after a public hearing, dismissed the applicants' appeal, on the basis of documentary evidence collected during the proceedings and never shown during the hearing.

ADVERSARIAL PROCEEDINGS

- ✘ The ECtHR considered that the acquisition of additional evidence by the Constitutional Court on its own motion did not violate, *per se*, the right to a fair hearing.
- ✘ However, the Court found a violation of the right to adversarial proceedings, because none of the parties had the opportunity to have knowledge of, and comment on, all evidence adduced or observations filed in the proceedings.

INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

Another key guarantee under Article 6(1) is the right to an independent and impartial tribunal established by law.

TRIBUNAL

‘Tribunal’ in the meaning of the Convention?

- Exercise of judicial functions
- Independent from the executive and from the parties to the case
- Duration of its members’ terms of office
- Existence of guarantees afforded by its procedure
- ‘appearance of independence’

TRIBUNAL

In *Campbell and Fell v. The United Kingdom*, (Judgment of 28 June 1984) concerning certain proceedings before the Prison Board of Visitors, the ECtHR reaffirmed that such body – when carrying out its adjudicatory tasks – can be considered a ‘tribunal established by law’.

INDEPENDENCE

As far as the ‘appearance’ of independence, in *Delcourt v. Belgium*, Judgment of 17 January 1970, the ECtHR had already stressed the importance of the dictum ‘justice must not only be done; it must also be seen to be done.’

INDEPENDENCE

The circumstance that the duty term of tribunals' members is limited or particularly short (as in the *Campbell and Fell* case – three years) does not itself constitute a lack of independence when it is fixed and predetermined.

INDEPENDENCE

In *Beaumartin v. France* (Judgment of 24 November 1994) the ECtHR remarked that if a tribunal can refer a question of interpretation of the law to the executive (in the case at hand, it was also one of the parties), the guarantee of independence is not satisfied.

INDEPENDENCE

Similarly, in *Van de Hurk v. The Netherlands* (Judgment of 19 April 1994) the ECtHR remarked that the requirement of independence is not fulfilled when the executive (in that case, the Crown) can decide whether or not to implement a judgment of a tribunal.

IMPARTIALITY

The ECtHR has repeatedly stated that the personal impartiality of members of a ‘tribunal’ must be presumed until there is proof to the contrary (cf., ex multis, *Campbell and Fell v. The United Kingdom*)

IMPARTIALITY

“Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 §1 of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.”

(Piersack v. Belgium, Judgment of 1 October 1982, para 30)

IMPARTIALITY

- ✘ The issue of lack of impartiality mainly arises in criminal proceedings.
- ✘ For example, racial bias, personal beliefs and opinion of a judge towards people belonging to a certain ethnic group, or religion, etc.

IMPARTIALITY

‘It is of fundamental importance in a democratic society that the courts inspire confidence in the public...’

(*Gregory v. The United Kingdom*, Judgment of 25 February 1997, para 47)

ESTABLISHED BY LAW

The court system of a State and the specific judicial body must be regulated by law and not left to discretionary acts of the executive or of the judicial authorities.

(See, ex multis, *Coëme and Others v. Belgium*, Judgment of 22 June 2000)

ESTABLISHED BY LAW

A second aspect is that also the composition of the specific court must be set in accordance to the law.

However, courts have some margin of discretion in interpreting the relevant national legislation.

ESTABLISHED BY LAW

According to the ECtHR case law, ‘the phrase established by law covers not only the legal basis for the very existence of a tribunal but also the composition of the bench in each case’.

(Posokhov v. Russia, Judgment of 4 March 2003)

LENGTH OF PROCEEDINGS

The right to a decision within a reasonable time serves the function of protecting civil litigants and criminal defendants against excessive delays in legal proceedings, and to underline the importance of rendering justice without delays.

LENGTH OF PROCEEDINGS

In civil proceedings the time of commencement ‘begins to run from the moment the action was instituted before the tribunal’.

(Erkner and Hofauer v. Austria, Judgment of 24 March 1987, para 64)

LENGTH OF PROCEEDINGS

However, the ECtHR has noted that:

‘It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.’

(Golder v. The UK, Judgment of 21 February 1975, para 32)

LENGTH OF PROCEEDINGS

For example, in *E.P. v. Italy* (Judgment of 16 November 1999), the period considered by the ECtHR started on 26 October 1988, when the Rome Youth Court ordered the temporary placement of a minor with the applicant's brother's family, and ended on 24 October 1995 when the Court of Cassation's Judgment of 7 June 1995 was deposited with the registry.

LENGTH OF PROCEEDINGS

The ECtHR also noted that Article 6(1) ‘imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet the requirements of this provision’.

(*Bottazzi v. Italy*, Judgment of 28 July 1999, para 22)

LENGTH OF PROCEEDINGS

The high number of judgments against Italy led the Italian legislator to the adoption of a special law against delays in proceedings (so called 'Legge Pinto'), which entitled victims of unjustified delayed proceedings to the right of compensation.

LENGTH OF PROCEEDINGS

However, the ECtHR observed that the compensation awarded by the Italian government under the new law was not fully satisfactory, due to the relatively insignificant sums awarded as compensation, or because further delays followed, in the stage of executing the decisions.

(Apicella v. Italy, [Grand Chamber], Judgment of 29 March 2006)

LENGTH OF PROCEEDINGS

The reasonableness of the timeframe required to fully adjudicate a case is conducted on a case by case basis according to the factual circumstances presented by each case.

LENGTH OF PROCEEDINGS

In order to assess when time is 'reasonable', the ECtHR has laid down the following criteria:

- the complexity of the case
- the conduct of the parties and of the State authorities
- the importance of what was at stake for the applicant.

(*Veliyev v. Russia*, Judgment of 24 June 2010; *Uhl v. Germany*, Judgment of 10 February 2005; *Pélissier and Sassi v. France*, (Grand Chamber), Judgment of 25 March 1999)

LENGTH OF PROCEEDINGS (CONDUCT OF THE PARTIES)

For example, in *Vernillo v. France*, the ECtHR noted that ‘the parties showed little alacrity in filing their submissions’ and that they ‘did much to prolong the proceedings’, and concluded that no breach of Article 6(1) with respect of the reasonableness of length of proceedings had occurred.

(*Vernillo v. France*, Judgment of 20 February 1991, para 34)

LENGTH OF PROCEEDINGS (CONDUCT OF THE PARTIES)

Similarly, in *Proszak v. Poland*, the ECtHR found no violation of Article 6, noting that the applicant groundlessly challenged the reporting judge on three occasions, failed to attend the hearings, only some of which were justified by her state of health, and refused to attend for the third psychiatric examination, which ‘contributed decisively to slowing down the proceedings’.

(*Proszak v. Poland*, Judgment of 16 December 1997, para 40)

LENGTH OF PROCEEDINGS (CONDUCT OF THE STATE AUTHORITIES)

However, the domestic courts are not exempted from organizing their judicial system in a way that ensures compliance with the right to a decision in a reasonable time.

(*Neves e Silva v. Portugal*, Judgment of 27 April 1989, paras 44-46; *Manieri v. Italy*, Judgment of 27 February 1992, paras 18-19)

LENGTH OF PROCEEDINGS (THE IMPORTANCE OF WHAT IS AT STAKE)

In a case where the proceedings – regarding the applicant’s entitlement to a disability pension - the ECtHR considered that Article 6 was violated.

(Stamoulakatoes v. Greece, Judgment of 26 November 1997, para 39)

LENGTH OF PROCEEDINGS (COMPLEXITY OF THE CASE)

A case can be considered complex, according to the ECtHR, when it involves a greater depth of issues or concerns numerous factual circumstances to be determined, or as consequence of the legal complexity due to the application of a fresh piece of legislation.

RIGHT TO A REASONED JUDGMENT

- ✘ The right to a fair hearing pursuant to Article 6 places an affirmative duty on a court, tribunal or jury to provide reasoned judgments, specifically a judgment that adequately outlines the legal and factual basis of the decision.

RIGHT TO A REASONED JUDGMENT

- ✘ A final reasoned judgment provides the parties protection from arbitrary decisions veiled behind ambiguous and incomplete reasoning, in that the parties should be provided with all the data needed to make a fully informed decision regarding whether to lodge an appeal or not.

RIGHT TO A REASONED JUDGMENT

The ECtHR pointed out that the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6, can only be determined in the light of the specific circumstances of the case (*Ruiz Torija v. Spain*, judgment of 9 December 1994), depending – inter alia – on the differences existing in the Contracting States with regard to statutory provisions, customary rules, case law, etc. (*Suominen v. Finland*, Judgment of 1 July 2003).