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Fair Trial Rights

Training manual on Article 6 of the ECHR for Macedonian judges and prosecutors

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The content of the present Manual reflects the views of its authors and not necessarily those of the Council of Europe and the European Union.

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INTRODUCTION

How to use this Manual

This Manual has been developed within the framework of the Project "Increasing judicial capacity to safeguard human rights and combat ill-treatment and impunity "CAPI", running from December 2016 to May 2018 as part of the Horizontal Facility for the Western Balkans and Turkey. The latter is a co-operation framework of the Council of Europe and the European Union aiming at supporting South East Europe and Turkey to comply with European standards. With this project the Council of Europe, as the leading European Institution in promoting and setting European human rights standards and practices, intends to contribute to the efforts of the country to strengthen the capacities of legal professionals to safeguard human rights and combat ill-treatment and impunity.

One of the objectives of the Project is to increase the knowledge and skills of the judiciary (Judges and Prosecutors) in investigating and adjudicating cases where deprivation of liberty or allegations of torture or inhuman or degrading treatment are at stake. The present Manual is one of the outputs produced by the Project, namely training manuals on articles 3 and 5 (both civil and criminal limbs) ECHR, reasoning of judgments, adult training methodology and techniques, as well as a moot court scenario and instructions on how to run this type of activity.

The idea was to make available to the Academy of Judges and Prosecutors material to be used for in-person pre and in-service training of Judges and Prosecutors to enable them to apply human rights principles and norms in the exercise of their daily professional activities. The ultimate goal of these educational resources and activities is to strengthen the protection of human rights in and through domestic legal procedures.

This Manual aims to assist current and future trainers of the Academy of Judges and Prosecutorsin delivering pre and in-service training on article 6 ECHR. Its use requires, as a prerequisite, that trainers familiarise themselves with the principles of adult education and training methodologies and techniques illustrated in the Manual on Training Methodology developed under the same Project. The present work is in fact based on a training methodology that encourages participants to play an active role, contributing their professional expertise to the joint study of how to apply international human rights standards effectively. The idea around which it was developed is that of co-operative learning, when people learn through working together to seek outcomes that are beneficial both to themselves and to all members of the group. In addition to favouring ownership of knowledge and skills, co-operative learning promotes higher achievement and greater productivity, and greater social competence and internalization of results. The activities proposed in this manual require great participation and engagement: resistance can only be overcome if there is a supporting environment which is perceived as not judgmental and focuses on processes rather than final solutions.

In terms of substance, use of this work requires a solid understanding of the Convention system and its principles of interpretation. This, of course, in addition to specific knowledge of the subject matter, that cannot be confined to the information provided in this manual. The suggested readings indicated, thus, represent the essential minimum in order to run the course.

As always, it is for the facilitators to use their experience and talents to guide the audience through the course and at all times assess and reassess the needs of the participants. Accordingly, the materials proposed can and should be used with a substantial degree of flexibility: presentations, examples, case studies and role plays may need to be tailored and customized to reflect relevant legal systems and address issues of particular interest.

The present manual is structured as follows:
CHAPTER 1 offers material and guidance for running, at a minimum, a 2-day course (general module) for candidate judges and prosecutors (pre-service training);
CHAPTER 2 concerns a 1-day training (specific module) within the context of continuous training on article 6 ECHR, focused on reasoning of judgments and evidentiary matters. It goes without saying that the specific module requires, as a prerequisite, the knowledge of the main features of article 6 ECHR as well as the principles of interpretation of the ECHR.
Annex 1 is comprised of the materials needed to be printed and distributed to the participants (case facts as specified in each Unit).
Annex 2 contains the PPT presentations the trainers can use during the work on different Units, as specified in the Instructions.
The case references throughout the text can be used by the trainers for further reading or to provide participants with them if asked, but the focus should be on the content rather than on listing the names of the cases during the sessions.

Each unit contains guidance for the organization of the sessions, including opening and closing, as well as self-assessment exercises. Additional training aids such as questions for discussion, planning charts, exercises, case studies and role plays are also available. These tools should in no way limit the facilitator's freedom to introduce other useful and thought-provoking questions and exercises, provided that they are aimed at meeting the learning objectives of the various sessions. The proposed questions are merely indicative of what can be asked. There may well be occasions when some facilitators will find it difficult to put too direct a question to the participants and when it might be preferable, in order to obtain the same results, to ask questions in a more indirect way.

The time allocated to each session is indicative but not final, as it might be influenced by the response or interest of the audience, also in relation to recent cases or developments. Exceptionally, the exercises presented in the manual may be too complex. In such situations, it is the task of the trainers the needs of the participants and to adjust the material provided so that it is adequate and

meaningful to them at that time.

The training proposed for the pre-service training is to be complemented with the moot court that was developed under the present Project on articles 3, 5 and 6 and which is presented as a separated output, together with an accompanying guidebook on how to run this type of exercise.

Keys to symbols and headings used to present activities

 **Time** provides a general indication of the time needed to run the whole activity, including the debriefing and discussion, when applicable. You will need to make your own estimate of how much time you will need: for instance, if you are working with many small groups reporting back to plenary, then you will have to allow more time for each to feedback. If the group is large, then you will need to allow time for everyone to have an opportunity to contribute to the debriefing and evaluation.

 **Methodology and instructions** for how to run the activity.

CHAPTER 1 - GENERAL MODULE

Course specifications

1. Course title	**Fair Trial Rights** *Article 6 of the ECHR - General module*
2. Key thematic areas	Article 6 – general considerations Key concepts – civil rights and obligations, criminal charge General guarantees: - Access to a court - Institutional requirements (tribunal established by law, independent and impartial) - Procedural requirements (fairness – administration of evidence, reasoning of decisions; public hearing and public delivery of judgments; reasonable length of proceedings) Specific guarantees: - The presumption of innocence (burden of proof, presumptions of fact and law, prejudicial statements) - The rights of the defence (information about the charge, adequate time and facilities, right to defend oneself in person or through legal assistance, right to examine and have examined witnesses, right to an interpreter)
3. Course type	In-person training course
4. Course level	Initial general training
5. Course duration	2 days (12 hours) Day 1 - 10 AM to 17.30 PM, with two coffee breaks (15' each) and one lunch break (1h) Day 2 – 10 AM to 17.30 PM, with two coffee breaks (15') and one lunch break (1h)
6. Target group	Mainly candidate judges and prosecutors, but certain sections can be used in training for experienced judges and prosecutors
7. Knowledge level	Basic (in general HR aspects)
8. Learning objectives	General: —To provide information on international human rights sources, systems, standards and issues relevant to the work of the target profession; —To encourage the development of skills, and the formulation and

	application of policies, necessary to transform that information into practical professional behaviour; —To sensitize participants to their particular role in protecting and promoting human rights and their own potential for affecting human rights in their daily work. - To understand the human rights principles, institutions, processes and practices, issues and methods Course specific: - Familiarise with the human rights standards concerning fair trial; - Understand the inherent obligations and the way they should be implemented; - Understand the application in the national system of the standards reviewed - Receive a detailed perspective on the fair trial standards and their applicability at national level - Understand the interplay between various standards - Understand the hierarchy between international and national frameworks and apply it coherently - Make use of the information received in their daily work - Know where to search for more in-depth information and use the resources provided
9. Methodology	Ice-breaking exercise, PPT based presentations, case-studies, hypos, group exercises, opinion polls, trainer animated debates, assessment tests
10. Resources	For participants (resources docket delivered to participants for the training): - PPTs in print version - Evaluation test - Case studies handout - Practical application handout
	For the trainer: - Course curriculum and specification - sample PPts - evaluation test (with correct answers in italics) - ECHR case-law guides on Article 6 - Training methodology manual
11. Logistical requirements	Training room Projector and laptop Internet connection Computer facilities for participants (for Module IV – exercise) Flipchart

	Board Paper, markers, highlighters Printouts
12. Stimuli	Certification Prerequisite for participation to other in-person advanced or thematic HR training
13. Course tutors	Profile: —Expertise in the subject matter; —Ability to apply the interactive methodology of the programme; —Professional credibility and appropriate reputation among other practitioners
	Role (2 trainers per training session): - Deliver presentations of content - Animate debates on topics of interest - Guide the participants through the practical applications - Reply to questions - Prepare the support materials and the points for discussion
14. Course components	Course intro Brief presentation of the trainers and division of tasks, presentation of the structure of the seminar
	Substantive content Brief presentations - PPT based Mirror structure of content international/national to highlight both perspectives and allow for identifying the similarities/differences Open questions for diversification, opinion polls
	Practical applications Case-studies, group exercise, opinion polls, station technique
	Assessment Pre and post module tests (multiple choice): - a series of multiple choice questions will be given to the participants before starting the presentations on the content (10 questions); they will receive their score at the end of the module, the same test is given to the participants and they will see their score and be able to also see which were the correct answers and whether their score improved from the initial to the final test.
15. Course evaluation	Pre-evaluation Course trial by tutors, adaptation after ToT
	Post evaluation Feedback questionnaire to be filled in by the participants at the end of

	the course

General structure

General module		
Unit I	Introduction	45 min
Unit II	General guarantees of Article 6	5h 15min
Unit III	Specific guarantees - Presumption of innocence	1h 20min
Unit IV	Specific guarantees - The rights of the defence	2h 40min
Unit V	Practical application	1h 30min
Unit VI	Closure	30 min

Structure of the units

Unit I

Unit I Introduction Duration: 45 min		
Step 1 10 min	Introduction of participants	Welcoming speech Presentation – tour de table
Step 2 10 min	Pre-course evaluation	QCM of 10 questions, correction at the end of the training course
Step 3 15 min	Ice-breaking exercise	Questions poll – each participant writes down a Q to which they seek clarification, exposed on a board and to which the trainer will refer whenever the topic is reached during the training
Step 4 10 min	Introduction of the course	Brief opening on the ECHR system and the importance of Article 6

Unit II

Unit II General guarantees of Article 6 Duration: 5h 15 min	
Step 1 45 min	Article 6 Applicability and key concepts

	Brief introduction The nature of Article 6 (the procedural safeguard of the ECHR, circumstantiated right, main principles) • Applicability • Civil rights and obligations • Criminal charge National context
Step 2 45 min	General Guarantees A. RIGHT OF ACCESS TO A COURT
Step 3 45 min	General guarantees B. INSTITUTIONAL REQUIREMENTS 1. Tribunal 2. Established by law 3. Independence and impartiality National context Case-study on indep/impartiality
Step 4 3h	General guarantees C. PROCEDURAL REQUIREMENTS 1. Fairness a) Equality of arms and adversarial proceedings b) Reasoning of judicial decisions c) Right to remain silent and privilege against self-incrimination d) Evidentiary matters e) Entrapment 2. Public hearing and public delivery of the judgments 3. Reasonable length of proceedings National context

Unit III

Unit III Specific guarantees – the presumption of innocence 1h 20 min	
Step 1 1h	Specific guarantees PRESUMPTION OF INNOCENCE (1) Burden of proof (2) Presumptions of fact and of law (3) Scope of Article 6 § 2 (4) Prejudicial statements National context

Step 2 20 min	Practical application - Prejudicial statements

Unit IV

Unit IV Specific guarantees – the rights of the defence 2h 40 min	
Step 1 5 min	Introductive remarks
Step 2 30 min	Information About The Charge
Step 3 15 min	Adequate Time And Facilities
Step 4 30 min	Right To Defend Oneself In Person Or Through Legal Assistance
Step 5 45 min	Right To Examine Or Have Examined Witnesses
Step 6 5 min	Right To An Interpreter
Step 7 30 min	National context Relevant practice

Unit V

Unit V Practical exercise 1h 30 min	
10 min – instructions, division in groups, reading and preps 30 min – group work step I 20 min – group work step II 30 min – presentations of work	Group exercise based on *Gafgen v Germany* Group divided in 4 groups, 2 for App, 2 for Gvt Asked to build arguments in favour of their party, then submissions are swapped and they are asked to respond.

Unit VI

Unit VI Closure 30 min		
Step 1 15 min – test, correction and feedback 5 min – Q poll	Evaluation	Post-course evaluation test Feedback Status of questions poll and further steps
Step 2 5 min – speech 5 min – evaluation form	Closure	Closure speech with sum up of main goals and conclusions Course evaluation

Course content

Unit I - Introduction

45 minutes

Step 1 - Introduction of the participants

10 minutes

Methods: Presentation – tour de table (can be combined with Step 2 in case of time constraints, allocate 20 minutes for the total)

INSTRUCTIONS FOR THE TRAINER

- *the group is given 5 minutes to think of a question/issue related to Article 6 they would like to have clarified during the training (impose short questions) and write it down on a piece of paper*
- *each participant presents him/herself and then reads out the question, while the trainer pins the paper to the board (or writes it down on the board)*

Step 2 - Ice-breaking exercise

10 minutes

Method: questions poll

INSTRUCTIONS FOR THE TRAINER

- *each participant writes down a question to which they seek clarification during the seminar*

- *the trainer will make an expectations board, where the issues raised are listed and to which the trainer will refer whenever the topic is reached during the training*
- *this step can also be combined with Step 1, in this case, allocate 20 minutes for the two steps combined*

Step 3 - Pre-course evaluation

🕘 15 minutes
Method: QCM of 10 questions

INSTRUCTIONS FOR THE TRAINER

- *test to be distributed to the participants in prior (Annex 1 - Materials for print). The correct answers are in italics below.*
- *explain to the participants that this is a self assessment and they are required to keep the test with the initial choices until the end of the training, when they can take it again and the correct replies will be discussed; the trainer can also mention to them that if ever during the training they change their mind about a reply, they can go back to the test and correct it*

ASSESSMENT

1. The presumption of innocence in criminal cases:
a. means that the burden of proof falls on the prosecution
b. excludes the use of presumptions of facts and law
c. is hurt by prejudicial statements concerning guilt, only if they are made by judges

2. The notion of criminal charge for the purposes of Article 6 ECHR:
a. Relies on the approach at national level in all cases
b. Has an autonomous meaning in that it can differ from the national approach both when it excludes and when it includes the offence in the criminal sphere
c. Has an autonomous meaning in that it can consider an offence falling under the criminal sphere, even when it is not as such considered at national level

3. The Engel criteria (characterisation of the 'criminal charge'):
a. includes, as one of the conditions, the severity of the penalty potentially incurred
b. is of a cumulative nature
c. includes as one of the conditions the severity of the penalty actually served

4. The personal convictions of a judge:
a. are considered under the objective test and impartiality is presumed until proof of the contrary

b. are considered under the subjective test and partiality is presumed until proof of the contrary
c. are considered under the subjective test and impartiality is presumed until proof of the contrary

5. The requirement of fairness under Article 6:
a. implies both a substantive and a procedural fairness
b. implies a procedural fairness
c. implies a substantive fairness

6. Statements obtained contrary to Article 3:
a. can be used in domestic proceedings if they are obtained under ill- treatment, but never if they are obtained under torture
b. can be used in proceedings if corroborated with other evidence adduced
c. can trigger the finding of a violation of Article 6 with regard to fair trial guarantees if used in domestic proceedings

7. The use in criminal proceedings of pieces of real evidence obtained in breach of the Convention: ?
a. breaches fair trial standards if obtained under ill-treatment and are conclusive for the conviction
b. breaches fair trial standards if they are conclusive for the conviction and not corroborated, in all cases
c. breaches fair trial standards if obtained under torture and not corroborated by other evidence

8. The presumption of innocence:
a. is applicable only to the trial stage
b. is applicable to the prosecution stage only if the case reaches trial stage
c. is applicable to the subsequent proceedings as well

9. The requirement to provide information about the charge is considered compliant with Article 6 if:
a. it includes information provided in a certain formal manner
b. it includes information provided as to the cause and the nature of the accusation
c. it includes information about the evidence adduced

10. The right to examine or have examined witnesses:
a. refers to the witnesses under the national qualification
b. refers to witnesses as an autonomous concept, including experts and co-accused
c. refers to witnesses as an autonomous concept, including experts only

Step 4 - Introduction of the course

🕘 10 minutes

Method: Brief introductory speech

INSTRUCTIONS FOR THE TRAINER

- *Make a brief opening on the ECHR system and the importance of Article 6; you can use a famous citation, or a mention on fair trial from the national supreme court or the constitutional court. Example which can be used: "Whatever disagreement there may be as to the scope of the phrase "due process of law" there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard" - Oliver Wendell Holmes, Jr.*
- *Use this time also to present the structure of the course (outline with the headings), in order for the participants to understand clearly the structure of Article 6 as well. Explain which part will be dealt with under which module.*

Article 6 - structure
Key concepts – civil rights and obligations, criminal charge
General guarantees:

- Access to a court
- Institutional requirements (tribunal established by law, independent and impartial)
- Procedural requirements (fairness – administration of evidence, reasoning of decisions; public hearing and public delivery of judgments; reasonable length of proceedings)

Specific guarantees:

- The presumption of innocence (burden of proof, presumptions of fact and law, prejudicial statements)
- The rights of the defence (information about the charge, adequate time and facilities, right to defend oneself in person or through legal assistance, right to examine and have examined witnesses, right to an interpreter)

Unit II - General guarantees under Article 6 of the ECHR

Step 1 - Applicability and key concepts

35 minutes (+ 10 minutes national context)
Methods: brief presentation, case analysis, story-telling

INSTRUCTIONS FOR THE TRAINER

- *Use the sample presentation (Fair trial rights 1) – projected during presentation and provided as handout to participants.*
- *Use the below notes to briefly introduce the concepts and project 'Fair trial rights 1' during the presentation*
- *Note that each part should take only 10-15 minutes, therefore not all the information below can be conveyed to the participants; select the*

most appropriate cases to develop upon based on the profile of the target group
- *Use the ECHR Case-law Guides on Article 6 for additional information to be provided to the participants during the presentation*

Brief introduction
The nature of Article 6: the procedural safeguard of the ECHR, circumstantiated right

- Applicability
- Civil rights and obligations
- Criminal charge

Points to emphasize
-the two components concerning the scope of Article 6 – 'civil rights and obligations' and 'criminal charge'
-the first paragraph of Article 6 applies to both

ARTICLE 6 ECHR

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.

Civil rights and obligations

Points to emphasize
After giving them the main approach of the Court, provide briefly the examples detailed below and select one or two of the below cases to develop in a story-telling manner and pinpoint the main principles. Recommended: *Boulois v Luxembourg*, *Micallef v Malta* (the summaries of the cases can be found below).
All cases are provided with the relevant citations so that the trainer can chose the ones most relevant to the target audience, based on the information received during the ice-breaking exercise. However, because of time constraints, it would not be possible to develop on more than two.

The Court examines the applicability of Article 6 to national proceedings by considering them in an autonomous manner (thus regardless of their qualification at

national level). Therefore, 'civil rights and obligations' is considered to be an autonomous concept. The proceedings should consist of a dispute related to rights and obligations and the Court requires the existence of an arguable right in domestic law in order to consider it as falling under the civil limb of Article 6. It also looks at the substantive content and the effects of the respective right.
Other elements the Court also takes into consideration are the legal basis (recognised right in domestic law), the discretion of the authorities, the recognition of the alleged right in similar circumstances by the domestic courts or the fact that the latter examined the merits of the applicant's request.

Boulois v. Luxembourg [GC] - 37575/04, Judgment 3.4.2012 [GC]
Article 6-1 - Civil rights and obligations - Civil proceedings

Prison board's repeated refusal, with no right of appeal to the administrative courts, to grant prisoner temporary leave: no violation

Facts – The applicant was sentenced to fifteen years' imprisonment. Between 2003 and 2006 he submitted six requests for temporary leave of absence ("prison leave") on the grounds, in particular, that he wished to carry out administrative tasks and take courses in order to gain qualifications. His requests were all refused by the Prison Board. The applicant lodged an application for judicial review of the first two refusals with the Administrative Court, which declined jurisdiction to examine the application. That judgment was upheld by the Higher Administrative Court. (...)

Law – Article 6 § 1: Article 6 § 1 of the Convention was not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to determination of a "criminal charge". The Court therefore had to consider whether the applicant had had a "civil right", in order to assess whether the procedural safeguards afforded by Article 6 § 1 were applicable to the proceedings concerning his requests for prison leave. It first had to be determined whether the applicant had possessed a "right" to prison leave. The domestic legislation defined prison leave as permission to leave prison either for part of a day or for periods of twenty-four hours. This was a "privilege" which "[might] be granted" to prisoners in certain circumstances. It had clearly been the legislature's intention to create a privilege in respect of which no remedy was provided. The competent authorities enjoyed discretion as to whether or not to grant leave, even where the prisoner concerned formally met the required criteria. As to the interpretation of the legislation by the domestic courts, the administrative courts had declined jurisdiction to examine the applicant's application for judicial review. Accordingly, the applicant could not claim, on arguable grounds, to possess a "right" recognised in the domestic legal system.
Furthermore, although the Court had recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment, neither the

Convention nor the Protocols thereto expressly provided for a right to prison leave. The same was true in relation to a possible principle of international law. Lastly, no consensus existed among the member States regarding the status of prison leave and the arrangements for granting it. In any event, the respondent State was far from indifferent to the issue of resettlement of prisoners, as testified by the existence of prison leave and the legislative reform which was under way concerning the execution of sentences.
In view of all these considerations, the applicant's claims did not relate to a "right" recognised in Luxembourg law or in the Convention. Accordingly, Article 6 was not applicable.
Conclusion: no violation (fifteen votes to two).

Examples of proceedings falling under the civil limb of Article 6:

- "Public law" proceedings whose result is decisive for private rights and obligations - *Benthem v. the Netherlands*, § 36
- Disciplinary proceedings - *Philis v. Greece* (No. 2), § 45
- Civil-party complaint in criminal proceedings - *Perez v. France* [GC], §§ 70-71
- Social matters - *Salesi v. Italy* § 19
- Disputes concerning public servants - *Vilho Eskelinen and Others v. Finland* [GC], §§ 50-62
- Constitutional disputes - *Ruiz-Mateos v. Spain*, § 57
- Other non strictly pecuniary matters (environment...) - *Taşkın and Others v. Turkey*

Secondary proceedings:

- Preliminary proceedings - *Micallef v. Malta* (GC), §§ 83-86
- Consecutive criminal and civil proceedings - *Philis v. Greece* (No. 2), § 45
- Execution of court decisions - *Hornsby v. Greece*, § 40
- Applications to have proceedings reopened - *Melis v. Greece*, §§ 19-20

Example - *Micallef v. Malta* [GC]
The applicant's sister was an unsuccessful party to civil litigation which was decided on the merits in 1992. In 1985 an injunction was issued against her, following which her neighbour brought a substantive action. She challenged the injunction before the court, which declared it null and void, finding that it had been issued in breach of the adversarial principle. That judgment was set aside on appeal. In 1993 the applicant's sister instituted constitutional proceedings, alleging that the president of the court of appeal had lacked objective impartiality by reason of his family ties with the other party's lawyer. In 2002, after his sister's death, the applicant intervened in the proceedings. In 2005 the constitutional claim was dismissed. In 2006 the applicant lodged an application with the European Court. (...)

Law – (a) Preliminary objections: The respondent Government contested the admissibility of the application on three grounds: ... thirdly, that Article 6 was not applicable to injunction proceedings.

...

(iii) Applicability of Article 6 § 1 – The injunction proceedings and the consequent challenge to their fairness were one set of proceedings connected to the merits of the cause and could not be seen as distinct from each other. Although preliminary proceedings did not normally fall within the protection of Article 6, the Court observed that there was now a widespread consensus amongst Council of Europe member States regarding the applicability of Article 6 to interim measures, including injunction proceedings. This was also the position that had been adopted in the case-law of the Court of Justice of the European Communities. In excessively long proceedings, a judge's decision on an injunction would often be tantamount to a decision on the merits of the claim for a substantial period of time, or even permanently in exceptional cases. It followed that, frequently, both the interim and the main proceedings decided the same "civil rights or obligations", within the meaning of Article 6, and produced the same effects. In the circumstances, the Court no longer found it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor was it convinced that a defect in such proceedings would necessarily be remedied in proceedings on the merits since any prejudice suffered in the meantime might by then have become irreversible and with little realistic opportunity to redress the damage caused, except for the possibility of pecuniary compensation. The Court therefore considered that a change in the case-law was necessary. Article 6 would be applicable if the right at stake in both the main and the injunction proceedings was "civil" within the meaning of Article 6 and the interim measure could be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it was in force. However, the Court accepted that in exceptional cases it might not be possible to comply with all of the requirements of Article 6. While the independence and impartiality of the tribunal or the judge remained an inalienable safeguard in such proceedings, other procedural safeguards might apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In the present case the substance of the right at stake in the main proceedings concerned the use by neighbours of property rights and therefore a right of a "civil" character. The purpose of the injunction was to determine the same right as the one being contested in the main proceedings and was immediately enforceable. Article 6 was therefore applicable.

Conclusion: preliminary objections dismissed (eleven votes to six).

<u>Excluded from the application of Art. 6:</u>

- Tax proceedings - *Ferrazzini v. Italy* [GC], § 29
- Immigration proceedings - *Maaouia v. France* [GC] § 38
- Disputes of civil servants (exercising State authority) - *Suküt v. Turkey* (dec.)

• Political rights - *Pierre-Bloch v. France*, § 50

Criminal charge

Points to emphasize
- the rationale for using an autonomous concept (to avoid intentional exclusion from states of certain offences from the criminal field, in order to prevent application of Article 6)
- case-law references only as background information, not needed to be given during the presentation
- the criteria set in *Engel v. The Netherlands*

The notion of 'criminal charge' is also an autonomous concept and the examination of the Court in order to establish whether a proceeding falls under the criminal limb of Article 6 follows the "Engel" criteria (*Engel and Others v. The Netherlands*, §§ 82-83)

(1) classification in domestic law:

If domestic law classifies an offence as criminal -> decisive for the Court; the Court will look behind the national classification and examine the substantive reality of the procedure in question.

(2) nature of the offence:

- legal rule in question - directed solely at a specific group or of a generally binding character
- proceedings - instituted by a public body with statutory powers of enforcement
- legal rule - punitive or deterrent purpose
- the imposition of any penalty - dependent upon a finding of guilt
- comparable procedures - classified in other CoE member States

(3) severity of the penalty that the person concerned risks incurring:

- by reference to the maximum potential penalty for which the relevant law provides

Points to emphasize
-The criterion refers to the sanction provided in law and not the one actually imposed to the applicant
-Second and third criteria do not need to cumulate, if one is filled, it will be considered criminal charge

(2) and (3) -> alternative, not necessarily cumulative

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of

a criminal charge.

Examples of proceedings falling under the criminal limb of Article 6:
Method: brainstorming

INSTRUCTIONS FOR THE TRAINER
Ask participants to give you some examples of proceedings they think would qualify as criminal under ECHR criteria.
After collecting some examples, provide a brief overview of the ones below (select according to time available and relevance for the target group).
Use slides in the PPT presentation for exemplification.

Military disciplinary proceedings - *Engels and Others v. the Netherlands*
Offences against prison discipline - *Ezeh and Connors v. the United Kingdom* [GC], § 82
Administrative offences:
– road-traffic offences (fines/driving restrictions) - *Lutz v. Germany*, § 182
– minor offences of causing nuisance or a breach of the peace - *Nicoleta Gheorghe v. Romania*, §§ 25-26

Example - *Nicoleta Gheorghe v. Romania*
On the basis of a police report drawn up in May 2004 the applicant was ordered to pay a fine for causing a disturbance in the block of flats where she lived, amounting to a breach of the peace. She contested the police report before the court of first instance, which dismissed her claims as unsubstantiated. The applicant then lodged an appeal against that judgment, which was dismissed as unfounded by the county court.

Law – Article 6 § 1 - Admissibility – The new admissibility criterion provided for by Article 35 § 3 (b) of the Convention was not applicable, since respect for human rights required examination of the application to be continued notwithstanding the amount of the fine (approximately EUR 17) giving rise to the complaint. In that regard, the application raised the issue of the applicability of Article 6 in its criminal aspect to a set of criminal proceedings concerning the minor offence of breach of the peace. This was the first case which the Court had been called upon to examine since the changes to the relevant domestic law and practice previously held by the Court to be contrary to Article 6 on the ground that they did not provide sufficient safeguards, particularly with regard to respect for the presumption of innocence. A ruling by the Court on this question of principle would provide the domestic courts with guidance as to the scope of the guarantees which should be afforded at domestic level to persons committing the minor offence of breach of the peace. As to applicability, the general nature of the statutory

provision infringed by the applicant and the deterrent and punitive purpose of the penalty imposed were sufficient to demonstrate that the offence in question was of a criminal nature for the purposes of Article 6, which was therefore applicable.

– offences against social-security legislation (failure to declare employment, despite the modest nature of the fine imposed) - *Hüseyin Turan v. Turkey*, §§ 18-21
– administrative offence (promoting and distributing ethnic hatred material, punishable by an administrative warning and confiscation) - *Balsytė-Lideikienė v. Lithuania*, § 61
Political issues:
- electoral sanctions - *Pierre-Bloch v. France*, §§ 53-60
- the dissolution of political parties - *Refah Partisi and Others v. Turkey* (dec.)
- parliamentary commissions of inquiry - *Montera v. Italy* (dec.)
- impeachment proceedings against a country's President for a gross violation of the Constitution - *Paksas v. Lithuania* [GC], §§ 66-67
- lustration proceedings (if there are aspects with criminal connotations: nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) - *Matyjek v. Poland* (dec.)
Different stages of criminal proceedings, ancillary proceedings and subsequent remedies:
- pre-trial stage - *Imbrioscia v. Switzerland*, § 36
- investigation - *Vera Fernández-Huidobro v. Spain*, §§ 108-114
- sentencing - *Phillips v. the United Kingdom*, § 39
- appeals on points of law - *Meftah and Others v. France* [GC], § 40
- constitutional proceedings - *Gast and Popp v. Germany*, §§ 65-66
- supervisory review proceedings resulting in the amendment of a final judgment - *Vanyan v. Russia*, § 58
Excluded from the application of Art 6 § 1 (criminal limb):
Professional disciplinary proceedings - *Moullet v. France* (dec.)
Proceedings concerning the prison system - *Enea v. Italy* [GC], § 98
Proceedings concerning the execution of sentences (application of an amnesty) - *Montcornet de Caumont v. France* (dec.)
- parole proceedings - *A. v. Austria* (dec.)
- transfer proceedings under the Convention on the Transfer of Sentenced Persons - *Szabó v. Sweden* (dec.)/*Buijen v. Germany*, §§ 40-45
- exequatur proceedings - enforcement of a forfeiture order made by a foreign court - *Saccoccia v. Austria* (dec.)

National references (if any) - examples of cases qualified as administrative in national law but which would fit under the criminal limb according to the ECHR criteria.

In the domestic system, there are two types of misdemeanor/minor offence proceedings: 1) misdemeanors prosecuted by the administrative organs before the courts whereby the administrative body performs a "prosecutorial" role and 2) misdemeanors directly decided by the administrative bodies, whose administrative decisions could then be challenged in judicial review proceedings before the administrative judiciary. In any event, both types of misdemeanor proceedings (i.e. including the proceedings conducted before administrative bodies) should be considered as falling under the criminal limb of Article 6.
Another example of administrative procedure which could qualify under the criminal limb would be the taxation by 70% of the unreported income (see, Popcevska-Gerovska case, 53249/08 (communicated)).

Note: lustration proceedings were categorized by the ECHR under the civil limb of Article 6 despite some features that make this kind of proceedings akin to criminal law (see Ivanovski 29908/11, Karajanov 2229/15 cases). In the domestic system these proceedings have been part of the administrative law as the Lustration Commission has been an administrative body that made decisions susceptible to being challenged as other administrative acts, before the Administrative Court. This fact, in combination with the outcome of the separate criminal proceedings initiated by the Lustration Commission against the applicant in the Ivanovski case (the criminal complaint was rejected by the prosecutor) resulted with a prevailing conclusion that the lustration proceedings fall under the civil limb of Article 6.

Step 2 - Access to a court

50 minutes (+ 10 minutes national context)
Methods: brief presentation (20 minutes), case study (15 minutes)

INSTRUCTIONS FOR THE TRAINER

- *Use the sample presentation (Fair trial rights 1) – projected during presentation and provided as handout to participants.*
- *Use the support notes below for providing background information on each slide*
- *Use the ECHR Case-law Guides on Article 6 for additional information to be provided to the participants during the presentation/discussions*
- *As on this matter most of the problems arise with regard to the civil limb, the respective part is more developed, but at the end of the section you can find the references for the cases concerning the criminal limb.*

Civil proceedings

The judicial remedy would need to be effective and enable applicants to assert their civil rights. Access to court implies the right to institute proceedings but also the right to obtain a determination of the dispute by a court. It may, however, be subject to limitations (without impairing the essence): court fees, time-limits, procedural bars. Limitations imply the existence of a legitimate aim and of a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Examples:

- legitimate restrictions:
- statutory limitation periods - *Stubbings and Others v. the United Kingdom*, §§ 51-52
- security for costs orders - *Tolstoy Miloslavsky v. the United Kingdom*, §§ 62-67
- legal representation requirement - *R.P. and Others v. the United Kingdom*, §§ 63-67

Waivers to the right of access to a court are frequent in civil matters (i.e. arbitration clauses) and are not contrary to Art. 6 per se. They are permissible when established freely and unequivocally.

Legal aid - there is no obligation to provide free legal aid for every "civil right" dispute, but only when assistance proves indispensable for an effective access to court. Reasons for refusing legal aid should be given and requests should be handled with with diligence. Shortcomings in the legal aid system deprive individuals of the "practical and effective" access to a court to which they are entitled.

Examples related to access to court in criminal proceedings:

- Parliamentary immunity - *Kart v. Turkey* [GC], § 90
- Procedural rules - *Labergère v. France*
- Requirement of enforcement of a previous decision - *Omar v. France*

National context

On national level, the right to access to a court is established in the Law on Courts (systemic, 2/3 majority Law). Article 5 of this Law stipulates that the courts shall protect human and citizens' rights unless the Constitution prescribes such protection to be provided by the Constitutional Court. Article 6 of the Law stipulates that everyone has **equal right of access to a court** for the protection of his/her rights and legal interests and that no one's access shall be limited due to lack of financial resources. Article 8 prescribes that the courts shall assert lack of jurisdiction only when competency of another State organ is foreseen. The courts

cannot reject a request because there is a legal lacuna and shall make a decision on the basis of general legal principles.

Macedonian cases before ECHR:
Dermendzieva and others – erroneous rejection (otfrlanje) by the Supreme Court of an appeal on points of law as being lodged out of time. The Supreme Court was not forwarded the whole case-file in which retun receipts for service of the appellate decision indicating the correct date of receipt were contained. Violation.

Boris Stojanovski – criminal proceedings initiated by the applicant for injuries sustained in an incident. The applicant also made a compensation claim in the criminal proceedings. Ten years after the incident and few years after he had made his civil claim, the criminal proceedings were discontinued as time-barred advising the applicant to initiate fresh civil action for his compensation claim. Violation.

Fetaovski – after few remittals and instructions to establish the correct date of the appeal, the applicant's appeal was rejected as lodged out of time. The applicant however possessed a copy of his appeal with court-stamped date proving that it was lodged on time. The appeal was ultimately rejected and access to court was denied primarily taking into consideration the date entered in the court register. Violation.

Spasovski – compensation claim for injuries sustained from a terrorist violence directed against both the State and the municipality. The claim was initially accepted against the State and dismissed against the municipality. Upon an appeal lodged by the State, the claim against the State was finally dismissed as the municipality was found liable for the damages sustained. However, the dismissal of the claim against the Municipality was not appealed against and it had already become final. The final outcome of the proceedings meant that in substance the applicant's claim was never adjudicated on the merits. Violation.

Ivanovski – lustration proceedings. The Administrative Court entertained the applicant's claim on the merits. No violation in respect of access to a court complaint. In order to get the whole picture of the case, the Government's non-exhaustion objection should also be taken into account.

Petkovski – civil proceedings for annulment of statutory decision of an agricultural cooperative. After pending for more than 10 years and after number of remittals, the applicants' claim was finally rejected because, as a result of legislative developments, social and cooperative property was ceased and in any case removed from the civil courts' protection. Violation.

Few pending cases communicated: Center for analytical psychology (excessive formalism, the applicant-company was forced to register anew, got a new tax number and consequently lost its claim against the State), Dejanovik (interplay

between criminal proceedings and civil claim) and Vaskov and Karadza case (access to Supreme Court denied ratione valoris in a dispute over hotel Bristol in Skopje).

CASE STUDY

15 minutes

INSTRUCTIONS FOR THE TRAINER

- *Distribute the case facts to the applicants - the case facts are included in Annex 1 - Materials for print*
- *Ask them to read the case and to work in tandems to discuss the possible outcome and the criteria to be used*
- *Ask the participants to focus only on the access to court aspect and to reply to the following questions:*

Under the ECHR, was there a hindrance in the applicant's access to court? Why/Why not? What importance do you think has the national law provisions in this situation?

- *Conduct a discussion on the criteria relevant for the analysis and present the conclusion of the case (Stanev v. Bulgaria)*

Case-study

In 2000, at the request of two of the applicant's relatives, a court declared him to be partially lacking legal capacity on the ground that he was suffering from schizophrenia. In 2002 the applicant was placed under partial guardianship against his will and admitted to a social care home for people with mental disorders, near a village in a remote mountain location. Following its official visits in 2003 and 2004, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concluded that the conditions at the home could be said to amount to inhuman and degrading treatment. In 2004 and 2005 the applicant, through his lawyer, asked the public prosecutor and the mayor to institute proceedings for his release from partial guardianship, but his requests were refused. His guardian likewise refused to take such action, finding that the social care home was the most suitable place for him to live since he did not have the means to lead an independent life. In 2006, on his lawyer's initiative, the applicant was examined by an independent psychiatrist, who concluded that the diagnosis of schizophrenia was inaccurate but that the applicant had a tendency towards alcohol abuse and the symptoms of the two conditions could be confused, that he was capable of reintegrating into society, and that his stay in the social care home was very damaging to his health.

Legal analysis (only available to the trainer):
Article 6 § 1: The applicant had been unable to apply for restoration of his legal capacity other than through his guardian or one of the persons listed in Article 277 of the Code of Civil Procedure. Domestic law made no distinction between those who were entirely deprived of legal capacity and those who were only partially incapacitated, and did not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remained valid. Moreover, in the applicant's case the measure in question had not been limited in time. While the right of access to the courts was not absolute and restrictions on a person's procedural rights could be justified, even where the person had been only partially deprived of legal capacity, the right to ask a court to review a declaration of incapacity was one of the most important rights for the person concerned. It followed that such persons should in principle enjoy direct access to the courts in this sphere. However, the State remained free to determine the procedure by which such direct access was to be realised. At the same time, it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts were not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seemed clear that this problem could be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications could be made or introducing a system for prior examination of their admissibility on the basis of the file. In addition, there was now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity. International instruments for the protection of people with mental disorders were likewise attaching growing importance to granting them as much legal autonomy as possible. Article 6 § 1 should be interpreted as guaranteeing in principle that anyone who had been declared partially incapable, as was the applicant's case, had direct access to a court to seek restoration of his or her legal capacity. Direct access of that kind was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation.
Conclusion: violation (unanimously).

Step 3 - Institutional requirements

🕐35 minutes (+ 10 minutes national context)

Structure:

- Tribunal
- Established by law
- Independence and impartiality

Tribunal established by law

Points to emphasize
Remind the participants the rationale for the Court's use of the autonomous concept principle.
Summarise Coeme case by focusing on the explanation concerning the issue of 'tribunal established by law' – see case summary below

Autonomous concept (substantive sense of the term)
Judicial function:
- capacity of determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.
- power of giving a binding decision
Findlay v. the United Kingdom, § 77
"established by law" - Aim: to ensure that the organisation of the judicial system does not depend on the discretion of the executive but is regulated by law emanating from Parliament - *Coëme and Others v. Belgium*, § 98

Coëme and Others v. Belgium - 32492/96, 32547/96, 32548/96 et al. - Judgment 22.6.2000
Article 6-1 - Tribunal established by law - Criminal proceedings
Special procedure for Ministers before the Court of Cassation applied to others: violation

Facts: In 1989 criminal proceedings were opened against Mr Javeau, who was suspected of fraud and corruption between 1981 and 1989, when he ran the association "I", whose activities included carrying out market surveys and opinion polls. During the judicial investigation both Mr Javeau and Mr Stalport were heard. In 1994 the prosecution requested the Chamber of Representatives to lift Mr Coëme's parliamentary immunity, since he was implicated in certain of that association's illegal activities while occupying a post as minister. Pursuant to Article 103 of the Constitution on judicial proceedings against ministers, the Chamber of Representatives decided that Mr Coëme should be prosecuted before the Court of Cassation sitting as a full court, which under that article was the only court with jurisdiction to try a minister. The other applicants were dealt with under the same procedure, before the Court of Cassation, by virtue of the connected offences principle provided for in the Code of Criminal Investigation, although none of them was a minister. At the hearing before the Court of Cassation on 5 February 1996, it was announced that the procedure to be followed would be the ordinary criminal procedure. On 12 February 1996 an interlocutory judgment was read out, in which the Court of Cassation declared that the matter had been properly brought before it and that it had jurisdiction to deal with it; in the same judgment the court stated

that the rules governing ordinary criminal procedure would be applied only in so far as they were compatible with the provisions governing the procedure before the Court of Cassation sitting as a full court. The Court of Cassation also refused to request the Administrative Jurisdiction and Procedure Court to give a preliminary ruling on two questions submitted by two of the applicants, one concerning the connected offences principle taken from the Code of Criminal Investigation and applied to the instant proceedings and the other referring to the application to those proceedings of a new statute, the Law of 24 December 1993, which extended from three to five years the period after which prosecution for minor offences (délits) became time-barred. The Court of Cassation delivered its judgment on 5 April 1996, finding the applicants guilty and imposing various penalties.

Law: Article 6: (...)
(b) The situation of the other applicants: The applicants recalled that neither the Constitution nor the law conferred jurisdiction on the Court of Cassation in criminal proceedings against persons other than a minister. Although Article 103 of the Constitution provides, exceptionally, that ministers are to be tried by the Court of Cassation, there was no provision under which its jurisdiction might be extended to accused persons other than ministers in respect of offences connected with those with which the ministers were charged. Although the application of the connected offences rules laid down in the code of Criminal investigations was foreseeable in the light of academic opinion and the case-law, those indications could not justify the conclusion in the instant case that the rule on connection was provided for by law, especially since the Court of Cassation, the supreme judicial authority, decided that the summoning of persons who had never held ministerial office was based on Article 103 of the Constitution rather than on the Code of Criminal Investigation or the Judicial code. Since it was established that the connection rule was not provided for by law, the Court of Cassation could not be regarded as a tribunal established by law to try the four applicants.
Conclusion: violation (unanimously). (...)

There are different bodies/institutions in the national context that are not part of the standard judicial structure but in the proceedings before them, Article 6 was found to be applicable. Examples include the State Judicial Council as established in the proceedings for dismissal of judges (see for example the case of Mitrinovski), Facts Verification Commission in the lustration proceedings (Ivanovski and Karajanov cases) or the proceedings upon human rights protection request before the Constitutional Court (case of Selmani and others).

Questions/points for discussion:
Do the existing State Administrative Appeals Commissions (State Administrative Second-Instance Commission, State Second-Instace Commission for Inspectoral Supervision and State Second-Instance Public Procurement Commission) meet the

criteria to be considered a "tribunal" within the meaning of Article 6? These Commissions: 1) are set up by special Laws; 2) their members are appointed by the Parliament with a fixed term of office, 3) have power to make binding decisions, 4) have jurisdiction over the facts and the law, 5) decide on civil rights and obligations. Are there any other bodies/institutions that could be considered as "tribunal" within the meaning of Article 6 and which are not part of the standard judicial structure?

Independence and impartiality


STATION TECHNIQUE


INSTRUCTIONS FOR THE TRAINER

- *Divide the participants in several groups (up to 4 in each group)*
- *give the participants the facts of the case*
- *allow them to read and discuss the possible outcome and ask them to write the main conclusions on a sheet of paper, together with the main elements which they considered during their analysis; explain to them that their paper would need to be clear enough in order for another group to read and understand their conclusions - give them 15 minutes*
- *Take the papers and swap them in between groups; ask them to read the papers received and present the positions of the other group*
- *At the end summarise the main elements to keep in mind and the applicable principles*
- *Provide the name of the case and the ECHR conclusions: Kyprianou v. Cyprus [GC] - 73797/01*
- *Defence counsel found in contempt of court by the same judges before whom the contempt had taken place and judges' use of emphatic language when convicting him: violation*

Case study

The applicant, acting as defence counsel during a murder trial before an Assize Court, was interrupted by the court while cross-examining a prosecution witness. He felt aggrieved and sought leave to withdraw from the case, but as leave was not granted, he responded by alleging that during the cross-examination members of the court had been talking to each other and sending each other notes ("ravasakia" - which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges stated they had been "deeply insulted" "as persons"; could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate"; and that "if the court's reaction is not immediate and drastic, … justice will have suffered a disastrous blow". They gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be

imposed on him, or to retract. As the applicant did neither, the court found him in contempt of court and sentenced him to five days' imprisonment, to be enforced immediately, which the court deemed to be the "only adequate response", as "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned". The applicant served the prison sentence, although he was in fact released early, in accordance with the relevant legislation. His appeal was dismissed by the Supreme Court.

Case analysis (available to the trainer only):

Law: Article 6(1) – This complaint was directed at a functional defect in the relevant proceedings. The applicant's case had related to contempt in the face of the court, aimed at the judges personally. They had been the direct object of his criticisms as to the manner in which they had been conducting the proceedings. The same judges then had taken the decision to prosecute him, had tried the issues arising from his conduct, had determined his guilt and had imposed the sanction (a term of imprisonment) on him. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench. Accordingly, the impartiality of the Assize Court had been capable of appearing open to doubt and the applicant's fears in that respect could therefore be considered to have been objectively justified.

Turning to the applicant's allegation that the judges concerned had acted with personal bias, the Court observed that the judges in their decision sentencing the applicant had acknowledged that they had been "deeply insulted" "as persons" by the applicant. That statement in itself had showed that the judges had been personally offended by the applicant's words and conduct and had indicated personal embroilment on the part of the judges. In addition, the emphatic language used by the judges throughout their decision had conveyed a sense of indignation and shock, which had run counter to the detached approach expected of judicial pronouncements. The judges had proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they had deemed to be the "only adequate response" to what had happened. In addition, the judges had expressed the opinion early on in their discussion with the applicant that they had considered him guilty of the criminal offence of contempt of court. After deciding that he had committed the above offence they had given him the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. Although no doubt the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and, for that purpose, felt it appropriate to initiate the procedure in question, they did not succeed in detaching themselves sufficiently from the situation. That conclusion was reinforced by the speed with which the proceedings had been carried out and the brevity of the exchanges between the judges and the applicant. Against that background and having regard in particular to the different elements of the judges' personal conduct

taken together, the applicant's misgivings about the Assize Court's impartiality had been justified in this respect as well. As the Supreme Court had declined to quash the lower court's decision the defect in question had not been remedied. Conclusion: violation (unanimously).

Points to emphasise
Explain the two tests and mention that the subjective one is harder to prove.
Make reference to the focus on the reasoning of the Court in Kyprianou discussed above, in finding that the national judges lacked impartiality when deciding on the conviction of the applicant for contempt of court.

"Independent" means vis-à-vis the other powers (the executive, the Parliament).
Criteria:
- the manner of appointment of its members, the duration of their term of office;
- the existence of guarantees against outside pressures;
- whether the body presents an appearance of independence

"Impartial":
- subjective test (personal conviction and behaviour of a particular judge - personal prejudice or favouritism in a given case); personal impartiality - presumed until proof to the contrary;
- objective test (whether the tribunal itself and its composition offered sufficient guarantees to exclude any legitimate doubt); mostly concerns hierarchical or other links between the judge and other persons involved in the proceedings.

National context overview
The national legislation is sufficiently developed and flexible to embrace/incorporate the ECHR standards on judicial independence and impartiality.

The judiciary and its independence are constitutionally positioned and protected: judges are with indefinite (permanent) mandate, the judiciary is financially autonomous and its affairs are primarily managed by the Judicial Council which is in charge of appointment, dismissal and (re)assignments of judges, judges' evaluation, regulation of the judicial profession etc. Similar institutional design is foreseen for the public prosecution.

On more practical terms, the procedural legislation provides for grounds for exclusion of a judge, in particular Article 33 of the Law on Criminal Proceedings and Article 64 in the Law on Civil Proceedings. The grounds for exclusion primarily address the possible lack of subjective impartiality: personal (family) relationship

with one of the parties or some kind of interest in the outcome of the case. There is also additional ground, namely, "any other circumstances" when doubts about judge's impartiality could be cast. These provisions are mutatis mutandis applicable to the others involved in the proceedngs: lay-judges, expert-witnesses, prosecutors.

The legislation also foresees an option to allocate a case from one court to another when there are "legal or material circumstances" (as stated in the Law on Criminal Proceedings) or "important reasons" (as stipulated in the Law on Civil Proceedings). This is the so called delegated competency *ratione loci* (prenesena mesna nadleznost). It should also be noted that in criminal proceedings it is the immediately higher court that decides the delegation upon a request of the judge while in civil proceedings this is decided by the Supreme Court upon a request made by the parties. See in this context, the case of Mitrov (below).

Similar grounds such as the ones for exclusion of judges are also foreseen in the Law on General Administrative Procedure (Article 25) which is applicable to administrative proceedings before State administrative bodies as well as before the State second—instance commissions. It is to be noticed that the ground "any other circumstances" is not foreseen in this Law, however the legislative provisions appear to be elaborate enough to embrace different situations.

Macedonian cases before ECtHR related to the lack of impartiality/independence:

Mitrinovski (and the other cases related to judges dismissal) – same initiator of the proceedings against the applicant sat in the Judicial Council which decided on the applicant's dismissal from his post of a judge.

Mitrov – criminal proceedings for traffic accident with fatal consequences, conducted before trial court where the mother of the victim was judge and close colleague to the judges involved in the trial;

Nikolov – lack of subjective impartiality due to the employment of the judge's wife in a company that was the opponent party to the applicant in the impugned civil proceedings;

Bajaldziev – same judge sat twice in the case, first as president of the adjudicating bench of the Court of Appeal, then as a member of the adjudicating bench of the Supreme Court. In this regard, see for example Kvp .br. 30/2006 and Rev. 1080/2006 (Collection of Supreme Court jurisprudence, available here);

Kocevski – inadmissible as manifestly ill-founded. The company owned by the unmarried partner of the trial judge had some business relations and stakes with

the bankrupted company which was in the centre of the impugned criminal proceedings against the applicant.

Step 4 - Procedural requirements

2 h 15 min (+ 45' national context)

Fairness

1 h 10 minutes

Methods: guided discussion, hypos, case studies, case analysis

INSTRUCTIONS FOR THE TRAINER

- *Ask the participants which aspect they the most important: the procedural fairness of the fairness of the result?*
- *Ask those replying to explain their choice*
- *Ask them which one they think protected by Article 6 § 1 and why*
- *Guide the discussions based on the information provided below and stress the main principles they need to remember*

Points to emphasize

Explain the difference between the procedural fairness (covered by Article 6) and the substantive fairness (linked to the outcome of the domestic case and which as a rule is not within the Court's mandate to oversee; the issues related to the national courts' conclusions will be examined by the Court only in case of manifest arbitrariness, otherwise the Court would not take up a 'fourth instance' role).
Focus on the understanding of 'adversarial' hearing from the ECHR perspective.

"Procedural" fairness = adversarial proceedings (each party - a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent; submissions heard, parties placed on equal footing before the tribunals) - *Klimentyev v. Russia*, § 95
The desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle as the right to adversarial proceedings - *Nideröst-Huber v. Switzerland*, § 30

The principle of adversarial proceedings:
The opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision - *Ruiz-Mateos v. Spain*, § 63

Not absolute, its scope may vary depending on the specific features of the case in question
Hudakova and others v. Slovakia, §§ 26-27
In criminal trials, adversarial hearing - opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party + the prosecution authorities to disclose to the defence all material evidence in their possession for or against the accused - *Rowe and Davis v. the United Kingdom* [GC], § 60

Fairness – *Equality of arms*

Equality of arms = fair balance struck between the parties, applies equally to criminal and civil cases - *Dombo Beheer B.V. v. the Netherlands*, § 33
It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment - *APEH Üldözötteinek Szövetsége and Others v. Hungary*, §42
If observations submitted are not communicated to either of the parties - no infringement of equality of arms as such, but rather of the broader fairness of the proceedings - *Nideröst-Huber v. Switzerland*, §§ 23-24

Fairness – *Administration of evidence*

INSTRUCTIONS FOR THE TRAINER

- *Give the participants brief examples concerning the administration of evidence (see below the hypos) and ask them what the impact would be on the proceedings*
- *Ask those replying to explain their choice*
- *Guide the discussions based on the information provided below and stress the main principles they need to remember*
- *At the end, sum up the main principles for both civil and criminal proceedings - see main points below*

Hypo 1: A confession obtained under torture is used in a criminal trial together with other corroborating evidence.
Hypo 2: A witness statement obtained under torture is used in a criminal trial.
Hypo 3: Real evidence obtained under torture is used in trial together with corroborative evidence.
Hypo 4: Real evidence obtained under degrading treatment is used in trial as sole and conclusive piece of evidence.

Points to emphasise
Mention the vast number of situations the ECtHR had to deal with under this aspect (administration of evidence).
Clarify the approach of the ECtHR concerning the evidence obtained in breach of Convention articles:
-statements obtained in breach of Article 3 (regardless of the degree of severity) – if used in a trial, trigger a breach of Article 6
-Real evidence obtained by torture – if used in trial, trigger a violation of Article 6
-Real evidence obtained by inhuman or degrading treatment – if used in trial and sole or conclusive for the finding of guilt – trigger a violation of Article 6
-Evidence obtained in breach of Article 8 – do not necessarily trigger a violation of Article 6 if used in a trial
Entrapment – summarise Teixeira de Castro for exemplification (see case docket) and emphasise the elements which differentiate undercover/infiltration operations (acceptable under Article 6) from entrapment (in breach of Article 6).

Civil proceedings:
The role of national law and courts:
- admissibility of evidence and the way it should be assessed - *García Ruiz v. Spain* [GC], § 28
- the probative value of evidence and the burden of proof - *Tiemann v. France and Germany* (dec.)
- the relevance of proposed evidence - *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], §198

ECtHR's task under the Convention:
- to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken - *Elsholz v. Germany* [GC], § 66
- establish whether the evidence was presented in such a way as to guarantee a fair trial - *Blucher v. the Czech Republic*, § 65

Criminal proceedings:
In criminal trials, administration of evidence must be done in light of the presumption of innocence, with the burden of proof falling on the prosecution, which has to produce evidence sufficient to convict the defendant, any doubt benefitting the latter - *Barberà, Messegué and Jabardo v. Spain*, §§ 76, 77
- Right to remain silent and privilege against self incrimination - *Saunders v. the United Kingdom*, § 60
- Evidence obtained in breach of Convention rights - *Jalloh v. Germany* (GC)
- Entrapment - *Teixeira de Castro v. Portugal*
Role of national law and courts:

- admissibility of evidence and the way it should be assessed - *Laska and Lika v. Albania*, § 57
- the probative value of evidence and the burden of proof - *Huseyn and Others v. Azerbaijan*, § 212).
- the relevance of proposed evidence - *Patsuria v. Georgia*, § 86

Court's task under the Convention - to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken - *Khan v. the United Kingdom*, § 34

National context overview 15 min

The domestic procedural legislation (Law on Criminal Procedure, Law on Civil Procedure, Law on Non-Contentious Civil Procedure, Law on Administrative Disputes and Law on General Administrative Procedure) foresees number of safeguards that ensure procedural equality and fair treatment of the parties involved in the proceedings. However, there are some inherent systemic problems that could be identified from the Macedonian cases before ECtHR:

- the presence of the prosecutor on the sessions held before higher courts in absence of the accused (cases of Atanasov, Nasteska, Eftimov) – criminal proceedings against the applicants who were put in an unequal position as the prosecution was given an advantage to be the only party arguing its case before the higher court (appellate as well as Supreme). The unequal treatment stemmed from the legislative provisions and this systemic flaw was found in violation of the equality of arms.
- Reliance on an expert-report produced during criminal investigation by the Ministry of Interior which is at the same time the body that initiated the criminal prosecution. As established in the Stoimenov case, such expert report cannot be considered as independent and neutral and it would be a violation of the equality of arms principle if the applicant has no possibility to effectively challenge the expert report with an alternative one. *A contrario* in the case of Poletan and Azirovik, although there were similar doubts as regards the impartiality of the expert report produced by the Ministry, the ECtHR declared the complaint manifestly ill-founded because the applicants had the possibility to raise their concerns and the expert witnesses were examined before the court.

  Note: As a follow-up to the finding of violation in the Stoimenov case the criminal chamber of the Supreme Court on 29 June2006 issued a Legal Opinion according to which ECHR and ECtHR case-law are directly applicable. In the context of issuance of independent expert opionons and the Stoimenov case, the Supreme Court urged the courts to fully respect the

parties' equality at all stages of the proceedings. The legal opinion is available here.

- No transmission of submissions resulting with the impossibility to effectively challenge them in the course of the proceedings (Grozdanovski and Naumoski cases).

INSTRUCTIONS FOR THE TRAINER

- *Use the cases studies below according to the time you have at disposal and those which you esteem the most adapted to the needs of the participants. There are 3 options from which you can choose.*

CASE STUDY OPTION 1 - Administration of evidence (opinion poll)

INSTRUCTIONS FOR THE TRAINER

- *Distribute the case facts to the participants*
- *Ask them to read the case and place themselves in one of the following positions: agree with violation, disagree with violation, neutral*
- *In order to group them, either ask them to move to specific parts of the room, preassigned for one of the respective positions, or else distribute coloured post-its and ask them to raise the ones corresponding to their position*
- *Ask those agreeing to argument, then ask the neutral ones if they formed a positions*
- *Ask those disagreeing to argument, then ask again the neutral ones, this time ask them to explain what keeps them undecided*
- *Let them discuss the conflicting opinions*
- *Continue the discussion by guiding them to focus on the main elements needed for arriving to a conclusion*
- *At the end check again if anyone changed their minds and ask them to explain their change of positions*
- *Sum up the main principles and provide the case reference with the conclusion of the Court by highlighting the issue of use of evidence in breach of Article 3 (the standards) and also mention the reasoning of the Court concerning the breach of the right not to incriminate oneself - Gafgen v. Germany*

Case study

In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse near a pond. Meanwhile, he sought a ransom from the boy's parents and was arrested shortly after having collected the money. He was taken to a police

station where he was questioned about the victim's whereabouts. The next day the deputy chief police officer ordered one of his subordinate officers to threaten the applicant with physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's location. Following these orders, the police officer threatened the applicant that he would be subjected to considerable pain by a person specially trained for such purposes. Some ten minutes later, for fear of being exposed to such treatment, the applicant disclosed where he had hid the victim's body. He was then accompanied by the police to the location, where they found the corpse and further evidence against the applicant, such as the tyre tracks of his car. In the subsequent criminal proceedings, a regional court decided that none of his confessions made during the investigation could be used as evidence since they had been obtained under duress contrary to Article 3 of the European Convention. At the trial, the applicant again confessed to murder. The court's findings were based on that confession and on other evidence, including evidence secured as a result of the statements extracted from the applicant during the investigation. The applicant was ultimately convicted to life imprisonment and his subsequent appeals were dismissed, the Federal Constitutional Court having nonetheless acknowledged that extracting his confession during the investigation constituted a prohibited method of interrogation both under the domestic law and the Convention. In 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines of EUR 60 for 60 days and EUR 90 for 120 days, respectively. In 2005 the applicant applied for legal aid in order to bring proceedings against the authorities for compensation for the trauma the investigative methods of the police had caused him. The courts initially dismissed his application, but their decisions were quashed by the Federal Constitutional Court in 2008. At the time of the European Court's judgment, the remitted proceedings were still pending before the regional court.

Case analysis (available only to the trainer):

Article 6: The use of evidence obtained by methods in breach of Article 3 raised serious issues regarding the fairness of criminal proceedings. The Court was therefore called upon to determine whether the proceedings against the applicant as a whole had been unfair because such evidence had been used. At the start of his trial, the applicant was informed that his earlier statements would not be used as evidence against him because it had been obtained by coercion. Nonetheless he confessed to the crime again during the trial, stressing that he was confessing freely out of remorse and in order to take responsibility for the crime he had committed. The Court had therefore no reason to assume that the applicant would not have confessed if the domestic courts had decided at the outset to exclude the disputed evidence. In the light of these considerations the Court concluded that, in the particular circumstances of the applicant's case, the failure of the domestic courts to exclude the evidence obtained following a confession extracted by means of

inhuman treatment had not had a bearing on the applicant's conviction and sentence or on the overall fairness of his trial.

 CASE STUDY OPTIONS 2 AND 3 - entrapment (opinion poll)

INSTRUCTIONS FOR THE TRAINER

- *ask them to read the case you chose for the exercise; give them 5 minutes; if time allows, do both cases consecutively, if not chose one*
- *ask them to tell you whether they think there is a violation of Article 6 and why; if not why; let them discuss the conflicting opinions;*
- *after exchanging opinions, let them know which case it is (Khudobin v Russia / Ramanauskas v Lithuania) and summarise the ECtHR's finding (see case studies docket) by highlighting the main criteria for an operation to be considered entrapment (and thus contrary to Art 6)*

Case study

The applicant worked as a prosecutor. He submitted that he had been approached through a private acquaintance by a person previously unknown to him who was, in fact, an officer from a special anti-corruption police unit. The officer offered the applicant a bribe of USD 3,000 in return for a promise to obtain a third party's acquittal. The applicant had initially refused but later agreed as the officer had repeated the offer a number of times. The officer informed his employers and in January 1999 the Deputy Prosecutor General authorised him to simulate criminal acts of bribery. Shortly afterwards, the applicant accepted the bribe from the officer. In August 2000 he was convicted of accepting a bribe of USD 2,500 and sentenced to imprisonment. The judgment was upheld on appeal. When dismissing the applicant's cassation appeal, the Supreme Court noted that there was no evidence that the initial negotiations with the applicant had taken place on police instructions; that the authorities had been informed only after the applicant had agreed to accept the bribe and that, in authorising the officer's further actions, they had merely joined in a criminal act which was already in progress. According to the Supreme Court, the question of incitement was of no consequence for the legal classification of the applicant's conduct.

Case analysis - *Ramanauskas v Lithuania* (available only to the trainer):

The national authorities could not be exempted from responsibility for the actions of police officers simply by arguing that, although carrying out police duties, the officers were acting "in a private capacity". It was particularly important that the authorities should have assumed responsibility, as the initial phase of the operation had taken place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the officer to simulate acts of bribery and by exempting him from all criminal responsibility, the authorities had legitimised the preliminary phase ex post facto and made use of its results. Moreover, no satisfactory explanation had been

provided as to what reasons or personal motives could have led the officer to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he had not been prosecuted for his acts during that preliminary phase. On that point, the Government had simply referred to the fact that all the relevant documents had been destroyed. The authorities' responsibility was thus engaged for the actions of the officer and the applicant's acquaintance prior to the authorisation of the bribery simulation. To hold otherwise would open the way to abuse and arbitrariness by allowing the applicable principles to be circumvented. The actions of the officer and the applicant's acquaintance had gone beyond the mere passive investigation of existing criminal activity: there was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences; all the meetings between the applicant and the officer had taken place on the latter's initiative; and, the applicant seemed to have been subjected to blatant prompting on the part of his acquaintance and the officer to perform criminal acts, although there was no objective evidence to suggest that he had been intending to engage in such activity. Throughout the proceedings, the applicant had maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination of whether the prosecuting authorities had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. That was especially important having regard to the fact that his acquaintance, who had originally introduced the officer to the applicant and who appeared to have played a significant role in the events leading up to the giving of the bribe, had never been called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of those points. However, the domestic authorities had denied that there had been any police incitement and had taken no steps at judicial level to carry out a serious examination of the applicant's allegations. More specifically, they had not made any attempt to clarify the role played by the protagonists in the applicant's case, despite the fact that the applicant's conviction was based on the evidence that had been obtained as a result of the police incitement complained of. The Court noted the Supreme Court's finding that, once the applicant's guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. However, a confession to an offence committed as a result of incitement could not eradicate either the incitement or its effects. The actions of the officer and the applicant's acquaintance had had the effect of inciting the applicant to commit the offence of which he had been convicted. There was no indication that the offence would have been committed

without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial had been deprived of fairness.
Conclusion: violation (unanimously).

Case study
In 1998 an undercover police informant called the applicant and asked him to buy her some drugs. The latter agreed and bought 0.05 grammes of heroin which he paid for with the money she gave him. On his return to the meeting point where he was to hand over the drug, he was apprehended by police officers. The next day he was charged with drug trafficking and detained on remand. His detention was further prolonged on several occasions, without any reasons given by the court. When the applicant was arrested he was suffering from several chronic diseases, including epilepsy, pancreatitis, viral hepatitis B and C, as well as various mental illnesses. He was also HIV-positive. During his detention he contracted several serious diseases including measles, bronchitis and acute pneumonia. He also had several epileptic fits. His request to undergo a thorough medical examination either in the detention facility or by an independent doctor was refused. The applicant was not present at the hearing on the merits. His lawyer asked for an adjournment because several witnesses, including the person who had sold heroin to the applicant, as well as the policemen involved in the operation, failed to appear. The court refused his request and found him guilty of selling heroin. It discontinued the criminal proceedings due to the findings of a psychiatric report which stated that he had committed the crime in a state of insanity. Instead he was ordered to undergo compulsory medical treatment During the trial the defence argued that, contrary to Russian law, the applicant had been incited to commit an offence by the police informant and that a confession had been extracted from the applicant by force while he was in a state of drug intoxication and without having benefited from legal advice.

Case analysis - *Khudobin v. Russia* (available only to the trainer):
Article 6(1) – The applicant had not had a criminal record and the only allegations of his involvement in drug dealing had come from the police informant. Furthermore, he had made no financial gain from the deal. It therefore appeared to the Court that the police operation had not targeted the applicant personally as a well-known drug dealer, but rather any person who would agree to procure heroin for the informant. A clear and foreseeable procedure for authorising investigative measures, as well as their proper supervision, should have been put in place in order to ensure the authorities' good faith and compliance with proper law-enforcement objectives. However, the police operation had been authorised by a simple administrative decision of the body which later carried out the operation, the text of which contained very little information as to the reasons for and purposes of the planned "test buy". Furthermore, the operation had not been subjected to judicial review or any other independent supervision. In the absence of a comprehensive system of

checks accompanying the operation, the role of the subsequent control by the trial court had been crucial. However, the policemen involved in the "test buy" had never been questioned by the court, although the defence had sought to have them heard. The person who had sold the drug to the applicant had not been questioned either. Finally, the Court was particularly struck by the fact that the applicant himself had not been heard on the subject of incitement as he had also been absent from the hearing on the merits. In sum, although the domestic court had had reason to suspect that there was an entrapment, it did not analyse relevant factual and legal elements which would have helped it to distinguish the entrapment from a legitimate form of investigative activity. Moreover, the domestic law should not tolerate the use of evidence obtained as a result of incitement by State agents. It followed that the proceedings, which had led to the conviction of the applicant, had not been "fair". Conclusion: violation (unanimously).

Reasoning of judicial decisions

30 minutes

Points to emphasize
Explain the main requirements based on the ECtHR case law (see below) and the approach of the Court

- the obligation for courts to give sufficient reasons for their decisions - *H. v. Belgium*, § 53 (civ.) / *Boldea v. Romania* (crim.)
- reasons given must be such as to enable the parties to make effective use of any existing right of appeal - *Hirvisaari v. Finland*, § 30 (civ.) / *Hadjianastassiou v. Greece* (crim.)
- no obligation for a detailed answer to every argument - *Van de Hurk v. The Netherlands*, § 61

CASE ANALYSIS

INSTRUCTIONS FOR THE TRAINER

- *Distribute the facts and the reasoning of the case to the participants*
- *Ask them to read the case summary and identify the main elements taken into consideration by the ECtHR in its judgement and to underline the parts which they esteem as relevant for drawing a conclusion on the case.*
- *You can decide to do this exercise as individual work or in pairs/groups; for a shorter time allocated, the work in groups might be best.*
- *Ask them to present their findings and comment on it; alternatively*

you can also ask them to write down the criteria identified on paper board.

- *Sum up the conclusion yourself and provide the case reference: Garcia Ruiz v. Spain; add on the criteria to provide the full overview (see below).*

Facts: The applicant, a Spanish national, was born in 1941 and lives at Alcorcón (Madrid). He is a lawyer. Having lost his case at first instance in an action against M., a client, for the recovery of fees owed to him for certain non-contentious services performed in the context of foreclosure proceedings before Judge No. 19 of the Madrid Court of First Instance, the applicant appealed to the Madrid Audiencia Provincial. The first instance court had held that he had not proved that he had performed the services in question. His appeal was dismissed on 17 March 1995. The Audiencia Provincial ruled in its judgment that there was no proof that the applicant had acted as counsel in the foreclosure proceedings before Judge No. 19 of the Madrid Court of First Instance, "although he [might] have carried out non-contentious work". Relying in particular on Article 24 of the Spanish Constitution, the applicant then lodged an appeal de amparo with the Constitutional Court arguing that the judgment of the Audiencia Provincial gave no reply whatsoever to his arguments. In his appeal the applicant emphasised that he had indeed not acted as counsel in the foreclosure proceedings before Judge Nº 19 of the Madrid Court of First Instance, but solely as M.'s agent, providing non-contentious services, advice and assistance. On 11 July 1995 the appeal was dismissed.
The applicant complained that he had not had a fair hearing in the appeal proceedings before the Madrid Audiencia Provincial, since that court had not replied to his submissions, contrary to Article 6 § 1 of the European Convention on Human Rights.

Law: The Court first reiterated that, according to its established case-law, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. However, although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. In the present case the Court noted that at first instance judge No. 12 of the Madrid Court of First Instance had taken into account in his decision the defendant's statements denying the facts alleged by the applicant in his claim. It had held that the evidence of a witness called by the applicant was not conclusive and ruled that the applicant had not proved that he had performed the services for which he was claiming a fee. On appeal the Audiencia Provincial had first stated that it accepted and deemed to be reproduced in its own decision the statement of the facts set out in the judgment

at first instance. It had gone on to say that it likewise endorsed the legal reasoning of the impugned decision in so far as it was not incompatible with its own findings. On that point, it had held that there was not the slightest evidence in the case file to prove that the applicant had acted as counsel in the foreclosure proceedings, although he might have performed non-contentious services. It had therefore dismissed the appeal and upheld the judgment delivered at first instance. The case had then been referred to the Constitutional Court, which, in its judgment of 11 July 1995, had dismissed the applicant's appeal de amparo on the grounds that, according to the trial courts, the applicant had not established that he had rendered the professional services for which he was claiming a fee and that assessment of the facts was a matter over which the Constitutional Court did not have jurisdiction. Insofar as the applicant's complaint might be understood to concern assessment of the evidence and the result of the proceedings before the domestic courts, the Court reiterated that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts. The Court noted that the applicant had had the benefit of adversarial proceedings. At the various stages of those proceedings he had been able to submit the arguments he considered relevant to his case. The factual and legal reasons for the first-instance decision dismissing his claim had been set out at length. In the judgment at the appeal stage the Audiencia Provincial had endorsed the statement of the facts and the legal reasoning set out in the judgment at first instance in so far as they did not conflict with its own findings. The applicant could not therefore validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable. In conclusion, the Court considered that, taken as a whole, the proceedings in issue had been fair for the purposes of Article 6 § 1 of the Convention and that there had been no violation of that provision.

Criteria: the nature of the decision, the circumstances of the case, the nature of the submissions of the parties, the differences existing in the legal systems of the Contracting States, customary rules, legal opinions and the presentation and drafting of judgments - *Ruiz Torija v. Spain*, § 29

Where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply - *Ruiz Torija v. Spain*, § § 29-30

In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision - *Garcia Ruiz v. Spain* [GC], § 26

National context overview (15 min)

Sufficient and consistent reasoning of the decisions is acknowledged also in the domestic legislation as one of the most important fair trial standards. Lack or inconsistency of the reasoning of court decisions is a ground for lodging an appeal and for quashing of judgments/decisions. This ground is also subject to *ex officio* consideration by the higher judicial instances which is yet another proof of the key role of this aspect for proper administration of justice. It should be noted that, while the judges enjoy the freedom of judicial discretion (slobodno sudsko uveruvanje), still, their decisions need to be clearly reasoned as stipulated in Articles 16 and 408 of the Law on Criminal Procedure. This Law (as well as other procedural legislation) requires from the judges as well as from the other stakeholders to clearly elaborate their decisions and motions made in various circumstances and instances (for example, in deciding on the detention, taking of evidence, requesting exclusions etc). Substantially the same provisions are foreseen in the Law on Civil Procedure.

Macedonian cases before ECtHR related to lack of reasoning under Article 6:

Atanasovski – labour proceedings for annulment of reassignment and dismissal. The Supreme Court decided the case contrary to its well-established practice without providing more substantial statement of reasons justifying the departure from its jurisprudence. Violation.

Stoilkovska – civil proceedings for damages incurred in labour relations. The applicant's case was decided contrary to the outcome of the series of cases against her colleagues concerning the same factual backgroud. The courts did not give any reasonable explanation for this divergence that resulted in an unjustified restriction of the applicant's right to a fair trial. Violation.

Mitkova – administrative proceedings for reimbursement of expenses for medical treatment abroad. After number of remittals and instructions to establish a contested point of fact, the Administrative Court finally decided the case without holding an oral hearing although requested by the applicant. The Administrative Court gave no reasons why it considered that hearing was not necessary, especially having in mind the factual issues that needed to be discussed. Violation.

Public hearing

10 minutes

Method: guided discussion

INSTRUCTIONS FOR THE TRAINER

- *Ask participants why is this safeguard important in their opinion*
- *Collect the replies and match them with the principles developed by the ECHR (see notes below)*

The safeguard is aimed at protecting litigants against the administration of justice in secret with no public scrutiny; it is also one of the means to maintain confidence in the courts - *Martinie v. France* [GC], § 39 (civ.) / *Sutter v. Switzerland*, § 26 (crim.)
It implies a right to an oral hearing at least before one instance - *Fischer v. Austria*, § 44 (civ.) / *Jussila v. Finland* [GC], § 40 (crim.)
Exceptions - safety or privacy of witnesses, free exchange of information and opinion in the pursuit of justice, security - *B. and P. v. the United Kingdom*, § 37
Mitkova case – administrative proceedings for reimbursement of expenses for medical treatment. No exceptional circumstances to justify dispensing with an oral hearing.

Public delivery of the judgments

🕘 10 minutes

Various means of rendering a judgment public, aside from reading out in open court, may also be compatible with Article 6 § 1 - *Welke and Białek v. Poland*, § 83

Complete concealment from the public of the entirety of a judicial decision cannot be justified - *Raza v. Bulgaria,* § 53

Jancev v "The former Yugoslav Republic of Macedonia" – civil proceedings between neighbours for disturbance of the possession. The application was ejected as inadmissible, as there was no significant disadvantage in the lack of public pronouncement of the court decision.

Reasonable length of proceedings

🕘15 minutes

Points to emphasize
Explain the criteria used by the Court and focus on the national cases and the specificities of the implementation at national level.

Aim: to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined - *Kart v. Turkey* [GC], § 68
The fairness of the length of proceedings must be assessed in the light of:
- the complexity of the case,
- the conduct of the applicant,

- the conduct of the relevant administrative and judicial authorities
Pélissier and Sassi v. France [GC], § 67

Overview of national cases (v. "The former Yugoslav Republic of Macedonia") for the last 3 issues presented in this step 15 min

The length of the proceedings has been a systematic problem identified in huge number of cases against "The former Yugoslav Republic of Macedonia". Since 2011 the ECtHR found that the remedy for the protection of the right to trial within reasonable time before the Supreme Court was effective and that accordingly it must be exhausted by the applicants before they submit their length complaint to the ECtHR (Adzi Spirkovska case).

The remedy is both compensatory and acceleratory because the Supreme Court awards just satisfaction and may also set a time-limit to complete the proceedings or the stage in which they are pending at that particular moment.

Domestic legislation foresee urgency in few types of proceedings: labour disputes, bankruptcy proceedings, criminal proceedings when there is pre-trial detention, proceedings for deprivation of legal capacity, proceedings for protection of disturbed possession etc.

In principle, ECtHR tolerates around 2 years per instance. In administrative cases, the starting point for the calculation of the length is the emergence of a "dispute" i.e. from the moment of lodging the first appeal in the case.

According to Article 36 of the Law on Courts, when deciding upon the length remedy, the Supreme Court is obliged to follow the case-law of the ECtHR, namely, the complexity of the case, type of the proceedings and what is at stake for the claimant as well as the conduct of the court and of the parties. As evident from its jurisdprudence on the matter, the Supreme Court routinely takes these elements into consideration. This is probably the area in which the ECtHR jurisprudence is mostly used and reflected.

Question/point for discussion:
Can civil claim be lodged against the State for damages sustained from the delays in court proceedings?

Unit III - Specific guarantees - presumption of innocence

Step 1 - Introduction to the concept

🕘 45 minutes (+ 15 minutes national context)

Methods: brief presentation and open discussions

INSTRUCTIONS FOR THE TRAINER

- *Use the sample presentation (Fair trial rights 2) – projected during presentation and provided as handout to participants.*
- *Construct the session on an open discussion based on the elements provided to the participants*
- *Use the 'Case-law Guide on Article 6 – criminal limb' for additional information to be provided to the participants during the presentation*
-

ARTICLE 6 § 2

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

Structure:

(1) Burden of proof
(2) Presumptions of fact and of law
(3) Scope of Article 6 § 2
(4) Prejudicial statements

Burden of proof

Points to emphasise
Explain the importance of the principle *in dubio pro reo* and the burden of proof which falls on the prosecution.

It falls on the prosecution - any doubt should benefit the accused (duty to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him) *Barberà, Messegué and Jabardo v. Spain*, § 77

Example: *Telfner v. Austria* (no. 33501/96) - Violation Article 6 § 2
Thomas Telfner, an Austrian national convicted of causing injury by negligence after a road traffic accident, complained that, in the criminal proceedings against him, the courts failed to respect the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

The European Court of Human Rights noted that both the District Court and the Regional Court dealing with the case relied on a police report that Mr Telfner was the main user of the car and that he had not been home on the night of the accident, but that the victim of the accident had not been able to identify the driver, or even to say whether the driver had been male or female, and that the Regional Court had found that the car in question was also used by the applicant's

sister. In requiring the applicant to provide an explanation, the courts shifted the burden of proof from the prosecution to the defence.

The District and Regional Courts also speculated as to whether the applicant had been under the influence of alcohol, which was not supported by any evidence and which was not directly relevant to the offences with which the applicant had been charged. This contributed to the impression that the courts had a preconceived view of the applicant's guilt.

The European Court of Human Rights held unanimously that there had been a violation of Article 6 § 2 (presumption of innocence) and awarded the applicant 20,000 Austrian schillings for non-pecuniary damage.

Presumptions of fact and law

- not prohibited in principle by the Convention - Falk v. the Netherlands (dec.)
- within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence - *Salabiaku v. France*, § 28

Scope

Criminal proceedings – in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge - *Poncelet v. Belgium*, § 50
Subsequent proceedings - *Allen v. the United Kingdom* [GC]

Prejudicial statements

Points to emphasise
Explain the difference between statement concerning suspicion, which is not in breach of the presumption of innocence (also in the context of the information to the public about the judicial process) and statement concerning guilt. Statements by judges are subject to stricter scrutiny than those by investigative authorities.

Examples:
Lavents v Latvia - where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty: The Court noted that it appeared from the judge's statements to the press that she was persuaded of the applicant's guilt. She had even suggested that he prove that he was not guilty, an attitude which in the Court's opinion was at variance with the very principle of the presumption of innocence, one of the fundamental principles governing a democratic State. The Court accordingly held that there had been a violation of Article 6 § 2 of the Convention.

Samoila and Cionca v Romania - remand prisoner forced to wear convicted prisoner's uniform at hearing of an application for his release on bail: violation

National context overview

Presumption of innocence is guaranteed by Article 13 of the Constitution and by the Law on Criminal Proceedings already in its Article 2 as well through few subsequent provisions of the Law. This procedural guarantee was strengthened in the new Law on Criminal Procedure with an additional, second paragraph that obliges the state institutions, media and all other subjects to respect the presumption of innocence. The national legislative framework in this context requires application of the *in dubio pro reo* principle (Article 4 of the LCP).

So far, the presumption of innocence was analysed before the ECtHR in couple of cases against "The former Yugoslav Republic of Macedonia".

In the case of Miladinovi, the ECtHR had some concerns in respect of the wording used in the detention decisions issued against the applicants. The Court rejected the complaint as manifestly ill-founded; it however noted that the wording used in the detention orders was "unfortunate".

In the case of Poletan and Azirovik, problematic point was made in the reasoning of the first-instance judgment where it was stated that the defendant's assertion that he did not know that cocaine was planted in the truck that he drove cannot be accepted since it is "unsupported with any evidence". The wording used, suggested that the burden of proof was shifted to the applicant/defendant i.e. that it was for him to submit evidence and prove that he was not aware of the drugs. The ECtHR ultimately considered the case on the merits but found that there was no violation of the presumption of innocence. The domestic courts provided sufficient reasoning and there was nothing that would cast doubt as to the conclusions they have made.

Step 2 - Practical application

20 minutes

CASE STUDY - Prejudicial statements - *Ismoilov v Russia*

INSTRUCTIONS FOR THE TRAINER

The case studies are in 'case studies handout', to be provided in print to the participants in prior
Ask them to read the case; give them 5 minutes
Ask them to tell you whether they think there is a violation of Article 6 and why; if not why; let them discuss the conflicting opinions; other possible guiding questions: Is the wording used in the public statement important? Does it affect the applicants' situation in any way? Does it matter that the proceedings are in a foreign country?
For background information, use the case summary
After exchanging opinions, let them know which case it is and summarise the ECtHR's finding (see case studies docket) by highlighting the effect of the prosecutor's statements concerning their guilt, even if the trial would take place in another country

Case study

The applicants, who are 12 Uzbek nationals and one Kyrgyz national, were arrested in June 2005 in Russia. They were the subject of an extradition request from the government of Uzbekistan, which claimed that they had financed the May 2005 unrest in the Uzbek city of Andijan. The applicants were held in detention with a view to extradition until March 2007, when they were released. In 2006 the United Nations High Commissioner for Refugees granted the applicants refugee status determining that they each had a well-founded fear of being persecuted and tortured if returned to Uzbekistan. The Russian authorities refused to give them refugee status or asylum. Instead, a deputy prosecutor general ordered their extradition to Uzbekistan after noting that they had "committed" acts of terrorism and other criminal offences and that the Russian authorities had received diplomatic assurances from the Uzbek government that they would not be tortured or sentenced to death upon their return. The extradition orders were upheld by the Russian courts, but the applicants were not extradited because of an interim measure indicated by the Court under Rule 39 of the Rules of Court.

Legal analysis (only available to the trainer):

Article 6 § 2 – Applicability – The applicants had not been charged with any criminal offence within Russia. The extradition proceedings against them therefore did not concern the determination of a criminal charge within the meaning of Article 6 of the Convention. However, the applicants' extradition had been ordered for the purpose of their criminal prosecution. The extradition proceedings were therefore a direct consequence, and the concomitant, of the criminal investigation pending against the applicants in Uzbekistan. The Court therefore considered that there was a close link between the criminal proceedings in Uzbekistan and the extradition proceedings

justifying the extension of the scope of the application of Article 6 § 2 to the latter. Moreover, the wording of the extradition decisions clearly showed that the prosecutor regarded the applicants as "charged with criminal offences" which was in itself sufficient to bring into play the applicability of Article 6 § 2 of the Convention. The Court further considered that an extradition decision might raise an issue under Article 6 § 2 if supporting reasoning, which could not be dissociated from the operative provisions, amounted in substance to the determination of the person's guilt. The extradition decisions in the present case declared that the applicants should be extradited because they had "committed" acts of terrorism and other criminal offences in Uzbekistan. That statement was not limited to describing a "state of suspicion" against the applicants, it represented as an established fact, without any qualification or reservation, that they had been involved in the commission of the offences, without even mentioning that they denied their involvement. The wording of the extradition decisions amounted to a declaration of the applicants' guilt which could encourage the public to believe them guilty and which prejudged the assessment of the facts by the competent judicial authority in Uzbekistan.

Unit IV - Specific guarantees - the rights of the defence

Step 1 - Introductive remarks

5 minutes
Method: legal text analysis

ARTICLE 6 § 3

Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against
him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Points to emphasise
Stress the 5 main safeguards provided by Article 6 § 3:
Information About The Charge
Adequate Time And Facilities
Right To Defend Oneself In Person Or Through Legal Assistance
Right To Examine Or Have Examined Witnesses
Right To An Interpreter

INSTRUCTIONS FOR THE TRAINER
- *Use the sample presentation (Fair trial rights 2) – projected during presentation and provided as handout to participants.*
- *Use the 'Case-law Guide on Article 6 – criminal limb' for additional information to be provided to the participants during the presentation*

Step 2 - Information about the charge

30 minutes
Method: brief presentation, case study

Points to emphasise
Summarise *Pelisiser and Sassi* by focusing on the issue relevant to this aspect.
Remind the 3 elements – 'in detail', promptly', 'language'
Highlight the applicability of this requirement to the situations of reclassification of charges (whether to more serious or more lenient crimes). If the new charge contains elements intrinsic to the initial accusation, then the principle does not apply.

6 § 3 a : to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him

Essential prerequisite for ensuring that the proceedings are fair - *Pélissier and Sassi v. France* [GC]
"cause" = the acts allegedly committed and on which the accusation is based
"nature" = the legal characterisation given to those acts

Example: *Pélissier and Sassi v. France* [GC] - 25444/94
Recharacterisation of charge by appeal court without giving defence a proper opportunity to submit arguments: violation

Facts – After a criminal investigation the applicants were committed to stand trial in the Toulon Criminal Court on charges of criminal bankruptcy. That court acquitted them in 1991, finding that they had not acted as de jure or de facto managers. In a judgment delivered on 26 November 1992 the Aix-en-Provence Court of Appeal upheld that finding but convicted them of aiding and abetting criminal bankruptcy instead. It sentenced them to a suspended term of eighteen months' imprisonment and imposed a FRF 30,000 fine. The applicants' appeal to the Court of Cassation was dismissed on 14 February 1994. They relied on Article 6 §§ 1 and 3 (a) and (b) of the Convention.

Law - Article 6 §§ 1 and 3 (a) and (b) as regards the fairness of the proceedings: The Court considered the decision of the Aix-en-Provence Court of Appeal to convict the applicants of a different offence. After explaining the scope of Article 6 § 3 (a) and (b), the Court noted that the only charge contained in the order committing the applicants for trial before the Criminal Court was criminal bankruptcy. There was nothing to suggest that a charge of aiding and abetting criminal bankruptcy was considered to have been a genuine possibility during the investigation. Argument before the Criminal Court had been confined to the offence of criminal bankruptcy. On the public prosecutor's appeal to the Aix-en-Provence Court of Appeal the applicants were at no stage, whether in the summons to appear or at the hearing, accused by the judicial authorities of having aided and abetted criminal bankruptcy. On the facts, the Court found that it had not been established that the applicants were aware that the Court of Appeal might return an alternative verdict of "aiding and abetting" criminal bankruptcy. None of the Government's arguments, whether taken together or in isolation, could suffice to guarantee compliance with the provisions of Article 6 § 3 (a) of the Convention.
With regard to the question whether the notion of aiding and abetting under French law meant that the applicants ought to have been aware of the possibility that a verdict of aiding and abetting criminal bankruptcy might be returned instead of one of criminal bankruptcy, the Court noted that the provisions of Articles 59 and 60 of the Criminal Code as applicable at the material time expressly provided that aiding and abetting could be made out only on proof of a number of special elements, subject to strict, cumulative conditions. The Court could not, therefore, accept the Government's submission that aiding and abetting differed from the principal offence only as to the degree of participation. It was not for the Court to assess the merits of the defences the applicants could have relied on had they had an opportunity to make submissions on the charge of aiding and abetting criminal bankruptcy. It merely noted that it was plausible that the defence would have been different from the defence to the substantive charge. Further, the principle that criminal statutes had to be strictly construed meant that it was not possible to avoid having to make out the specific elements of aiding and abetting. The Court also found that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings. The Court accordingly considered that, in using the right which it unquestionably

had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It found nothing in the case before it capable of explaining why, for example, the hearing had not been adjourned for further argument or, alternatively, the applicants had not been requested to submit written observations while the Court was in deliberation. On the contrary, the evidence indicated that the applicants had been given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they had become aware of the recharacterisation of the facts. Plainly, that had been too late. The Court concluded that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence had been infringed. Consequently, there had been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article.
Conclusion: violation (unanimously).

 CASE STUDY - information about the charge - *Varela Geis v Spain*

INSTRUCTIONS FOR THE TRAINER

- *ask them to read the case*
- *ask them to tell you whether they think there is a violation of Article 6 and why; if not why; let them discuss the conflicting opinions; other possible guiding questions: is the information on the legal characterisation important?*
- *for background information, use 'case studies docket', where you have the case summary (Varela Geis)*
- *after exchanging opinions, let them know which case it is and summarise the ECtHR's finding (see case studies docket) by highlighting the issue of information about the charge*

Case study
In 1996 the applicant was indicted for the continuing offence of "genocide" on account of his alleged Holocaust denial, on the basis of Article 607 § 2 of the Criminal Code, and the continuing offence of "incitement to racial discrimination" under Article 510 § 1 of the Criminal Code. Two private parties joined the prosecution. In 1998 the applicant was convicted of those offences. He appealed to the Audencia Provincial. In 2007, after a request from the Audencia Provincial for a preliminary ruling, the Constitutional Court declared Article 607 of Criminal Code unconstitutional in so far as it concerned genocide denial but found that the remainder of that Article was constitutional. The applicant then asked whether the charge against him under Article 607 § 2 of the Criminal Code remained valid. The Audiencia Provincial stated that it was unnecessary to answer his request. The public prosecutor's office withdrew the charge of genocide denial and sought to

have the applicant acquitted of the offence under Article 607 of the Criminal Code and convicted only of the offence of incitement to racial discrimination, hatred and violence, under Article 510 § 1 of the Criminal Code. However, the private prosecutors called for the applicant's conviction under Article 607 to be upheld, arguing that his conduct had gone further than mere denial of genocide. In 2008 the Audiencia Provincial partly quashed the lower court's judgment, acquitted the applicant of the offence under Article 510 of the Criminal Code and sentenced him to seven months' imprisonment for the offence of justifying genocide, under Article 607 § 2 of the Criminal Code. An amparo appeal by the applicant was unsuccessful.
Before the Court, the applicant complained that he had been convicted on appeal of an offence –justifying genocide – which had not formed part of the indictment and of which he had not been convicted at first instance.

Case analysis (only available to the trainer):
Article 6 § 3 (a) and (b) in conjunction with Article 6 § 1: Article 6 § 3 (a) of the Convention afforded persons charged with a criminal offence the right to be informed not only of the cause of the accusation, that is to say the acts they were alleged to have committed and on which the accusation was based, but also, in detail, of the legal classification of those acts. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, was an essential prerequisite for ensuring that the proceedings were fair. Moreover, Article 6 § 3 (a) did not impose any special formal requirement as to the manner in which the accused were to be informed of the nature and cause of the accusation against them; nevertheless, it had to be foreseeable. Lastly, sub-paragraphs (a) and (b) of Article 6 § 3 were connected and the right to be informed of the nature and the cause of the accusation had to be considered in the light of the accused's right to prepare their defence.
It could be inferred from the public prosecutor's decision to withdraw the charge of genocide denial that the conduct to which the prosecution related was no different from the conduct that had been decriminalised by the Constitutional Court. In addition, the applicant had already made his submissions at the hearing in the appeal proceedings before he had even become aware of the substance of the private prosecutors' arguments and had never been clearly accused of any conduct amounting to justification of genocide. None of the evidence submitted indicated that the applicant had been informed that the Audiencia Provincial had reclassified the alleged offence, or even that the private prosecutors' arguments supporting the charge of justifying genocide had been considered. Nor had it been established that the applicant had been aware of the mere possibility that the Audiencia Provincial might amend the charge against him from "denying" to "justifying" genocide.

Justification of genocide had not constituted an intrinsic element of the initial accusation known to the applicant from the beginning of the proceedings. In using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Audiencia Provincial should have afforded the applicant the opportunity to exercise his defence rights on that issue in a practical and effective manner, and hence in good time. That had not been the case, as it was only through the judgment on his appeal that the applicant had belatedly learnt of the recharacterisation of the facts.
Conclusion: violation (unanimously).

Step 3 - Preparation for defence

15 minutes
Method: brief presentation

Points to emphasise
Adequate time
Adequate facilities – which has two aspects – access to evidence and consultation with a lawyer

6 § 3 b : to have adequate time and facilities for the preparation of his defence

The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings - *Can v. Austria*, § 53
"facilities" = the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings - *Huseyn and Others v. Azerbaijan*, § 175
"facilities" = consultation with his lawyer - *Goddi v. Italy*, § 31

Example: *Makhfi v France*
He appeared before the Maine-and-Loire Assize Court on charges of rape and theft as a member of a gang, having had previous convictions for similar offences. The trial began on 3 December 1998 at 9.15 a.m. and ended on 5 December at 8.30 a.m.
After the second day of the trial had ended at 12.30 a.m., counsel for the applicant applied unsuccessfully for an adjournment. The proceedings resumed at 1 a.m. and lasted until 4 a.m. Counsel for the applicant gave his address when the hearing resumed at 4.25 a.m., by which time the sitting had lasted for a total of 15 hours and 45 minutes. The judge and jury, who held their deliberations between 6.15 and 8.15 a.m. on 5 December, found the applicant guilty and

sentenced him to eight years' imprisonment.
Relying on Article 6 (right to a fair hearing) of the European Convention on Human Rights, the applicant submitted that the time at which his lawyer had had to give his address and the length of the hearing had infringed his defence rights.
The European Court of Human Rights considered it essential that not only those charged with a criminal offence but also their counsel should be able to follow the proceedings, answer questions and make their submissions without suffering from excessive tiredness. Similarly, it was vital that judges and jurors should be in full control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment.
Finding that the rights of the defence and the principle of equality of arms had not been observed in the present case, the Court held unanimously that there had been a violation of Article 6 § 3 taken together with Article 6 § 1

Step 4 - Legal representation

30 minutes
Method: brief presentation, case study

6 § 3 c: to defend oneself in person or through legal assistance

This provision implies the right to defend oneself or through legal assistance. Legal aid should be provided "where the interests of justice so require" and it should be "practical and effective". The notion of "where the interests of justice so require" is to be judged by taking account of the facts of the case as a whole, including not only the situation at the time the decision on the application for legal aid is handed down but also that at the time the national court decides on the merits of the case.

Points to emphasise
Mention the issue of quality of legal service, which is also an obligation of the state to a certain extent; however, a Contracting State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or chosen by the accused
As example, summarise *Czekalla v Portugal*.

Example - *Czekalla v. Portugal*
The applicant was arrested in Portugal and remanded in custody as part of an anti-drug-trafficking operation. In April 1994 thirty-five defendants, including the applicant, were committed for trial. During the trial the applicant dismissed his lawyer and asked to be officially assigned another lawyer. On 21 February 1995 the court assigned Ms T.M. as defence lawyer for the applicant. On 24 July 1995

the Sintra District Court sentenced the applicant to 15 years' imprisonment for drug trafficking with aggravated circumstances. The applicant personally appealed against that judgment. His appeal was dismissed, however, on the ground that it had been drafted in German and not Portuguese. On 7 August 1995 Ms T.M., for her part, lodged an appeal against that judgment on the applicant's behalf. The following month the applicant dismissed Ms T.M. Her appeal against the conviction was declared inadmissible by the Supreme Court on 10 July 1996 for failure to state the grounds of appeal adequately. The appeal had not set out a summary of the grounds of appeal and had failed to state how the provisions allegedly breached should have been construed and applied. Giving judgment on an appeal lodged by the public prosecutor on 11 December 1996, the Supreme Court also found the applicant guilty of conspiracy. It increased his sentence to 18 years' imprisonment.

Relying on Article 6 § 1 (right to a fair hearing) and Article 6 § 3 (right to legal assistance), the applicant complained of inadequacies in the legal assistance he had received. In his submission, the omissions by his officially assigned defence lawyer had deprived him of the right of access to the Supreme Court.

The Court reiterated that, where legal assistance was provided, the State was not responsible for every shortcoming on the part of an officially assigned lawyer. However, the national authorities were required to intervene where the inadequacy of such a lawyer appeared obvious or had been brought to their attention.

The Court considered that deficiencies or errors in the presentation of the defendant's case by an officially assigned lawyer did not engage the State's responsibility. The position was different, however, where a failure to comply with procedural requirements deprived the defendant of a particular remedy and the situation was not rectified by the higher courts. In the present case the applicant had been a foreigner who had no knowledge of the language in which the proceedings were conducted and faced a lengthy prison sentence. Those factors led the Court to conclude that the applicant had not had the benefit of a practical and effective defence in his appeal to the Supreme Court.

The Court considered that the failure of the applicant's officially assigned lawyer to comply with a procedural requirement in lodging the appeal with the Supreme Court was a manifest shortcoming requiring positive steps to be taken by the national authorities, such as a request to enlarge on or revise the statement of grounds of appeal. The Court further noted that it appeared from the Constitutional Court's recent case-law that it was no longer possible to declare an appeal inadmissible on the grounds that had been given by the Supreme Court in the present case.

Conclusion: violation of Article 6 §§ 1 and 3 (c) of the Convention


CASE STUDY - defence through legal assistance - *Salduz v Turkey*


INSTRUCTIONS FOR THE TRAINER

- ask them to read the case under Module IV – specific guarantees – the rights of the defence – defence through legal assistance); give them 5

minutes
- ask them to tell you whether they think there is a violation of Article 6 and why; if not why; let them discuss the conflicting opinions; other possible guiding questions: as of when should the right to a lawyer have been secured? Are there exceptions to the rule?
- at the end give them the case reference (Salduz v Turkey) and sum up the conclusion of the Court by highlighting the issue of the importance of securing the defence through legal assistance and the effect of taking evidence in the absence of a lawyer

Case study
At the material time, Turkish law afforded suspected offenders a right of access to a lawyer from the moment they were taken into custody, unless they were accused of an offence falling within the jurisdiction of the state security courts. The applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the state security courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, he sought to retract that statement, alleging it had been extracted under duress. The investigating judge remanded him in custody, at which point he was allowed to see a lawyer. He continued to deny his statement at trial, but the state security court found that his confession to the police was authentic and convicted him as charged. He was given a thirty-month prison sentence.

Case analysis (only available to the trainer):
Article 6 § 3 (c): In order for the right to a fair trial under Article 6 § 1 to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction. In the instant case, the justification given for denying the applicant access to a lawyer – namely that such access was by law systematically denied for offences falling within the jurisdiction of the state security courts – fell short of the requirements of Article 6. Moreover, the state security court had used the applicant's statement to the police as the main evidence on which to convict him, despite the fact that he denied its accuracy. Neither the assistance subsequently provided by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The applicant's age was also a material factor. As the significant number of relevant international law

materials on the subject showed, access to a lawyer was of fundamental importance where the person in police custody was a minor. In sum, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irretrievably affected his defence rights.
Conclusion: violation (unanimously).

Step 5 - Examination of witnesses

45 minutes
Method: brief presentation, case study

Points to emphasise
Highlight the use of the term 'witness' from the point of view of an autonomous concept.
Mention the different standard (more relaxed and less protective of the defendant) in cases of sexual and domestic violence and point out that this will be clarified via a practical exercise (see *Y v Slovenia and Aigner v Austria*)

6 § 3 d : to examine or have examined witnesses

The term "witness" has an autonomous meaning and it includes co-accused and experts. The accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.

Example: *Hümmer v. Germany* (no. 26171/07)
The applicant was placed in a psychiatric hospital for two counts of assault occasioning grievous bodily harm by a court decision of February 2005, he complained that neither he nor his counsel had been able to examine the main witnesses against him at any stage of the proceedings. The witnesses, family members of the applicant, had made use of their right not to testify in court. Their pre-trial testimonies were, however, introduced at the trial by the testimony of an investigating judge who had heard the witnesses at the investigative stage in the absence of the applicant and counsel. Mr Hümmer relied on Article 6 §§ 1 and 3 (d) (right to a fair trial; right to obtain attendance and examination of witnesses).
Conclusion: violation of Article 6 § 1 in conjunction with Article 6 § 3 (d)

In principle, the attendance of witnesses in court should be secured, any absence needing justification. Exceptions can apply, for instance in case of death or the right to remain silent of the respective witness. Other aspects to consider is the use of anonymous witnesses and the equality of arms in terms of the possibility to examine witnesses for the defence.

Example: *Luca v. Italy*
N. and C. were arrested in possession of cocaine. N. told the police that he and C. had gone to the applicant's home and had been told by him that he was prepared to supply them with cocaine . N. was originally questioned as a witness but was subsequently regarded as a "suspect " and questioned by the public prosecutor in that capacity. N. was called to give evidence as a "person accused in connected proceedings" . However, he chose to remain silent as he was entitled to do under the domestic legislation. The applicant was as a result deprived of any opportunity of examining him or of having him examined . The criminal court noted that N.'s refusal to give evidence was lawful. As it was entitled to do under the case-law of the Constitutional Court, the criminal court admitted in evidence the statements made by the persons accused in connected proceedings. Consequently , the record of the statements made by N. to the public prosecutor were read out at the hearing . The applicant was convicted and sentenced to over eight years' imprisonment and a fine. The criminal court noted that the main evidence against the accused was the statements made by N. to the public prosecutor. The applicant's appeal to the court of appeal and to the Court of Cassation were dismissed.
Conclusion: violation of Article 6 §§ 1 and 3(d)

 CASE STUDY - comparative approach – *Y v Slovenia and Aigner v Austria*

 INSTRUCTIONS FOR THE TRAINER

Divide the group in two, give each group one case from the two below and ask them to read it; give them 10 minutes

- *Group with case 1 – ask the first group to summarise the facts of the case and ask them to say whether they think there is a breach of the Convention and why, if not why, ask them to frame the issue under an article of the Convention*
  - *Let them develop and ask the other group what they think, let them discuss*
  - *for background information, use 'legal analysis provided below (Aigner v Austria)*
- *Group with case 2 - ask the second group to summarise the facts and ask them to say whether they think there is a breach of the Convention and why, if not why not; ask them to frame the issue under an Article of the Convention*
- *Let them develop and ask the other group what they think, let them discuss*
- *for background information, use legal analysis provided below (Y v Slovenia)*
- *after exchanging opinions, let them know which case it is and summarise the ECtHR's finding by highlighting the different standard*

in cases of sexual and domestic violence, in which the rights of the defence need to be balanced against the right of the victim to respect of private life (Article 8)

Highlight that in criminal trials the specific guarantees (paras 2 and 3 of Art 6) apply only to the defendant; while the victim's right (like in Y case) would be covered under 8 (not to be overexposed in repeated testimonies etc); victims of violence also have their procedural rights protected under Article 3 (procedural limb – the right to an effective investigation)

Case 1

Mrs K was questioned twice by the police after an alleged rape by the applicant and criminal proceedings were instituted against the latter. A month later, Mrs K was questioned by the investigating judge in the presence of the applicant, his lawyer, a psychiatric expert and the court stenographer. The applicant and his lawyer were given the opportunity to put questions to Mrs K and the hearing was recorded on video. At the end of the examination the applicant's counsel stated that she had no further questions to put to Mrs K. Subsequently the questioning was transcribed and the transcript ran to 29 pages.

On 9 October 2001 the Graz Regional Court convicted the applicant of attempted rape with violence. At the trial Mrs K refused to give evidence. The applicant appealed to the Supreme Court, which upheld his plea of nullity and quashed the conviction. It found that the proceedings before the Regional Court were defective as the Regional Court had based its findings on Mrs K's statements to the police, which had not been read out at the trial.

The Regional Court then resumed the proceedings in a new composition and heard evidence from the applicant and further witnesses, from four police officers who had been called to the scene as well as from the psychiatric expert present at the questioning of Mrs K.

Mrs K was invited to give evidence while the applicant was to be taken into an adjacent room. However, as the Code of Criminal Procedure entitled her to do, Mrs K refused to give evidence and requested that the statements she had made to the police and the investigating judge be read out instead. The court granted her request. The Court also granted the applicant's request for the video recording of her deposition before the investigating judge to be shown. However, when played, the video recording turned out to be a blank tape.

The applicant requested further evidence proving the alleged discrepancies in the several witness statements. The court dismissed the applicant's requests for the further taking of evidence, by explaining why it considered there was no need in this regard.

On 19 November 2002 the Regional Court convicted the applicant of attempted rape with violence. It relied partly on Mrs K's statements to the police and the investigating judge. Having regard to Mrs K's injuries and to the applicant's criminal

record of eleven previous convictions, it sentenced the applicant to three years' imprisonment. Referring to a psychiatric expert opinion, it further ordered that he be detained in an institution for mentally ill offenders.
The applicant filed a plea of nullity with the Supreme Court in which he complained inter alia about the dismissal of his requests for further evidence to be taken.
On 19 February 2002 the Supreme Court rejected the applicant's plea of nullity. Following a reasoned argumentation, it noted that the Regional Court had dealt with the inconsistencies between Mrs K's statements to the police and to the investigating judge and between her statements and Mrs P's statement in the context of its assessment of evidence, an assessment that appeared logical.
On 20 February 2003 the Graz Court of Appeal dismissed the applicant's appeal, but granted the Public Prosecutor's cross-appeal and increased the sentence to four years' imprisonment. That decision was served on the applicant's counsel on 9 May 2003.

Case 2
The applicant, Y., accused a family friend of repeatedly sexually assaulting her. Y.'s mother first lodged a criminal complaint against the family friend in July 2002, accusing him of having forced her daughter, who was 14 years old, to engage in sexual intercourse with him between July and December 2001. The family friend, 55 years old at the time, often took care of Y., together with his wife, helping her to prepare for beauty contests.
In the course of the ensuing investigation and trial, the authorities questioned Y. and her alleged assailant – who denied having had any sexual relations with Y. –, examined a number of witnesses and appointed experts to clarify the conflicting testimonies. Thus, two gynaecological reports neither confirmed nor disproved Y.'s allegations and two other experts came to contradictory conclusions: the first, a psychologist, found that Y. clearly showed symptoms of sexual abuse; and the second, an expert in orthopaedics, considered that the defendant could not have overpowered Y. and performed the acts of which he was accused on account of a disability (his left arm had been disabled since birth). During the gynaecological consultation, the doctor confronted Y. with the findings, in particular, of the orthopaedics report and questioned her why she had not defended herself more vigorously.
Y.'s request that the legal representative of the defendant should be disqualified from the proceedings – on the grounds that, having known him previously, she and her mother had consulted him concerning the sexual assaults even before the police was informed – was rejected by the trial court, finding that there were no statutory grounds for such disqualification.
During two of the hearings in the case, the defendant personally cross-examined Y. He maintained that he was physically incapable of assaulting her and that her accusations against him were prompted by her mother's wish to extort money from him; several questions were phrased in a way to suggest a particular answer and he continuously contested the veracity of Y.'s answers, alleging that she was able

to cry on cue to make people believe her.
In September 2009, after having held 12 hearings in total, the first-instance court acquitted Y.'s alleged assailant of all charges. The State prosecutor's appeal against that judgment was rejected in May 2010, as was Y.'s request for the protection of legality with the Supreme State Prosecutor a few months later.
Y. complained, among others, under Article 8 (right to respect for private and family life), of breaches of her personal integrity during the criminal proceedings and in particular that she had been traumatised by having been cross-examined by the defendant himself during two of the hearings in her case.

Case 1 - Legal analysis (Aigner v. Austria, only available to the trainer):
The Court reiterates that the admissibility of evidence is governed primarily by the rules of domestic law. The Court's task under the Convention is not to rule on whether witnesses' statements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, however. As a general rule, paragraphs 1 and 3 (d) of Article 6 cannot be interpreted as requiring in all cases that questions be put directly by the accused or his lawyer, whether by means of cross-examination or by any other means, but rather that the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when the witness makes his statement or at a later stage. The use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with the provisions cited above, provided that the rights of the defence have been respected. Even where such a statement is the sole or decisive evidence against a defendant, its admission in evidence will not automatically result in a breach of Article 6 § 1. However, the Court will examine in each case whether there were sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence.
Furthermore, Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to call a witness.
The Court must also have regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the

victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.
The Court notes further that Mrs K's description of events constituted decisive evidence on which the courts' findings were based as the other witnesses heard by the Regional Court were not eyewitnesses and gave evidence only as to their perception of Mrs K and events before and after the commission of the alleged offence. The Court must, therefore, examine whether the applicant was provided with an adequate opportunity to exercise his defence rights within the meaning of Article 6 of the Convention in respect of the evidence given by Mrs K. In doing so, the Court will examine whether there were factors capable of counterbalancing the fact that the defence could not question Mrs K. before the trial court.
The Court notes that Mrs K was heard by the investigating judge in the presence of the applicant and his counsel, who put questions to her. The applicant maintains, however, that this questioning did not satisfy the requirements of Article 6 of the Convention as the video recording of this hearing was not available at the trial and the evidence given by other witnesses heard at the trial conflicted with Mrs K's description of the events.
The Court observes that when questioning Mrs K in the preliminary proceedings the defence must have been aware that the position under national law was that, after the adversarial hearing, Mrs K would be exempted from giving evidence at the trial as the proceedings related to a sexual offence. The Court acknowledges that it would have been preferable for the trial court also to have been able to study the video recording of that hearing to gain a direct impression of Mrs K's conduct under questioning. However, in the light of the fact that at the time of the hearing Mrs K was an adult with full mental capacity, the Court cannot subscribe to the applicant's view that this was indispensable for the fair conduct of the proceedings.
Furthermore, the Court does not find that the applicant's inability to confront Mrs K with the testimony given by other witnesses at the trial restricted his rights of the defence to an unacceptable extent. In that connection, it notes that the applicant was able to provide the Regional Court with his own version of the events and point out any incoherence in Mrs K's statements or inconsistencies with the statements of the other witnesses heard at the trial.
As to the decision not to allow further evidence, the Court notes that the Regional Court concluded, on the basis of logical and pertinent arguments, that this was of no relevance to the proceedings. It subsequently convicted the applicant on the basis of Mrs K's statements, which it found credible and corroborated by other evidence that had been examined at the trial, and gave detailed reasons why it did not believe the applicant's version of events.
The Court finds that this manner of proceeding fell within the domestic court's normal discretion in deciding on the relevance and admissibility of evidence and does

not disclose any failure by the Austrian authorities to afford the applicant a fair hearing for the purposes of Article 6 §§ 1 and 3(d) of the Convention. Accordingly, there has been no breach of Article 6 §§ 1 and 3 (d) of the Convention.

Case 2 - Legal analysis (Y v. Slovenia, only available only to the trainer):
Article 8 - Having regard to the fact that Y.'s testimony at the trial constituted the only direct evidence in the case and the fact that the other evidence – the psychologist's report and the orthopaedics report – was conflicting, it was in the interest of a fair trial that the defence be provided with an opportunity to cross-examine Y, who was moreover an adult at the time of the hearings. Nevertheless the Court had to determine whether a fair balance had been struck between her personal integrity and the rights of the defence.
In the Court's opinion, the fact that Y.'s questioning had stretched over four hearings, held over seven months, without an apparent reason for the long intervals between hearings, in itself raised concerns.
As regards the nature of the cross-examination by the defendant himself, the Court noted that, while the defence had to be allowed a certain leeway to challenge Y.'s credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses. Some of the defendant's questions and remarks, such as his allegation that Y. could cry on cue in order to manipulate people, had aimed not only to challenge her credibility but also to degrade her character. Such offensive insinuations exceeded the limits of what could be tolerated for the purpose of mounting an effective defence. It would have been first and foremost the responsibility of the presiding judge to ensure that respect for Y.'s integrity was adequately protected from those remarks, an intervention which could have mitigated what must have been a distressing experience for her.
Concerning Y.'s assertion that the defendant's lawyer should have been disqualified as she had previously consulted him, it was not the Court's task to speculate on the question to what extent she had known the lawyer before. However, assuming that her allegation was true, the negative psychological effect of being cross-examined by him should not have been entirely disregarded.
Moreover, the information the lawyer might have received from her should not have been used to benefit a person with adverse interests in the proceedings. Nevertheless, her motion was rejected, as under national law there were no statutory grounds for dismissing a legal representative in the situation at hand. The Court therefore found that the Slovene legislation on disqualification of counsel, or the manner in which it had been applied, did not take sufficient account of Y.'s interests.
Finally, as regards the gynaecological consultation conducted in the course of the investigation, the Court observed that the doctor – in particular by confronting Y.

with the findings of the orthopaedics report and questioning her concerning her self-defence – had exceeded the scope of his task.
The Court acknowledged that the authorities had taken a number of measures to prevent Y. from being traumatised further, such as excluding the public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, given the sensitivity of the matter and her young age at the time when the alleged sexual assaults had taken place, a particularly sensitive approach would have been required. The Court found that – taking into account the cumulative effect of the shortcomings of the investigation and the trial – the authorities had failed to take such an approach and to provide Y. with the necessary protection. There had accordingly been a violation of Article 8.

Step 6 - Interpretation

🕐5 minutes
Method: brief discussion

Points to emphasise
The guarantee is not absolute and is provided based on factual assessment of the case

6 § 3 e : assistance of an interpreter

Aspects to consider:
- applies exclusively in situations where the accused cannot understand or speak the language used in court; includes situations in which the accused is represented by a lawyer - *Kamasinski v. Austria*, § 74
- implies the translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial - *Hermi v. Italy* [GC], § 69

Step 7 - National context

🕐30 minutes

National context overview
Requalification of criminal charges

According to the Law on Criminal Procedure, Article 397, the judgement may refer only to the defendant specified and actions impugned in the indictment submitted prior to or amended during the main hearing (so called, objective and subjective

identity of the indictment). The court however is not bound to the legal assessment/qualification contained in the indictment.
A delicate balance should however be exercised when the indictment is amemded/specified and when charges are requalified, in order to protect the defence rights of the accused.

Entrapment

The Law on Criminal Procedure prescribes the use of undercover agents and simulated operations as part of the special investigating measures (Article 252) that could be used when no other means are available to gather required information and evidence necessary for the successful conduct of criminal proceedings. According to Article 253, special investigating measures may be used to detect and prove only the crimes particularized in the Article. The Law prohibits the use of the special investigating measures for an incitement to commit a criminal offence (Article 254).

Right to interpretation
According to Article 8 of the Law on Criminal Procedure, official language on which criminal proceedings are conducted is the Macedonian language. The language spoken by the minority group represented by 20% of the population is also official to the extent foreseen in the separate Law on Languages. Few other provisions in the Law on Criminal Procedure operationalize and ensure the use of language by the defendant as well as by others involved in the proceedings (injured parties, witnesses) both in oral and in written pleadings.

Macedonian cases before ECtHR relevant to the above context

Eftimov case 59974/08. In legthy criminal proceedings for medical malpractice, the applicant was convicted to a prison sentence after the initial charge that the offence was committed out of negligence was requalified as intentional perpetration of the criminal offence for which the statutory time-bar was not yet reached. The case however was analysed through the equality of arms prism because the applicant, unlike the prosecutor, did not have a chance to participate at the last hearing before the Supreme Court.Violation.

Sandel case 21790/03. The applicant was an Israeli with Hebrew as mother tongue. He was arrested and criminal proceedings were opened against him. Translation from/to Macedonian to Hebrew was provided on some hearings while later in the proceedings hearings were translated in Serbian, Bulgarian and English as the applicant demonstrated that he understood well these languages. The ECHR accepted that the domestic courts undertook a whole range of measures in an attempt to ensure translation to Hebrew and that the translation was in any event

provided on a language that the applicant had sufficient command of. Inadmissible as manifestly ill-founded.

Doncev and Burgov case 30265/09 : the applicants were police officers who were convicted to a conditional prison sentence for bribery of 500 MKD that they accepted from an undercover police officer in exchange of a speeding ticket. The applicants complained that the police operation was an entrapment and that they were incited to commit the crime. The case was analysed from the viewpoint of examination of witnesses. The undercover agent was examined by the trial court as a protected witness after the applicants and the defence counsel were removed from the courtroom. The applicants however, ultimately, without providing any specific justification, waived of their right to question the protected witness through the court although they were given a possibility to do so. No violation.

Unit V - Practical Exercise

1 hour 30 minutes

Method: Group work - brief case argumentation

INSTRUCTIONS FOR THE TRAINER

Option 1:

- *Group divided in 4 groups, 2 for App, 2 for Gvt*
- *Asked to build arguments in favour of their party, then submissions are swapped and they are asked to respond.*
- *Divide the participants in four groups.*
- *Ask them to read the case*
- *Ask two groups to develop arguments in favour of the applicant's position*
- *Ask the other two groups to develop arguments in favour of the State's position*
- *Give them 30 minutes to discuss among themselves and write down their main arguments in brief (an a piece of paper or on a board paper); ask them to be very brief and use bullet points rather than elaborate phrases*
- *At the end of the group work, ask them to swap their paper with the one of the other group which had the same position (the two applicant groups swap between themselves and so do the government groups)*
- *Ask them to read the paper received and to find counter arguments to the ones written down by the other group; give them 20-30 minutes*
- *At the end, each group will present their work (first applicants, then governments in response, then the counter arguments found)*
- *As support for trainer, use the legal analysis provided below, for*

highlighting to the participants the conclusions of the Court in the given case

Option 2 (if not enough time for option 1):

- *Ask the participants to read the summary from the practical application handout (if you have more time, ask them to read the entire set of facts)*
- *Ask them to position themselves in the right side of the room if they think here is a violation of 6 and in the left side, if they think there is no violation (alternatively, distribute them red and green post-its and ask them to raise the red for violation and green for no violation)*
- *Ask the 'violation' group to explain their position*
- *Ask the 'no violation' group to explain their position*
- *Ask everyone if they stick to their position, if not, those who changed their minds should join the other group*
- *Ask those who changed their minds what convinced them*
- *Ask again if other want to do so*
- *See the composition of groups and let them develop the exchange of opinions freely, but intervene when explanations are needed and also to channel the discussion on Article 6*
- *At the end give them the Court's conclusion (use 'Art 6 practical application Gafgen summary' for support and highlight the main points to remember concerning the principle applicable*

Case facts

In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse near a pond. Meanwhile, he sought a ransom from the boy's parents and was arrested shortly after having collected the money. He was taken to a police station where he was questioned about the victim's whereabouts. The next day the deputy chief police officer ordered one of his subordinate officers to threaten the applicant with physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's location. Following these orders, the police officer threatened the applicant that he would be subjected to considerable pain by a person specially trained for such purposes. Some ten minutes later, for fear of being exposed to such treatment, the applicant disclosed where he had hid the victim's body. He was then accompanied by the police to the location, where they found the corpse and further evidence against the applicant, such as the tyre tracks of his car. In the subsequent criminal proceedings, a regional court decided that none of his confessions made during the investigation could be used as evidence since they had been obtained under duress contrary to Article 3 of the European Convention. At the trial, the applicant again confessed to murder. The court's findings were based on that confession and on other evidence, including evidence secured as a result of the statements extracted from the applicant during the investigation. The applicant was ultimately convicted to life imprisonment and

his subsequent appeals were dismissed, the Federal Constitutional Court having nonetheless acknowledged that extracting his confession during the investigation constituted a prohibited method of interrogation both under the domestic law and the Convention. In 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines of EUR 60 for 60 days and EUR 90 for 120 days, respectively. In 2005 the applicant applied for legal aid in order to bring proceedings against the authorities for compensation for the trauma the investigative methods of the police had caused him. The courts initially dismissed his application, but their decisions were quashed by the Federal Constitutional Court in 2008. At the time of the European Court's judgment, the remitted proceedings were still pending before the regional court.

Case analysis (available only for the trainer):
Law – Article 34: The national authorities had acknowledged the breach of the Convention both in the criminal proceedings against the applicant and in the subsequent conviction of the police officers. However, it was necessary to establish whether they had afforded the applicant appropriate and sufficient redress for the violation suffered. Although the criminal proceedings against the police officers, which had lasted some two years and three months, had been sufficiently prompt and expeditious, the officers had been sentenced to very modest and suspended fines since the domestic court took into account a number of mitigating circumstances, including the urgent need to save the victim's life. While the applicant's case could not be compared to other cases involving arbitrary acts of brutality by State agents, imposing almost token fines could not be considered an adequate response to a breach of Article 3. Such punishment, which was manifestly disproportionate to a breach of one of the core rights of the Convention, did not have the necessary deterrent effect in order to prevent further violations of that right in future difficult situations. Moreover, even though both police officers had initially been transferred to posts which no longer involved direct association with the investigation of criminal offences, one of them had later been appointed chief of his section, which raised serious doubts as to whether the authorities' reaction adequately reflected the seriousness of a breach of Article 3. Finally, as to the proceedings for compensation, the applicant's request for legal aid was still pending after over three years. Consequently, no hearing had been held and no judgment given on the merits of his claim. In such circumstances, the domestic courts' failure to decide the merits of the applicant's compensation claim without the requisite expedition brought into question the effectiveness of those proceedings. In conclusion, the Court held that the different measures taken by the domestic authorities had failed to comply fully with the requirement of redress as established by its case-law and that, consequently, the applicant could still claim to be the victim

of a violation of his Convention right. Conclusion: victim status upheld (eleven votes to six).
Article 3: It was uncontested between the parties that the applicant was threatened by the police officer with intolerable pain by a person specially trained for such purposes if he refused to disclose the victim's whereabouts. Since the deputy chief officer had ordered his subordinates on several occasions to threaten the applicant or, if necessary, to use force against him, his order could not be regarded as a spontaneous act, but as a premeditated and calculated one. The interrogation under the threat of ill-treatment had lasted for about ten minutes in an atmosphere of heightened tension and emotions when the officers believed that the victim's life could still be saved. The applicant was handcuffed and thus in a state of vulnerability, so the threat he had received must have caused him considerable fear, anguish and mental suffering. Despite the police officers' motives, the Court reiterated that torture and inhuman or degrading treatment could not be inflicted even in circumstances where the life of an individual was at risk. In conclusion, the method of interrogation to which the applicant had been subjected was found to be sufficiently serious to amount to inhuman treatment prohibited by Article 3. Conclusion: violation (eleven votes to six).
Article 6: The use of evidence obtained by methods in breach of Article 3 raised serious issues regarding the fairness of criminal proceedings. The Court was therefore called upon to determine whether the proceedings against the applicant as a whole had been unfair because such evidence had been used. At the start of his trial, the applicant was informed that his earlier statements would not be used as evidence against him because it had been obtained by coercion. Nonetheless he confessed to the crime again during the trial, stressing that he was confessing freely out of remorse and in order to take responsibility for the crime he had committed. The Court had therefore no reason to assume that the applicant would not have confessed if the domestic courts had decided at the outset to exclude the disputed evidence. In the light of these considerations the Court concluded that, in the particular circumstances of the applicant's case, the failure of the domestic courts to exclude the evidence obtained following a confession extracted by means of inhuman treatment had not had a bearing on the applicant's conviction and sentence or on the overall fairness of his trial. Conclusion: no violation (eleven votes to six).

Unit VI - Closure

30 minutes
Method: Post-course evaluation test, Feedback, Status of questions poll and further steps

INSTRUCTIONS FOR THE TRAINER

- *Ask the participants to take the test again (5 min)*
- *inquire how many corrected their answers in between the first time and second time they took the test, give the participants the correct answers to the QCM and discuss if clarifications are asked*
- *Check together the expectations board, review the questions and ask the answers from them this time*
- *If there were questions left unanswered, try clarify them yourself*

At the end: Closure speech with sum up of main goals and conclusions

- *Course evaluation*

CHAPTER 2 - SPECIFIC MODULE

Course specifications

1. Course title	**Fair Trial Rights** *Reasoning of judgments and evidentiary matters - Specific module*
2. Key thematic areas	1. General principles related to the reasoning of judgments and other procedural guarantees - Legality, reasoning and fairness of judgments (general approach) - the minimum requirements of reasoning at first instance and in further review proceedings (appeal, appeal on points of law) - Equality of arms and adversarial proceedings - Evidentiary matters under Article 6 of the ECHR - types of evidence and the ECHR standards, admissibility, relevance, reliability, evaluation - Examination of witnesses and the use of testimonial evidence - The standard and the burden of proof 2. Specific principles related to the criminal limb - the reasoning of judgments in criminal cases and the relationship with the procedural guarantees under Article 6 of the ECHR: - Qualification of the charge - limits, change, elements of the crime - Plea bargaining - The reasoning of the sentence
3. Course type	In-person training course
4. Course level	Continuous training
5. Course duration	1 Day - 10 AM to 17.30 PM, with two coffee breaks (15' each) and one lunch break (1h)
6. Target group	Experienced judges and prosecutors
7. Knowledge level	Basic (HR aspects and fair trial rights)
8. Learning objectives	General: —To provide information on international human rights sources, systems, standards and issues relevant to the work of the target profession;

	—To encourage the development of skills, and the formulation and application of policies, necessary to transform that information into practical professional behaviour; —To sensitize participants to their particular role in protecting and promoting human rights and their own potential for affecting human rights in their daily work. - To understand the human rights principles, institutions, processes and practices, issues and methods Course specific: - Familiarise with the human rights standards concerning fair trial; - Understand the inherent obligations and the way they should be implemented; - Understand the application in the national system of the standards reviewed - Receive a detailed perspective on the fair trial standards and their applicability at national level - Understand the interplay between various standards - Understand the hierarchy between international and national frameworks and apply it coherently - Make use of the information received in their daily work - Know where to search for more in-depth information and use the resources provided
9. Methodology	Ice-breaking exercise, PPT based presentations, case-studies, hypos, group exercises, opinion polls, trainer animated debates, assessment tests
10. Resources	For participants (esources docket delivered to participants for the training): - PPTs in print version - Evaluation test - Case studies handout - Practical application handout
	For the trainer: - Course curriculum and specification - sample PPts - evaluation test (with correct answers in italics) - ECHR case-law guides on Article 6 (in Macedonian, when translated) - Training methodology manual
11. Logistical requirement	Training room Projector and laptop Internet connection

s	Computer facilities for participants (for Module IV – exercise) Flipchart Board Paper and markers Printouts
12. Stimuli	Certification Prerequisite for participation to other in-person advanced or thematic HR training
13. Course tutors	Profile: —Expertise in the subject matter; —Ability to apply the interactive methodology of the programme; —Professional credibility and appropriate reputation among other practitioners
	Role (2 trainers per training session): - Deliver presentations of content - Animate debates on topics of interest - Guide the participants through the practical applications - Reply to questions - Prepare the support materials and the points for discussion
14. Course components	Course intro Brief presentation of the trainers and division of tasks, presentation of the structure of the seminar
	Substantive content Brief presentations - PPT based Mirror structure of content international/national to highlight both perspectives and allow for identifying the similarities/differences Open questions for diversification, opinion polls
	Practical applications Case-studies, group exercise, opinion polls, station technique
	Assessment Pre and post module tests (multiple choice): - a series of multiple choice questions will be given to the participants before starting the presentations on the content (10 questions); they will receive their score at the end of the module, the same test is given to the participants and they will see their score and be able to also see which were the correct answers and whether their score improved from the initial to the final test.
15. Course evaluation	Pre-evaluation Course trial by tutors, adaptation after ToT

	Post evaluation Feedback questionnaire to be filled in by the participants at the end of the course

General structure

Specific module		
Unit I	Introduction	30 min
Unit II	General principles related to the reasoning of judgments and other procedural guarantees	3h
Unit III	Specific principles related to the criminal limb - the reasoning of judgments in criminal cases and the relationship with the procedural guarantees under Article 6 of the ECHR	1h 30min
Unit IV	Practical application	1h
Unit V	Closure	15 min

Structure of the units

Unit I

Unit I Introduction 30 min	
Step 1 15 min	Introduction of the participants
Step 2 15 min	Introduction to the concept

Unit II

Unit II General principles 3h	
Step 1 30 min	Legality, reasoning and fairness of judgments (general approach)
Step 2 30 min	Equality of arms and adversarial proceedings
Step 3 45 min	Evidentiary matters
Step 4 45 min	Examination of witnesses and the use of testimonial evidence

Step 5 30 min	The standard and the burden of proof

Unit III

Unit III Specific principles related to the criminal limb 1h 30 min	
Step 1 45 min	Qualification of the charge
Step 2 30 min	Plea bargaining
Step 3 15 min	The reasoning of the sentence

Unit IV

Unit IV Practical application 1h	
	Drafting exercise based on an ECHR case

Unit V

Unit V Closure 15 min	
	Feedback Status of questions poll and further steps Closure speech with sum up of main goals and conclusions Course evaluation

Course content

Unit I - Introduction

🕘 30 minutes

Step 1 - Introduction of the participants

🕘 15-20 minutes
Methods: Presentations – tour de table

INSTRUCTIONS FOR THE TRAINER

- *the group is given 5 minutes to think of a question/issue related to Article 6 they would like to have clarified during the training (impose short questions) and write it down on a piece of paper*
- *each participant presents him/herself and then reads out the question, while the trainer pins the paper to the board (or writes it down on the board)*
- *At the end the trainer presents him/herself too and refers to the issues highlighted which will be dealt with during the training*

Step 2 - Introduction to the concept

🕘 10-15 minutes
Methods: Open discussion

INSTRUCTIONS FOR THE TRAINER

- *Ask the participants if they think reasoning of judgments is problematic at national level in terms of compliance with ECHR principles*
- *Let the discussion develop in order to touch upon the relevant aspects and make the link with other important elements (administration of evidence etc.)*
- *Ask the participants if they know any cases against MKD relevant to the topic*
- *Sum up by presenting the structure of the course*

1. General principles related to the reasoning of judgments and other procedural guarantees
- Legality, reasoning and fairness of judgments (general approach) - the minimum requirements of reasoning at first instance and in further review proceedings (appeal, appeal on points of law)

- Equality of arms and adversarial proceedings
- Evidentiary matters under Article 6 of the ECHR - types of evidence and the ECHR standards, admissibility, relevance, reliability, evaluation
- Examination of witnesses and the use of testimonial evidence
- The standard and the burden of proof
- Specificities in the reasoning of decisions related to the protection of individual rights (private life, freedom of expression)

2. Specific principles related to the criminal limb - the reasoning of judgments in criminal cases and the relationship with the procedural guarantees under Article 6 of the ECHR:
- Qualification of the charge - limits, change, elements of the crime
- Plea bargaining
- The reasoning of the sentence
- Specificities in the reasoning of decisions related to the protection of individual rights (the right to life, prohibition of ill-treatment, the right to liberty and security)

Unit II - General principles

Step 1 - Legality, reasoning and fairness of judgments (general approach)

30 minutes
Methods: open discussion, sum-up, case analysis

INSTRUCTIONS FOR THE TRAINER
- *Ask the participants which is, in their opinion, the main reason for the requirement to have reasoned decisions, why it is important*
- *Collect the replies and based on them exemplify with the references and principles detailed below*
- *Explain the legal analysis developed by the Court in the two cases presented as examples*

Points to emphasise
- the minimum requirements of reasoning at first instance and in further review proceedings (appeal, appeal on points of law)
- Protection against arbitrariness

Decisions of domestic courts should contain reasons that are sufficient to reply to the main aspects to the parties' factual and legal arguments (whether substantive or procedural).

"**(A) further function of a reasoned decision is to demonstrate to the parties that they have been heard.** … a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice" (*Suominen v. Finland*, § 37).

"… **the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions**. … In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. … it must be clear from the decision that the essential issues of the case have been addressed ..." (*Taxquet v. Belgium*, [GC]*, § 89)

Judgments of domestic courts must state the reasons on which they are based. Clear indication of the grounds on which it is based will allow the effective and useful exercise by an accused of his right to appeal. Fair trial guarantees do not extend to the 'right' result, therefore **the reasoning of a decision will only be put into question if there is clear arbitrariness, gross inconsistency or the limits of reasonable interpretation have been exceeded.**

Lack of reasoning

Failure of a criminal court **to set out the constituent elements of the offence** together with **the facts supporting the applicant's guilt** or to **explain its apparent rejection of the applicant's evidence** can be considered as **not compliant** with the requirement of a fair hearing.

Example: *Boldea v. Romania*
The applicant complained under Article 6 § 1 that he had not had a fair hearing in that he had been ordered to pay an administrative fine although there had been no relevant evidence and the courts had not addressed the grounds and arguments he had submitted. In addition, he complained that his right to an effective remedy had been infringed because the Timiş County Court had dismissed his appeal against the judgment of 27 November 2001 without examining the arguments he had submitted.
The Court noted that the Court of First Instance had not carried out an interpretation of all the essential elements of an offence or examined the evidence adduced by the applicant. Furthermore, the court that had dealt with the applicant's appeal had not addressed any of his grounds of appeal, concerning in

particular the lack of reasons in the first-instance judgment. In those circumstances, the Court considered that the decisions that had resulted in the applicant's conviction had not contained sufficient reasons and had thereby deprived him of a fair hearing.
Conclusion: violation of Article 6 § 1 of the Convention.

Jury verdicts do not have to contain the reasons if they can be ascertained from other elements of the case (indictment bill, questions/directions to the jury).

Lack of reasoning of decisions of higher courts is more acceptable under Art. 6, especially when it is clear that the matters raised can legitimately receive a short shrift and grounds have thoroughly been examined. Moreover, **higher courts may remedy the lack of reasons at first instance stage** (*Hirvisaari v. Finland*). Brief reasoning in disallowing leave to appeal by simply referring to the findings of the lower courts is not contrary to the right to a reasoned decision (*Gorou (no.2),* §§ 38-42). However, a higher court cannot merely endorse a lower court's judgment, where the latter has itself failed to provide reasons.

Example: *Gorou (no. 2) v. Greece*
The applicant complains that insufficient reasons were given for the decision by means of which the public prosecutor rejected her application for leave to appeal on points of law in a procedure concerning a criminal complaint against her boss.
The Court reiterated its case-law to the effect that an appellate court is not necessarily required to give very detailed reasoning when it decides on the admissibility of an appeal on points of law. In the applicant's case, it took the view that the public prosecutor did not have a duty to justify his decision, which would have placed on him an additional burden that was not imposed by the nature of the request, but only to give a response to the civil party.
Conclusion: no violation of Article 6 § 1 of the Convention

Lacunary or inadequate reasoning

There is **no obligation to give in the judgment a detailed answer to every argument raised by the parties** and reasons given by lower courts may be simply endorsed without repeating them. This is not the case when the higher courts revert the conclusions. **The extent to which this duty to give reasons applies may vary according to the nature of the decision.** It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and

drafting of judgments. This principle has been further applied to criminal proceedings as well.

Example: *Salov v. Ukraine*
The applicant was arrested and placed in detention for having disseminated false information about the incumbent president of Ukraine. On 10 November 1999 he lodged a petition seeking his release from detention with the District Court, which was dismissed on 17 November 1999. On 7 March 2000 the District Court ordered an additional investigation to be undertaken into the circumstances of the case, having found no evidence to convict the applicant of the offences with which he was charged. However, in April 2000, the Presidium of the Regional Court allowed a protest lodged by the prosecution against the ruling of 7 March 2000 and remitted the case for further judicial consideration. The applicant was released from detention in June 2000. In July 2000, the District Court, chaired by the judge who had initially ordered an additional investigation into the facts, convicted the applicant to a five-year suspended prison sentence for interfering with the citizens' right to vote for the purpose of influencing election results by means of fraudulent behaviour. As a result, he also lost his licence to practise law for three years and five months.
The Court observed that the domestic courts gave no reasoned answer as to why the district court had originally found no evidence to convict the applicant of the offences with which he was charged and yet, subsequently found him guilty of interfering with voters' rights.

An adequate consideration of evidence is a crucial constitutive element of a reasoned decision - apparent oversight of important evidence by neglecting to mention why it has not been considered is contrary to the fair trial guarantees.

Domestic courts must prove **clear precision with regard to the concepts used in their reasoning**, especially for those decisive for their findings. In addition, arguments that are not legally valid or are based on an erroneous legal reasoning as to the applicable law may also be contrary to fair trial guarantees. **Manifest incoherence or inconsistency in the reasoning, based on conflicting arguments, is considered as revealing arbitrariness**.

Example: *Tatishvili v. Russia*
The applicant complained about the domestic authorities' arbitrary refusal to certify her residence at a chosen address, following unfair judicial proceedings concerning her claim and, in particular, that the courts had not applied domestic laws correctly, in breach of Article 6 § 1.
The Court reiterated that Article 6 § 1 obliged courts to give reasons for their judgments and observed that Ms Tatishvili's complaint was dismissed, firstly, because the district court considered that her right to move into the flat was in dispute even though the flat-owner's consent was proved and acknowledged by

that same court, and secondly, because the domestic courts relied on a "treaty" between Russia and Georgia on visa requirements, which didn't actually exist, the visa requirement for Georgian citizens, in fact, not having been introduced by a treaty. Furthermore, the Court found it inconsistent that the district court relied on a "treaty" governing the conditions of entry and residence of Georgian citizens, when it had not been proved that the applicant was indeed Georgian. No evidence to that effect had been produced either in the domestic proceedings or before the Court. The Court further noted that Moscow City Court had endorsed the District Court's findings in a summary fashion, without reviewing the arguments in the applicant's statement of appeal.
Accordingly, the Court considered the national courts' reasoning and subsequent endorsement of it on appeal without giving proper reasons of its own, to be manifestly deficient, and that the requirements of a fair trial had not been fulfilled.
Conclusion: violation of Article 6 § 1

The reasoned decision test is rather quantitative than qualitative, as long as there are some reasons given, there is in principle compliance with Art. 6. The reasons do not have to take written form and do not have to be given immediately after the adoption of the decision, as long as it allows the applicant to effectively introduce an appeal.

Poor reasoning in judgments could amount to a violation of fair trial rights not only at the first instance. *"There can be no useful or effective enjoyment of rights of appeal without a judgment that indicates with sufficient clarity the grounds on which the decision was taken"* (*Hadjianastassiou v. Greece*, § 33)

Example: *Ajdaric v. Croatia*
In 2005 the applicant was arrested for car theft and detained in a remand prison. During his detention, he fell ill and was transferred to a prison hospital, where he shared a room with seven other inmates. One of these inmates, M.G., was accused of killing three people in 1998, and another, S.Š., was a former police officer who had been sentenced for attempted murder. At an unspecified date, S.Š. informed the police that he had knowledge of the circumstances of the 1998 murders. He later gave a statement before the investigating judge of the competent county court explaining that he had overheard private conversations between the applicant and M.G. which revealed that the applicant had in fact been an accomplice to the three murders M.G. had been accused of. The applicant was subsequently charged on three counts of murder and the criminal proceedings against him were joined to those already pending against M.G. S.Š. repeated his testimony in court, but two other inmates, who had spent time with them in the same room at the prison hospital, did not support his evidence. A psychiatric report concluding that S.Š. was suffering from emotionally instability and histrionic personality disorder was also submitted to the court. The county court ultimately

sentenced the applicant and M.G. each to forty years' imprisonment and the judgment was upheld by the Supreme Court.
According to the Court's established case-law, judgments of courts and tribunals should be properly reasoned, although the extent of this duty might vary according to the nature of the decision and the circumstances of each particular case. The Court noted at the outset that the applicant had been sentenced to forty years' imprisonment on three counts of murder solely on the basis of evidence given by S.Š. The national courts had expressly stated that there had been no other evidence implicating the applicant in the murders at issue. However, they had made no efforts to verify S.Š.'s statements but had accepted them as truthful, irrespective of the medical evidence that he suffered from emotional instability and histrionic personality disorder and had not received the psychiatric treatment that had been recommended for him. Moreover, his statements referring to the applicant's involvement in the murders were unclear, imprecise and often contradictory. Despite this, the domestic courts had made no comments on the evidence to the contrary that had been given by other inmates who had shared the room with the applicant, M.G. and S.Š. For those reasons, the Court concluded that the decisions reached in the applicant's case had not been adequately reasoned, had failed to observe the basic criminal-justice requirement of proof beyond reasonable doubt and had not been in accordance with the in dubio pro reo principle.
Conclusion: violation of Article 6 § 1

Example: *Pronina v. Ukraine*
In March 2000 the applicant lodged a claim with the Yalta City Court against the local social welfare department, challenging the refusal of the latter to award her a higher pension. In support of her claim the applicant maintained, among other things, that under Article 46 of the Constitution her pension should not be lower than the minimum living standard. Her complaint was rejected by the Yalta City Court and later, on appeal, by the Supreme Court. Neither court considered her arguments under Article 46 of the Constitution.
The domestic courts had made no attempt to analyse the applicant's claim under Article 46 of the Constitution, despite explicit references she had made before every judicial instance. By ignoring the point altogether, even though it was specific, pertinent and important, the courts had fallen short of their obligations under Article 6(1).
Conclusion: violation of Article 6 § 1

Overview of the cases v "The former Yugoslav Republic of Macedonia"

Sufficient and consistent reasoning of the judicial decisions is acknowledged also in

the domestic legislation as one of the most important fair trial standards. Lack or inconsistency of the reasoning is a ground for lodging an appeal and for quashing of the decisions. This ground is also subject to *ex officio* consideration by the higher judicial instances which is yet another proof of the key role of this aspect for proper administration of justice. It should be noted that, while the judges enjoy the freedom of judicial discretion, still, their decisions must not be arbitrary and need to be clearly reasoned as stipulated in Articles 16 and 408 of the Law on Criminal Procedure. This Law (as well as other procedural legislation) requirees from the judges as well as from the other stakeholders to clearly elaborate their decisions and motions made in various circumstances and instances (for example, in deciding on the detention, taking of evidence, requesting exclusions etc). Substantially the same provisions are foreseen in the Law on Civil Procedure.

Few Macedonian cases before ECtHR are worth noting in this context:

Atanasovski 36815/03 – labour proceedings for annulment of reassignment and dismissal. The Supreme Court decided the case contrary to its well-established practice without providing more substantial statement of reasons justifying the departure from its jurisprudence. Violation.

Stoilkovska 29784/07 – civil proceedings for damages incurred in labour relations. The applicant's case was decided contrary to the outcome of the cases against her colleagues concerning the same set of facts. The courts did not give any reasonable explanation for this divergence that resulted in an unjustified restriction of the applicant's right to a fair trial. Violation.

Mitkova 48386/09 – administrative proceedings for reimbursement of expenses for medical treatment abroad. After number of remittals and instructions to establish a contested point of fact, the Administrative Court finally decided the case without holding an oral hearing although requested by the applicant. The Administrative Court gave no reasons why it considered that hearing was not necessary, especially having in mind the factual issues that needed to be discussed. Violation.

Miladinovi 46398/09, 50570/09 and 50576/09 - this is a case under Article 5. However, the reasoning applied in the ECHR judgment is mutatis mutandis applicable to Article 6. Insufficient substantiation of the detention decisions. Violation.

Poletan and Azirovik case 26711/07, 32786/10 and 34278/10 – problematic point

was made in the reasoning of the first-instance judgment where it was stated that the defendant's assertion that he did not know that cocaine was planted in the truck that he drove cannot be accepted since it is "unsupported with any evidence". The wording used, suggested that the burden of proof was shifted to the applicant/defendant i.e. that it was for him to submit evidence and prove that he was not aware of the drugs. The ECtHR ultimately considered the case on the merits and found that there was no violation of the presumption of innocence. The domestic courts provided sufficient reasoning and there was nothing that would cast doubt as to the conclusions they have made.

Dusko Ivanovski 10718/05 – criminal proceedings in which the applicant was convicted to a prison sentence on drug-related charges. The ECtHR found violation on the account of equality of arms and examination of witnesses. ECtHR noted that the domestic courts gave no reasons when they refused to consider the evidence proposed by the applicant (to examine witnesses and to provide alternative expert analysis).

Deleva case 30458/13 (communicated and subsequently finished with friendly settlement). The applicant was found guilty for a decision that she made as a judge sitting in a case. Her complaint that, according to the Constitution, she could not have been held criminally liable for the judicial decisions made, remained unaddressed.

Step 2 - Equality of arms and adversarial proceedings

30 minutes
Methods: case discussion, open discussion

INSTRUCTIONS FOR THE TRAINER

- *Divide the participants into 4-5 groups*
- *Provide them the case facts and ask them to identify the issues*
- *Ask each group to give their opinions and along the aspects raised by them provide additional information as specified below*
- *At the end give the the case reference (Grozdanoski v MKD) and develop a brief overview of the national case-law in this regard*

Case study
The applicant concluded a loan agreement ("the agreement") (договор за одобрување на кредит) with a company in accordance with which he received a

loan for the benefit of Mr K.S. who had been ineligible to apply due to his poor financial status. Ohrid Municipal Court entered a notice in the public register, recording a mortgage in favour of the company over a house and a plot of land owned by the applicant.
The principal amount of the loan with interest was paid by Mr K.S. on time. Despite that fact, the company continued charging 8% interest and the applicant and K.S. overpaid it.
On 29 May 1997 the Ohrid Court of First Instance deleted the notice from the public register after it had received a notification by the company that the loan had been completely repaid.
On 6 February 1998 the Ohrid Court of First Instance dismissed the applicant's request to intervene in the proceedings initiated earlier by K.S. and ordered that the applicant's claim be registered separately.
Mr K.S.'s claim was dismissed on 10 February and 17 October 2000 respectively, by the Court of First Instance and the Court of Appeal. The applicant's claim was dismissed by the trial court's decision of 16 February 2000.
After couple of remittals by the appellate court, on 24 December 2001 the Ohrid Court of First Instance upheld the applicant's claim. The court found that the company had not been properly incorporated and, as a consequence, it had not been authorised to give loans in foreign currency.
On 7 February 2002 the company appealed.
On 25 April 2002 the Bitola Court of Appeal dismissed the company's appeal and upheld the lower court's decision.
On 22 May 2002 the company submitted to the Supreme Court an appeal on points of law and on 9 July 2002 the public prosecutor lodged with the Supreme Court a request for the protection of legality. These submissions had never been communicated to the applicant for his observations in reply.
On 27 February 2003 the Supreme Court gave a single decision upholding the company's appeal on points of law and the public prosecutor's request for the protection of legality. It overturned the lower courts' decisions and dismissed the applicant's claim. It found that at the time when the agreement had been concluded, the company had been registered as a financial institution authorised to enter into loan and savings agreements with physical persons.

Case analysis (available to the trainer only):
The Court firstly recalls that, in civil proceedings, the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case - including evidence – under conditions that do not place him/her at a substantial disadvantage vis-à-vis his/her opponent (see Dombo Beheer B.V. v. the Netherlands, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, Series A no. 301B, p. 81, § 46). The concept of a fair trial, of which equality of arms is one aspect, implies the right for the parties to have knowledge of and to comment

on all evidence adduced or observations filed (see Nideröst-Huber v. Switzerland, judgment of 18 February 1997, Reports of Judgments and Decisions 1997-I, p. 108, § 24, Steck-Risch and Others v. Liechtenstein, no. 63151/00, § 55, 19 May 2005; M.S. v. Finland, no. 46601/99, § 32, 22 March 2005).
In the present case, the Court notes that the Supreme Court had full jurisdiction to decide the applicant's case, as it examined the merits of the company's appeal on points of law and the public prosecutor's request for the protection of legality. It had, accordingly, the option of remitting the case for a new decision by the lower courts or quashing the impugned decision and taking the decision itself: the latter option was taken in the present case.
It further observes that the company, being the opposing party in the proceedings at issue, filed an appeal on points of law against the Court of Appeal's decision. The public prosecutor also filed a request for the protection of legality. According to section 376 of the Act, they should have been communicated to the applicant (see paragraph 27 above). In the absence of any evidence of service, the Court is unable to accept the Government's argument that the appeal and the request were ever served on the applicant. Moreover, the company's appeal and the public prosecutor's request led to the Supreme Court's decision which was to the applicant's significant disadvantage. The Court considers that that procedural failure prevented the applicant from effectively participating in the proceedings before the Supreme Court.
Article 6 § 1 of the Convention is intended, above all, to secure the interests of the parties and those of the proper administration of justice (see, mutatis mutandis, Acquaviva v. France, judgment of 21 November 1995, Series A no. 333-A, p.17, § 66). In the present case, respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be given an opportunity to have knowledge of, and to comment upon the company's appeal and the public prosecutor's request.
Consequently, there has been a violation of Article 6 § 1 of the Convention.

Equality of arms

Equality of arms is an inherent feature of a fair trial. It requires that each party be given a **reasonable opportunity to present his case** under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. Equality of arms requires that a fair balance be struck between the parties, and applies equally to criminal and civil cases.

Example: *Lomaseita Oy and Others v. Finland*
The applicant is a Finnish national who partly owned the two applicant companies, Lomaseita Oy and CPT Data Oy, which are both limited liability companies. In 1987, she co-founded a company called CPT Informations Systems Oy ("CPT IS"). On 20 October 1993 the company was ordered to be wound-up. The official

receiver of the estate of CPT IS, instituted civil proceedings against the applicant and her companies and requested that assets allegedly transferred from CPT IS to the applicants before the winding-up order was issued be returned to its estate. On 31 January 1996, the District Court found in favour of the estate in so far as the applicant was concerned and partly in favour of the estate insofar as the applicant companies were concerned.
The parties to the proceedings appealed. After the relevant time-limit for appeal had elapsed, the estate on two occasions submitted additional documentary material, including a police report, to the Court of Appeal, requesting that it be taken into account. On 23 December 1997 the Court of Appeal found in favour of the estate, stating that the additional material had not been taken into consideration. On 18 June 1998 the Supreme Court refused the applicants leave to appeal. Having received the Supreme Court's decision, the applicants' representative at the time requested copies of all the relevant documents from the Court of Appeal. He found out that the judicial secretary of the Court of Appeal had in fact made a substantial number of remarks about the additional documentary material.
On 30 November 1998, the applicants requested that the Supreme Court reopen the proceedings, claiming that they had been denied a fair trial before the Court of Appeal as the estate's submissions – which had clearly been relevant and which had been taken into account even though there was a statement to the contrary in the Court of Appeal's judgment – had not been communicated to them. They also noted that it appeared from the invoice concerning the estate's legal costs included in the court file, that the official receiver had consulted the Court of Appeal's judicial secretary several times during the proceedings and that they had not been informed of any such discussions. On 31 January 2001 the Supreme Court refused to reopen the proceedings.
The Court reiterated that only the parties could properly decide whether or not the submissions called for their comments. The representative of the estate expressed his opinion on the relevance of the supplementary police report and the additional legal submission to the Court of Appeal, thereby intending to influence the court's judgment. The Court considered that procedural fairness required that the applicants should also have been given an opportunity to assess the relevance and weight of the material and to formulate any such comment on it as they deemed appropriate.
In the light of those considerations, the Court found that the procedure did not enable the applicants to participate properly and in conformity with the principle of equality of arms in the proceedings before the Court of Appeal. The Court therefore held, unanimously, that there had been a violation of Article 6 § 1 concerning the failure to communicate to the applicants the material that the other party submitted to the Court of Appeal.

The **failure to lay down rules of criminal procedure in legislation** may breach equality of arms, since their purpose is to protect the defendant against any abuse of

authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.

Witnesses for the prosecution and the defence must be treated equally; however, whether a violation is found depends on whether the witness in fact enjoyed a privileged role. **Non-disclosure of evidence to the defence** may breach equality of arms (as well as the right to an adversarial hearing). Equality of arms may also be breached when the accused has **limited access to his case file** or other documents on public-interest grounds.

Adversarial proceedings

- **opportunity for the parties to have knowledge of and comment on all evidence adduced** or observations filed with a view to influencing the court's decision. In addition Art. 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.

- **entitlement to disclosure of relevant evidence is not an absolute right**. In criminal proceedings there may be competing interests (such as national security, need to protect witnesses who are at risk of reprisals, need to keep secret the methods used by the police to investigate crime, fundamental rights of another individual, safeguard of an important public interest etc.) which must be weighed against the rights of the accused.

National context overview

The domestic procedural legislation (Law on Criminal Procedure, Law on Civil Procedure, Law on Non-Contentious Civil Procedure, Law on Administrative Disputes and Law on General Administrative Procedure) foresees number of safeguards that ensure procedural equality and fair treatment of the parties involved in the proceedings. However, there are some inherent systemic problems that could be identified from the Macedonian cases before ECtHR:

- the presence of the prosecutor on the sessions held before higher courts in absence of the accused (cases of Atanasov, Nasteska, Eftimov) – criminal proceedings against the applicants who were put in an unequal position as the prosecution was given an advantage to be the only party arguing its case before the higher court (appellate and Supreme). The unequal treatment stemmed from the legislative provisions and this systemic flaw was found in violation of the equality of arms.
- Reliance on an expert-report produced during criminal investigation by the Ministry of Interior which is at the same time the body that initiated the

criminal prosecution. As established in the Stoimenov case, such expert report cannot be considered as independent and neutral and it would be a violation of the equality of arms principle if the applicant has no possibility to effectively challenge the expert report with an alternative one.The same approach was used in the case of Dusko Ivanovski. *A contrario* in the case of Poletan and Azirovik, although there were similar doubts as regards the impartiality of the expert report produced by the Ministry, the ECHR declared the complaint manifestly ill-founded because the applicants had the possibility to raise their concerns and the expert witnesses were examined before the court.

Note: As a follow-up to the finding of violation in the Stoimenov case the criminal chamber of the Supreme Court on 29 June2006 issued a Legal Opinion according to which ECHR and ECtHR case-law are directly applicable. In the context of issuance of independent expert opionons and the Stoimenov case, the Supreme Court urged the courts to fully respect the parties' equality at all stages of the proceedings. The legal opinion can be consulted here.

- No transmission of submissions resulting with the impossibility to effectively challenge them in the course of the proceedings.

Few additional Macedonian cases:

Grozdanoski – civil proceedngs, the applicant was not served with the appeal on points of law and the legality protection request lodged in favour of the opponent. Violation.

Atansov no. 2 – criminal proceedings for defamation, the applicant was convicted for the letter he allegedly published although the letter no longer existed and the chief-editor was never summoned at the trial and examined by the applicant (only a written submission of the director of the newspaper was read out at the trial). Violation in respect of overall fairness and the right to examine witnesses. Violation.

Naumoski – civil proceedings, the applicant was never served with the opposing party's observations in reply to his appeal. Violation.

Step 3 - Evidentiary matters under Article 6 of the ECHR

45 minutes
Method: open discussion

INSTRUCTIONS FOR THE TRAINER

- *Start an open discussion based on the issues mentioned below and bring the conclusions along the main aspects to consider, while presenting in parallel any national cases relevant to the topic*

Points to emphasise
- types of evidence and the ECHR standards, admissibility, relevance, reliability, evaluation
- the Court exerts only a limited supervision of the domestic courts with regard to administration of evidence
- the Court will examine whether, on the overall, the fair trial guarantees have been respected, including the way the evidence was submitted; the issues assessed will concern any evidential imbalance or unfairness, in light of the proceedings as a whole, of the applicant's possibility to effectively participate in the proceedings and any impairment of the position of the defence.
- collection and presentation of the evidence must comply with the guarantees set forth by §§ 2 and 3 of Art. 6.

The courts have an obligation to ensure that evidence is properly and fairly presented (*Barberà, Messegué and Jabardo v. Spain*).

Oral evidence

The Court shows a high consideration for oral evidence. **It requires the respect of the duty to hear the applicants and also all the witnesses, in order to establish the facts, in compliance with the right to defence and fair trial.**

- in the criminal context, ... there must be at first instance a tribunal ... where an applicant has an entitlement to have his case "heard", with the opportunity, inter alia, **to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses** (*Jussila v. Finland*,§ 40).

Written evidence

The evaluation of written and documentary evidence follows the general principles and the principles set out by the Court concerning oral evidence and testimony.

Use of indirect or documentary evidence is not as such prohibited by the fair trial guarantees set forth by the Convention, but it may pose a problem in cases in which it is the sole evidence. Where written statements of alleged witnesses are used to convict the accused without the possibility of the latter to challenge them at some stage, issues under Article 6 may arise.

- in itself, the gathering of additional documentary evidence by a court is not incompatible with the requirements of a fair hearing. When such evidence is **not communicated to the applicants, a problem may arise**. Even when documentary evidence was submitted and read during the oral hearing, this would not have satisfied the right of the applicants to adversarial proceedings, given the character and importance of this evidence. **A party to the proceedings must have the possibility to familiarise itself with the evidence before the court**, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance (*Krcmar and Others v. Czech Republic*, §§ 38- 42).

In the case of Poletan and Azirovik, there was an attempt to summon witnesses who were abroad, in Montenegro. Ultimately, these witnesses were examined in Montenegro by local court through international legal assistance between the two countries. Witnesses' statements were read out at the trial. The European Court declared inadmissible the complaint about the examination of these witnesses as manifestly ill-founded, finding that the witnesses' statements were not sole or decisive evidence against the applicant and that no objection was made when the statements were read out at the trial, but only later in the proceedings.

Material evidence

The Court recognizes that material evidences should be taken into account, particularly during criminal proceedings. The common material evidence are body and psychiatric examination, interception of communications and audio and video tape.

A blood test is a method of proof which can work to the advantage or disadvantage of the accused. While compulsory blood testing may be seen as constituting a violation of private life within the meaning of Art. 8, paragraph 1, it may also be seen as necessary for protection of the rights of others, within the meaning of paragraph 2 of the same article (*X v. the Netherlands*, p. 188, 189).

Ordering a psychiatric report in order to determine the mental state of a person charged with an offence remains a necessary measure and one which protects individuals capable of committing offences without being in full possession of their mental faculties. However, the State authorities are required to make sure such a measure does not upset the fair balance that should be maintained

between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice. (*Worwa v. Poland*, § 82).

Telephone interception is an interference with the applicant's private life and correspondence. Such an interference is not in breach of the Convention if it complies with the requirements of paragraph 2 of Art. 8 and is aimed at the "prevention of crime", and the Court has no doubt whatever as to its necessity in a democratic society (*Lüdi v. Switzerland*, § 39).

The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations. .. (*Peck v. The United Kingdom*, §§ 59 and 79).

Direct evidence

Fair trial guarantees impose that a conviction is based on direct evidence examined by the national courts invested with reaching a decision. Moreover, failure to examine evidence directly by the courts able to overturn an acquittal is in direct violation of Art. 6.

Examination of matters of factual nature, especially in the case in which the respective court would have been the first to issue a conviction, **require a fresh and direct examination of the evidence** (*Hanu v. Romania*, § 35)

However the use of indirect or circumstantial evidence is not excluded by Art. 6 (*Haxhia v. Albania*, § 142). Where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Art. 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.

Corroborating evidence

Where there is a risk of evidence being unreliable, the need for supporting evidence (in other words, corroboration) **is greater in order to secure a fair trial.**

The value of corroboration - important where there is an issue over the quality of a particular piece of evidence relied upon, the authenticity of that evidence, or the manner in which it was obtained. The Court recognises the need for the defence to have adequate opportunity to effectively challenge the quality,

authenticity and provenance of evidence.

Where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.(*Bykov v. Russia* [GC], § 90)

Evaluation of evidence

- **admissibility of evidence -** primarily a matter for regulation under national law. The Court must only ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (*Ramanauskas v. Lithuania* [GC], § 52, *Laska and Lika v. Albania*, § 57).

- the **quality of the evidence** must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy;

- the **opportunity to challenge the authenticity of the evidence should be effective,** which includes proper examination of the applicant's submissions by the national courts (*Jannatov v. Azerbaijan*, § 82).

- **public interest concerns** cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Art. 6 of the Convention.

- national courts - under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (*Van de Hurk v. the Netherlands*, § 59).

- all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument (*Lüdi v. Switzerland*, § 49).

- the use as evidence of statements obtained at the pretrial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Art. 6 (Art. 6-3-d, Art. 6-1), provided **the rights of the defence have been respected** (*Isgró v. Italy*, § 34).

- the public interest cannot justify the use of evidence obtained as a result of **police incitement**. (*Teixeira de Castro v. Portugal*, §36)

- difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (*Doorson v. The Netherlands*, § 72).

Relevance of evidence

A decision to appoint an expert, be it with or without the parties' consent, is a matter that normally falls within the national court's discretion under Art. 6 § 1 in assessing the admissibility and relevance of evidence (*Schenk v. Switzerland*, § 46).

In the case of Stoimenov, it was concluded that the expert report issued by the Ministry of Interior which also initiated the criminal prosecution against the applicant could not be considered as neutral. As the applicant had no opportunity to effectively challenge this report and therefore was not on an equal footing with the prosecutor, violation was found on the equality of arms principle.

Art.6 § 1 requires that the **prosecution authorities disclose to the defence all material evidence in their possession for or against the accused** (*Rowe and Davis v. the United Kingdom* [GC], § 60).

However, **the entitlement to disclosure of relevant evidence is not an absolute right** - competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime must be weighed against the rights of the accused (*Doorson v. The Netherlands*, § 70).

Admissibility of evidence - fruit of the poisonous tree

Where conviction is to a crucial or decisive extent based on evidence obtained unfairly from the standpoint of autonomous principles of **Art. 6,** the proceedings would be unfair.

Evidence obtained in violation of Art. 6: When assessing fairness of the proceedings, the quality of the evidence must be taken into consideration. In particular, the reliability of evidence would be compromised where it was obtained in breach of the right to silence and the privilege against self-incrimination (*Lutsenko v. Ukraine*, §§ 48-49).

Evidence obtained in violation of Art. 8: Regard must be given to all the circumstances of the case, and in particular to the question of respect for the applicant's defence rights and the quality and importance of the evidence in question (*Gäfgen v. Germany* [GC], § 165).

Evidence obtained in breach of Art. 3: The use in criminal proceedings of such evidence, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (*Jalloh v. Germany* [GC] §§ 99 and 105).

In the case of Hajrulahu, the ECHR established that the applicant was tortured for the purpose of extracting a confession for his involvement in a terrorist act. The statement exorted was then used in the criminal proceedings against the applicant. In line with the well-established practice, violation of Article 6 was automatically found since the judgment relied on a statement/confession obtained in violation of Article 3.

National context mentioned above :
- Poletan and Azirovik
- Stoimenov
- Hajrulahu

Step 4 - Examination of witnesses and the use of testimonial evidence

45 minutes
Methods: hypos, open discussion

INSTRUCTIONS FOR THE TRAINER
- *Read the hypos to the participants (part in italics) and ask them what solution they think it's fit (violation/no violation?); you can also transform it into a voting exercise*
- *Based on their replies give them the information provided for each case and the Court's conclusion; at the end, as sum-up, develop the principles as presented below*

Hypos

Conviction based to decisive degree on witness statements that had since been retracted
(The applicant was arrested in 1999 on suspicion of being a member of the PKK (Workers' Party of Kurdistan, an illegal organisation) and murder. In 2003 he was sentenced to life imprisonment for carrying out acts designed to bring about the secession of part of Turkey's territory. Relying on Article 6 §§ 1 and 3 (d) (right to a fair hearing), he complained that the court which had convicted him had not re-examined a key witness despite the fact that he had changed his version of events in the course of the proceedings. Violation - Orhan Çaçan v. Turkey)

Conviction based on key pre-trial witness statements retracted before trial court
(The case concerned a complaint about the unfairness of criminal proceedings

brought against the applicant for heroin trafficking in Zagreb. He notably alleged that his conviction in April 2005 of conspiracy to supply heroin had been based to a decisive extent on oral statements made by his co-accused, heroin addicts going through withdrawal, who had alleged that they had been ill-treated by the police during their questioning about the trafficking ring. Mr Erkapić relied on Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights. Violation - Erkapić v. Croatia)

Criminal conviction based on statement made by defendant in police custody after swearing oath normally reserved for witnesses
(The applicant was taken into police custody pursuant to a judicial warrant on account of his suspected involvement in the assault of a man by two people in balaclavas in the underground car park at the man's home in Paris. Relying on Article 6 §§ 1 and 3 (right to a fair hearing), the applicant complains that he was required to take an oath before being questioned, that he was denied the right to remain silent, the right not to incriminate himself and the right to be brought before a judge, and that the judgment by which the Court of Appeal found him guilty did not contain sufficient reasons. Violation - Brusco v. France)

Use in evidence of confession to police of a minor who had been denied access to a lawyer
(At the age of 15 the applicant was accused of murdering a 12-year-old boy. At the close of proceedings conducted under the 1982 Procedure Act as applicable to minors, he was found guilty of the charges against him and placed in a reformatory for six years. Relying on Article 6 §§ 1 and 3 (right to a fair trial) of the European Convention on Human Rights, Mr Adamkiewicz complains of the restrictions placed on the exercise of his defence rights during the investigation and the fact that statements made by him then were admitted at the trial. Violation - Adamkiewicz v. Poland)

Conviction essentially based on the testimony of minors subject to sexual abuse to which the accused were not confronted
(Proceedings were brought against the for sexual abuse of their two minors. The children, who were then aged over six and a half, were questioned during the preliminary investigation. The investigating judge carried out the questioning in the presence of child psychologist, who asked the children certain questions. The applicants, their lawyers and the representative of the prosecution service were in a different room, separated by a two-way mirror, from where they could listen to and see the children. Given the difficulty experienced by one of the children in replying to a question, the judge left the courtroom in order to follow the final part of the sitting from behind the two-way mirror. The applicants were committed for trial. The court convicted them of the offences charged. It based its decision on two elements of the prosecution's evidence: an audiovisual recording of the

questioning of the children during the preliminary investigation, and the evidence of persons, examined during the court proceedings, who had been in contact with the children at the time of the alleged offences and in whom the children had confided. The court refused to hear the expert witness for the defence. The applicants were convicted and sentenced to twelve years' imprisonment. The court of appeal upheld the guilty verdict and dismissed the defence's requests: the children, whose statements were, taken as a whole, coherent, had already been monitored over a lengthy period by a psychologist from social services and questioned by a psychologist during the preliminary investigation; the applicants had attended that hearing and their lawyers had had an opportunity, through the investigating judge, to ask the children any questions they considered necessary for the defence. The sentence for the mother was reduced to nine years' imprisonment. The applicants appealed unsuccessfully on points of law. Inadmissible. - Accardi and Others v. Italy(dec.))

Absence of reasons for authorities' refusal to secure attendance of witness whose testimony had been used for applicant's conviction
(The applicant was convicted of robbery and sentenced to seven years' imprisonment in a judgment upheld in 2010. Finally, under Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses), he complained that it had been impossible to obtain the attendance of a key witness and that the judge of the first instance court had not been impartial. Violation - Rudnichenko v. Ukraine)

Points to emphasise
Concerning witnesses, the Court encourages the examination of their statements, also in the case of anonymous witnesses, and demands the domestic courts to ascertain the truthfulness and reliability of these statements. The Court also recognizes the importance of expert advice in order to have neutral and impartial opinions on technical matters, applying all the general principles for witnesses.

The impossibility to call a witness does not necessarily hinder the applicant's right to examine or have examined witnesses against him, especially where the applicant had not shown that it was necessary to call that witness in order to establish the truth or that the refusal to examine him had infringed the rights of the defence. The Court consequently held that it was not necessary to examine whether the witness had really been untraceable. (*Craxi v. Italy*, § 83). When the applicant's conviction was founded upon conflicting evidence against him, the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights (*Popov v. Russia*, § 188).

Art. 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to examine a witness (*Accardi and Others v. Italy* (dec.)).

There **must be a good reason for the non-attendance of a witness**. When a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Art. 6 (the so-called "sole or decisive rule"). Where a conviction is based solely or decisively on the evidence of absent witnesses, the central question is whether there are **sufficient counterbalancing factors in place**, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (*Al-Khawaja and Tahery v. the United Kingdom* [GC], § 119, 147).

Article 6 §§ 1 and 3(d) of the Convention contain a presumption against the use of hearsay evidence against a defendant in criminal proceedings. Exclusion of the use of hearsay evidence is also justified when that evidence may be considered to assist the defence (*Thomas v. United Kingdom* (dec.)).

It may prove necessary in certain circumstances to refer to depositions made during the investigative stage: when a witness has died, has exercised the right to remain silent, or when reasonable efforts by the authorities to secure the attendance of a witness have failed. When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort. Evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. Statements made by the witnesses at the pretrial stage and unavailable for adversarial examination can be taken into consideration, if these statements are corroborated by other evidence.

Art. 6 § 3(d) only requires the possibility of cross-examining witnesses whose testimony was not adduced before the trial court in situations where this testimony played a main or decisive role in securing the conviction.

Even where a **hearsay statement** is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Art. 6 § 1. However, the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness would constitute a very important factor to weigh in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take

place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

Example - *Mirilashvili v. Russia*
In 2003 the applicant was convicted on suspicion of organising the abduction of a group of people. The trial court relied on the recordings of telephone conversations made by the police in one of the victims' flat. Citing the Operational and Search Activities Act, the court refused to disclose to the defence the materials relevant to the authorisation of the wiretapping. The court also relied heavily on the written testimonies of three important witnesses, which had been obtained by an investigator at the pre-trial stage and read out at the trial. As these witnesses lived in Georgia, the court requested the Georgian authorities to secure their attendance at the trial, but without success. Two of the witnesses never appeared before the Russian courts, and one attended only the appeal hearing. Nor was the applicant able to question them during the pre-trial investigation. However, the three witnesses were questioned in Georgia by the defence lawyers after the start of the trial and sent written statements to the court retracting their earlier testimony. They all stated that they had falsely accused the applicant, and that their previous statements to the prosecution had been given under pressure. The defence applied to the trial judge for the admission of these statements. However, the court declared them inadmissible since the law prohibited defence lawyers from questioning witnesses after they had been questioned by the prosecution and in a manner that was not in accordance with the "proper" procedure for collecting of evidence prescribed by law. The applicant's conviction was in the main upheld on appeal.
Materials withheld from the defence: The Court could not rule out the possibility that the materials in question might have been helpful to the defence, which would, therefore, have had a legitimate interest in seeking their disclosure. However, it was prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence. The question arose whether the non-disclosure had been counterbalanced by adequate procedural guarantees. The materials relating to the authorisation of the wiretapping had been examined by the presiding judge ex parte. Therefore, the decision to withhold certain documents had been taken not by the prosecution unilaterally, but by a member of the judiciary. However, the court had not analysed whether the materials would have been of any assistance to the defence or whether their disclosure would, at least arguably, have harmed an identifiable public interest. The court's decision had been based on the type of material at issue, not on an analysis of its content. Having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to operational and search activities, the court's role in examining the disclosure request lodged by the defence had been very limited. The decision-making process had therefore been seriously flawed. The

impugned decision was vague and did not specify what kind of sensitive information the materials relating to the surveillance operation could contain. The court had accepted the blanket exclusion of all the materials from adversarial examination. Furthermore, the surveillance operation had not targeted the applicant or his co-accused. In sum, the decision to withhold materials relating to the surveillance operation had not been accompanied by adequate procedural guarantees, and had not been sufficiently justified.
Admissibility of witness statements:The defence had been in a disadvantageous position vis-à-vis the prosecution: whereas the prosecution had been able to examine the key witnesses directly, the defence had been deprived of that opportunity. However, the applicant's inability to examine these witnesses in person could be attributed to certain objective circumstances which were outside the control of the Russian authorities. Nevertheless, that fact alone did not suffice to conclude that the evidence had been taken and examined in a fair manner. The defence had not been allowed to produce new written depositions obtained from the witnesses. The evidence submitted by the defence was relevant and important. The three witnesses at issue were key witnesses for the prosecution. By obtaining new statements from them the defence had sought not only to produce exculpatory evidence, but also to challenge the evidence against the applicant. When refusing to examine the new statements, the court had relied on a domestic law provision which did not appear to pursue any identifiable legitimate interest. In the particular circumstances of the case, namely where the applicant had been unable to examine several key witnesses in court or at least at the pre-trial stage, the refusal to admit the statements obtained by the defence had not been justified. The Court, however, emphasised that it was not taking a stand on the assessment of that evidence, which was the prerogative of the domestic courts.
Overall fairness of the proceedings: The defence had been placed at a serious disadvantage vis-à-vis the prosecution in respect of the examination of a very important part of the case file. In view of the importance of appearances in matters of criminal justice, the proceedings in question, taken as a whole, had not satisfied the requirements of a "fair hearing".
Conclusion: violation (unanimously).

National context

The rules on witnesses are elaborated in details within the Law on Criminal Procedure, in particular, the sections on the rules of evidence (dokazni sredstva), as well as the provisions for the examination of the witnesses before and during the main hearing stage. It can be concluded that the basic principles of the Strasbourg court are reflected in these provisions and that they provide a framework flexible enough to ensure the fair trial standards in respect of the examination of witnesses.

Macedonian cases on examination of witnesses

Solakov – the applicant was prosecuted for drug-smuggling case in U.S.A. where the witnesses were serving prison sentences. The investigating judge examined the witnesses in the U.S. The applicant's lawyers were not present although they were given the possibility to attend the examination. Two additional witnesses proposed by the applicant at the trial were not examined. ECtHR concluded the examination of the witnesses was done in an adequate manner, that the applicant did not really substantiate any particular concerns as regards the lack of cross-examination or the contents of the witnesses' statements, that the non-examination of the two additionally proposed witnesses did not represent a restriction of the applicant's defence rights and that the applicant's conviction was corroborated with other evidence. No violation.

Dusko Ivanovski – criminal proceedings in which the applicant was convicted to a prison sentence on drug-related charges. A cellar adjacent to the applicant's home was searched where drugs were found and according to the applicant he was coerced to leave fingerprints on the packages with the drugs. His requests to examine the neighbours, the involved police officers, expert witnesses and admit alternative expert analysis (different from the one delivered from the Ministry of Interior) were all dismissed. Violation in respect of examination of witnesses and equality of arms.

Iljazi – the applicant was a truck driver who was convicted to a prison sentence for drug-trafficking. His was found guilty because he was involved in the loading of the truck in Istanbul, hid the drugs in a secret compartment and then drove the truck back when it was discovered at the border-crossing. The witness statements obtained in Kosovo from people who were present during the loading of the truck were disregarded same as the applicant's request to have these witnesses summoned and examined before the court. In absence of any direct evidence, the refusal to examine the defence witnesses led to a limitation of the defence rights incompatible with the guarantees of a fair trial. Violation.

Papadakis – the applicant was convicted for drug-trafficking after a trans-national operation was carried out involving also undercover agents from the DEA. At the trial, a protected witness (U.S. agent of DEA) was examined by the court, who was available and present only that day. The applicant and his attorneys were removed out of the courtroom during the examination and were subsequently given only an hour to pose questions and to indirectly cross-examine the protected witness through the court. The allocated time was insufficient to effectively challenge the protected witness's statement. Violation.

Doncev and Burgov case: the applicants were police officers who were convicted to a conditional prison sentence for bribery of 500 MKD that they accepted from an undercover police officer in exchange of a speeding ticket. The applicants complained that the police operation was an entrapment and that they were incited to commit the crime. The case was analysed from the viewpoint of examination of witnesses. The undercover agent was examined by the trial court as a protected witness after the applicants and the defence counsel were removed from the courtroom. The applicants however, ultimately, without providing any specific justification, waived of their right to question the protected witness through the court although they were given a possibility to do so. No violation.

Point for discussion: a parallel between the Papadakis and Doncev cases. See the dissenting opinion of judge Sicilianos in the Doncev and Burgov case.

Confession as evidence

Confession as an evidence should not be obtained by coercion, from unrepresented persons or following an imposition of an oath.

Confessions obtained during intimidating interrogations immediately following arrest or in the absence of a lawyer are not compliant with Art. 6 standards unless the defendants have not shown reasonable efforts/considerable diligence in availing themselves to procedural rights in making the confession.

When it is not clear whether a person is questioned as a witness (who does not have the right to silence) or as a suspect (who can benefit from the right to silence), the Court takes into account the formal status of the person and the factual circumstances (*Brusco v. France*, §§ 44-55).

Confession obtained by use of trickery of private informants is permissible under Art. 6, even when it is decisive piece of evidence, as long as it is obtained in the context of public activity and not outside the confines of a prison. These techniques may only be used to obtain evidence of past offences, not to create new ones.

National legislation

The Law on Criminal Procedure in its Article 12 prohibits coercion in obtaining a confession from the accused or other person involved in the proceedings. Article 70 lists the right not to be coerced to confess or self-incriminate among the basic rights of the accused, while Article 208 stipulates that the accused must not be mislead to confess the perpetration of criminal offence. Article 334 foresees that the court shall examine the veracity of the confession (the guilty plea) and shall check that 1) the confession was given voluntarily, consciously and with a full

understanding of the legal consequences and 2) there are sufficient evidence corroborating the guilty plea of the accused. The statement containing a confession that was not accepted by the court cannot be used as evidence in the proceedings and shall be separated from file.

Question/point for discussion:

How to proceed and what should be done if the accused makes credible and substantiated statements that he/she was coerced to confession? In this context, Hajrulahu case.

Step 5 - The standard and the burden of proof

30 minutes

Methods: case study, sum-up of main principles

INSTRUCTIONS FOR THE TRAINER

- *Ask the participants to read the case facts and to discuss with their neighbours about the possible conclusion and the elements to take into consideration*
- *Ask them what the conclusion of the Court could be and why; after each reply ask the other if they agree/disagree; are there exceptions to the burden of proof rule? Are they compatible with the Art 6?*
- *Conclude by giving them the case reference and summing up the finding of the Court; develop the main principles detailed below*

Case study

Both applicants were convicted of drug-trafficking offences and given custodial sentences. In accordance with the Drug Trafficking Act 1994, at the first stage of the confiscation procedure the onus was on the prosecution to establish, on the balance of probabilities, that the defendant had spent or received specific sums of money during the six years preceding the trigger offence. The Act empowered a court 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. The burden then passed to the defendant to show, again on the balance of probabilities, that the money had instead come from a legitimate source. At the second stage of the procedure, the burden shifted to the defendant to establish that his realisable assets were less than the amount of benefit he was assessed to have received from drug-trafficking. Since the applicants had failed to prove that their realisable property was less than the amount of their assessed benefit, the confiscation orders were made equal to that amount. The applicants were liable to additional terms of imprisonment if they did not pay the sums within the time-limit. They appealed unsuccessfully.

Case analysis (available for the trainer only) - *Grayson and Barnham v. the United Kingdom* - 19955/05

In *Phillips v. the United Kingdom* (no. 41087/98) the Court had held that the reversal of the burden of proof in confiscation proceedings following a conviction for a drug trafficking offence was compatible with Article 6. In the instant cases, the Court's task was to determine whether the way in which the statutory assumptions had been applied in the confiscation proceedings had offended the basic principles of a fair procedure inherent in Article 6 § 1. Throughout the confiscation proceedings the rights of the defence had been protected by the safeguards built into the system. Thus, in each case the assessment had been carried out by a court through a judicial procedure that included a public hearing, advance disclosure of the prosecution case and the opportunity for the applicants to adduce documentary and oral evidence. Each applicant had been represented by counsel of his choice. Before the Court, neither applicant had seriously complained about the fairness of the first stage of the confiscation procedure in which the benefit from drug trafficking was calculated. It was not incompatible, in principle or practice, with the concept of a fair trial under Article 6 to place the onus on the applicants, once they had been convicted of a major offence of drug dealing, to establish that the source of money or assets which they had been shown to have possessed in the years preceding the offence was legitimate. Given the existence of the safeguards referred to above, the burden on them had not exceeded reasonable limits. Furthermore, the judges had a discretion not to apply the impugned assumption if, in their opinion, it would give rise to a serious risk of injustice. As regards the second stage of the confiscation procedure, the applicants had chosen to give oral evidence relating to their realisable assets. They were legally represented and had been informed, through the judges' detailed rulings, exactly how the benefit figure had been calculated. They had been given the opportunity to explain their financial situation and to describe what had happened to the assets which the judge had taken into account in setting the benefit figure. The first applicant, who had been found to have had large sums of unexplained money passing through his bank accounts, had failed to give any credible explanation for these anomalies. The second applicant had not even attempted to explain what had happened to the various consignments of cannabis he had been found to have purchased. In each case the judge found the applicant's evidence to have been entirely dishonest and lacking in credibility. It was not for the European Court to substitute its own assessment of the evidence for that of the national courts. Moreover, since the applicants had been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect them to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money. Such matters fell within the applicants' particular knowledge and the burden on them would not have been difficult to meet if their accounts of their financial affairs had been true.

Conclusion: no violation (unanimously).

Points to emphasise

General standard: beyond reasonable doubt

The standard of proof required from the prosecution to prove a criminal defendant guilty must be, as a rule, that of beyond reasonable doubt. Different standards of proof are required for a person to be convicted and for a person to be prosecuted. Casting doubt on an accused's innocence once an acquittal (giving him/her the benefit of the doubt) is final is not admissible under Art. 6 § 2 of the ECHR.

In assessing evidence, **the Court has generally applied the standard of proof "beyond reasonable doubt"**. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

In criminal cases, the burden of proof is on the prosecution and any doubt should benefit the accused. Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.

Example - *Telfner v Austria*
The applicant was convicted of causing injury by negligence after a road traffic accident, complained that, in the criminal proceedings against him, the courts failed to respect the presumption of innocence guaranteed by Article 6 § 2 of the Convention. The ECHR noted that both the District Court and the Regional Court dealing with the case relied on a police report that Mr Telfner was the main user of the car and that he had not been home on the night of the accident, but that the victim of the accident had not been able to identify the driver, or even to say whether the driver had been male or female, and that the Regional Court had found that the car in question was also used by the applicant's sister. In requiring the applicant to provide an explanation, the courts shifted the burden of proof from the prosecution to the defence. The District and Regional Courts also speculated as to whether the applicant had been under the influence of alcohol, which was not supported by any evidence and which was not directly relevant to the offences with which the applicant had been charged. This contributed to the impression that the courts had a preconceived view of the applicant's guilt.
Conclusion: violation of Article 6 § 2 (presumption of innocence).

Art. 6 § 2 does not prohibit **presumptions of fact or of law** in principle, it requires however States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved (*Salabiaku v. France*, § 28; Janosevic v. Sweden, § 101).

The burden of proof cannot be reversed in compensation proceedings brought following a final decision to discontinue proceedings. Exoneration

from criminal liability does not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof.

The national courts cannot conclude that the accused is guilty merely because he chooses to **remain silent**. It is only if the evidence against the accused "calls" for an explanation which the accused ought to be in a position to give that a failure to give any explanation "may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty".

The fact that the applicant was acquitted does not in itself mean that his/her prosecution was illegal or otherwise tainted in the first place. **Different standards of proof are required for a person to be convicted** (proof beyond reasonable doubt) **and for a person to be prosecuted** (reasonable suspicion that the person has committed a crime). Therefore there may well be cases of reasonable suspicion which at trial do not result in a conviction beyond reasonable doubt.

Following a final acquittal - be it an acquittal giving the accused the benefit of the doubt in accordance with Art. 6 § 2 - the voicing of suspicions regarding an accused's innocence, including those expressed in the reasons for the acquittal, is no longer admissible. The same applies to imposition of a confiscation order in respect of offences of which the applicant had been acquitted.

Example - *Lavrechov v. the Czech Republic*
In 2001 the applicant, a Russian national, was charged in the Czech Republic with insider trading and fraud and taken into pre-trial custody. The following year he was released on bail subject to the payment of the equivalent of EUR 400,000 as security. The trial was subsequently conducted in his absence as he had been out of the country for a lengthy period and had failed to maintain contact with the trial court regarding the conduct of the trial or to forward an address for service. Although the applicant was ultimately acquitted of the offences charged, the security was forfeited as he had failed to respect the conditions of his bail.
Law – Article 1 of Protocol No. 1: The forfeiture of the bail constituted interference with the applicant's property rights. The measure had complied with the requirement of lawfulness and pursued the legitimate aims of ensuring the proper conduct of criminal proceedings and of fighting crime and crime prevention, which undoubtedly fell within the general interest. While bail of approximately EUR 400,000 was substantial, the time for discussing the proportionality of the amount was when the bail was set, rather than when it was forfeited. In the instant case, the applicant had not contended that the amount was unreasonable and had been able to provide the security swiftly and without undue hardship. The main issue in the case was whether his acquittal should have been taken into account when deciding whether to forfeit the bail.
The purpose of bail is to ensure the proper conduct of criminal proceedings, and in particular to ensure the accused appears at the hearing. In the instant case, the conduct of the proceedings was significantly hampered by the applicant's failure to comply with the bail conditions. He failed to appear at any of the scheduled

hearings or to assist the court in any way, even though he must have been aware that he was in breach of his bail conditions. This had resulted in the length of the proceedings being considerably extended and serious difficulties in attempts to serve the applicant with documents. The fact that the applicant was later acquitted did not in itself mean that his prosecution had been illegal or was otherwise tainted. Different standards of proof were required for a conviction (usually proof beyond reasonable doubt) and a prosecution (usually reasonable suspicion of the commission of a crime). There could therefore well be cases of reasonable suspicion which at trial did not result in a conviction beyond reasonable doubt. Nevertheless, in such situations the State still had a legitimate interest in ensuring that individuals in respect of whom there existed a reasonable suspicion did not try to evade justice or undermine the smooth conduct of the proceedings. Accordingly, the outcome of the proceedings had no direct relevance to the question whether the security for bail should be forfeited. The question was rather whether forfeiture was proportionate given the breach of the bail conditions during the proceedings. Even though the applicant might have had objective reasons owing to the theft of his passport for not attending the initial hearings, the decision to hold the trial in absentia was not taken until two years and eight months after he acquired a new passport. In these circumstances, the domestic courts' finding that the applicant had been avoiding criminal prosecution by staying out of the country for several years did not seem unreasonable. As the applicant must have been aware that he had been in breach of his bail conditions for a substantial period, he should have informed the court clearly and unequivocally of his address in Russia and remained in regular contact, but this he had failed to do. Lastly, forfeiture had been ordered after full adversarial proceedings, and the domestic courts had carefully scrutinised the pertinent issues and given comprehensive reasons for their decisions. The procedural requirements of Article 1 of Protocol No. 1 had thus been complied with. In the circumstances, therefore, the decision to forfeit the applicant's bail had struck a "fair balance" between the demands of the general interest of the community and the requirements of the applicant's rights.
Conclusion: no violation

National case-law

Presumption of innocence is guaranteed by Article 13 of the Constitution and by the Law on Criminal Proceedings already in its Article 2 as well through few subsequent provisions of the Law. This procedural guarantee was strengthened in the new LCP with an additional, second paragraph that obliges the state institutions, media and all other subjects to respect the presumption of innocence. The national legislative framework in this context requires application of the *in dubio pro reo* principle (Article 4 of the LCP).

So far, the presumption of innocence was analysed before the ECtHR in couple of

cases against "The former Yugoslav Republic of Macedonia".

In the case of Miladinovi, the ECtHR had some concerns in respect of the wording used in the detention decisions issued against the applicants. The Court rejected the complaint as manifestly ill-founded; it however noted that the wording used in the detention orders was "unfortunate".

In the case of Poletan and Azirovik, problematic point was made in the reasoning of the first-instance judgment where it was stated that the defendant's assertion that he did not know that cocaine was planted in the truck that he drove cannot be accepted since it is "unsupported with any evidence". The wording used, suggested that the burden of proof was shifted to the applicant/defendant i.e. that it was for him to submit evidence and prove that he was not aware of the drugs. The ECtHR ultimately considered the case on the merits and found that there was no violation of the presumption of innocence. The domestic courts provided sufficient reasoning and there was nothing that would cast doubt as to the conclusions they have made.

Questions/points for discussion:

Confiscation of assets is allowed when there are factual or legal impediments for a criminal prosecution (Article 100-a (4) of the Criminal Code). How to deal with the confiscation in cases in which there is a statutory time-bar for the criminal prosecution (legal impediment for criminal prosecution) and preserve the presumption of innocence?

Is there something that the courts can do during the proceedings to ensure that the "other subjects" (paragraph 2 of Article 2 of Law on Criminal Procedure) genuinely respect the presumption of innocence?

Unit III - Specific principles related to the criminal limb

Points to emphasise
the reasoning of judgments in criminal cases and the relationship with the procedural guarantees under Article 6 of the ECHR

Step 1 - Qualification of the charge

45 minutes
Methods: case brief, presentation

INSTRUCTIONS FOR THE TRAINER

- *Provide the case brief to the participants and ask them to read it*
- *Discuss their opinions on the matter and ask them why they think the Court found a violation*
- *Sum-up their replies and provide the main principles as detailed below*
- *Discuss the national context and the relevant case-law v MKD*

Case brief

In 2002 the applicant was convicted with final effect in criminal proceedings for an irregularity committed in his capacity as representative of a State-owned company. Relying on Article 6 §§ 1 and 3 (a) and (b) (right to a fair trial) of the Convention, he contended that, in the proceedings against him, the recharacterisation of the facts by the Supreme Court during its deliberations had prevented him from exercising his defence rights and that the assessment of the evidence by the Supreme Court had rendered the criminal proceedings against him unfair.
Violation of Article 6 §§ 1 and 3 (a) and (b) (fairness)

Change in the qualification of the crime (related to the moral component of the crime) by the court of last resort without the applicant being able to adapt his defence: violation

Adrian Constantin v. Romania, no. 21175/03, 12 April 2011

Points to emphasise

- limits, change, elements of the crime

Any changes in the qualification of the crime (related to a recharacterisation of the facts pertaining to the legal, material or moral elements of the crime), without giving the accused the possibility to adapt his/her defence to the new qualification, infringes the fair trial guarantees.
A reclassification of the charges brought against the defendant must duly be followed by the possibility afforded to him take adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation. This obligation covers formal changes but also implicit extension of the charges. Any failure to do so can be remedied by higher courts.

The accused must be duly and fully informed of any changes in the accusation, including changes in its "cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (*Mattoccia v. Italy*, § 61).

Information concerning the charges made, including the legal characterisation that the court might adopt in the matter, must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or

implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion from the prosecution as regards the qualification of an offence is clearly not sufficient (*I.H. and Others v. Austria*, § 34).

In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time (*Pelissier and Sassi v. France* [GC], § 62).

A reclassification of the offence is considered to be sufficiently foreseeable to the accused if it concerns an element which is intrinsic to the accusation.

Example - *Sadak (no.1) and Others v. Turkey*
The four applicants, all former parliamentarians and members of the former Democracy Party (DEP), were accused of having committed treason, under section 125 of the Turkish Penal Code, punishable by the death penalty, in relation to activities allegedly undertaken in the name of the Kurdistan Workers' Party (PKK) and declarations in support of the PKK. On 8 December 1994 they were convicted by the Ankara State Security Court to 15 years' imprisonment for belonging to an armed organisation, under section 168 of the Penal Code, but the charges under section 125 were thrown out.
The Court further held, unanimously, that the applicants' rights under Article 6 (3) (a), (b) and (d) had been violated, in that they had not been informed in time of modifications to the charges against them and that they had not been able to have key witnesses questioned.

Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects.

Step 2 - Plea bargaining

30 minutes
Method: brief case analysis, open discussion

INSTRUCTIONS FOR THE TRAINER
- *Present the case below and stress the main principles as detailed in the Court's reasoning*
- *Based on these principles, discuss the national context and the compliance with the Court's approach*

Points to emphasise
Plea bargaining rules are a common feature of European criminal-justice systems,

allowing for an accused to obtain the lessening of charges or a reduction of sentence in exchange for a guilty or nolo contendere plea before trial or substantial cooperation with the investigative authority.

The process of plea bargaining itself does not pose problems as to compliance with fair trial guarantees, but where the process leads to an abridged form of judicial examination and thus a waiver by the accused of a number of procedural rights, the waiver has to be established in unequivocal manner and be attended by minimum safeguards commensurate with its importance.

Example - Conviction without the examination of the merits of the case following a plea bargain: no violation - *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014

Facts – The first applicant, the managing director of a public company in which he and his wife (the second applicant) also held shares, was charged with various company-law offences. An agreement was reached between the defence and the prosecution according to which the prosecutor undertook to request the trial court to convict the first applicant without an examination of the merits of the case and to seek a reduced sentence in the form of a fine. The trial court approved the agreement, found the applicant guilty and sentenced him to the payment of a fine. The decision could not be appealed.
In his application to the European Court, the first applicant complained that the plea-bargaining procedure was unfair and had amounted to an abuse of process (Article 6 § 1 of the Convention), that he had not been able to appeal against the decision approving the plea bargain (Article 2 of Protocol No. 7) and that his right to be presumed innocent had been breached by the extensive media coverage of his arrest and comments made by the regional governor in a television interview (Article 6 § 2 of the Convention). Both applicants also lodged complaints under Article 34 of the Convention and under Article 1 of Protocol No. 1.
Law – Article 6 § 1 of the Convention and Article 2 Protocol No. 7: The Court noted from the comparative law materials before it that it was a common feature of European criminal-justice systems for an accused to obtain the lessening of charges or a reduction of sentence in exchange for a guilty or nolo contendere plea before trial or substantial cooperation with the investigative authority. There was nothing improper in the process of plea bargaining in itself. However, where the process led to an abridged form of judicial examination and thus a waiver by the accused of a number of procedural rights, the waiver had to be established in unequivocal manner and be attended by minimum safeguards commensurate with its importance.
By striking a bargain with the prosecution over sentence and pleading no contest as regards the charges, the first applicant had waived his right to an examination of the case against him on the merits. Accordingly, the Court had to examine whether he had accepted the plea bargain in a genuinely voluntary manner in full

awareness of the facts and legal consequences and whether there had been sufficient judicial review of the content of the plea bargain and of the fairness of the manner in which it had been reached.
The Court noted that the initiative for plea bargaining had emanated from the first applicant and had not been imposed by the prosecution. He had been granted access to the case materials and had been duly represented by qualified lawyers of his choice throughout the negotiations and during the judicial examination of the agreement. The judge examining the lawfulness of the plea bargain had enquired whether he had been subjected to any kind of undue pressure and the first applicant had explicitly confirmed on several occasions, both before the prosecution authority and the judge, that he fully understood the content of the agreement, that his procedural rights and the legal consequences of the agreement had been explained to him, and that he had not accepted it as a result of duress or false promises.
Importantly, a written record of the agreement had been drawn up, signed by the prosecutor, the first applicant and his lawyer, and submitted to the trial court for consideration, making it possible to have the exact terms of the agreement, as well as of the preceding negotiations, set out for judicial review.
The trial court had power to review the appropriateness of the sentence recommended by the prosecutor and to reduce it or indeed to reject the agreement altogether, depending upon its own assessment of the fairness of the terms and the process by which it had been entered into. The trial court had also enquired whether the accusations against the first applicant were well-founded and supported by prima facie evidence. In addition, it had examined and approved the plea bargain at a public hearing.
As regards the complaint under Article 2 of Protocol No. 7, the Court considered it normal for the scope of the exercise of the right to appellate review to be more limited with respect to a conviction based on a plea bargain. By accepting the plea bargain, the first applicant had waived his right to ordinary appellate review, a legal consequence that would or should have been explained to him by his lawyers. By analogy with its finding under Article 6 § 1, the Court considered that the waiver of the right to ordinary appellate review had not represented an arbitrary restriction on the requirement of reasonableness contained in Article 2 of Protocol No. 7.
Conclusion: no violation (six votes to one).

Step 3 - The reasoning of the sentence

🕘 15 minutes
Methods: brief presentation

INSTRUCTIONS FOR THE TRAINER

- *Explain the principles below and the rationale of the Court for*

introducing this safeguard

Points to emphasise
While sentencing as such falls outside of the scope of Art. 6, the matter of imposing a certain sentence and of its amount being left to the full appreciation of national courts, the fair trial guarantees impose that the reasoning for it follows the same standards as any other court decision.

With regard to the reasons given in the establishment of the sentence, the same standards apply. Proceedings regarding sentencing are covered by the fair trial guarantees set forth by Article 6 (*Findlay v. United Kingdom*, § 69).

As a matter of principle, sentencing (the choice thereof and the tariff imposed) is not subject to scrutiny by the Court, save for exceptional cases, such as the imposition of life sentences for children (*Singh v. United Kingdom*).

Indeterminate sentences do not pose problems under the Convention, if there is a sufficient link between the original conviction and continuing detention and there is a possibility for release after a certain time (*Vinter and others v. United Kingdom*).

Interference of the executive in imposing the sentence (fixing the tariff) may disclose a violation of Article 6 (Stafford v. the United Kingdom[GC], § 87).

National Context

As regards the reasoning of the criminal sentence, the Law on Determination of Sanctions applies in combination with the Criminal Code and prescribes the calculation method of the criminal sanctions. The purpose of this Law is to establish consistent penal policy across the country.

In the Macedonian criminal justice system the sentencing is not a separate stage and the determination of the sentence is part of the single set of criminal proceedings (together with the establishment of the guilt). The judgment needs to properly address and provide reasons for the aggravating and mitigating circumstances, in line with the provisions of the Criminal Code, Law on Criminal Procedure and the Law on Determination of Sanctions.

Unit IV - Practical application

1 hour
Methods: drafting exercise

INSTRUCTIONS FOR THE TRAINER

- *Divide the participants into 3 groups (1st instance, appeal, last instance)*
- *Ask them to read the case facts and the table and highlight the boxes with elements which they consider problematic, namely where the national court was wrong in its approach*
- *Then ask them to draft the reasoning as they were the court higher than the one they were assigned by highlighting the main issues which they identify as problematic*
- *At the end each group presents their work*
- *Sum up the findings of the ECHR and give them the reference*

Case facts - see separate annex

Case analysis (available to the trainer only): - *Gradinar v Moldova*

1. General principles

The Court reiterates that the effect of Article 6 § 1 is, inter alia, to place a "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence, without prejudice to its assessment or to whether they are relevant for its decision, given that the Court is not called upon to examine whether arguments are adequately met (see Perez v. France [GC], no. 47287/99, § 80, ECHR 2004-I, and Buzescu v. Romania, no. 61302/00, § 63, 24 May 2005). Nevertheless, although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see Van de Hurk v. the Netherlands, judgment of 19 April 1994, Series A no. 288, p. 20, §§ 59 and 61, and Burg v. France (dec.), no. 34763/02, ECHR 2003-II). The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see Ruiz Torija v. Spain and Hiro Balani v. Spain, judgments of 9 December 1994, Series A nos. 303-A and 303-B, p. 12, § 29, and pp. 29-30, § 27, respectively, and Helle v. Finland, judgment of 19 December 1997, Reports of Judgments and Decisions 1997VIII, § 55).

For instance, in Ruiz Torija v. Spain (judgment of 9 December 1994, Series A no. 303 -A, §§ 29 and 30) the Court found that the failure of the domestic court to deal with the applicant's contention that the court action against her had been time-barred amounted to a violation of Article 6 of the Convention. Similar failures to give sufficient reasons resulted in findings of violations of Article 6 of the Convention in Hiro Balani (cited above, §§ 27 and 28), Suominen v. Finland (no. 37801/97, §§ 34-38, 1 July 2003), Salov v. Ukraine (no. 65518/01, § 92, ECHR 2005-... (extracts), Popov v. Moldova (no. 2), (no. 19960/04, §§ 49-54, 6 December 2005), Melnic v. Moldova (no. 6923/03, §§ 39-44, 14 November 2006) and other similar cases.

2. Application of these principles to the present case (...)
The Court notes that in her submissions the applicant relied on the findings of the Chişinău Regional Court as confirming the alleged breaches of domestic procedural law during the criminal investigation. Accordingly, it will examine whether the proceedings as a whole, including the manner in which the higher courts addressed specific findings of the lower court, were in compliance with Article 6 § 1 of the Convention.
The Court notes that a number of findings of the Chişinău Regional Court were not contradicted by the findings of the higher courts and that, accordingly, they must be considered as established facts (see Bimer S.A. v. Moldova, no. 15084/03, §§ 57-59, 10 July 2007). These included the fact that G. and the other accused were arrested and detained on the basis of a fabricated administrative offence, during which period of detention they were questioned and made self-incriminating statements in the absence of any procedural safeguards (see paragraphs 18-22 above). There was no response to the finding that G. had unlawfully been shown the video recording of D.C.'s statement at the crime scene (see paragraph 28 above) in order to obtain consistent statements by all the accused.
The Court further notes that the higher courts did not deal with the finding of the lower court that G. and the other co-accused had an alibi for the presumed time of the crime (see paragraphs 41-42 above), and that a number of serious procedural violations made unreliable most of the expert reports (see paragraphs 56-57 above).
The higher courts also relied on the many witness statements in G.'s case. However, the Court observes that no comment was made on the finding by the lower court that some of those statements were fabricated by the police (see paragraphs 31 and 41 above).
The Court concludes that while accepting as "decisive evidence" (see paragraph 75 above) the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect.
In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting G. and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention.
The Court recalls its finding that the proceedings against G. concerned directly the applicant's own rights (see paragraph 101 above). It concludes that G.'s conviction,

in the absence of sufficient reasons, necessarily breached the applicant's right to a fair trial.
Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

Unit V - Closure

🕒 15 minutes

INSTRUCTIONS FOR THE TRAINER

- *Review the expectation board and sum up what has been touched upon and clarified*
- *Provide brief clarifications for the parts left out and if time does not allow for detail over the content, provide relevant resources where participants can research the matter*

ANNEXES

1. Materials for print

General module

Unit I - Step 3

ASSESSMENT

1. The presumption of innocence in criminal cases:
a. means that the burden of proof falls on the prosecution
b. excludes the use of presumptions of facts and law
c. is hurt by prejudicial statements concerning guilt, only if they are made by judges

2. The notion of criminal charge for the purposes of Article 6 ECHR:
a. Relies on the approach at national level in all cases
b. Has an autonomous meaning in that it can differ from the national approach both when it excludes and when it includes the offence in the criminal sphere
c. Has an autonomous meaning in that it can consider an offence falling under the criminal sphere, even when it is not as such considered at national level

3. The Engel criteria (characterisation of the 'criminal charge'):
a. includes, as one of the conditions, the severity of the penalty potentially incurred
b. is of a cumulative nature
c. includes as one of the conditions the severity of the penalty actually served

4. The personal convictions of a judge:
a. are considered under the objective test and impartiality is presumed until proof of the contrary
b. are considered under the subjective test and partiality is presumed until proof of the contrary
c. are considered under the subjective test and impartiality is presumed until proof of the contrary

5. The requirement of fairness under Article 6:
a. implies both a substantive and a procedural fairness
b. implies a procedural fairness
c. implies a substantive fairness

6. Statements obtained contrary to Article 3:

a. can be used in domestic proceedings if they are obtained under ill- treatment, but never if they are obtained under torture
b. can be used in proceedings if corroborated with other evidence adduced
c. can trigger the finding of a violation of Article 6 with regard to fair trial guarantees if used in domestic proceedings

7. The use in criminal proceedings of pieces of real evidence obtained in breach of the Convention:
a. breaches fair trial standards if obtained under ill-treatment and are conclusive for the conviction
b. breaches fair trial standards if they are conclusive for the conviction and not corroborated, in all cases
c. breaches fair trial standards if obtained under torture and not corroborated by other evidence

8. The presumption of innocence:
a. is applicable only to the trial stage
b. is applicable to the prosecution stage only if the case reaches trial stage
c. is applicable to the subsequent proceedings as well

9. The requirement to provide information about the charge is considered compliant with Article 6 if:
a. it includes information provided in a certain formal manner
b. it includes information provided as to the cause and the nature of the accusation
c. it includes information about the evidence adduced

10. The right to examine or have examined witnesses:
a. refers to the witnesses under the national qualification
b. refers to witnesses as an autonomous concept, including experts and co-accused
c. refers to witnesses as an autonomous concept, including experts only

Unit II - Step 2

In 2000, at the request of two of the applicant's relatives, a court declared him to be partially lacking legal capacity on the ground that he was suffering from schizophrenia. In 2002 the applicant was placed under partial guardianship against his will and admitted to a social care home for people with mental disorders, near a village in a remote mountain location. Following its official visits in 2003 and 2004, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concluded that the conditions at the home could be said to amount to inhuman and degrading treatment. In 2004 and 2005 the applicant, through his lawyer, asked the public prosecutor and the mayor to institute proceedings for his release from partial guardianship, but his requests

were refused. His guardian likewise refused to take such action, finding that the social care home was the most suitable place for him to live since he did not have the means to lead an independent life. In 2006, on his lawyer's initiative, the applicant was examined by an independent psychiatrist, who concluded that the diagnosis of schizophrenia was inaccurate but that the applicant had a tendency towards alcohol abuse and the symptoms of the two conditions could be confused, that he was capable of reintegrating into society, and that his stay in the social care home was very damaging to his health.

Unit II - Step 3

The applicant, acting as defence counsel during a murder trial before an Assize Court, was interrupted by the court while cross-examining a prosecution witness. He felt aggrieved and sought leave to withdraw from the case, but as leave was not granted, he responded by alleging that during the cross-examination members of the court had been talking to each other and sending each other notes ("ravasakia" which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges stated they had been "deeply insulted" "as persons"; could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate"; and that "if the court's reaction is not immediate and drastic, … justice will have suffered a disastrous blow". They gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. As the applicant did neither, the court found him in contempt of court and sentenced him to five days' imprisonment, to be enforced immediately, which the court deemed to be the "only adequate response", as "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned". The applicant served the prison sentence, although he was in fact released early, in accordance with the relevant legislation. His appeal was dismissed by the Supreme Court.

Unit II - Step 4 Option 1 (administration of evidence)

In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse near a pond. Meanwhile, he sought a ransom from the boy's parents and was arrested shortly after having collected the money. He was taken to a police station where he was questioned about the victim's whereabouts. The next day the deputy chief police officer ordered one of his subordinate officers to threaten the applicant with physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's location. Following these orders, the police officer threatened the applicant that he would be subjected to considerable pain by a person specially trained for such purposes. Some ten minutes later, for fear of

being exposed to such treatment, the applicant disclosed where he had hid the victim's body. He was then accompanied by the police to the location, where they found the corpse and further evidence against the applicant, such as the tyre tracks of his car. In the subsequent criminal proceedings, a regional court decided that none of his confessions made during the investigation could be used as evidence since they had been obtained under duress contrary to Article 3 of the European Convention. At the trial, the applicant again confessed to murder. The court's findings were based on that confession and on other evidence, including evidence secured as a result of the statements extracted from the applicant during the investigation. The applicant was ultimately convicted to life imprisonment and his subsequent appeals were dismissed, the Federal Constitutional Court having nonetheless acknowledged that extracting his confession during the investigation constituted a prohibited method of interrogation both under the domestic law and the Convention. In 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines of EUR 60 for 60 days and EUR 90 for 120 days, respectively. In 2005 the applicant applied for legal aid in order to bring proceedings against the authorities for compensation for the trauma the investigative methods of the police had caused him. The courts initially dismissed his application, but their decisions were quashed by the Federal Constitutional Court in 2008. At the time of the European Court's judgment, the remitted proceedings were still pending before the regional court.

Unit II - Step 4 Options 2 and 3 (entrapment)

The applicant worked as a prosecutor. He submitted that he had been approached through a private acquaintance by a person previously unknown to him who was, in fact, an officer from a special anti-corruption police unit. The officer offered the applicant a bribe of USD 3,000 in return for a promise to obtain a third party's acquittal. The applicant had initially refused but later agreed as the officer had repeated the offer a number of times. The officer informed his employers and in January 1999 the Deputy Prosecutor General authorised him to simulate criminal acts of bribery. Shortly afterwards, the applicant accepted the bribe from the officer. In August 2000 he was convicted of accepting a bribe of USD 2,500 and sentenced to imprisonment. The judgment was upheld on appeal. When dismissing the applicant's cassation appeal, the Supreme Court noted that there was no evidence that the initial negotiations with the applicant had taken place on police instructions; that the authorities had been informed only after the applicant had agreed to accept the bribe and that, in authorising the officer's further actions, they had merely joined in a criminal act which was already in progress. According to the Supreme Court, the question of incitement was of no consequence for the legal classification of the applicant's conduct.

In 1998 an undercover police informant called the applicant and asked him to buy her some drugs. The latter agreed and bought 0.05 grammes of heroin which he paid for with the money she gave him. On his return to the meeting point where he was to hand over the drug, he was apprehended by police officers. The next day he was charged with drug trafficking and detained on remand. His detention was further prolonged on several occasions, without any reasons given by the court. When the applicant was arrested he was suffering from several chronic diseases, including epilepsy, pancreatitis, viral hepatitis B and C, as well as various mental illnesses. He was also HIV-positive. During his detention he contracted several serious diseases including measles, bronchitis and acute pneumonia. He also had several epileptic fits. His request to undergo a thorough medical examination either in the detention facility or by an independent doctor was refused. The applicant was not present at the hearing on the merits. His lawyer asked for an adjournment because several witnesses, including the person who had sold heroin to the applicant, as well as the policemen involved in the operation, failed to appear. The court refused his request and found him guilty of selling heroin. It discontinued the criminal proceedings due to the findings of a psychiatric report which stated that he had committed the crime in a state of insanity. Instead he was ordered to undergo compulsory medical treatment During the trial the defence argued that, contrary to Russian law, the applicant had been incited to commit an offence by the police informant and that a confession had been extracted from the applicant by force while he was in a state of drug intoxication and without having benefited from legal advice.

Unit II - Step 4 (reasoning of judgments)

Facts: The applicant, a Spanish national, was born in 1941 and lives at Alcorcón (Madrid). He is a lawyer. Having lost his case at first instance in an action against M., a client, for the recovery of fees owed to him for certain non-contentious services performed in the context of foreclosure proceedings before Judge No. 19 of the Madrid Court of First Instance, the applicant appealed to the Madrid Audiencia Provincial. The first instance court had held that he had not proved that he had performed the services in question. His appeal was dismissed on 17 March 1995. The Audiencia Provincial ruled in its judgment that there was no proof that the applicant had acted as counsel in the foreclosure proceedings before Judge No. 19 of the Madrid Court of First Instance, "although he [might] have carried out non-contentious work". Relying in particular on Article 24 of the Spanish Constitution, the applicant then lodged an appeal de amparo with the Constitutional Court arguing that the judgment of the Audiencia Provincial gave no reply whatsoever to his arguments. In his appeal the applicant emphasised that he had indeed not acted as counsel in the foreclosure proceedings before Judge Nº 19 of the Madrid Court of First Instance, but solely as M.'s agent, providing non-contentious services, advice and assistance. On 11 July 1995 the appeal was dismissed.

The applicant complained that he had not had a fair hearing in the appeal proceedings before the Madrid Audiencia Provincial, since that court had not replied to his submissions, contrary to Article 6 § 1 of the European Convention on Human Rights.

Law: The Court first reiterated that, according to its established case-law, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. However, although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. In the present case the Court noted that at first instance judge No. 12 of the Madrid Court of First Instance had taken into account in his decision the defendant's statements denying the facts alleged by the applicant in his claim. It had held that the evidence of a witness called by the applicant was not conclusive and ruled that the applicant had not proved that he had performed the services for which he was claiming a fee. On appeal the Audiencia Provincial had first stated that it accepted and deemed to be reproduced in its own decision the statement of the facts set out in the judgment at first instance. It had gone on to say that it likewise endorsed the legal reasoning of the impugned decision in so far as it was not incompatible with its own findings. On that point, it had held that there was not the slightest evidence in the case file to prove that the applicant had acted as counsel in the foreclosure proceedings, although he might have performed non-contentious services. It had therefore dismissed the appeal and upheld the judgment delivered at first instance. The case had then been referred to the Constitutional Court, which, in its judgment of 11 July 1995, had dismissed the applicant's appeal de amparo on the grounds that, according to the trial courts, the applicant had not established that he had rendered the professional services for which he was claiming a fee and that assessment of the facts was a matter over which the Constitutional Court did not have jurisdiction. In so far as the applicant's complaint might be understood to concern assessment of the evidence and the result of the proceedings before the domestic courts, the Court reiterated that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts. The Court noted that the applicant had had the benefit of adversarial proceedings. At the various stages of those proceedings he had been able to submit the arguments he considered relevant to his case. The factual and legal reasons for the first-instance decision dismissing his claim had been set out at length. In the judgment at the appeal stage the Audiencia Provincial had endorsed the statement of the facts and the legal reasoning set out in the judgment at first

instance in so far as they did not conflict with its own findings. The applicant could not therefore validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable. In conclusion, the Court considered that, taken as a whole, the proceedings in issue had been fair for the purposes of Article 6 § 1 of the Convention and that there had been no violation of that provision.

Unit III - Step 2

The applicants, who are 12 Uzbek nationals and one Kyrgyz national, were arrested in June 2005 in Russia. They were the subject of an extradition request from the government of Uzbekistan, which claimed that they had financed the May 2005 unrest in the Uzbek city of Andijan. The applicants were held in detention with a view to extradition until March 2007, when they were released. In 2006 the United Nations High Commissioner for Refugees granted the applicants refugee status determining that they each had a well-founded fear of being persecuted and tortured if returned to Uzbekistan. The Russian authorities refused to give them refugee status or asylum. Instead, a deputy prosecutor general ordered their extradition to Uzbekistan after noting that they had "committed" acts of terrorism and other criminal offences and that the Russian authorities had received diplomatic assurances from the Uzbek government that they would not be tortured or sentenced to death upon their return. The extradition orders were upheld by the Russian courts, but the applicants were not extradited because of an interim measure indicated by the Court under Rule 39 of the Rules of Court.

Unit IV - Step 2

In 1996 the applicant was indicted for the continuing offence of "genocide" on account of his alleged Holocaust denial, on the basis of Article 607 § 2 of the Criminal Code, and the continuing offence of "incitement to racial discrimination" under Article 510 § 1 of the Criminal Code. Two private parties joined the prosecution. In 1998 the applicant was convicted of those offences. He appealed to the Audencia Provincial. In 2007, after a request from the Audencia Provincial for a preliminary ruling, the Constitutional Court declared Article 607 of Criminal Code unconstitutional in so far as it concerned genocide denial but found that the remainder of that Article was constitutional. The applicant then asked whether the charge against him under Article 607 § 2 of the Criminal Code remained valid. The Audiencia Provincial stated that it was unnecessary to answer his request. The public prosecutor's office withdrew the charge of genocide denial and sought to have the applicant acquitted of the offence under Article 607 of the Criminal Code and convicted only of the offence of incitement to racial discrimination, hatred and violence, under Article 510 § 1 of the Criminal Code. However, the private prosecutors called for the applicant's conviction under Article 607 to be upheld,

arguing that his conduct had gone further than mere denial of genocide. In 2008 the Audiencia Provincial partly quashed the lower court's judgment, acquitted the applicant of the offence under Article 510 of the Criminal Code and sentenced him to seven months' imprisonment for the offence of justifying genocide, under Article 607 § 2 of the Criminal Code. An amparo appeal by the applicant was unsuccessful.
Before the Court, the applicant complained that he had been convicted on appeal of an offence –justifying genocide – which had not formed part of the indictment and of which he had not been convicted at first instance.

Unit IV - Step 4

At the material time, Turkish law afforded suspected offenders a right of access to a lawyer from the moment they were taken into custody, unless they were accused of an offence falling within the jurisdiction of the state security courts. The applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the state security courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, he sought to retract that statement, alleging it had been extracted under duress. The investigating judge remanded him in custody, at which point he was allowed to see a lawyer. He continued to deny his statement at trial, but the state security court found that his confession to the police was authentic and convicted him as charged. He was given a thirty-month prison sentence.

Unit IV - Step 5

Case 1
Mrs K was questioned twice by the police after an alleged rape by the applicant and criminal proceedings were instituted against the latter. A month later, Mrs K was questioned by the investigating judge in the presence of the applicant, his lawyer, a psychiatric expert and the court stenographer. The applicant and his lawyer were given the opportunity to put questions to Mrs K and the hearing was recorded on video. At the end of the examination the applicant's counsel stated that she had no further questions to put to Mrs K. Subsequently the questioning was transcribed and the transcript ran to 29 pages.
On 9 October 2001 the Graz Regional Court convicted the applicant of attempted rape with violence. At the trial Mrs K refused to give evidence. The applicant appealed to the Supreme Court, which upheld his plea of nullity and quashed the conviction. It found that the proceedings before the Regional Court were defective as the Regional Court had based its findings on Mrs K's statements to the police, which had not been read out at the trial.

The Regional Court then resumed the proceedings in a new composition and heard evidence from the applicant and further witnesses, from four police officers who had been called to the scene as well as from the psychiatric expert present at the questioning of Mrs K.
Mrs K was invited to give evidence while the applicant was to be taken into an adjacent room. However, as the Code of Criminal Procedure entitled her to do, Mrs K refused to give evidence and requested that the statements she had made to the police and the investigating judge be read out instead. The court granted her request. The Court also granted the applicant's request for the video recording of her deposition before the investigating judge to be shown. However, when played, the video recording turned out to be a blank tape.
The applicant requested further evidence proving the alleged discrepancies in the several witness statements. The court dismissed the applicant's requests for the further taking of evidence, by explaining why it considered there was no need in this regard.
On 19 November 2002 the Regional Court convicted the applicant of attempted rape with violence. It relied partly on Mrs K's statements to the police and the investigating judge. Having regard to Mrs K's injuries and to the applicant's criminal record of eleven previous convictions, it sentenced the applicant to three years' imprisonment. Referring to a psychiatric expert opinion, it further ordered that he be detained in an institution for mentally ill offenders.
The applicant filed a plea of nullity with the Supreme Court in which he complained inter alia about the dismissal of his requests for further evidence to be taken. On 20 February 2003 the Supreme Court rejected the applicant's plea of nullity. Following a reasoned argumentation, it noted that the Regional Court had dealt with the inconsistencies between Mrs K's statements to the police and to the investigating judge and between her statements and Mrs P's statement in the context of its assessment of evidence, an assessment that appeared logical.
On 9 April 2003 the Graz Court of Appeal dismissed the applicant's appeal, but granted the Public Prosecutor's cross-appeal and increased the sentence to four years' imprisonment. That decision was served on the applicant's counsel on 9 May 2003.

Case 2
The applicant, Y., accused a family friend of repeatedly sexually assaulting her. Y.'s mother first lodged a criminal complaint against the family friend in July 2002, accusing him of having forced her daughter, who was 14 years old, to engage in sexual intercourse with him between July and December 2001. The family friend, 55 years old at the time, often took care of Y., together with his wife, helping her to prepare for beauty contests.
In the course of the ensuing investigation and trial, the authorities questioned Y. and her alleged assailant – who denied having had any sexual relations with Y. –, examined a number of witnesses and appointed experts to clarify the conflicting testimonies. Thus, two gynaecological reports neither confirmed nor disproved Y.'s

allegations and two other experts came to contradictory conclusions: the first, a psychologist, found that Y. clearly showed symptoms of sexual abuse; and the second, an expert in orthopaedics, considered that the defendant could not have overpowered Y. and performed the acts of which he was accused on account of a disability (his left arm had been disabled since birth). During the gynaecological consultation, the doctor confronted Y. with the findings, in particular, of the orthopaedics report and questioned her why she had not defended herself more vigorously.
Y.'s request that the legal representative of the defendant should be disqualified from the proceedings – on the grounds that, having known him previously, she and her mother had consulted him concerning the sexual assaults even before the police was informed – was rejected by the trial court, finding that there were no statutory grounds for such disqualification.
During two of the hearings in the case, the defendant personally cross-examined Y. He maintained that he was physically incapable of assaulting her and that her accusations against him were prompted by her mother's wish to extort money from him; several questions were phrased in a way to suggest a particular answer and he continuously contested the veracity of Y.'s answers, alleging that she was able to cry on cue to make people believe her.
In September 2009, after having held 12 hearings in total, the first-instance court acquitted Y.'s alleged assailant of all charges. The State prosecutor's appeal against that judgment was rejected in May 2010, as was Y.'s request for the protection of legality with the Supreme State Prosecutor a few months later.
Y. complained, among others, under Article 8 (right to respect for private and family life), of breaches of her personal integrity during the criminal proceedings and in particular that she had been traumatised by having been cross-examined by the defendant himself during two of the hearings in her case.

Unit V

In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse near a pond. Meanwhile, he sought a ransom from the boy's parents and was arrested shortly after having collected the money. He was taken to a police station where he was questioned about the victim's whereabouts. The next day the deputy chief police officer ordered one of his subordinate officers to threaten the applicant with physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's location. Following these orders, the police officer threatened the applicant that he would be subjected to considerable pain by a person specially trained for such purposes. Some ten minutes later, for fear of being exposed to such treatment, the applicant disclosed where he had hid the victim's body. He was then accompanied by the police to the location, where they found the corpse and further evidence against the applicant, such as the tyre tracks of his car. In the subsequent criminal proceedings, a regional court decided that none of his confessions made during the investigation could be used as

evidence since they had been obtained under duress contrary to Article 3 of the European Convention. At the trial, the applicant again confessed to murder. The court's findings were based on that confession and on other evidence, including evidence secured as a result of the statements extracted from the applicant during the investigation. The applicant was ultimately convicted to life imprisonment and his subsequent appeals were dismissed, the Federal Constitutional Court having nonetheless acknowledged that extracting his confession during the investigation constituted a prohibited method of interrogation both under the domestic law and the Convention. In 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines of EUR 60 for 60 days and EUR 90 for 120 days, respectively. In 2005 the applicant applied for legal aid in order to bring proceedings against the authorities for compensation for the trauma the investigative methods of the police had caused him. The courts initially dismissed his application, but their decisions were quashed by the Federal Constitutional Court in 2008. At the time of the European Court's judgment, the remitted proceedings were still pending before the regional court.

Specific module

Unit II - Step 2

Case study

The applicant was born in 1934 and lives in Ohrid. On 30 December 1993 the applicant concluded a loan agreement ("the agreement") (договор за одобрување на кредит) with the "Makbanka-BS" A.D. ("the company"), in accordance with which he received a loan in the amount of DM 40,000 (German Marks) under the following conditions: to repay the loan within three months with 8% monthly interest. The applicant took the loan for the benefit of Mr K.S. who had been ineligible to apply due to his poor financial status. On the same date, the then Ohrid Municipal Court entered a notice ("the notice") in the public register, recording a mortgage in favour of the company over a house and a plot of land owned by the applicant.

The principal amount of the loan with interest was paid by Mr K.S. within the three-month period as set forth in the agreement. Despite that fact, the company continued charging 8% interest although the validity of the agreement had not been extended. Until 10 May 1996 the amount was paid by Mr K.S. on behalf of the applicant. After that date, the applicant continued to pay the 8% interest until 26 October 1996 when the loan was completely repaid.

On 29 May 1997 the Ohrid Court of First Instance deleted the notice from the public register after it had received a notification by the company that the loan had been completely repaid.

On an unspecified date in 1997, Mr K.S. brought a civil action against the company and the applicant claiming the difference between the interest actually paid and the domestic rate, following the three-month period. According to the expert

opinion given in this case, Mr K.S. and the applicant overpaid in the sum of DM 85, 831. On 28 October 1997 Mr K.S. withdrew the claim against the applicant. On 6 February 1998 the Ohrid Court of First Instance dismissed the applicant's request to intervene in the proceedings as a claimant and ordered his claim to be registered separately. On 16 September 1998 the court's decision became final and the applicant's action was registered as a separate claim.

Mr K.S.'s claim was dismissed on 10 February and 17 October 2000 respectively, by the Court of First Instance and the Court of Appeal. The courts considered that the company had no legal capacity to stand in the proceedings as it had concluded the agreement with the applicant and not with Mr K.S. The courts further found Mr K.S.'s claim ill-founded as he had not been a party to the agreement, even though the applicant had concluded it for his benefit.

It appears that the applicant's claim was dismissed by the trial court's decision of 16 February 2000. On 1 June 2000 the Bitola Court of Appeal upheld the applicant's appeal and remitted the case for a fresh consideration.

On 3 April 2001 the Ohrid Court of First Instance dismissed as ill-founded the applicant's claim for unlawful enrichment (неосновано збогатување). It held that the company had lawfully charged 8% interest as the loan had not been repaid in time and accordingly as such the applicant had been liable to pay interest as set forth in the agreement. It concluded, therefore, that the agreement had been implicitly extended without a need for a further express agreement by the parties. The court further declared as withdrawn the applicant's claim against Mr K.S.

On 25 September 2001 the Bitola Court of Appeal upheld the applicant's appeal and remitted the case for re-examination. It held that the lower court had not properly established in what capacity the company had concluded the agreement: as an undertaking or a savings institution (штедилница). Relying on a letter of the National Bank of 4 May 1999, it stated that the company had not been incorporated as a savings institution at the time when the agreement had been concluded and consequently, that it had not been authorised to give loans in foreign currency. It held that the manner of incorporation of the company was decisive for the legal status of the agreement: namely, whether it was null and void or whether another agreement was implicitly concluded. In the latter case, the company could only charge statutory interest, but not at the rate as provided for by the agreement.

On 24 December 2001 the Ohrid Court of First Instance upheld the applicant's claim. The court found that, at the time when the agreement had been concluded, the company had not been incorporated in compliance with the Law on Banks and Savings Institutions and, as a consequence, it had not been authorised to give loans in foreign currency, but only in domestic currency. It further established that the company had been incorporated as a savings institution on 1 March 1994, i.e. following the conclusion of the agreement. It consequently declared the agreement null and void. As the agreement met the statutory requirements of another agreement (договор за заем), the court decided to consider it as it had been so concluded. As the company was not authorised to enter into loan agreements in foreign currency and to charge interest as set forth by the agreement, the court

ordered it to repay the applicant DM 85,831, as the difference between the interest actually paid and the domestic rate, together with interest.
On 7 February 2002 the company appealed. By submissions of 26 February and 19 March 2002 it supplemented the appeal.
On 14 March 2002 the applicant replied to the company's appeal.
On 25 April 2002 the Bitola Court of Appeal dismissed the company's appeal and upheld the lower court's decision. It held that the court below had correctly established the facts and applied domestic law. It reiterated that, at the time when the agreement had been concluded, the company had not been incorporated in accordance with the Law on Banks and Savings Institutions and, as such, it had not been authorised to give loans in foreign currency. It also found that the lower court had correctly declared the agreement null and void.
On 15 May 2002 the Ohrid Court of First Instance granted the applicant's request for enforcement and ordered the company to pay the amount due. The money was subsequently transferred to the applicant.
On 22 May 2002 the company submitted to the Supreme Court an appeal on points of law (ревизија).
On 9 July 2002 the public prosecutor lodged with the Supreme Court a request for the protection of legality (барање за заштита на законистоста).
On 27 February 2003 the Supreme Court gave a single decision upholding the company's appeal on points of law and the public prosecutor's request for the protection of legality. It overturned the lower courts' decisions and dismissed the applicant's claim. It found that the lower courts had properly established the facts, but had incorrectly applied the substantive law. It found that at the time when the agreement had been concluded, the company had been registered as a financial institution authorised to enter into loan and savings agreements with physical persons. It stated, inter alia, that:
"... In accordance with the Law on Banks and Savings Institutions of 1993 in force at that time, [the company] was authorised to accept savings in domestic currency from physical persons and to give loans to physical persons and sole proprietors. Inferences can be drawn that [the company] was not authorised to accept or to give loans in foreign currency to citizens. However, that law does not provide for nullity of such agreements nor does it prohibit the execution of such operations by savings institutions. Such operation of a savings institution is regulated by penalty provisions. It is undisputed that the agreement concluded between the parties [the company and the applicant] was voluntarily executed by [the applicant]... "
The court rejected the lower courts' reasoning that the agreement had been null and void, as the company had been registered and authorised to enter into such agreements irrespective of whether it had concerned foreign currency. It stated that that fact could have only influenced the execution of the agreement. It went on to conclude that the applicant could not have requested restoration of the money already paid to the company under the agreement, as the latter was a financial institution set up by virtue of law, the operation of which was authorised by the National Bank. Moreover, the scope of reference of the company was regulated by a law which could not have been unknown to the applicant.

The decision was served on the applicant on 24 April 2003.
On 5 May 2003 the Ohrid Court of First Instance granted the company's request for enforcement of the Supreme Court's decision. The money, which had already been transferred to the applicant, has been deducted from the latter's pension in monthly instalments since then.

RELEVANT DOMESTIC LAW
Section 374 of the Civil Proceedings Act (Закон за парничната постапка) ("the Act") provides that appeals on points of law must be submitted to the first-instance court in sufficient number of copies for the court, the opposing party and the public prosecutor.
Section 376 of the Act provides that, inter alia, the presiding judge of the first-instance court's panel of judges shall communicate a copy of a timely, complete and admissible appeal on points of law to the opposing party and to the public prosecutor authorised to file a request for the protection of legality. According to paragraph 3 of this section, the opposing party may, within thirty days from the service of the appeal, lodge with the court a reply. According to paragraph 4, after receipt of the reply or after expiration of the time-limit for reply, the presiding judge of the first-instance court's panel of judges shall transfer the appeal and any reply, together with the complete file, to the [the Supreme Court] through the second-instance court.
Section 381 § 1 of the Act provides that [the Supreme Court] shall uphold the appeal on points of law and overturn the impugned decision if it finds that domestic law was wrongly applied.
Section 392 of the Act provides that the Supreme Court shall give a single decision if an appeal on points of law and a request for the protection of legality were submitted against the same decision.
Section 394 of the Act provides that, if not otherwise regulated, the above provisions likewise apply to a request for the protection of legality submitted by the public prosecutor.

Unit II - Step 5

Case study
Both applicants were convicted of drug-trafficking offences and given custodial sentences. In accordance with the Drug Trafficking Act 1994, at the first stage of the confiscation procedure the onus was on the prosecution to establish, on the balance of probabilities, that the defendant had spent or received specific sums of money during the six years preceding the trigger offence. The Act empowered a court 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. The burden then passed to the defendant to show, again on the balance of probabilities, that the money had instead come from a legitimate source. At the second stage of the procedure, the burden shifted to the defendant to establish

that his realisable assets were less than the amount of benefit he was assessed to have received from drug-trafficking. Since the applicants had failed to prove that their realisable property was less than the amount of their assessed benefit, the confiscation orders were made equal to that amount. The applicants were liable to additional terms of imprisonment if they did not pay the sums within the time-limit. They appealed unsuccessfully.

Unit III - Step 1

Case brief
The applicant, Adrian Constantin, is a Romanian national who was born in 1955 and lives in Brăila (Romania). In 2002 he was convicted with final effect in criminal proceedings for an irregularity committed in his capacity as representative of a State-owned company. Relying on Article 6 §§ 1 and 3 (a) and (b) (right to a fair trial) of the Convention, he contended that, in the proceedings against him, the recharacterisation of the facts by the Supreme Court during its deliberations had prevented him from exercising his defence rights and that the assessment of the evidence by the Supreme Court had rendered the criminal proceedings against him unfair.
Violation of Article 6 §§ 1 and 3 (a) and (b) (fairness)

Change in the qualification of the crime (related to the moral component of the crime) by the court of last resort without the applicant being able to adapt his defence: violation

Adrian Constantin v. Romania, no. 21175/03, 12 April 2011

Unit IV - see separate annex

2. **PPT presentations**

Fair trial rights

Article 6§1 ECHR – civil limb

1. In the determination of his civil rights and obligations …, 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.

Article 6 - Applicability

CIVIL RIGHTS AND OBLIGATIONS

- Autonomous concept
- Dispute related to rights and obligations (civil)
- Existence of an arguable right in domestic law
- Substantive content and effects of the right

Types of proceedings

- "Public law" proceedings whose result is decisive for private rights and obligations
- Disciplinary proceedings
- Civil-party complaint in criminal proceedings
- Social matters
- Disputes concerning public servants
- Constitutional disputes
- Other non strictly pecuniary matters (environment...)

Types of proceedings

Secondary:

- Preliminary proceedings
- Consecutive criminal and civil proceedings
- Execution of court decisions
- Applications to have proceedings reopened

Excluded:

- Tax proceedings
- Immigration proceedings
- Disputes of civil servants (exercising State authority)
- Political rights

Article 6§1 ECHR – criminal limb

1. In the determination 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.

Article 6 - Applicability

CRIMINAL CHARGE

- Autonomous concept

- "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence"
  - test whether "the situation of the [suspect] has been substantially affected"

Article 6 - Applicability

CRIMINAL CHARGE

- "Engel" criteria:

(1) classification in domestic law;
(2) nature of the offence;
(3) severity of the penalty that the person concerned risks incurring.

Article 6 – Criminal charge

(1) Classification in domestic law
- If domestic law classifies an offence as criminal -> decisive for the Court
- the Court will look behind the national classification and examine the substantive reality of the procedure in question.

Article 6 – Criminal charge

(2) Nature of the offence – factor to be taken into consideration
- legal rule in question - directed solely at a specific group or of a generally binding character
- proceedings - instituted by a public body with statutory powers of enforcement
- legal rule - punitive or deterrent purpose
- the imposition of any penalty - dependent upon a finding of guilt
- comparable procedures - classified in other CoE member States

Article 6 – Criminal charge

(3) Severity of the penalty incurred
- by reference to the maximum potential penalty for which the relevant law provides

(2) and (3) -> alternative, not necessarily cumulative

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge

Types of proceedings

- Military disciplinary proceedings
- Offences against prison discipline
- Administrative offences:

– road-traffic offences (fines/driving restrictions)
– minor offences of causing nuisance or a breach of the peace
– offences against social-security legislation (failure to declare employment, despite the modest nature of the fine imposed)
– administrative offence (promoting and distributing ehtnic hatred material, punishable by an administrative warning and confiscation

Types of proceedings

- Tax surcharges proceedings
- Political issues
- electoral sanctions
- the dissolution of political parties
- parliamentary commissions of inquiry
- impeachment proceedings against a country's President for a gross violation of the Constitution
- lustration proceedings (if aspects with criminal connotations: nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period)

Types of proceedings

- Different stages of criminal proceedings, ancillary proceedings and subsequent remedies
- pre-trial stage
- investigation
- Sentencing
- appeals on points of law
- constitutional proceedings

- supervisory review proceedings resulting in the amendment of a final judgment

Types of proceedings

Excluded:

- Professional disciplinary proceedings
- Proceedings concerning the prison system
- Proceedings concerning the execution of sentences (application of an amnesty)
- parole proceedings
- transfer proceedings under the Convention on the Transfer of Sentenced Persons
- exequatur proceedings - enforcement of a forfeiture order made by a foreign court

General guarantees

A. RIGHT OF ACCESS TO A COURT

B. INSTITUTIONAL REQUIREMENTS
    1. Tribunal
    2. Established by law
    3. Independence and impartiality

C. PROCEDURAL REQUIREMENTS
    1. Fairness
    2. Public hearing and public delivery of the judgments
    3. Reasonable length of proceedings

General guarantees

A. RIGHT OF ACCESS TO A COURT
    - may be subject to limitations (without impairing the essence)

- Court fees
- Time-limits
- Procedural bars
    - the right to institute proceedings but also the right to obtain a determination of the dispute by a court

General guarantees

B. INSTITUTIONAL REQUIREMENTS

Tribunal

- Autonomous concept (substantive sense of the term)
- Judicial function:
    - capacity of determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.
    - power of giving a binding decision

- "established by law" - aim: to ensure that the organisation of the judicial system does not depend on the discretion of the executive but is regulated by law emanating from Parliament
- Guarantees (substantive and procedural) in place

General guarantees

B. INSTITUTIONAL REQUIREMENTS

Independence and impartiality

- "*Independent*"
- *vis-à-vis* the other powers (the executive, the Parliament)
- *vis-à-vis* the parties
- Criteria:
  - the manner of appointment of its members, the duration of their term of office;
  - the existence of guarantees against outside pressures;
  - whether the body presents an appearance of independence "Impartial": subjective/objective test

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness

- "Procedural" fairness = adversarial proceedings (submissions heard, parties placed on equal footing before the tribunals)
- Requirements for cases concerning civil rights - less onerous than for criminal charges
- "Effective right" = duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness - Adversarial proceedings

- Each party - a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent
- The desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle as the right to adversarial proceedings

- The opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed + the prosecution authorities to disclose to the defence all material evidence in their possession for or against the accused
- Not absolute, its scope may vary depending on the specific features of the case in question

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness – Equality of arms

- Equality of arms = fair balance struck between the parties, applies equally to criminal and civil cases
- It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment
- If observations submitted are not communicated to either of the parties - no infringement of equality of arms as such, but rather of the broader fairness of the proceedings

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness – Administration of evidence

- Done in light of the presumption of innocence, with the burden of proof falling on the prosecution, which has to produce evidence sufficient to convict the defendant, any doubt benefitting the latter
- Right to remain silent and privilege against self incrimination
- Evidence obtained in breach of Convention rights
- Entrapment

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness – Administration of evidence

- National law and courts:
- admissibility of evidence and the way it should be assessed

• the probative value of evidence and the burden of proof
• the relevance of proposed evidence

- Court's task under the Convention:

- to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken
- establish whether the evidence was presented in such a way as to guarantee a fair trial

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness

- Reasoning of judicial decisions
  - the obligation for courts to give sufficient reasons for their decisions
  - reasons given must be such as to enable the parties to make effective use of any existing right of appeal
  - No obligation for a detailed answer to every argument

General guarantees

C. PROCEDURAL REQUIREMENTS

Fairness

- Reasoning of judicial decisions
  - Criteria: the nature of the decision, the circumstances of the case, the nature of the submissions of the parties, the differences existing in the legal systems of the Contracting States, customary rules, legal opinions and the presentation and drafting of judgments
  - Where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply
  - In dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision

General guarantees

C. PROCEDURAL REQUIREMENTS

Public hearing

- protects litigants against the administration of justice in secret with no public scrutiny; maintain confidence in the courts
- a right to an oral hearing at least before one instance
- at least the opportunity of requesting a public hearing
- presence of press and public - subject to exceptions expressly mentioned in Art. 6§1
- waiver - made in an unequivocal manner and must not run counter to any important public interest
- Criminal limb: exceptions - safety or privacy of witnesses, free exchange of information and opinion in the pursuit of justice, security

General guarantees

C. PROCEDURAL REQUIREMENTS

Public delivery of the judgments

- Various means of rendering a judgment public, aside from reading out in open court, may also be compatible with Article 6 § 1
- The form of publicity of the judgment under domestic law - assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1
- If only operative part read out in public: it must be ascertained whether the public had access by other means to the reasoned judgment; the forms of publicity used must be examined in order to subject the judgment to public scrutiny
- Complete concealment from the public of the entirety of a judicial decision cannot be justified

General guarantees

C. PROCEDURAL REQUIREMENTS

Reasonable length of proceedings

- The importance of administering justice without delays which might jeopardise its effectiveness and credibility
- Criminal limb -aim: to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined
- The fairness of the length of proceedings must be assessed in the light of:
- the complexity of the case,
- the conduct of the applicant,
- the conduct of the relevant authorities,
- the object of the dispute

Specific guarantees

A. PRESUMTION OF INNOCENCE

(1) Burden of proof

(2) Presumptions of fact **and of law**

(3) Prejudicial statements

B. RIGHTS OF THE DEFENCE

A. Information About The Charge

B. Adequate Time And Facilities

C. Right To Defend Oneself In Person Or Through Legal Assistance

D. Right To Examine Or Have Examined Witnesses

E. Right To An Interpreter

Article 6 §§ 2-3 ECHR

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Presumption of innocence

Burden of proof

- on the prosecution - any doubt should benefit the accused (duty to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him)

Presumptions of fact and law

- not prohibited in principle by the Convention
- within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence

Presumption of innocence

Prejudicial statements

- Statement concerning suspicion vs. declaration concerning guilt
- Statements by judges - subject to stricter scrutiny than those by investigative authorities

Rights of the defence

6 § 3 a : to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him

- Essential prerequisite for ensuring that the proceedings are fair
  - "cause" = the acts allegedly committed and on which the accusation is based
  - "nature" = the legal characterisation given to those acts

- reclassification of the charge

Rights of the defence

6 § 3 b : to have adequate time and facilities for the preparation of his defence

- The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings
- "facilities" = the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings
- "facilities" = consultation with his lawyer

Rights of the defence

6 § 3 c : to defend oneself in person or through legal assistance

- Defence in person
- Legal assistance
- Legal aid - "where the interests of justice so require"

"practical and effective"

Rights of the defence

6 § 3 d : to examine or have examined witnesses

- "witness" – autonomous meaning (includes co-accused, experts)
- the accused - adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings
- attendance of witneses – absence needs justification
- testimonies not adduced in court (death, right to remain silent etc.)
- anonymous witnesses
- defence witnesses – equality of arms principle

Rights of the defence

6 § 3 e : assistance of an interpreter

- applies exclusively in situations where the accused cannot understand or speak the language used in court; includes situations in which the accused is represented by a lawyer
- translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand or to have rendered into the court's language in order to have the benefit of a fair trial