KEY THEME[1]
Article 6 (criminal limb)
Exhaustion of domestic legal remedies/compliance with the four-month rule (premature expressions of guilt)

(Last updated: 31/08/2024)

Introduction

There are two aspects from which the presumption of innocence can be viewed (*Allen v. the United Kingdom* [GC], 2013, §§ 93-94):

- As a procedural guarantee in the context of a criminal trial where it imposes requirements in respect of, *inter alia*, the burden of proof; use of presumptions; the privilege against self-incrimination; pre-trial publicity; and premature expressions of a defendant's guilt. In this latter context, it is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings (*Kasatkin v. Russia* (dec.), 2021, § 22).
- As a guarantee to protect individuals acquitted of a criminal charge, or those in respect of whom criminal proceedings have been discontinued, from being treated by authorities as though they are in fact guilty of the offence charged. To a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8 of the Convention.

This Key Theme focuses on the question of which domestic legal remedies can be considered effective in respect of premature expressions of a defendant's guilt by public officials (*Allenet de Ribemont v. France*, 1995, §§ 35-36), including judges examining the applicant's case.

The primary question is whether criminal (namely, a complaint within the criminal proceedings) or civil remedies can be accepted as appropriate and effective.

Principles drawn from the current case-law

Factors to be taken into account in determining whether civil-law and/or criminal-law remedies are effective:

The Court has regard to several factors when determining what remedies – those available in the context of a criminal trial and/or in separate civil proceedings – can be effective in respect of presumption of innocence complaints (for instance, *Matijašević v. Serbia*, 2006, §§ 32 and 33; *Lakatos and Others v. Serbia*, 2014, §§ 105-113; *Bivolaru v. Romania*, 2017, §§ 114-116; *Mamaladze v. Georgia*, 2022, §§ 64-67; *Okropiridze v. Georgia*, 2023, § 114):

(i) the nature and structure of remedies available in the domestic legal order;

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(ii) the precise context in which the impugned statements were made. For example, if statements containing premature expressions of guilt are contained in judicial decisions in the applicant's case, a criminal law remedy may be seen as effective (*Matijašević v. Serbia*, 2006, §§ 32 and 33, and *Hajnal v. Serbia*, 2012, § 121). By contrast, if the complaint is about public statements made by officials outside of the trial, a civil law remedy, such as a claim for defamation, may be more appropriate (*Lakatoš and Others v. Serbia*, 2014, § 113; *Okropiridze v. Georgia*, 2023, § 114; *Narbutas v. Lithuania*, 2023, § 211);

(iii) the precise nature of the applicant's complaint, namely whether, invoking the presumption of innocence, the applicant complains primarily about (a) infringement of a fair process *or* (b) an attack on his or her "reputation" by the impugned statements.

The latter distinction is well illustrated by contrasting the cases of *Mamaladze v. Georgia*, 2022, and *Okropiridze v. Georgia*, 2023.

In *Mamaladze v. Georgia*, 2022, §§ 62-67, the Court found that the applicant's complaint, at domestic level, concerning the presumption of innocence had primarily been formulated as being closely linked to the alleged breach of the principle of publicity and the operation of the non-disclosure obligation as part of the criminal proceedings against him. In such circumstances, with the presumption of innocence viewed as a procedural guarantee in the context of a criminal trial itself, the Court considered it reasonable for the applicant to pursue the matter as part of the criminal proceedings without availing himself of another remedy. By contrast, in *Okropiridze v. Georgia*, 2023, § 114, the issues at the heart of the applicant's complaint were the statements that public officials had made separately from the trial and the video-recording of his arrest. The Court considered that the criminal proceedings against the applicant could not, in principle, provide an adequate forum in respect of those matters, as the trial judge lacked jurisdiction to entertain the applicant's grievance, to impose sanctions on the officials concerned or to award damages. A civil remedy for defamation was available but the applicant failed to use it.

Criminal law remedies

The criminal law remedy, as a complaint raised in the relevant criminal proceedings against the applicant, may be effective where the applicant's complaint concerning the presumption of innocence is closely linked to the alleged breach of the procedural guarantees in the context of the criminal trial itself (*Mamaladze v. Georgia*, 2022, §§ 62-67).

In *Matijašević v. Serbia*, 2006, §§ 32 and 33, and *Hajnal v. Serbia*, 2012, § 121, the applicants complained that the presumption of innocence had been breached due to the language used by the criminal courts themselves and the Court held that the applicants, having complained about this in the criminal context, could not in addition have been expected to make use of a civil remedy (the effectiveness of which was also uncertain).

The higher court may rectify the impugned statements made by the lower courts by correcting their wording so as to exclude any prejudicial suggestion of guilt (*Benghezal v. France*, 2022, § 36, where the higher court's correction led to a finding of no violation of Article 6 § 2; *Grubnyk v. Ukraine*, 2020, § 146, where the failure to correct a problematic expression led to a violation).

However, appeals and other such remedies in the context of the criminal proceedings against the applicant may not be an effective remedy where, under domestic law, grounds for the use of such remedies are limited to errors of fact and law as well as procedural errors concerning only the *substance* of the criminal charges, while the applicant's complaint before the Court concerns prejudicial statements expressing an opinion of guilt (*Peša v. Croatia*, 2010, § 132; *Kasatkin v. Russia* (dec.), 2021, §§ 20-24).

Raising the matter of the presumption of innocence when challenging the lawfulness of specific measures taken against the applicant in the context of criminal proceedings (such as property seizures), where those measures are unrelated to prejudicial statements of guilt made by officials outside of the criminal proceedings, may not be an effective remedy (*Narbutas v. Lithuania*, 2023, § 213).

Civil law remedies

A civil-law remedy (such as a civil claim for defamation) is, in principle, an effective way of addressing a complaint relating to allegedly prejudicial statements made by public officials in respect of ongoing criminal proceedings, either alone or in combination with a criminal-law remedy, subject to the above-noted distinction regarding the nature of the complaint (*Mamaladze v. Georgia*, 2022, § 63).

In some domestic legal systems legislation itself recognises the presumption of innocence as a right which can form a basis for a civil action in case it is breached (*Marchiani v. France* (dec.), 2008) while in others domestic case-law allows individuals to bring claims to protect the presumption of innocence as part of a civil action for the protection of such rights as personal integrity, good name and reputation (*Babjak and Others v. Slovakia* (dec.), 2004; *Lakatoš and Others v. Serbia*, 2014, § 108) or honour and dignity (*Januškevičienė v. Lithuania*, 2019, §§ 43, 46, 60-62).

Where the Government maintain the existence of an effective remedy arising from domestic case-law, it may not be necessary for case-law examples to be provided to show its success for plaintiffs using the remedy, provided that the courts examine civil claims based on an alleged violation of the presumption of innocence on the merits. This is an expression of a well-established principle that the effectiveness of a remedy, within the meaning of Article 13, does not depend on the certainty of a favourable outcome for the applicant (*Kudła v. Poland* [GC], 2000, § 157).

For example, in *Narbutas v. Lithuania*, 2023, §§ 214-16, the Government provided only two examples of domestic cases in which the courts examined civil claims lodged against politicians regarding their public statements and those cases were still pending before domestic courts. The Court noted that the applicant did not comment on those examples and did not provide any other arguments or domestic court decisions showing that the remedy was obviously futile. He did not institute any proceedings whereby the effectiveness of that remedy could be tested. The Court concluded that it was not up to it to find *in abstracto* that it was not effective and rejected his complaint under Article 6 § 2 for a failure to exhaust domestic remedies.

Requirements for the effectiveness of a civil remedy

To be effective, a civil remedy must be capable of securing, either alone or in combination with another (criminal) remedy: (a) the acknowledgment of a violation; and (b) an award of damages (*Babjak and Others v. Slovakia* (dec.), 2004). Moreover, to be effective, such a civil remedy should:

(i) be available immediately after the alleged infringement occurred and cannot be dependent on the final outcome of the criminal proceedings (for instance, *Marchiani v. France* (dec.), 2008; *Gutsanovi v. Bulgaria*, 2013, §§ 176 and 178; see also, in the context of subsequent proceedings, *Januškevičienė v. Lithuania*, 2019, §§ 49 and 60);

(ii) not be excluded due to the official immunity of magistrates for statements made in the exercise of their functions (*Gutsanovi v. Bulgaria*, 2013, § 177).

Combination of remedies

In the context of Article 13 of the Convention, the Court has held that, although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (*Silver and Others v. the United Kingdom*, 1983, § 113 (c)). This principle also

finds its application in the determination of appropriate remedies for presumption of innocence complaints.

For example, in *Rimšēvičs v. Latvia* (dec.), 2023, §§ 43-56, the Court found that the applicant had been required to avail himself of a combination of domestic remedies: (i) a criminal-law remedy whereby he could obtain an acknowledgement of his right to be presumed innocent; and (ii) a civil claim which could afford him redress in the form of compensation. The relevant remedy under domestic criminal procedure law allowed a person concerned to lodge, without waiting for the adjudication of the case, a complaint alleging a violation of the presumption of innocence by statements of those not involved in criminal proceedings. Within that framework the authority in charge of the criminal proceedings could acknowledge a violation of the presumption of innocence, ensure that that acknowledgement was publicised and submit the matter for evaluation to the authority which could decide on the liability of the official who made the statement. The acknowledgement could then serve as the basis for a civil claim for compensation.

In legal systems where defamation is criminalised, a criminal complaint for defamation (with ancillary civil claim for damages lodged within the framework of criminal proceedings) could in principle pursue the same goal as a civil claim in legal systems where defamation is a civil matter (*Gutsanovi v. Bulgaria*, 2013, § 178). However, the effectiveness of such a remedy can be undermined by the need to apply the criminal-law standard of proof where the accusing party (the applicant) may be required to prove the falseness of the impugned statement. This may imply the requirement for the applicant to prove his or her innocence and such a remedy could not be considered effective (Ibid., § 179).

Compliance with the four-month rule and independence of the outcome of criminal proceedings:

The answer to the question whether the domestic legal system offers an effective legal remedy and whether it has been used also affects the question of compliance with the four-month (previously six-month) time-limit (*Hajnal v. Serbia*, 2012, § 126).

In contrast to the complaints under Article 6 §§ 1 and 3, which, in the absence of special circumstances, are declared inadmissible as premature when they concern pending criminal proceedings (*Sperisen v. Switzerland*, 2023, § 48), complaints under Article 6 § 2 about premature expressions of guilt are not rejected on the grounds that the criminal proceedings are still pending (*Gutsanovi v. Bulgaria*, 2013, § 176; *Narbutas v. Lithuania*, 2023, § 211).

This was, for example, the situation in *Nadir Yıldırım and Others v. Türkiye*, 2023, §§ 45-48, where criminal proceedings against the applicants were started in 2010. In 2016 the trial court president drew up investigatory reports for the lifting of the applicants' parliamentary immunity which contained an unqualified statement that the applicants had committed the offences imputed to them. The applicants unsuccessfully asked for the judge's recusal on those grounds. The Government submitted that the criminal proceedings were still pending and that, should the applicants be convicted, they could raise their complaint in respect of the presumption of innocence in their appeal to the Court of Cassation. The Court held that, given the time required to have access to that potential remedy, it could not be considered effective.

Where the Court accepted that a complaint under Article 6 § 2 could not be rejected for non exhaustion of domestic remedies because the applicant duly raised the issue in the course of criminal proceedings, the four/six month time-limit is to be counted from the moment of the final determination of the criminal charge (*Panasyuk v. Ukraine* (dec.), 2011). Where no remedy (notably criminal-law remedy) is accepted as effective, the time-limit is counted from the day of the relevant allegedly prejudicial statement (*Neagoe v. Romania*, 2015, §§ 26-34).

Noteworthy examples

- *Arrigo and Vella v. Malta* (dec.), 2005 – the case concerned a Prime Minister's statements to the media regarding an investigation into suspected offences committed by the applicants. While criminal proceedings were pending, their complaint about a violation of the presumption of innocence was examined in parallel constitutional redress proceedings and the Constitutional Court declared that there had been a violation of the applicants' rights to a fair trial and to be presumed innocent. It ordered that a copy of its judgment be placed in the records of the criminal proceedings pending against the applicants. The Court found that the applicants could no longer claim to be victims of the alleged violation of Article 6 § 2 within the meaning of Article 34: incompatible *ratione personae* since a violation was acknowledged and they were afforded sufficient redress;
- *Marchiani v. France* (dec.), 2008 – the applicant (a Member of the European Parliament) complained under Article 6 § 2 about statements made about him in a report submitted by a prosecutor to the President of the European Parliament and about a newspaper article that published passages from that report which could not be disclosed, he argued, without the authorities' involvement. The Court pointed out that French Civil Code provided for the possibility of claiming damages and requesting urgent interim relief based on an alleged violation of the presumption of innocence, which the applicant did not use. His complaint was rejected for –a failure to exhaust domestic remedies;
- *Konstas v. Greece*, 2011, §§ 28-31 – concerned remarks made by the Prime Minister and two ministers about the applicant's criminal case and the wording of a domestic court decision dropping charges against some of the accused while stating that "the applicant played a major role in the commission of the offences". The Government argued that the applicant should have sought damages for defamation in a civil procedure in respect of both politicians' statements and the wording of the court decision. According to the Government, that remedy was effective in respect of both aspects of the applicant's complaint, without distinction. The Court found that the applicant did not have an effective remedy which would enable him to invite the criminal court concerned to find a violation of the presumption of innocence from the procedural standpoint and that the civil claim for defamation could not fully remedy the alleged infringement of the principle. However, in the absence of an effective domestic remedy, the complaint about the wording used in the judicial decision was rejected as having been submitted more than six months after the date of that decision. By contrast, the complaints about public remarks made by the members of the Government were found to have been lodged in time and examined on the merits;
- *Januškevičienė v. Lithuania*, 2019, §§ 56-63 – the applicant complained that, in criminal proceedings against third parties, the courts had adopted judgments which stated that she had committed criminal offences as part of an organised group. The Government provided examples of domestic case-law in which individuals had claimed that statements presenting them as guilty of a criminal offence breached their honour and dignity. There were no exceptional circumstances which would have absolved the applicant from the obligation to avail herself of that remedy. The Court found that the applicant had failed to exhaust domestic remedies in respect of her complaint under Article 6 § 2;
- *Narbutas v. Lithuania*, 2023, §§ 211-17 – the case concerned public statements by several political figures about the applicant's criminal case. He was acquitted at first instance but an appeal from the prosecutor was pending. The Court rejected the Government's submissions that his complaint about a violation of the presumption of innocence was premature: it was not persuaded, in such circumstances, that raising, in the criminal proceedings, the matter of prejudicial statements by figures who were not parties to those criminal proceedings was an effective remedy. However, the Court rejected the applicant's complaint for – failure to

exhaust domestic remedies because he failed to use an effective remedy, a civil claim for the protection of his honour and dignity, against the political figures in question.

KEY CASE-LAW REFERENCES

- *Babjak and Others v. Slovakia* (dec.), no. 73693/01, 30 March 2004 (inadmissible – non-exhaustion of domestic remedies);
- *Arrigo and Vella v. Malta* (dec.), no. 6569/04, 10 May 2005 (inadmissible – no longer a victim);
- *Matijašević v. Serbia*, no. 23037/04, ECHR 2006-X (violation of Article 6 § 2);
- *Marchiani v. France* (dec.), no. 30392/03, 27 May 2008 (inadmissible – non-exhaustion of domestic remedies);
- *Peša v. Croatia*, no. 40523/08, 8 April 2010 (violation of Article 6 § 2);
- *Znaykin v. Ukraine*, no. 37538/05, 7 October 2010 (inadmissible – non-exhaustion of domestic remedies);
- *Konstas v. Greece*, no. 53466/07, 24 May 2011 (violation of Article 6 § 2 in respect of the statements made by the Deputy Minister of Finance and the Minister of Justice and no violation of Article 6 § 2 in respect of the Prime Minister's statements);
- *Panasyuk v. Ukraine* (dec.), no. 19906/04, 23 August 2011 (inadmissible – six-month time-limit);
- *Hajnal v. Serbia*, no. 36937/06, 19 June 2012 (violation of Article 6 § 2);
- *Gutsanovi v. Bulgaria*, no. 34529/10, ECHR 2013 (violation of Article 6 § 2);
- *Lakatoš and Others v. Serbia*, no. 3363/08, 7 January 2014 (inadmissible – non-exhaustion of domestic remedies);
- *Neagoe v. Romania*, no. 23319/08, 21 July 2015 (inadmissible – six-month time-limit);
- *Paulikas v. Lithuania*, no. 57435/09, 24 January 2017 (no violation of Article 6 §§ 1 and 2);
- *Bivolaru v. Romania*, no. 28796/04, 28 February 2017 (violation of Article 6 § 2);
- *Januškevičienė v. Lithuania*, no. 69717/14, 3 September 2019 (inadmissible – non-exhaustion of domestic remedies);
- *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019 (inadmissible for non-exhaustion in respect of statements of members of parliament, admissible and a violation of Article 6 § 2 in respect of dissemination of the applicant's audio recording by the State authorities);
- *Kasatkin v. Russia* (dec.) no. 53672/14, 22 June 2021 (inadmissible – six-month time-limit);
- *Benghezal v. France*, no. 48045/15, 24 March 2022 (no violation of Article 6 § 2);
- *Mamaladze v. Georgia*, no. 9487/19, 3 November 2022 (violation of Article 6 § 2);
- *Okropiridze v. Georgia*, nos. 43627/16 and 71667/16, 7 September 2023 (inadmissible – non-exhaustion of domestic remedies);
- *Rimšēvičs v. Latvia* (dec.), no. 31634/18, 10 October 2023 (inadmissible – non-exhaustion of domestic remedies);
- *Nadir Yıldırım and Others v. Türkiye*, no. 39712/16, 28 November 2023 (violation of Article 6 § 2);
- *Narbutas v. Lithuania*, no. 14139/21, 19 December 2023 (inadmissible – non-exhaustion of domestic remedies);
- *Rytikov v. Ukraine*, no. 52855/19, 23 May 2024 (inadmissible – non-exhaustion of domestic remedies).