



KEY THEME¹

Article 6 (criminal limb)

Hearings via video link

(Last updated: 28/02/2023)

Introduction

The Court has not so far been called upon often to examine issues relating to hearings *via* video link from the perspective of the right to a fair trial under Article 6 of the Convention. However, the Court's case-law provides some guiding principles in this respect.

The central tenets of the Court's case-law concerning a defendant's participation in a hearing *via* videoconference are set out in *Marcello Viola v. Italy*, 2006, § 67:

- a defendant's participation in proceedings by videoconference is not as such contrary to the Convention;
- nevertheless, recourse to this measure in any given case must serve a legitimate aim; and
- the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.

In its case-law the Court has consistently applied the above principles. However, it has stressed the need to ensure the relevant procedural safeguards. In particular, the Court has held that the defendant must be able to follow the proceedings and to be heard without technical impediments and have effective and confidential communication with a lawyer (*Grigoryevskikh v. Russia*, 2009, § 83).

'Legitimate aims' for hearings *via* video link

In *Marcello Viola v. Italy*, 2006, concerning a Mafia member's participation in an appeal hearing by videoconference due to the fact that he was under a special prison regime, the Court found that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention: the prevention of disorder, prevention of crime as well as the protection of witnesses and victims of offences in respect of their rights to life, freedom and security (§ 72).

In *Marcello Viola v. Italy*, 2006, the Court also considered the compliance with the "reasonable time" requirement in judicial proceedings to be a legitimate aim. According to the Court, the videoconferencing measure also aimed at reducing the delays incurred in transferring detainees and thus simplifying and accelerating criminal proceedings (*Ibid.*)

However, it follows from the Court's case-law that the domestic authorities have to provide sufficient reasons if they decide that a defendant will participate in hearings *via* videoconference. In *Medvedev v. Russia*, 2017, § 30, the Court noted that an applicant, who was imprisoned in Moscow, could not participate in person in the appeal hearing in Moscow and that the Government did not justify the decision to arrange for the applicant's participation *via* a video link rather than ensuring his presence in the courtroom.

¹ Prepared by the Registry. It does not bind the Court.

Presence at trial

First instance hearings:

The Court has not yet elaborated specific principles with regard to first-instance hearings *via* video link. However, the above-noted standards elaborated in *Marcello Viola v. Italy*, 2006, apply also in this context (*Asciutto v. Italy*, 2007, §§ 62-72). Moreover, in *Sakhnovskiy v. Russia* [GC], 2010, § 96, concerning an appeal hearing *via* video link, the Court stated that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing. Indeed, according to the Court's case-law, in some instances participating in a hearing *via* video-link could be a measure ensuring effective participation in the proceedings (*Bivolaru v. Romania (no. 2)*, 2018, §§ 138-139, 144-145; *Dijkhuizen v. the Netherlands*, § 56).

It should also be borne in mind that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial (*Murtazaliyeva v. Russia* [GC], 2018, § 91). In general, this includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings. Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article 6 (*Stanford v. the United Kingdom*, 1994, §§ 26 and 29).

Appeal hearings:

The Court has dealt with a number of cases concerning appeal proceedings *via* video link (*Marcello Viola v. Italy*, 2006; *Sakhnovskiy v. Russia* [GC], 2010; *Shulepov v. Russia*, 2008 ; *Yudin v. Russia*, 2018 ; *Medvedev v. Russia*, 2017 ; *Slashchev v. Russia*, 2012).

In *Grigoryevskikh v. Russia*, 2009, the Court reiterated that Article 6 does not always entail a right to be present in person, even where an appellate court has full jurisdiction to review the case on questions of both fact and law (§ 77). Therefore, it stressed that the use of video links does not constitute *per se* a violation of Article 6.

The Court stated that physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself. It rather serves the greater goal of securing the fairness of the proceedings, taken as a whole (*Golubev v. Russia* (dec.), 2006).

In some cases, the Court does not examine separately whether the right to be present at the hearing was violated by the mere participation in the hearing by video link. For instance, in *Grigoryevskikh v. Russia*, 2009, § 94, the Court concluded that the complaint concerning the conduct of the appeal hearing by video link largely overlapped with the complaint concerning the lack of legal assistance at the appeal hearing. Therefore, the Court did not consider it necessary to examine separately the question whether, in the circumstance of this case, the applicant's participation in the appeal hearing by video link complied with Article 6 (see also *Ichetovkina and Others v. Russia*, 2017, § 45).

Right to legal assistance

According to the Court's case-law, the exercise of the right to legal assistance takes on particular significance where the applicant communicates with the courtroom *via* video link (*Grigoryevskikh v. Russia*, 2009, § 92):

- The Court has held in several cases that the interests of justice demanded that, in order to receive a fair hearing, the applicants who appeared before the court by videoconference should be represented by a lawyer, particularly when a representative of the public prosecution participated in the hearing (*Shulepov v. Russia*, 2008, §§ 34-36; *Slashchev v. Russia*, 2012 ; *Grigoryevskikh v. Russia*, 2009);
- In *Sakhnovskiy v. Russia* [GC], 2010, the Court stressed the necessity of ensuring adequate facilities and time for consultation with a lawyer when a defendant is participating in a

hearing *via* video link (by contrast *Marcello Viola v. Italy*, 2006, and *Golubev v. Russia* (dec.), 2006, where the applicants’ lawyers were present at the courtroom);

- In this context, the Court has also held that an accused’s right to communicate with his or her lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial under Article 6 § 3(c) of the Convention. If a lawyer could not talk to his client without supervision and receive confidential instructions, his assistance would lose much of its usefulness, whereas the aim of the Convention is to protect concrete and effective rights (*Sakhnovskiy v. Russia* [GC], 2010, §§ 97, 102 and 104; *Medvedev v. Russia*, 2017, § 30; *Yudin v. Russia*, 2018, §§ 41-44; *Zagaria v. Italy*, 2007).

Noteworthy examples

- *Sakhnovskiy v. Russia* [GC], 2010: lack of personal contact prior to the appeal hearing with legal-aid counsel who had to plead the applicant’s case on the basis of submissions of another lawyer (violation of Article 6);
- *Marcello Viola v. Italy*, 2006: defendant participated in appeal hearings by video link (no violation of Article 6);
- *Golubev v. Russia* (dec.), 2006: defendant followed the appeal proceedings through a video communication system; he did not request to personally attend nor did he object to the hearing through the video communication system during the hearing; two lawyers were present at the hearing (manifestly ill-founded);
- *Grigoryevskikh v. Russia*, 2009: applicant had not been provided with legal-aid counsel during the appeal hearing; applicant further complained that his hearing impairment had prevented him from participating in the appeal hearing and from defending himself adequately, especially with regard to the video link by which his appeal had been examined (violation of Article 6).

Recap of general principles

- *Marcello Viola v. Italy*, 2006, § 67;
- *Sakhnovskiy v. Russia* [GC], 2010, §§ 94-98; see also *Medvedev v. Russia*, 2017, § 24.

Publicity

Hearings *via* video link may give rise to issues concerning the necessity to ensure the public nature of court proceedings, and certain aspects of the case-law may be relevant in that regard.

According to the Court’s case-law, a trial complies with the requirement of publicity only if the general public is able to obtain information about its date and place and if this place is easily accessible to them. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the holding of a trial outside a regular courtroom in places to which the general public in principle has no access, presents an obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access (*Riepan v. Austria*, 2000, § 29; *Hummatov v. Azerbaijan*, 2007, § 144).

When the proceedings are conducted remotely, an issue may also arise with respect to access to the file and disclosure of evidence. The Court has held that an accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives (*Kremzow v. Austria*, 1993, § 52). However, an accused’s limited access to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (*Öcalan*

v. Turkey [GC], 2005, § 140). When an accused has been allowed to conduct his own defence, denying him access to the case file amounts to an infringement of the rights of the defence (*Foucher v. France*, 1997, §§ 33-36). In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file or from compiling and using any notes taken (*Rasmussen v. Poland*, 2009, §§ 48-49; *Moiseyev v. Russia*, 2008, §§ 213-218; *Matyjek v. Poland*, 2007, § 59; *Seleznev v. Russia*, 2008, §§ 64-69).

As regards electronic files and disclosure of electronic data, it is important to ensure that the defence is provided with an opportunity to be involved in laying-down the criteria for determining what might be relevant for disclosure (*Sigurður Einarsson and Others v. Iceland*, 2019, § 90; see also *Rook v. Germany*, 2019, §§ 67 and 72). Moreover, as regards identified or tagged data, any refusal to allow the defence to have further searches of such data carried out in principle raises an issue with regard to the provision of adequate facilities for the preparation of the defence (*Sigurður Einarsson and Others v. Iceland*, 2019, § 91).

The way in which the defendant appears in a hearing held *via* video link may also be relevant from the perspective of the right to a fair trial. For instance, the Court has held that it would be difficult to reconcile the degrading treatment of a defendant during judicial proceedings with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, above all in the accused (*Yaroslav Belousov v. Russia*, 2016, § 147).

Related (but different) topic

- *Khodorkovskiy and Lebedev v. Russia* (no. 2), 2020: §§ 506-507, 511-512: questioning of witnesses, who were living abroad, by means of a video-conference (§§ 506-507, 511-512): violation of Article 6 §§ 1 and 3 (d).

Further references

Other key themes:

- [Absent witnesses and other restrictions on the right to examine witnesses](#)
- [Access to a lawyer](#)
- [Presumption of innocence](#)
- [Waiver of the guarantees of a fair trial](#)

Wider perspectives:

Studies

- Fair Trials: [Safeguarding the right to a fair trial during the coronavirus pandemic: Remote criminal justice proceedings](#)
- Transform Justice: [Defendants on video – conveyor belt justice or a revolution in access?](#)
- British Ministry of Justice: [Virtual Court pilot Outcome evaluation](#)
- [Remote Courts Worldwide platform](#)

Comparative case-law

- [Decision of the Supreme Court of Canada](#)
- [Judgment of the England and Wales High Court of Justice \(Family Division\), 5 May 2020](#)

International law

- Articles 9 and 10 of the [Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters](#) (hearing of witnesses or experts by videoconference or telephone conference)
- Articles 10 and 11 of the [Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union](#) (hearing of witnesses or experts by videoconference or telephone conference)
- [Resolution of the Council of the European Union of 23 November 1995 on the Protection of Witnesses in the Fight against International Organised Crime](#) (witnesses should be given the possibility to give evidence through the use of audio-visual methods)
- Articles 18 and 24 of the [United Nations Convention against Transnational Organized Crime](#) (hearing of witnesses or experts by videoconference)
- Articles 32 and 46 of the [United Nations Convention against Corruption](#) (hearing of witnesses and experts by videoconference)

KEY CASE-LAW REFERENCES

Leading case

- [Marcello Viola v. Italy](#), no. 45106/04, ECHR 2006-XI (extracts).

Other cases under Article 6

- [Golubev v. Russia](#) (dec.), no. 26260/02, 9 November 2006;
- [Asciutto v. Italy](#), no. 35795/02, 27 November 2007;
- [Shulepov v. Russia](#), no. 15435/03, 26 June 2008;
- [Grigoryevskikh v. Russia](#), no. 22/03, 9 April 2009;
- [Sakhnovskiy v. Russia](#) [GC], no. 21272/03, 2 November 2010;
- [Slashchev v. Russia](#), no. 24996/05, 31 January 2012;
- [Gennadiy Medvedev v. Russia](#), no. 34184/03, 24 April 2012;
- [Medvedev v. Russia](#), no. 5217/06, 27 June 2017;
- [Ichetovkina and Others v. Russia](#), nos. 12584/05 and 5 others, 4 July 2017;
- [Bivolaru v. Romania \(no. 2\)](#), no. 66580/12, 2 October 2018;
- [Yudin v. Russia](#), no. 9904/09, 11 December 2018;
- [Dijkhuizen v. the Netherlands](#), no. 61591/16, 8 June 2021.