



KEY THEME¹

Article 6 (criminal limb)

Waiver of the guarantees of a fair trial

(Last updated: 31/08/2023)

Introduction

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Furthermore, it must not run counter to any important public interest (*Sejdovic v. Italy* [GC], 2006, § 86; *Dijkhuizen v. the Netherlands*, § 58).

Principles drawn from the current case-law

- The Court adopts the standard of “knowing and intelligent waiver” (*Ibrahim and Others v. the United Kingdom* [GC], 2016, § 272).
- That standard requires any waiver to be (*Dvorski v. Croatia* [GC], 2015, §§ 100-102; *Simeonovi v. Bulgaria* [GC], 2017, § 115; *Pishchalnikov v. Russia*, 2009, § 77):
 - established in an unequivocal manner;
 - attended by minimum safeguards commensurate to its importance;
 - voluntary;
 - based on an informed choice;
 - clear: the person should reasonably be able to foresee the consequences which his or her conduct would entail;
 - must not run counter to any important public interest.
- Certain rights under Article 6 require a strict compliance with the standards of waiver developed in the Court’s case-law. In particular, waiver of the right to examine a witness, being a fundamental right among those listed in Article 6 § 3 which constitute the notion of a fair trial, requires such strict compliance (*Murtazaliyeva v. Russia* [GC], 2018, § 118).
- Likewise, the right to counsel, being another fundamental right constituting the notion of a fair under Article 6 of the Convention, requires the special protection of the “knowing and intelligent waiver” (*Dvorski v. Croatia* [GC], 2015, § 101). However, this does not mean that an applicant needs to have a lawyer present in order to validly waive his or her right of access to a lawyer (*Fariz Ahmadov v. Azerbaijan*, 2021, §§ 50-55).
- This special protection implies, in particular, the following:
 - suspects must be aware of their rights, including the right of access to a lawyer (*Ibrahim and Others v. the United Kingdom* [GC], 2016, § 272);
 - information about this right must be provided promptly after the arrest (*Simeonovi v. Bulgaria* [GC], 2017, § 118);

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

- waiver of the right to a lawyer by signing a pre-printed phrase “No lawyer sought” in the absence of relevant procedural safeguards will be of a questionable value (*Bozkaya v. Turkey*, 2017, § 48; contrast *Sklyar v. Russia*, 2017, §§ 22-25);
 - an earlier waiver, even if validly made, will no longer be considered valid if an applicant subsequently made an explicit request to access a lawyer (*Artur Parkhomenko v. Ukraine*, 2017, § 81);
 - waiver will not be valid if an applicant was subjected to ill-treatment by the police (*Turbylev v. Russia*, 2015, § 96);
 - the domestic courts must examine and establish in a convincing manner the circumstances related to the waiver of access to a lawyer (*Türk v. Turkey*, 2017, §§ 53-54).
- When a waiver of the right of access to a lawyer satisfies the “knowing and intelligent waiver” standard in the Court’s case-law, there will be no grounds for doubting the overall fairness of the criminal proceedings against the applicant (*Šarkienė v. Lithuania* (dec.), 2017, § 38; *Sklyar v. Russia*, 2017, § 26).
 - The Court has also noted that the effect of plea bargaining in criminal proceedings amounts, in substance, to a waiver of a number of procedural rights (*Navalnyy and Ofitserov v. Russia*, 2016, § 100). However, any decision to accept the plea bargain should be accompanied by the following conditions (*Natsvlshvili and Togonidze v. Georgia*, 2014, §§ 91-92):
 - the bargain has to be accepted by the applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner;
 - the content of the bargain and the fairness of the manner in which it had been reached between the parties has to be subjected to sufficient judicial review
 - The concept of waiver also bears special relevance in cases concerning trials *in absentia*. In this context, the Court has held that a denial of justice occurs where a person convicted *in absentia* is unable subsequently to obtain from a court a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he or she has waived his or her right to appear and to defend him- or herself or that he or she intended to escape trial (*Sejdovic v. Italy* [GC], 2006, § 82).

Noteworthy examples

- *Dvorski v. Croatia* [GC], 2015 – concerning the right of access to a lawyer of one’s own choosing;
- *Simeonovi v. Bulgaria* [GC], 2017 – concerning the right of access to a lawyer;
- *Medenica v. Switzerland*, 2001 – concerning trials *in absentia*;
- *Natsvlshvili and Togonidze v. Georgia*, 2014 – concerning plea bargaining.

Recap of general principles

- General principles: *Sejdovic v. Italy* [GC], 2006, § 86;
- General principles on the right to a lawyer: *Dvorski v. Croatia* [GC], 2015, §§ 100-102; *Simeonovi v. Bulgaria* [GC], 2017, § 115;
- General principles on plea bargaining: *Navalnyy and Ofitserov v. Russia*, 2016, § 100;
- General principles on trials *in absentia*: *Sanader v. Croatia*, 2015, §§ 72-74.

Waiver under other Articles of the Convention

Article 3 of the Convention:

- In *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, 2018, § 61, referring to the absolute nature of Article 3 (see, for instance, *Muršić v. Croatia* [GC], 2016, § 96), the Court did not accept the respondent Government's argument that the applicants, who had been deprived of their liberty, and thus within the power of the authorities, could be considered to have validly waived their right to be placed in adequate conditions of detention.

Article 5 of the Convention:

- The Court has held that the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the sole reason that he or she gives him- or herself up to be taken into detention. Detention might violate Article 5 even though the person concerned might have agreed to it (*De Wilde, Ooms and Versyp v. Belgium*, 1971, § 65; *Storck v. Germany*, 2005, § 75). The Court thus did not consider that the fact that an applicant himself had asked to be placed under house arrest and had not challenged the court decisions ordering this measure amounted to a waiver of the right to liberty under Article 5 (*Buzadji v. the Republic of Moldova* [GC], 2016, §§ 106-110).

Further references

Other key themes:

- [Access to a lawyer](#)
- [Arbitration \(Article 6 civil limb\)](#)
- [Presumption of innocence](#)

Press factsheets:

- [Police arrest and assistance of a lawyer](#)

KEY CASE-LAW REFERENCES

Leading cases:

- *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II (violation of Article 6 § 1);
- *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 118, 18 December 2018 (the complaint regarding the absence of the relevant witness inadmissible - manifestly ill-founded).

Other cases under Article 6:

- *Medenica v. Switzerland*, no. 20491/92, ECHR 2001-VI (no violation of Article 6 §§ 1 and 3(c));
- *Pishchalnikov v. Russia*, no. 7025/04, § 77, 24 September 2009 (violation of Article 6 §§ 1 and 3(c));
- *Natsvlshvili and Togonidze v. Georgia*, no. 9043/05, §§ 91-92, ECHR 2014 (extracts) (no violation of Article 6 § 1);
- *Sanader v. Croatia*, no. 66408/12, 12 February 2015 (violation of Article 6 § 1);
- *Turbylev v. Russia*, no. 4722/09, 6 October 2015 (violation of Article 6 §§ 1 and 3(c));
- *Dvorski v. Croatia* [GC], no. 25703/11, §§ 100-102, ECHR 2015 (violation of Article 6 §§ 1 and 3(c));
- *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016 (violation of Article 6 § 1);
- *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 272, 13 September 2016 (no violation of Article 6 §§ 1 and 3 (c) in respect of the first three applicants; violation of Article 6 §§ 1 and 3 (c) in respect of the fourth applicant);
- *Artur Parkhomenko v. Ukraine*, no. 40464/05, 16 February 2017 (no violation of Article 6 §§ 1 and 3 (c));
- *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 115, 12 May 2017 (no violation of Article 6 §§ 1 and 3 (c));
- *Šarkienė v. Lithuania* (dec.), no. 51760/10, 27 June 2017 (inadmissible);
- *Sklyar v. Russia*, no. 45498/11, §§ 22-26, 18 July 2017 (no violation of Article 6 §§ 1 and 3 (c));
- *Bozkaya v. Turkey*, no. 46661/09, § 48, 5 September 2017 (violation of Article 6 §§ 1 and 3 (c));
- *Türk v. Turkey*, no. 22744/07, 5 September 2017 (violation of Article 6 §§ 1 and 3 (c));
- *Fariz Ahmadov v. Azerbaijan*, no. 40321/07, 14 January 2021 (no violation of Article 6 §§ 1 and 3 (c));
- *Dijkhuizen v. the Netherlands*, no. 61591/16, 8 June 2021 (no violation of Article 6).

Waiver under other articles:

Article 3:

- *Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016;
- *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, no. 1089/09, § 61, 29 May 2018.

Article 5:

- *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12;
- *Storck v. Germany*, no. 61603/00, § 75, ECHR 2005-V;
- *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 106-110, 5 July 2016.