



## KEY THEME<sup>1</sup>

### Article 6 (criminal limb)

### Waiver of the guarantees of a fair trial

(Last updated: 31/08/2024)

#### Introduction

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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

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- 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);

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<sup>1</sup> Prepared by the Registry. It does not bind the Court.

- information about this right must be provided promptly after the arrest (*Simeonovi v. Bulgaria* [GC], 2017, § 118);
  - 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);
  - drug withdrawal symptoms constitute a form of vulnerability which may cast doubt on the validity of a waiver of the right to a lawyer and which imposes upon the domestic courts the duty to establish whether, despite this vulnerability, the waiver was voluntary (*Bogdan v. Ukraine*, 2024, §§ 57-69 and 75).
- 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 (*Natsvlishvili 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).
  - In *Pfeifer and Plankl v. Austria*, 1992, § 39, the Court left open the question of whether an accused can waive the institutional guarantees of Article 6 § 1 (namely the right to an independent and impartial tribunal established by law) and considered that, even if such rights could be waived, the waiver had not been valid in the circumstances of the case (see also, *Dāvidsons and Savins v. Latvia*, 2016, §§ 51-52).

### Noteworthy examples

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- *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*;

- [Natsvlishvili and Togonidze v. Georgia](#), 2014 – concerning plea bargaining.

## Recap of general principles

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- 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.

## Related (but different) topics

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### **Situations akin to a waiver:**

- There are instances which involve circumstances akin to a waiver but which are rather examined on the merits of a fair trial complaint under Article 6 to the extent it is appropriate in the circumstances of the case. See, for instance, [Naviede v. the United Kingdom](#) (dec.), 1999, concerning an applicant's abusive conduct with regard to the legal aid granted to him; [Smailagić v. Croatia](#) (dec.), 2015, concerning a failure by the applicant to use the effective and available mechanisms for the exclusion of judges in the proceedings, and, in the context of the civil limb, [Mutu and Pechstein v. Switzerland](#), 2018, § 96, concerning arbitration tribunals.

## Waiver under other Articles of the Convention

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### **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

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### **Other key themes:**

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

- Presumption of innocence
- Exhaustion of domestic legal remedies/compliance with the four-month rule (premature expressions of guilt)

## KEY CASE-LAW REFERENCES

### Leading cases:

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- *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:

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- *Pfeifer and Plankl v. Austria*, no. 10802/84, 25 February 1992, Series A no. 227 (violation of Article 6 § 1);
- *Naviede v. the United Kingdom* (dec.), no. 38072/97, 7 September 1999 (inadmissible – manifestly ill-founded);
- *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));
- *Natsvlishvili 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));
- *Smailagić v. Croatia* (dec.), no. 77707/13, 10 November 2015 (inadmissible – manifestly ill-founded);
- *Dāvidsons and Savins v. Latvia*, nos. 17574/07 and 25235/07, 7 January 2016 (no violation of Article 6 with regard to the first applicant and a violation of Article 6 with regard to the second applicant);
- *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 – manifestly ill-founded);
- *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));
- *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018 (no violation of Article 6 § 1 as regards the applicants' complaints of a lack of independence

and impartiality on the part of the Court of Arbitration for Sport; violation of Article 6 § 1 in respect of the second applicant on account of the lack of a public hearing before the Court of Arbitration for Sport);

- *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);
- *Bogdan v. Ukraine*, no. 3016/16, 8 February 2024 (violation of Article 6 §§ 1 and 3 (c)).

## Waiver under other articles:

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### Article 3:

- *Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016 (a violation of Article 3 for one period of detention; no violation for others);
- *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, no. 1089/09 29 May 2018 (violation of Article 3).

### Article 5:

- *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12 (no violation of Article 5 § 1; violation of Article 5 § 4 in that the applicants had no remedy open to them before a court against the decisions ordering their detention; no violation of Article 5 § 4 by reason of the rejection of the requests for release);
- *Storck v. Germany*, no. 61603/00, ECHR 2005-V (violation of Article 5 § 1 for one period and no violation for another);
- *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, 5 July 2016 (violation of Article 5 § 3).