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Art. 6 of the ECHR:

- **Fundamental principles of the right to a *fair* trial:**
- **Access to a court;**
- **Independent and impartial court (judge);**
- ***Fair* trial;**
- ***Public* hearing within *a reasonable time*;**
- **Procedural guarantees in [every] proceedings (Art. 6 § 1);**
- **Procedural guarantees in criminal proceedings (Art. 6 §§ 2,3); etc.**

Art. 6 para 1 of the European Convention on Human Rights (the Convention or the ECHR) – The right to a court (access) and to a *fair* trial:

- 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 […]

Art. 6 para 2, 3 of the ECHR/criminal cases:

- **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 […];**
- **(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 speak the language.**

Art. 6 – very important Article:

- **Case law of the European Court of Human Rights (ECtHR):**
- **no justification for interpreting Article 6 § 1 restrictively (*Perez v. France* case [GC], No. 47287/99, 2004 02 12);**
- **very often invoked by the applicants before the ECtHR from different perspectives (*i.e.*, *fair* trial requirement, access to a court; defence rights, equality of arms, admission/contestation of an admitted evidence, etc.).**

Subsidiarity and the Role of the ECtHR:

- ***It is not the European Court's function to deal with errors of fact or law allegedly committed by national courts or to substitute their own assessment unless they may have infringed the rights and freedoms protected by the Convention*** (*García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I).
- **Art. 19 of the ECHR – the unique Role of the Court.**

The Role of the Court:

- **The ECtHR is not an appellate court;**
- **Art. 6 does not allow the ECtHR to act as a court of fourth instance; it cannot replace national courts**
- **(*Bykov v. Russia* [GC], 10/03/ 2009, § 88);**
- **Art. 6 establishes a very strong presumption of facts as found by domestic courts unless the domestic proceedings breached the essence of the Art. 6 of ECHR.**

Admission of evidence:

- **General principles: *Mantovanelli v. France*, No. 21497/93, 18/03/1997, § 34:**

- **The admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts (*Garcia Ruiz v. Spain* [GC];**
- **The Convention does not lay down rules on evidence as such...**

- **The Court therefore cannot exclude as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted.**
- **It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced.**

Mantovanelli v. France/principles:

- **33. [...] one of the elements of a *fair* hearing under Art. 6-1 is the right to adversarial proceedings;**
- **each party must in principle have the opportunity not only to make known any evidence, but also to have knowledge of and comment on all evidence adduced with a view to influencing the court's decision (Nideröst-Huber v. Switzerland, judgment 18/02/1997, § 24).**
- **where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account.**
- **What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal" (see, mutatis mutandis, the Kerojärvi v. Finland judgment of 19 July 1995, § 42).**
- **34. [...] The Court has to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were *fair* under Art. 6-1 (see, mutatis mutandis, *the Schenk v. Switzerland,* judgment 12/07/88, § 46).**

This presentation focuses on such aspects under Art. 6:

- ***Fairness*** **of the proceedings as** ***whole*****;**
- **Duties of national courts in admitting evidence;**
- **Disclosure of evidence;**
- **Admission of sole and/or decisive evidence;**
- **Admission of evidence obtained by the police [active] incitement to commit a crime;**
- **Admission of secret evidence;**
- **Admission of evidence obtained in violation of Article 3 of the Convention (prohibition of torture, inhuman and degrating treatment);**
- **Admission of evidence obtained in violation of Article 8 of the Convention (respect for private and family life, home and correspondence).**

Rinkūnienė v. Lithuania, inadmissible (No. 55779/08, 01/12/09)/Assessment of the proceedings as whole:

- **Medical negligence case/death of the applicant‘s husband:**
- **The applicant complained about the refusal of the domestic courts to order a supplementary expert examination in breach of Art. 6 § 1.**
- **two expert reports were contradictory; a new expert opinion was requested (the third one) into the circumstances of her husband’s death.**
- **The ECtHR: Lithuanian courts based their conclusions on two expert reports and four experts were summoned to courts.**
- **They testified before both the first-instance and appellate courts. The Court does not find that the applicant was placed at a procedural disadvantage *vis-à-vis* the medical institutions or V.D.S.**

Rinkūnienė v. Lithuania, inadmissible (No. 55779/08, 1 December 2009):

- **The assessment of evidence and its probative value are primarily a matter for the domestic authorities:**
- **The Court is not competent to deal with an application alleging that errors of fact or law have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of the rights of the Convention (*Erikson v. Italy* (dec.), no. 37900/97, 26/10/99).**
- **The Court cannot conclude that the Lithuanian courts restricted the applicant's opportunities to prove her case or that they assessed the evidence before them arbitrarily.**
- **Overall, even if the Court of Appeal's silence as regards a third expert report could be regarded as a procedural flaw, this aspect alone had NOT reduced the effectiveness of the examination of the doctors' responsibility...**

Article 6/ Evidence:

- **Article 6 of the Convention does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law**

  (*Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX);

- **The Role of the ECtHR is to decide whether the proceedings as a whole, including the way in which the evidence was obtained, were *fair* *(assessment of an* overall *fairness* of the proceedings).**

Equality of arms/adversarial proceedings:

- **Equality of arms** – equal procedural ability to state the case;
- **Adversarial proceedings** – to have an access and a possibility to comment at trial on the observations filed or evidence adduced by the other party;
- **Both requirements – constituent part of Art. 6 (*fair* trial).**

Fair proceedings/use of evidence:

- In determining whether the proceedings as a whole were *fair*, the rights of the defence should be regarded;
- also the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010) and,
- The applicants should have the opportunity of challenging the authenticity of the evidence and of opposing its use (*Schenk, Khan* cases).

Evidence requirement:

- **the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy;**
- **where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (*Khan*, §§ 35 and 37, and *Allan*, § 43).**

Jalloh v. Germany [GC], No. 54810/01, 11/07/2006:

- **Criminal proceedings - Article 6-1, *Fair* hearing**
- **Use in evidence of a plastic bag containing drugs obtained by the forcible administration of emetics: *violation***
- **Even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence had been obtained by a measure which breached fundamental rights of the Convention.**
- **Furthermore, the drugs obtained by the impugned measure had proved the decisive element in securing the applicant's conviction. Lastly, the public interest in securing the applicant's conviction could not justify using such evidence at the trial.**
- **Accordingly, the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant had rendered his trial as a whole *unfair*.**

Disclosure of evidence:

- **The entitlement to disclosure of relevant evidence is not an absolute right.**
- **in any court proceedings there may be competing interests (*i.e.*, national security, the need to protect witnesses, keep secret police methods of investigation of crime or to safeguard an important public interest, etc.) which must be weighed against the rights of the defence.**

Disclosure of evidence:

- [Some] measures restricting the rights of the defence must be strictly necessary.
- [and] must be sufficiently counterbalanced by the procedures followed by the judicial authorities

(*Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000).

Case *Pocius v. Lithuania* (No. 35601/04, 06/07/2010) (OPPOSITE conclusion in the recent case *Regner v. Czech Republic*/2017):

- "*Civil right*" aspect under Article 6 of the Convention, VIOLATION of Art. 6 § 1:
- The decision-making procedure did not comply with the requirements of adversarial proceedings *or* equality of arms, and did not incorporate adequate safeguards to protect the applicant […].

Case *Pocius v. Lithuania:*

- **The applicant's name had been listed in the operational records file (without the applicant's knowledge),**
- **the police urged him to hand in his firearms as his licence to keep firearms was revoked.**

Case *Pocius v. Lithuania:*

- **Complaints:**
- **the restriction on his having access to the operational records file had not been proportionate;**
- **domestic courts had based their decisions on classified information which had not been disclosed to the applicant;**
- **Instead of [a real] evidence, the applicant had been presented with mere assumptions on his danger to the national security [...]**

Case *Pocius v. Lithuania/admission of evidence*

- **The content of the operational file was never disclosed to the applicant;**
- **Lithuanian judges did examine, behind closed doors, the operational records file and relied on it in their decisions;**
- **the applicant had NO possibility to challenge this evidence or to respond to it,**
- **unlike the police who had effectively exercised such rights.**

Case *Pocius v. Lithuania:*

- **53. […] where evidence has been withheld from the defence, it is not the role of the European Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them;**
- **BUT the decision-making procedure should ensure the adversarial proceedings and equality of arms, and incorporate adequate safeguards to protect the interests of the accused.**

Luca v. Italy case (no. 33354/96, § 40, 2001-II)- balancing of *fair* trial with the failure to examine key witness [at trial]

- The applicant complained that the criminal proceedings against him (possession of cocaine) had been *unfair* [...] [as] he had been convicted on the basis of statements made to the public prosecutor, without being given an opportunity to examine the maker of the statements, N., or to have him examined at trial.
- The main evidence was the statements which N. had made to the public prosecutor.
- Article 6 §§ 1 and 3 (d) of the Convention involved.

Luca case/correct or false statement?

- **22. The Court of Cassation observed that Article 6 § 3 (d) of the Convention concerned**
- **" the examination of witnesses, who are required to tell the truth, not the examination of the accused, who are entitled to defend themselves by remaining silent or even by lying".**
- **Further, since all States that were party to the Convention had an obligation by relevant domestic legislation to regulate the examination of witnesses, it was "obvious that ... when a witness refused to give evidence, statements made to the public prosecutor ... had to be produced for the court's file".**

Luca v. Italy/ Violation of Art. 6 §§ 1 and 3 (d).

- if the defendant has been given an adequate and proper opportunity to challenge the depositions made at investigation stage [...], their admission in evidence *will not in itself* contravene Art. 6 §§ 1 and 3 (d);
- where 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 are restricted in violation of Art. 6

Ramanauskas v. Lithuania [GC] incitement to commit a crime (No. 74420/01, judgment of 05/02/2008)

- **Article 6-1 Fair hearing**
- **Conviction of the offence of bribery incited by the police under the Criminal Conduct Simulation Model: VIOLATION of Article 6-1.**
- **Facts:**
- **The applicant worked as a prosecutor. He submitted that he had been approached through his 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 [...]**
- **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.**
- **Law:**
- **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".**

Ramanauskas v. Lithuania [GC] – use by national courts of an evidence obtained by the [active] acts of incitement to commit a crime (*in principle, sole evidence*):

- **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;**
- **all the meetings between the applicant and the officer had taken place on the latter's initiative.**
- **Throughout the proceedings, the applicant had maintained that he had been incited to commit the offence.**
- **The domestic authorities and courts should have undertaken a thorough examination of whether the prosecuting authorities had incited the commission of a criminal act.**
- **There was no indication that the offence would have been committed without their intervention.**
- **The applicant's trial had been deprived of fairness.**
- **Conclusion: violation (unanimously).**
- **Article 41 – EUR 30,000 in respect of all damages.**

Some „NEW“ tendencies in the case law of the ECtHR:

- ***Regner v. Czech Repu*blic [GC], No. 35289/11, 19/09/2017;**
- **Article 6-1: *Fair* trial/*Adversarial* trial/Equality of arms -**
- **Lack of access to classified information constituting decisive evidence in judicial-review proceedings:**
- **Article 6 applicable; BUT NO violation.**
- **Establishing of facts – “secret prisons” cases v. Lithuania (*Abu Zubaydah v. Lithuania*, no. 46454/11, 31/05/2018) and Romania (*Al Nashiri v. Romania*, No. 33234/12; 31/05/2018):**
- **ECtHR – was clearly “establishing” facts concerning the presence of secret prisons in the two mentioned countries.**

Al Nashiri v. Romania, Abu Zubaydah v. Lithuania:

- ***Al Nashiri v. Romania*** **- 33234/12; Judgment 31.5.2018 [Section I]**
- **Article 3 - Inhuman treatment; Extradition**
- **Inhuman treatment following applicants' extraordinary rendition to CIA: violations**
- **[This summary also covers the judgment in the case of *Abu Zubaydah v. Lithuania*, 46454/11, 31 May 2018].**
- **Establishment of the facts and jurisdiction: The Court found it established conclusively and beyond reasonable doubt that Lithuania and Romania had hosted on their territory a CIA Detention Site;**
- **that the applicants had been secretly detained there for more than a year and that the authorities of the respondent States knew of the nature and purposes of the CIA's activities in their countries;**
- **- within the "jurisdiction" of Lithuania and Romania under Art. 1 of the ECHR.**

*Regner v. Czech Repu*blic [GC], No. 35289/11, 19/09/2017

- Article 6-1: *Fair* trial/*Adversarial* trial/Equality of arms (Art. 6 applicable)
- Lack of access to classified information constituting decisive evidence in judicial-review proceedings: NO VIOLATION (??).
- *Facts:*
- The National Security Authority decided to revoke the security clearance that had been issued to the applicant enabling him to hold the post of deputy to the first Vice-Minister of Defence, on the grounds that he posed a risk to national security.
- The decision did not, however, indicate which confidential information it was based on, as this was classified "restricted" and
- could not therefore legally be disclosed to the applicant.
- The applicant and his lawyer were not permitted to consult the documents in the case file. [All] subsequent appeals by the applicant were unsuccessful.
- the applicant complained that the administrative proceedings had been unfair because he had been unable to have sight of decisive evidence, classified as confidential information, which had been made available to the courts by the defendant.

Regner v. Czech Republic [GC/2017]:

- **The proceedings to revoke the security clearance had been restricted in two ways with regard to the rules of a *fair* trial:**
- **- the classified documents and information had not been available either to him or to his lawyer, and**
- **- in so far as the decision revoking security clearance had been based on those documents, the grounds for the decision had not been disclosed to him.**
- **Domestic courts had unlimited access to all the classified documents; the applicant, who had been heard by the judges and had also been able to make his submissions in writing.**
- **The Supreme Administrative Court - that disclosure of the classified documents could have had the effect of disclosing the intelligence service's working methods, or leading to attempts to influence possible witnesses.**

Regner v. Czech Republic:

- **Accordingly, there was nothing to suggest that the classification of the documents had been decided arbitrarily or for a purpose other than the legitimate interest as […] the applicant had been prosecuted for participation in organised crime; aiding and abetting abuse of public power and illegally influencing public procurement procedures […];**
- **It was understandable that the authorities considered it necessary to take rapid action...**
- **Nonetheless, it would have been desirable – for the national authorities, or at least the Supreme Administrative Court, to have explained, if only summarily, the extent of the review they had carried out and the accusations against the applicant.**
- **Conclusion: NO violation (ten votes to seven) of the applicant's right to a *fair* trial.**

Conclusion on the sole or decisive evidence: (*Regner* case – different position):

- Where a hearsay statement is the sole or decisive evidence, *its admission as evidence will not automatically result in a breach of Art. 6 § 1;*
- in such cases, the European Court must subject the proceedings to the most searching scrutiny;
- proportionality and necessity test should be performed
- sufficient counterbalancing factors, including the existence of strong procedural safeguards, should be granted to the defence.

Older case - Perry v. the United Kingdom (dec.), 63737/00, ECtHR, 26 September 2002:

- **Videotaping for identification purposes**
- **The applicant had covertly been videotaped by the police for identification purposes in violation of domestic procedure.**
- **The applicant complained:**
- **- of a violation of Art. 6 resulting from the use of the evidence obtained by covert videotaping;**
- **the domestic courts failed to protect the applicant's rights by NOT excluding such unlawfully-obtained evidence from trial.**
- **- of a violation of Article 8 of the ECHR.**
- **The tape, along with other evidence, was used for conviction of robbery (NOT the SOLE evidence).**
- **Inadmissibility Decision (partially).**

Perry v. the United Kingdom:

- **Adequate Safeguards put in place/ECtHR:**
- **the applicant's counsel challenged the admissibility of the video tape;**
- **Defence was able to present arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner;**
- **the second judge admitted the evidence and the applicant remained entitled to challenge it before the jury;**
- **the judge's approach was reviewed on appeal by the Court of Appeal;**
- **At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and quality of the identification evidence based on the videotape.**
- **The trial and appeal satisfied the requirements of Article 6 § 1.**

Al-Khawaja case (GC – 15 to 2 Votes): NO VIOLATION

- ECtHR – complaints about conviction based on the sole or decisive evidence - conviction of Mr Al-Khawaja on two counts of indecent assault on two female patients while they were allegedly under hypnosis;
- The applicant was a consultant physician in the field of rehabilitative medicine; he was sentenced to 12 and 15 months' imprisonment.
- The appeal centred on the pre-trial ruling to admit S.T.'s statement as evidence.

Al-Khawaja case:

- The Court of Appeal - the first applicant's right to a *fair* trial had not been infringed.
- The witness, S.T., could not be examined because she had died.
- She was the only witness whose evidence went directly to the commission of an indecent assault on her by the appellant.
- If her statement had been excluded, the prosecution would have had to abandon the first count.

Al-Khawaja case:

- **Legal problem - [only one] decisive evidence, which was admitted, no cross-examination at trial.**
- **BUT - procedural safequards offered at the trial COMPENSATED difficulties caused to the defence:**
- **the statement of S.T. was recorded by the police in a proper form;**
- **there were strong similarities between S.T.'s description of the alleged assault and that of the other complainant, V.U.**

Tahery case - Violation of Art. 6 (GC – unan.):

Tahery was convicted principally of wounding with intent to cause grievous bodily harm (3 stab wounds) (10 years imprisonment).

When witnesses were questioned at the scene, no one claimed to have seen Mr. Tahery stab S.

Two days later, however, the witness T. made a statement to the police that he had seen Mr. Tahery stab S.

This was a decisive evidence for Tahery's conviction.

Legal problem – the same as in *Al-Khawaja* case – admission of T. statements given to the prosecution.

Witness T. was NOT questioned at trial/No cross-examination at trial.

The judge had supported the prosecution's application to read T.'s statement at the trial as T. was too fearful to attend trial before the jury [...].

Position of a National Judge:

- **34. In ruling that leave should be given for the statement to be read to the jury, the trial judge stated:**
- **"I am satisfied in those circumstances upon the criminal standard of proof that this witness is genuinely in fear; [...]**
- **[...] any risk [that] its admission or exclusion will result in unfairness to any party to the proceedings.**
- **I am satisfied that there would be an unfairness caused by its exclusion; but I am equally satisfied that no unfairness would be caused by its admission.**
- **Challenge of a statement does not always come from cross-examination;**
- **Challenge of a statement can be caused by evidence given in rebuttal.**

Tahery case/ECtHR:

- **165. [...] the decisive nature of T.'s statement in the absence of any strong corroborative evidence (the only witness who had claimed to see the stabbing);**
- **[therefore] the jury was unable to conduct a *fair* and proper assessment of the reliability of T.'s evidence (???).**
- **Such untested evidence weighs heavily in the balance and requires sufficient counterbalancing factors to be granted to the defence.**
- **Therefore, examining the fairness of the proceedings as a whole, the ECtHR concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T.'s statement.**
- **A violation of Art. 6 § 1 of read in conjunction with Art. 6 § 3 (d).**

Conclusions as regards the admission of evidence:

- **the admissibility of evidence as such, is primarily a matter for regulation under national law;**
- ***national judge should* decide on the admissibility of [a particular] evidence;**
- **the *Role of the ECtHR* is to determine whether the proceedings as a whole at domestic level were *fair*;**
- **the defendant should have an opportunity of challenging the authenticity of the evidence admitted and of opposing its use;**
- ***sufficient counterbalancing factors* are required to compensate difficulties caused to the defence by admission of an untested evidence.**

Violations of Art. 3 and 8 of the ECHR and the right to a *fair* trial – different position:

- **Admission in evidence of information obtained in breach of Art. 8 (Respect for private and family life) – *in principle*, not in conflict with Art. 6.**
- **the use of evidence obtained in violation of Art. 3 (prohibition of torture and inhuman or degrating treatment) raises serious issues as to the fairness of such proceedings, *even if the admission of such evidence was not decisive in securing the conviction;***
- **the use of evidence obtained as a result of *torture* renders a trial automatically *unfair***
- ***(Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007-...).**

Bykov v. Russia [GC]:

- The same position – followed in the case *Bykov v. Russia (*[GC], No. 4378/02, 10/03/2009).
- Art. 6: 11 votes to 6 – NO viol. (see also the Diss.Op.).
- Bykov complained that the covert operation of the police involved an unlawful intrusion into his home and that the interception and recording of his conversation with Mr V., where he incriminated himself, amounted to interference with his private life and his correspondence.
- The recording of the conversation was admitted as evidence in his criminal trial for a murder crime.

Bykov v. Russia:

- **97. […] V. was not cross-examined at the trial, the failure to do so was not imputable to the authorities, who took all necessary steps to establish his whereabouts, including by seeking the assistance of Interpol.**
- **The applicant was given an opportunity to question V. when they were confronted during the questioning on 10 October 2000.**
- **The applicant's counsel expressly agreed to having V.'s pre-trial testimonies read out in open court.**
- **Finally, V.'s incriminating statements were corroborated by circumstantial evidence, in particular numerous witness testimonies confirming the existence of a conflict of interests between the applicant and S.**
- **98. In view of the above, the Court accepts that the evidence obtained from the covert operation was not the sole basis for the applicant's conviction, but it was corroborated by other conclusive evidence.**

Case *Gulijev v. Lithuania*, No. 10425/03, 16 December 2008 (administrative decision-making process)

- **The Migration Office had refused to issue to the applicant a new temporary residence permit which resulted in the expulsion order.**
- **Complaints of the violation of Art. 8 of the Convention (procedural aspect) - Document provided by the State Security Department and classified as "secret" had never been disclosed to the applicant during the administrative proceedings.**
- **The decision to expel him was solely based on the allegation that he posed a "threat to national security and public order".**
- **The applicant had lived in Lithuania from 1993 with SG, a Lithuanian citizen, whom he had married in 2001 and with whom he had two children (Lithuanian citizens) [...]**

Case *Gulijev v. Lithuania*

- **Procedural violation of Art. 8 (“family life”).**
- **Art. 6 of the ECHR not applicable.**
- **Administrative courts of Lithuania relied upon the report of the State Security Department which was classified as “secret”;**
- **BUT - the content of this report was never disclosed to the applicant during the administrative proceedings, thus restricting his defence rights.**
- **The report was the sole basis for the refusal of the residence permit and the applicant‘s deportation order.**

Case *Gulijev v. Lithuania*

- **ECtHR paid attention to the practice of the domestic admin. courts that, as a rule, factual data which constitutes a State secret may not be used as evidence in an administrative case until it has been declassified […].**
- **However, admin. courts of Lithuania did not follow this clear procedural rule.**
- ***In the case file, there were no documents allowing the Court to conclude that the applicant posed a threat to national security (??);***
- **The applicant was deported and until 2099 is prohibited from re-entering Lithuania, where his two children and wife, all of whom were Lithuanian citizens, live (an important element for necessity and proportionality test).**

Violation of Article 3 (prohibition of torture and inhuman or degrating treatment) and admission of evidence:

- **Violation of Article 3 is subject to different considerations than evidence gathered by a violation of Art. 8 of the ECHR;**
- **the use of evidence obtained in violation of Art. 3 in criminal proceedings raises in itself serious issues as to the fairness of such proceedings, *even if the admission of such evidence was not decisive in securing the conviction;***
- **Article 3 of the Convention - an absolute right, permitting no exceptions or derogations;**
- **in particular, the use of evidence obtained as a result of *torture* renders a trial automatically *unfair* (*Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007-...).**

Gäfgen v. Germany: NO VIOL. of Article 6 § 1 and § 3 of the Convention. Violation of Art. 3.

- **Facts:**
- **In 2002 the applicant suffocated an eleven-year-old boy to death and hid his corpse.**
- **He sought a ransom from the boy's parents and was arrested shortly after having collected the money.**
- **In the police station he was questioned about the victim's whereabouts and threatened with physical pain in order to make him reveal the boy's location.**
- **For fear of being exposed to such treatment, the applicant disclosed where he had hid the victim's body.**
- **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 ECHR.**

Gäfgen v. Germany:

- **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.**
- **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 were convicted of coercion and incitement to coercion while on duty.**

Gäfgen v. Germany: NO VIOL. of Article 6 § 1 and § 3

- **ECtHR:**
- **187. […] in the particular circumstances of the applicant's case, the failure to exclude the impugned *real evidence in a murder criminal case*, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence.**
- **[he confessed to the crime again during the trial, stressing that he was confessing freely in order to take responsibility for the crime he had committed].**
- **As the applicant's defence rights have likewise been respected, his trial as a whole must be considered to have been *fair*.**
- **188. No violation of Art. 6 § 1 and § 3 of the Convention.**

Violation of Article 3 / impact to Art. 6 – *fairness/CONCLUSIONS:*

- **The suggestion that the admission of evidence obtained by any form of ill-treatment is unacceptable under Art. 6 appears already in the *Gôçmen* v. *Turkey case* (no. 72000/01, 17 October 2006).**
- **Recent developments suggest that this may also be the case with other forms of ill-treatment (see *Jalloh v. Germany* case [GC], where an emetic was administered to the applicant by force in order to force him to regurgitate the drugs he had swallowed. The evidence – drugs obtained in such way were used in the criminal proceedings against the applicant). Violations of Art. 3 and Art. 6 of the ECHR.**
- ***Gäfgen v. Germany* [GC], Viol. of Art. 3, BUT NO viol. of Art. 6 (by 11 to 6 votes, see also the Diss. Op.).**
- **FOR DISCUSSION – is *Gäfgen v. Germany* [GC] case in line with the Court's traditional case-law on admission of evidence or not?**

Evidence/[some] new tendencies :

- **Clear rule – admission of evidence - matter for regulation under national law/and for a national judge to decide;**
- **BUT – some exceptions possible – *Regner v. Czech Republic* case [GC, 2017]; admission of the sole and also secret evidence, NOT disclosed to the defence – NO Viol. of Art. 6;**
- **for discussions – is this in line with ECtHR case-law?**
- **„Secret prisons“ cases - ECtHR establishes „facts“– for discussions - is it the Role of the ECtHR under Art. 19 or NOT?**
- **Art. 41 and 46 of the Convention (Execution of judgments in such cases/positive obligations placed on the States).**
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