

**RIGHT TO A FAIR TRIAL AND EFFECTIVE REMEDY IN THE
RECENT JURISPRUDENCE OF THE STRASBOURG COURT**

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1. PREMISE

The jurisprudence of the Court of Human Rights on Article. 6 is commonly known for the convictions to the States as a reasonable duration of the process, but indeed the decisions of recent years, broadly analyze very large number of profiles of a fair trial.

The Art. 6 requires that the process is carried out before a public and impartial tribunal, previously established by law. The Court's decisions on those profiles of due process is often intertwined with the need, established by art. 13, which, for the protection of rights, we can propose an effective remedy to a national authority.

Rights before the Court is, therefore, common practice to be deducted on grounds related to breach of Articles. 6 and 13, but the judgments do not always recognize the violation of both provisions.

Sort this exhibition, we first analyze the decisions that recognize the violation of art. 6, then the related art. 13 and finally those that detect both violations.

2. ARTICLE 6 ECHR: THE DURATION OF THE PROCESS.

Following a well-established case law, the Court condemns the States for the excessive length of proceedings.

The Court continues to believe that the reasonable time of a process is not determined a priori, but it is up to it to assess their suitability taking into account the factual circumstances of each case: the object of contention, the number of trial subjects, the degree of difficulty of the investigation evidence.

In a case concerning an innovative process carried out before the Court of Auditors (Capriati vs. Italy, Judgement July 26, 2011), the Court considers excessive a proceedings lasted five years for one level of jurisdiction¹.

The Court reiterates that a reasonable length of proceedings must be assessed in the light of specific circumstances and with reference to the following criteria: the complexity of the case, the conduct of the applicants and competent authorities, the nature of the interests at stake in the dispute (Hoffer and Annen v. Germany, Judgement January 13, 2011)². It's therefore not unreasonable that a preliminary investigation last a year and two sets of proceedings are felt over three years and two months, when judgement concerning serious crimes and many more tests to examine (Buldakov v. Russia, Judgement July 19, 2011).

In case *Beru v. Turkey* (Judgement, January 11, 2011), the Court recognizes the violation of Article 6, co. 1 of the Convention (in the case: five years for two sets of proceedings), remembering how the character of reasonable duration of the process must be determined taking into account the circumstances of the case, the complexity of the case,

¹ « 20. La Cour a traité à maintes reprises d'affaires soulevant des questions semblables à celle du cas d'espèce et a constaté une méconnaissance de l'exigence du « délai raisonnable », compte tenu des critères dégagés par sa jurisprudence bien établie en la matière (voir, parmi beaucoup d'autres, *Cocchiarella* précité et *Frydlender c. France* [GC], n° 30979/96, § 43, CEDH 2000-VII). La Cour rappelle, notamment, qu'une diligence particulière s'impose pour le contentieux du travail (*Ruotolo c. Italie*, arrêt du 27 février 1992, série A n° 230-D, p. 39, § 17). N'apercevant rien qui puisse mener à une conclusion différente dans la présente affaire, la Cour estime qu'il y a également lieu de constater une violation de l'article 6 § 1 de la Convention, pour le même motif ».

² In this case, the Court took into account the particular situation of the country where the event is occurred, considering that it violates freedom of expression to the criminal conviction for defamation of two antiabortion activists who had compared the voluntary termination of pregnancy to holocaust and they had defined Nazi, the doctor who had performed the abortions.

the conduct of the parties and the competent authorities and on the basis of relevance for parties (in this sense *Daneshpayeh v. Turkey*, Judgement July 16, 2009).

In this case, the Court recognizes the violation of art. 6 for the excessive length of proceedings, but denied damages for the death of a child attacked by stray dogs, which the applicants claim to be treated by the local gendarmerie. This is a typical case in which the Court denies compensation to the applicant for the main issue of the proceedings, but recognizes compensation – usually minor – for the excessive length of proceedings. In accordance with the terms of the reasonable period of time: c. *Chuykina Ukraine*, Judgement January 13, 2011; *Stebnitskiy Komfort and c. Ukraine*, Judgement February 3, 2011.

It also says (*Ekdal and Others v. Turkey*, Judgement January 25, 2011) that even in legal systems based on the initiative of the parties, the attitude of the same does not exempt judges from ensuring the principles of reasonableness contained in Article 6 of the Convention (see also: *Varipati v. Greece*, Judgement October 26, 1999).

About the actual compensation for the excessive length of proceedings, there is the decision of December 21, 2010 in the case *Gaglione et all v. Italy*, where the Court finds that the remedy provided by law “Pinto” is not sufficient to ensure that the applicants also get a favorable ruling of the Court itself, as the Italian authorities fail to ensure the effectiveness of the protection with payments in the short term (delays established by the ECHR are of 19 months for 65% of 475 actions). These delays are likely to make unnecessary the measures taken by the Court, and so asked the Italian authorities to take appropriate steps to ensure the right obtained by the applicants.

3. ARTICLE 6 ECHR: PROFILES SUBSTANTIVE DUE PROCESS

The most interesting and innovative case law regards to material respects of fair trial.

The Art. 6 establishes that a process is considered fair when there is a independent and impartial tribunal established by law and when the process is carried out – except in certain exceptional circumstances – publicly.

On these two profiles are pronounced many judgments of the Court that, beyond the time of the process and its material respects, consider an unfair process that has not been done according to precise formal rules.

Confirming an orientation just stated, the Court considers that there is violation of Article. 6 when the procedure for applying the measure to prevent the seizure does not provide the debate in public hearing (*Pozzi v. Italia e Paleari v. Italia*, Judgments July 26, 2011). While acknowledging the seriousness and importance of the prevention measure, the Court believes unfair the application of a sanction without the recipient may request a public hearing³.

In the fundamental decision *Krivoshapkin v. Russia* (Judgement January 27, 2011), the Court provides a complete picture about his concept of impartiality. According

³ « 20. La Cour observe que la présente espèce est similaire à plusieurs affaires dans lesquelles elle a examiné la compatibilité des procédures d'application des mesures de prévention avec les exigences du procès équitable prévues par l'article 6 de la Convention (*Bocellari et Rizza c. Italie*, n° 399/02, 13 novembre 2007 ; *Perre et autres c. Italie*, n° 1905/05, 8 juillet 2008 ; *Leone c. Italie*, n° 30506/07, 2 février 2010 ; *Capitani et Campanella c. Italie*, n° 24920/07, 17 mai 2011). 21. Dans lesdites affaires, la Cour a observé que le déroulement en chambre du conseil des procédures visant l'application des mesures de prévention, tant en première instance qu'en appel, est expressément prévu par l'article 4 de la loi n° 1423 de 1956 et que les parties n'ont pas la possibilité de demander et d'obtenir une audience publique. 22. Tout en admettant que des intérêts supérieurs et le degré élevé de technicité peuvent parfois entrer en jeu dans ce genre de procédures, la Cour a jugé essentiel, compte tenu notamment de l'enjeu des procédures d'application des mesures de prévention et des effets qu'elles sont susceptibles de produire sur la situation personnelle des personnes impliquées, que les justiciables se voient pour le moins offrir la possibilité de solliciter une audience publique devant les chambres spécialisées des tribunaux et des cours d'appel. 23. La Cour considère que la présente affaire ne présente pas d'éléments susceptibles de la distinguer des affaires précitées. 24. Elle conclut, par conséquent, à la violation de l'article 6 § 1 de la Convention ».

to the Court because the art is respected. 6, the tribunal must be subjectively and objectively impartial. Under the first profile none component of the tribunal should have personal bias toward the defendants. This personal impartiality is presumed unless proved otherwise (See *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgement June 23, 1981). The objective impartiality consists to exclude any legitimate doubt, however, also apparent and not dependent on the personal conduct of judges (*Gautrin and Others v. France*, Judgement May 20, 1998, *Kyprianou v. Cyprus*, Judgement December 15, 2005).

In this case, the Court finds a violation of the objective impartiality, because the process had taken place without the presence of a prosecutor. The Court's reasoning is very articulate, because they are valued rules and procedures of individual States.

The Court refers in motivation, as already established in the recently decision *Ozerov v. Russia* (Judgement May 18, 2010), where states that there is a defect in the process when there is confusion between the role of the judge and the prosecutor. Indeed, in the same case *Thorgeir Thorgeirson v. Iceland* (Judgement June 25, 1992), the Court had found no violation of Article 6 c. 1, but on the assumption that the prosecutor was absent in some hearings where the Court had not conducted investigations on the merits, and when, however, the prosecutor could not have been in the debate.

In the case examined *Krivoshapkin v. Russia*, however, the public prosecutor was absent for the whole course of the case, or it may be inferred from the pleadings if it has been advised of the process and what were the possible reasons for his non-participation. The Court of First Instance confused its functions with those of the prosecution, the Court of Appeal did not detect this defect, although the applicant has found, in both first and second instance, the anomaly of the process.

In the case *Kontalexis v. Greece* (Judgement May 31, 2011) impartiality is declined in terms of need that Court is established by law.

The Court recalls the familiar idea of impartiality, understood in a subjective and objective, defined as the absence of prejudice or bias⁴. But the peculiarity of this decision regarding the existence of a lawfully constituted Court. In this regard, the appellant considers marred the advance fixing of the date of the hearing and the replacement of a judge the same day of hearing.

The Court, in a typical system of its judgments, claims that the Court established by law, as a basis for the rule of law, is regulated by individual national procedural laws, which keep about a margin of appreciation which the Court does not intend to affect.

However, the decision of the Court ends up ruling on the case, assessing whether the exceptions proposed by the applicant whether or not violation of the principle of a lawfully constituted court⁵.

The first relief, the Court notes that the hearing in the short term, if intended to avoid the requirement is not careful impartiality, the judges had applied the national legislation on sanctions. Instead, the replacement of the judge the same day of hearing,

⁴ « 53. La Cour rappelle que l'impartialité au sens de l'article 6 § 1 de la Convention se définit d'ordinaire par l'absence de préjugé ou de parti pris. Son existence s'apprécie selon une double démarche : la première consiste à essayer de déterminer ce que tel juge pensait dans son for intérieur ou quel était son intérêt dans une affaire particulière ; la seconde amène à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime (voir, par exemple, Gautrin et autres c. France du 20 mai 1998, Recueil des arrêts et décisions 1998-III, § 58, et Kyprianou c. Chypre [GC] no 73797/01, § 118, 15 décembre 2005) ».

⁵ 38. La Cour rappelle qu'en vertu de l'article 6 § 1, un « tribunal » doit toujours être « établi par la loi ». Cette expression reflète le principe de l'Etat de droit, inhérent à tout le système de la Convention et de ses protocoles. En effet, un organe n'ayant pas été établi conformément à la volonté du législateur, serait nécessairement dépourvu de la légitimité requise dans une société démocratique pour entendre la cause des particuliers. La « loi » visée par cette disposition est donc non seulement la législation relative à l'établissement et à la compétence des organes judiciaires, mais également toute autre disposition du droit interne dont le non-respect rend irrégulière la participation d'un ou de plusieurs juges à l'examen de l'affaire. Il s'agit notamment des dispositions relatives aux mandats, aux incompatibilités et à la récusation des magistrats.

without the slightest justification in the minutes of the hearing – as indeed required by Greek law –, of the replacement reasons (illness, personal reasons compelling) is a violation of the principle of a lawfully constituted Court and, as such, constitutes a violation of Article 6.

Also interesting are the judgments where the Court denies that there has been no violation of art. 6 in terms of the impartiality of judges.

In the case *Steulet v. Switzerland* (Judgement April 26, 2011), the applicant complains that a judge has been part of most colleges in different judicial processes that had been submitted. So, the Court reiterates the theory of subjective and objective impartiality, noting that the impartiality of a judge is presumed until proven otherwise (*Hauschildt v. Denmark*, Judgement May 24, 1989), because it's not sufficient, to integrate a case of bias, that the judge decides several times the same person in different processes.

The Court notes that the applicant has undergone three prosecutions for questions objectively different and with different parts, so the presence of a single judge can not constitute grounds for doubt about his impartiality as when the judge pronounced on the same case (*Mancel and Branquart v. France*, Judgement June 24, 2010).

In the same, the Court considers unacceptable (*Ekdal and Others v. Turkey*, Judgement January 25, 2011) a request of impartiality of the national process, when there is no evidence of arbitrariness in the conduct of the trial or of violation of rights the procedure involved. The Court notes that this exception had already been placed before the national Courts and its revival before the Constitutional Court would constitute an impermissible fourth instance.

Most important is the sentence *Vernes v. France* (Judgement January 20, 2011) where the Court sentenced the State, primarily because it is not possible to request a public hearing in the trial before an independent administrative authority, and secondly, because it is a lack of impartiality if is impossible to know the identity of the members of the college and, thirdly, for the presence of Government Commissioner in the deliberations of the

Council of State (in this sense already *Kress v. France*, Judgement June 7th, 2011 and *Martinie v. France*, Judgement April 12, 2006).

4. THE CASE LAW ON ARTICLE 13 ECHR: THE EFFECTIVE REMEDY

According to art. 13 of the Convention, each nation State must ensure the protection of rights through the possibility of an effective remedy to any judicial or administrative authorities. As mentioned, the violation of this principle is often connected to a fair trial under article 6. In this section, we examine the most significant judgments on art. 13.

In the event that an Afghan citizen requesting political asylum, is contrary to article 13 the expulsion procedure of urgency, which, while providing a precautionary measure, does not allow an adequate defense of the applicant, who returned to his country of origin, could be subject to inhuman treatment prohibited by article 3 of the ECHR (*MSS v. Belgium and Greece*, Judgement Grande Chambre January 21, 2011).

The Court pronounces on some cases of flagrant violations of the rights of freedom of or relating to inhumane treatment, penalizing States that do not have adequate systems to safeguard and they do not have effective of appeals. So there is no violation of article 13 in the case of a Russian citizen kidnapped and tortured by military groups on suspicion of collusion with the Chechens (*Gisayev v. Russia*, Judgement January 20, 2011); when there is an appeal against the limitations on personal freedom that occurred during a period of preventive detention (*Aydem v. Slovakia - Michalak v. Slovakia*, Judgement February 8, 2011); there is no effective remedy when a Russian Court will gives a small compensation to parents of victims of a military raid on a village where there was suspected Chechen terrorists (*Esmukhambetov and others v. Russia*, Judgement 29 March 2011); or when the police interrupted a church service of the “Association Unification Church”, confiscating propaganda, without an effective remedy for the protection of religious freedom (*Boychev*

and others v. Bulgaria, Judgement January 27, 2011); in the case of hard prison regime in prisons overcrowded and where there is an inhumane treatment there is not an effective remedy if the prosecutor, although independent authority to which prisoners can address, cannot get the change in the decisions taken by the prison authorities (Csüllög v. Hungary, Judgement June 7, 2011). In this sense, but also with violation of Article. 6, Fatih Taş v. Turkey (Judgement April 5, 2011); Bublákova v. Slovakia (Judgement 15 February 2011), the Court finds a violation of article 13, because the prisoners are subjected to inhuman prison systems and they have no chance of effective remedies.

It 'important to note, also, some emblematic cases in which the Court denies compensation for breach of Article 13.

In a case similar, when you apply a disciplinary sanction to a prisoner who attempted to escape, the Court finds that the applicant had the possibility of two sets of proceedings before the administrative court, so that is respected the provisions of art. 13, which requires the possibility of an effective remedy (Payet v. France, Judgement January 20, 2011).

The excessive length of the process is not element contrary to article 13. In case Gera De Petri Testaferrata Bonici Ghaxaq v. Malta (Judgement April 5, 2011), the applicant's property rights finds in the national system a means of effective protection, although the trial lasted more than thirty years with three levels of jurisdiction.

At the same time you do not have infringed Article. 13 when there is no appeal against decisions taken by the national constitutional Court (Paksas v. Lithuania, Judgement January 6, 2011).

Finally, in case Giuliani and Gaggio v. Italy (Judgement March 24, 2011) concerning the death of Carlo Giuliani during the Genoa G8 summit, the Court found no breach of article 13, because the rejection by the criminal Court of the instance of a civil part by family it's established by internal law. Again it does not prevent the request for damages in the civil Courts.

5. VIOLATIONS OF ARTICLES 6 AND 13 ECHR

The cases of greatest interest are those in which the Court recognizes the violation of articles 6 and 13, assuming that if there's the possibility of an effective remedy has resulted in an unfair trial. In the pilot-judgment on reasonable criminal trial *Dimitrov and Hamanov v. Bulgaria* (Judgement May 10, 2011), the Court finds that the reasonable time of the process is to ensure the parties to the proceedings, but also to induce trust of people in the administration of justice (in this sense: *Guincho v. Portugal*, 10 June 1984, *H. v. France*, 24 October 1989; *Moreira de Azevedo v. Portugal*, 23 October 1990; *Katti Klitsche de la Grange v. Italy*, 27 October 1994; *Bottazzi v. Italy*; *Niederböster v. Germany*, Judgement February 27, 2003).

But the real news of the judgement is that it identifies a State's responsibility not only for the delay of the decision of the individual case, but also for failure to reorganize the judicial system with an adequate increase in resources for a real improvement. So, setting up a sort of "fault of apparatus", the Court stated that "address the issue of unreasonable delay in judicial proceedings may then ask the State to take a series of legislative, organizational, budgetary and other measures". In the present case, a preliminary investigation and a first instance have been carried out in ten years and eight months, so that the Court ordered the State to the length of the process and why there are no effective remedies to be asserted in this circumstance.

In the event that the process has lasted eight years and three months (*Kashavelov v. Bulgaria*, Judgement January 20, 2011), the Court notes that the complexity of the case and the large number of suspects does not justify the delay of the Courts, for length of the investigation (two and a half years) and of the appeal proceedings. The violation of article 6 for the unreasonable length of the process is connected to the nonexistence in the Bulgarian legislation, until 2003, a remedy aimed at speeding up the process or indeed the subsequent introduction of the remedy could be used in the present case. So there has been no violation of Articles 6 and 13 combined.

And even when the change of the Bulgarian Penal Code of 2003 permits the accused to ask whether the conduct of the investigation has not been completed at a certain time, the violation of art. 13 is configured because, in the present case, the delay was excessive in violation of article 6. Accordingly, the Court considers that there is a violation of article 13 of the Convention because the applicant had no domestic remedy to enforce his right to a cause within a reasonable time as guaranteed by article 6 c. 1 of the Convention (*Makedonski v. Bulgaria*, Judgement January 20, 2011).

In the case cited *Fatih Tas v. Turkey* (Judgement April 5, 2011), the Court considers excessive the trial (five years and six months) for two levels of jurisdiction, and confirms that there is both contrary to article 13, because the law doesn't provide an effective remedy against such delays

In *Serdar Guzel v. Turkey* (Judgement March 15, 2011) is satisfied that the applicant was subjected to inhumane treatment in prison and that the alleged perpetrators were acquitted for excessive duration of the process. The ascertained violation of article 3 of the ECHR is associated with breaches of articles 6 (twelve years for a first trial) and 13 (lack of an effective remedy against illtreatment in prison.)

Similarly, in a process for divorce, there is a violation of article 6 for the length of the process and art. 13 because the national law does not provide an action to limit the duration of the process (*Kuhlen - Rafsanjani v. Germany*, January 20, 2011).

Finally, the inability to recover damages for a failure of a *res judicata* constitute a violation of articles 6 and 13 (c. *Eltari Albania*, Judgement March 8, 2011).

6. CONCLUSION

An examination of the decisions issued by the Court of the rights relating to fair trial and effective protection, it allows – as is typical of the judgments of the Court – a continuity with the previous case law, but also some news that is appropriate to recall

briefly. In case of fair trial for the excessive duration, it does not meet the Court's case law that found compensation for delays, calls on States to adopt effective remedies. In this sense, the responsibility is configured as a failure to increase resources for the judicial system, which would require structural remedies to prevent the excessive length of proceedings.

The Court then focuses on the profiles of impartiality, especially regarding the impartial tribunal and the Courts established by law, with the major cases cited, in which the Court adopts its own policy judgments about impartially, defining their contents, case by case.

The case law on article 13 shows its importance, especially in criminal law protection or guarantees of the rights of prisoners, because in these cases – especially in some countries – guarantees fade. In these circumstances, certainly more full of risks to human dignity, the Court gives a line to ensure the rights of the condemned, however, aware that democratic societies cannot use coercive means limiting the dignity of the person. So the lack of legal means of protection is responsibility of States. Finally, the few sentences that recognize the violation of articles 6 and 13 are relevant for the arguments.

In conclusion, the new jurisprudence detected that the Court of Strasbourg pursues, through a refinement of its case, greater effectiveness of its case against the nation States.

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