

Principles of Article 5 and 6 of the European Convention on Human Rights

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General principles

“It is not the function of the ECHR to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. It is not the role of the ECHR to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.” ALLAN v. THE UNITED KINGDOM - 48539/99 [2002] ECHR 702 (5 November 2002) Para 42.

“Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defense should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.” VAN MECHELEN AND OTHERS v. THE NETHERLANDS - 21363/93;21364/93;21427/93; [1997] ECHR 22 (23 April 1997) Para. 58.

Illegal arrest

An arrest must satisfy a two-part test. It must satisfy state law and it must not be arbitrary. LUKANOV v. BULGARIA - 21915/93 [1997] ECHR 18 (20 March 1997) Para 41.

In applying this test, in order to lawfully arrest someone, there must first be “reasonable suspicion” to believe that the suspect has committed a crime. All the circumstances must convince an objective person that person may have committed the offense. FOX, CAMPBELL AND HARTLEY v. THE UNITED KINGDOM - 12244/86;12245/86;12383/86 [1990] ECHR 18 (30 August 1990) Para 32.

The standard is less than what police need to bring a suspect to trial. BROGAN AND OTHERS v. THE UNITED KINGDOM - 11209/84;11234/84;11266/84;... [1988] ECHR 24 (29 November 1988) Para 53.

Notice of arrest

When arrested, the suspect must be informed of the grounds for his arrest, including those alleged facts that relate the charge to the suspect. FOX, CAMPBELL AND HARTLEY v. THE UNITED KINGDOM - 12244/86;12245/86;12383/86 [1990] ECHR 18 (30 August 1990) Para 41.

Right to remain silent

Although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 § 1. SAUNDERS v. THE UNITED KINGDOM - 19187/91 [1996] ECHR 65 (17 December 1996) Para. 68.

The right against self-incrimination protects more than just statements showing the defendant's guilt. It also protects against the forced disclosure of all factual statements. SAUNDERS v. THE UNITED KINGDOM - 19187/91 [1996] ECHR 65 (17 December 1996) Para. 71.

The protection against self-incrimination does not apply to material that may be gathered from the defendant by a search warrant (such as blood or samples) that is independent of the defendant's will to speak. SAUNDERS v. THE UNITED KINGDOM - 19187/91 [1996] ECHR 65 (17 December 1996) Para. 69.

The right to remain silent includes those who are arrested but not yet charged with a crime. HEANEY AND McGUINNESS v. IRELAND - 34720/97 [2000] ECHR 684 (21 December 2000) Para. 42.

The freedom to choose whether to talk or to remain silent is effectively undermined where the police use tricks to elicit, from the suspect (having chosen to remain silent during questioning), confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning. In this case, after the defendant refused to talk with them, the police secretly placed microphones in his jail cell pursuant to a search warrant. They also placed in his jail cell another prisoner who has repeatedly made deals in the past to inform against inmates in exchange for a reduction of sentence. The ECHR concluded that this violated Mr. Allan's right to remain silent. ALLAN v. THE UNITED KINGDOM - 48539/99 [2002] ECHR 702 (5 November 2002) Paras 50-53.

Status as a witness rather than suspect

In *Serves v. France*, Mr. Serves was summoned to appear as a witness before the investigating judge. He had neither been named in the application for a judicial investigation nor been charged. Nevertheless, he was obviously the target of a "charge" for the purposes of Article 6 § 1. Whether a person is the subject of a charge does not entirely depend on national law. It must also consider ECHR law. It may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected." *SERVES v. FRANCE* - 20225/92 [1997] ECHR 82 (20 October 1997) Para. 42.

The proper course for the witness, when he is in fact a suspect, to take is to swear the oath and then to refuse to answer questions that might incriminate himself. In *Serves*, since Mr. Serves refused to even take the oath, his protection against self-incrimination did not apply to him. He should have 1st taken the oath to tell the truth before refusing to answer questions. *SERVES v. FRANCE* - 20225/92 [1997] ECHR 82 (20 October 1997) Para. 47.

Right to an attorney

Right to free legal aid

There is a 2-part test. It must be provided to indigents and when the interests of justice require. ARTICO v. ITALY - 6694/74 [1980] ECHR 4 (13 May 1980) Para 34.

The ECHR will find a violation of the indigency prong if there are some indications that the defendant cannot afford an attorney and that there are no clear indications to the contrary. PAKELLI v. GERMANY - 8398/78 [1983] ECHR 6 (25 April 1983) Para. 34.

The legal aid attorney must be competent. The right to an attorney is not merely theoretical or hypothetical. But rather, the state is responsible to provide competent counsel as legal aid. The state does not satisfy this requirement merely by appointing legal aid. If the court is notified of any real deficiencies on the part of court-appointed counsel, the state must remedy those deficiencies. ARTICO v. ITALY - 6694/74 [1980] ECHR 4 (13 May 1980) Para 33.

The state, however, cannot be held responsible for every shortcoming of the lawyer. The court must in its supervisory role make sure that the defendant is truly enjoying his right to counsel. BALLIU v. ALBANIA - 74727/01 [2005] ECHR 394 (16 June 2005) Para 33

If the court is not made aware of the faults of defense counsel, it cannot be held responsible for them. The court can only be held responsible if it is brought to their attention (for instance by the defendant) or it is manifestly obvious. KAMASINSKI v. AUSTRIA - 9783/82 [1989] ECHR 24 (19 December 1989) Para 65.

If the country has an appellate procedure, the free legal aid should be provided on appeal if the interests of justice require. Relevant factors may include the complexity of the case and the severity of the sentence. BONER v. THE UNITED KINGDOM - 18711/91 [1994] ECHR 36 (28 October 1994) Para. 44.

Right to counsel of one's own choosing

Right to choose a lawyer only applies to retained counsel. It does not apply to legal aid. PAKELLI v. GERMANY - 8398/78 [1983] ECHR 6 (25 April 1983) Para. 31.

Right of access to counsel

The defendant's right to have unrestricted access to counsel exists at such early stages as arrest and pretrial investigation. MURRAY v. THE UNITED KINGDOM - 18731/91 [1996] ECHR 3 (8 February 1996) Paras 62-63.

When the defendant requests an attorney from the prosecutor, the prosecutor must honor the request. BERLINSKI v. POLAND - 27715/95;30209/96 [2002] ECHR 505 (20 June 2002) Para. 77.

Torture

“The European Convention prohibits torture and inhuman or degrading treatment or punishment. There is no exception, and there can be no derogation, even in the event of a public emergency threatening the life of the nation. In order to fall within the scope of Article 3, the mistreatment must reach a minimum level of severity. The assessment of this minimum is, in the nature of

things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the gender, age and state of health of the victim.” IRELAND v. THE UNITED KINGDOM - 5310/71 [1978] ECHR 1 (18 January 1978) Paras. 162-163.

“Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.” SOERING v. THE UNITED KINGDOM - 14038/88 [1989] ECHR 14 (7 July 1989) Para. 100.

If a prisoner receives injuries while in police custody, the burden is on the government to feasibly explain those injuries. AKSOY v. TURKEY - 21987/93 [1996] ECHR 68 (18 December 1996) Para. 61

Any use of force against a person in custody that is not strictly necessary by the arrestee's conduct and which diminishes his human dignity is a violation of Article 3. BALOGH v. HUNGARY - 47940/99 [2004] ECHR 361 (20 July 2004) Para. 45.

Jail conditions can violate article 3 as well. Factors include whether the jail is overcrowded, the unsanitary conditions of the jail cell, and the length of incarceration. The purpose of the imprisonment (whether meant to mistreat the prisoner) is a relevant but not dispositive factor. KALASHNIKOV v. RUSSIA - 47095/99 [2002] ECHR 596 (15 July 2002) Paras. 95-102.

Equality of arms

“The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence provided by the other party. In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defense all material evidence in their possession for or against the accused.” I.J.L. AND OTHERS v. THE UNITED KINGDOM - 29522/95;30056/96;30574/96 [2000] ECHR 421 (19 September 2000) Para 112.

Each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent. FOUCHER v. FRANCE - 22209/93 [1997] ECHR 13 (18 March 1997) Para. 34.

The prosecutor (pursuant to Austrian law) filed a "croquis" (the prosecutorial observations) with the trial court, neither notifying the defendant nor providing him a copy. The judgments of the trial court and appellate court both relied upon this ex parte filing. Despite the fact that it was legal under Austrian law to not serve the defendant with the pleading, it was improper under ECHR law. Art. 6-1 requires that the defendant formally know of any evidence and argument

submitted to the court. BRANDSTETTER v. AUSTRIA - 11170/84;12876/87;13468/87 [1991] ECHR 39 (28 August 1991) Paras. 67-69.

Speedy trial

The period begins when a person is charged. This includes the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened, whichever is earlier. ECKLE v. GERMANY - 8130/78 [1982] ECHR 4 (15 July 1982) Para. 73.

In considering the reasonableness of the pretrial delay, the court should consider the following factors: 1) complexity of the case, 2) the applicant's conduct, 3) the state's conduct, and 4) what is at stake for the applicant. PHOCAS v. FRANCE - 17869/91 [1996] ECHR 17 (23 April 1996) Para. 71.

Complexity of the case

The complexity refers to both the legal and factual issues. KATTE KLITSCH DE LA GRANGE v. ITALY - 12539/86 [1994] ECHR 34 (27 October 1994) Para. 62.

Many co-defendants may also make a case more complex. ANGELUCCI v. ITALY - 12666/87 [1991] ECHR 6 (19 February 1991) Para. 15.

The applicant's conduct

If the applicant caused delays, it will be used against him. However, he cannot be punished for fully utilizing the legal tools for his defense. Nor can he be punished for remaining silent. In reviewing the defendant's conduct. The defendant does not need to actively cooperate with the authorities. ECKLE v. GERMANY - 8130/78 [1982] ECHR 4 (15 July 1982) Para. 82

The defendant is not under a duty to act in such a way as to shorten the proceedings. GUINCHO v. PORTUGAL - 8990/80 [1984] ECHR 9 (10 July 1984) Para. 34.

The defendant's mental illness and self-damaging behavior cannot justify extensive delay of the trial. JABLONSKI v. POLAND - 33492/96 [2000] ECHR 685 (21 December 2000) Para. 104.

The defendant filed motions in trial court complaining of his pre-trial delay. The additional delays caused by these motions cannot be counted against the defendant. KALASHNIKOV v. RUSSIA, (Application no. 47095/99) JUDGMENT STRASBOURG 15 July 2002 Para 129.

The state's conduct

The primary excuse among countries is that it is experiencing a backlog of cases that prevent it from speedily resolving the applicant's case. The ECHR has mostly rejected this argument, responding that the state as a member to the council of Europe under an obligation to structure its legal system so that cases are handled without unreasonable delay. The ECHR will excuse a temporary backlog for the state provided that it promptly takes steps to remedy the backlog. BAGGETTA v. ITALY - 10256/83 [1987] ECHR 9 (25 June 1987) Para 23.

The wish to stay the appeal in order to hear other cases raising similar issues is understandable, but cannot justify a substantial delay. HENTRICH v. FRANCE - 13616/88 [1994] ECHR 29 (22 September 1994) Para 61.

What is at stake for the applicant

Pre-trial delay is more likely to become unreasonable if the defendant is awaiting trial in custody. “Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.” JABLONSKI v. POLAND - 33492/96 [2000] ECHR 685 (21 December 2000) Para. 79.

Hearing open to the public

“The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6-1). This public character protects litigants against the administration justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 Para. 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.” DIENNET v. FRANCE - 18160/91 [1995] ECHR 28 (26 September 1995) Para 33.

Impartial judge

The state must be impartial in determining the defendant’s guilt. There are two ways of measuring the court’s impartiality: the subjective test and the objective test. DE CUBBER v. BELGIUM - 9186/80 [1984] ECHR 14 (26 October 1984) Para. 26.

Subjective

The first test asks whether the judge is actually biased against the defendant. It is very difficult to prove that the judge is actually biased. The ECHR will presume the personal impartiality of a judge unless there is strong evidence to the contrary. HAUSCHILDT v. DENMARK - 10486/83 [1989] ECHR 7 (24 May 1989) Para. 47.

Objective

This impartiality is easier to prove. The court should not only be impartial, but should give the appearance of impartiality. In this sense, justice must not only be done, but seem to be done. If there is a legitimate reason for a judge to withdraw to avoid the appearance of impropriety, he should withdraw. DE CUBBER v. BELGIUM - 9186/80 [1984] ECHR 14 (26 October 1984) Para. 26.

If there is a claim of bias, the court must investigate it unless the claim is manifestly without merit. *REMLI v. FRANCE* - 16839/90 [1996] ECHR 18 (23 April 1996) Para. 48.

“What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be objectively justified.” *FEY v. AUSTRIA* - 14396/88 [1993] ECHR 4 (24 February 1993) Para. 30.

Specific instances of judge’s prior involvement that may fail the objective test

The judge was previously with the procuracy that investigated the defendant. This created a problem. *PIERSACK v. BELGIUM* - 8692/79 [1982] ECHR 6 (1 October 1982) Para. 30.

Appellate judge is asked to review his own rulings as a trial judge. This also fails the test. *DE HAAN v. THE NETHERLANDS* - 22839/93 [1997] ECHR 47 (26 August 1997) Para. 51.

It is alright for the same judge to rehear a case after the appellate court has remanded it for a new trial. *THOMANN v. SWITZERLAND* - 17602/91 [1996] ECHR 24 (10 June 1996) Para. 32.

The court must not make statements to the press before the case is decided that casts doubts upon its impartiality. *BUSCEMI v. ITALY* - 29569/95 [1999] ECHR 70 (16 September 1999) Para. 68.

Right to information

Article 6 § 1 requires that the prosecution authorities should disclose to the defense all material evidence in their possession for or against the defendant. *I.J.L. AND OTHERS v. THE UNITED KINGDOM* - 29522/95;30056/96;30574/96 [2000] ECHR 421 (19 September 2000) Para 112.

However, the prosecutorial duty to disclose evidence to the defendant is not an absolute right. Rather, there are exceptions that may be based upon such legitimate interests as national security, protection of a witness against reprisals, and the need to keep secret police methods of investigation. Any such limitations in disclosure must be strictly necessary and sufficiently counterbalanced by the procedures followed by the judge. *ROWE AND DAVIS v. THE UNITED KINGDOM* - 28901/95 [2000] ECHR 91 (16 February 2000) Para. 61.

When the defendant represents himself, without the benefit of an attorney, he should personally have a right to inspect the court file. *FOUCHER v. FRANCE* - 22209/93 [1997] ECHR 13 (18 March 1997) Para. 35.

Right to prepare a defense, including having adequate time for preparation

Notice of charges

The defendant must be notified of the charges. He cannot be convicted of charges different than that which he was notified. For instance, France has a procedure in which the court can convict a defendant of alternative charges that are related to the original charges. In the case of Pelissier, the defendant was charged as a principal actor but was convicted instead as an aider and abettor.

The ECHR found the conviction unlawful since he was never notified that the prosecutor or court may wish to convict him as an aider and abettor. *PÉLISSIER AND SASSI v. FRANCE* - 25444/94 [1999] ECHR 17 (25 March 1999) Para. 63.

“Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts. That information should, as the Commission rightly stated, be detailed.” . *PÉLISSIER AND SASSI v. FRANCE* - 25444/94 [1999] ECHR 17 (25 March 1999) Para. 51.

Adequate time to prepare a defense

Public defender is appointed on the day of trial and the judge does not on his own initiative continue the case to allow the defense to prepare. This is a violation of article 6-3 (b) and (c) because it violated both the defendant’s right to effective assistance of counsel and the defendant’s right to prepare a defense. *GODDI v. ITALY* - 8966/80 [1984] ECHR 4 (9 April 1984) Paras 27 and 31.

Presumption of innocence and burden of proof

Presumption of innocence

Everyone is presumed innocent of the crime. Government officials may not violate this assumption. Such a prohibition is not limited to judges. It also for example prohibits a government official from making an announcement in a press conference that the defendant is guilty. *ALLENET DE RIBEMONT v. FRANCE* - 15175/89 [1995] ECHR 5 (10 February 1995) Para. 36.

The presumption of innocence might not be violated by a rule that shifts the burden of proof upon the showing of certain facts. In such a case, the law might create an inference of guilt if certain facts exist, an inference which the defendant must rebut to found not guilty. Sometimes, such a shifting inference might be valid. *MURRAY v. THE UNITED KINGDOM* - 18731/91 [1996] ECHR 3 (8 February 1996) Para. 54.

Burden of proof

Article 6-2 requires that the burden of proof is on the prosecution and that any doubt should benefit the defendant. *BARBERÀ, MESSEGUÉ AND JABARDO v. SPAIN* - 10590/83 [1988] ECHR 25 (6 December 1988) Para 77.

Right for the defendant to be present at the hearing

Flowing from the right to a fair trial, the defendant has a general right to be present at a hearing. *EKBATANI v. SWEDEN* - 10563/83 [1988] ECHR 6 (26 May 1988) Para 25.

Present at reviews of pre-trial detention

Article 5-4 requires the defendant's presence at a hearing on pre-trial detention when the prosecutor is also present. *KAMPANIS v. GREECE* - 17977/91 [1995] ECHR 22 (13 July 1995) Para 58.

Temporary exclusion from trial

The right of an accused to be present at trial may be temporarily restricted if he or she disrupts the court proceedings to such an extent that the court deems it impractical for the trial to continue in his presence. The defendant may also be temporarily excluded from the proceedings if his presence violates the victim's right to privacy and personal security, particularly in cases of sexual assault, domestic violence, or trafficking in human beings. Such temporary restrictions are intended to prevent intimidation and re-traumatization of the victim by forcing a confrontation with the defendant. Here the defendant's rights must be balanced with the victim's rights. *Article I, Council of Europe Recommendation No. R (97)*.

Trial in absentia

The government can try a defendant in the defendant's absence if the defendant waives his right to be tried in court. However such a waiver must be unequivocal be attended by minimum safeguards reflecting to its importance. *POITRIMOL v. FRANCE* - 14032/88 [1993] ECHR 54 (23 November 1993) Para 31.

If the defendant does not appear in court, he still has an absolute right to have his attorney appear on his behalf. *KROMBACH v. FRANCE* - 29731/96 [2001] ECHR 88 (13 February 2001) Para 89.

It flows from this rule that the court must provide such adequate notice to the defendant of the court date that he can appear in court. Without sufficient notice, the court cannot proceed with the hearing in his absence. *ZILIBERBERG v. MOLDOVA* - 61821/00 [2005] ECHR 51 (1 February 2005) Para 39.

Defendant's presence at appellate hearings

The defendant has a right under the ECHR to be present at appellate hearings only if the appellate court will consider factual questions. If the appellate court will only consider issues of law, the defendant is not required to be present under ECHR law. *EKBATANI v. SWEDEN* - 10563/83 [1988] ECHR 6 (26 May 1988) Para 32.

Right to a interpreter

The right to an interpreter includes the right to translate necessary documents into a language the defendant can understand. It does not require translation of all documents. The interpretation must be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. *KAMASINSKI v. AUSTRIA* - 9783/82 [1989] ECHR 24 (19 December 1989) Para. 74.

Right to call witnesses and right to question witnesses

As a general rule, the right to question witnesses, which is an essential aspect of the right to a fair trial, provides the defendant the right to question any material part of a witness' statement or testimony. *BRICMONT v. BELGIUM* - 10857/84 [1989] ECHR 12 (7 July 1989) Para. 81.

Hearsay

Generally, all evidence must be produced in open court, providing the defendant the right to question the witness. However, a statement received during pre-trial investigation may be admissible in the declarant's absence only if the defense has had an adequate opportunity to challenge and question the declarant at the pre-trial stage—either when he was making his statement or at a later stage of the proceedings. *ASCH v. AUSTRIA* - 12398/86 [1991] ECHR 28 (26 April 1991) Para. 27.

The defendant's wife and step-daughter made pre-trial statements to the investigator. The defendant did not have an opportunity to question them before trial. At trial, they refused to testify because they were close relatives, and their statements were read to the court. The defendant was convicted, and the judgment on appeal relied upon the statements of the two women. This violated the defendant's right to a fair trial. *UNTERPERTINGER v. AUSTRIA* - 9120/80 [1986] ECHR 15 (24 November 1986) Paras. 28-33.

Anonymous witnesses

The court can in appropriate cases balance the defendant's right against the rights of witnesses. *DOORSON v. THE NETHERLANDS* - 20524/92 [1996] ECHR 14 (26 March 1996) Para. 70.

A legitimate purpose of anonymous testimony is to prevent reprisals by the defendant. *DOORSON v. THE NETHERLANDS* - 20524/92 [1996] ECHR 14 (26 March 1996) Para. 71.

The testimony by an anonymous witness is improper if there are no counterbalancing steps taken to ensure the defendant's right to a fair trial. A conviction should not be based either solely or to a decisive extent on anonymous statements. *VAN MECHELEN AND OTHERS v. THE NETHERLANDS* - 21363/93;21364/93;21427/93;... [1997] ECHR 22 (23 April 1997) Para. 55.

Evidentiary issues

The regulation of evidence and the assessment of evidence are primarily matters for the national court to decide. *TEIXEIRA DE CASTRO v. PORTUGAL* - 25829/94 [1998] ECHR 52 (9 June 1998) Para 34.

It is not the role of the ECHR to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. *ALLAN v. THE UNITED KINGDOM* - 48539/99 [2002] ECHR 702 (5 November 2002) Para 42.

Exclusionary rule

A violation of the exclusionary rule may lead to an unfair trial. It is not the role of the ECHR to determine whether the national court correctly or incorrectly properly exercised its discretion in determining the admissibility of evidence. But the ECHR will examine whether the defendant had the opportunity to challenge the admissibility and whether the judge so abused his discretion as to make the trial unfair. *SCHENK v. SWITZERLAND* - 10862/84 [1988] ECHR 17 (12 July 1988) Paras. 46-49.

Agent provocateur/entrapment

It violates the defendant's fair trial for police officers to so encourage and instigate the commission of a crime that they create a criminal intent in the defendant that would otherwise have been absent. *TEIXEIRA DE CASTRO v. PORTUGAL* - 25829/94 [1998] ECHR 52 (9 June 1998) Paras 31-39.

Court decision must be reasoned and must be made public

Reasoned judgment

The judgment does not need to provide a detailed answer to every argument. *HIRO BALANI v. SPAIN* - 18064/91 [1994] ECHR 45 (9 December 1994) Para 27.

The judgment must, however, be so detailed on all necessary issues as to provide the defendant the right to appeal the judgment. *HADJIANASTASSIOU v. GREECE* - 12945/87 [1992] ECHR 78 (16 December 1992) Para 37.

Judgment shall be made public

The judgment must either be read aloud or be made automatically available to the public. *WERNER v. AUSTRIA* - 21835/93 [1997] ECHR 92 (24 November 1997) Paras 55-57.

The exceptions to a public hearing (for example morals, and national security) do not apply to the requirement to make the judgment public. *CAMPBELL AND FELL v. THE UNITED KINGDOM* - 7819/77;7878/77 [1984] ECHR 8 (28 June 1984) Para. 90.

