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EU Criminal Law

Lecture

Criminal Procedure and Courts 5

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Right to a fair trial

Law of evidence – admissibility of evidence

General approach

The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function 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. **While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.**



Right to a fair trial

Law of evidence – admissibility of evidence

General approach

It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found.



Right to a fair trial

General approach

In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined:

- whether the applicant was given an opportunity to challenge the authenticity of the evidence
- whether the applicant was given opportunity to oppose the use of evidence.
- the quality of the evidence
- the circumstances in which evidence was obtained and whether these circumstances cast doubts on its reliability or accuracy.
- whether the evidence in question was or was not decisive for the outcome of the proceedings.



Right to a fair trial

There are situations where the ECtHR takes more or less firm position regarding principles and rules of evidence gathering and taking during trial.

1) Principles

Principle of immediacy

According to the principle of immediacy, in a criminal case the decision should be reached by judges who have been present throughout the proceedings and evidence-gathering process.

The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused.



Right to a fair trial

Principle of immediacy

However, there might be changes in the composition of a court during the course of a case. Very clear administrative or procedural factors may arise rendering a judge's continued participation in a case impossible. Measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court.



Right to a fair trial

Principle of immediacy

Škaro v. Croatia

The Court considers that in the present case there are particular circumstances which justify an exception to the principle of immediacy. The Court notes that the trial panel which convicted the applicant had heard him as well as all the witnesses in person, save for A.B. As to the composition of the trial panel which heard evidence given by A.B. and the trial panel which convicted the applicant, the Court notes that only one judge, namely Judge M.M., had not heard the evidence given by A.B. Even though one of the judges who had heard A.B. was later replaced, the four others had been present when A.B. had given his evidence. In those circumstances the fact that the new judge, Judge M.M., had the possibility to read the statement given by A.B. compensated for that judge's absence from the hearing where A.B. had testified.

Right to a fair trial

Improperly obtained evidence

- 1) Evidence obtained in violation of Article 3 ECHR,
- 2) Evidence obtained in violation of Article 8 ECHR,
- 3) Evidence obtained in violation of Article 6 ECHR, including:
 - (a) evidence obtained as a result of an entrapment,
 - (b) evidence obtained in violation of the privilege against self-incrimination,
 - (c) evidence obtained in violation of the right of access to a lawyer.



Right to a fair trial

Improperly obtained evidence

Particular considerations apply in respect of the **use in criminal proceedings of evidence obtained in breach of Article 3.**

The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.



Right to a fair trial

Improperly obtained evidence

The Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial.



Right to a fair trial

Improperly obtained evidence

The admission of statements (witness, suspect, accused) obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction.



Right to a fair trial

Improperly obtained evidence

Incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to “afford brutality the cloak of law”.

Right to a fair trial

Improperly obtained evidence

Where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter.



Right to a fair trial

Improperly obtained evidence

The Court left open the question whether the use of **real evidence obtained by an act classified as inhuman and degrading treatment, but falling short of torture, always rendered a trial unfair**, that is, irrespective of, in particular, the weight attached to the evidence, its probative value and the opportunities of the defendant to challenge its admission and use at trial.



Right to a fair trial

Improperly obtained evidence

Derivative evidence (fruits of poisonous tree) –

Both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.



Right to a fair trial

Evidence obtained by police incitement (entrapment)

Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – **do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed**, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.



Right to a fair trial

Evidence obtained by police incitement (entrapment)

In deciding whether the investigation was “essentially passive” the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were **objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence.**



Right to a fair trial

Evidence obtained by police incitement (entrapment)

Criteria taken into consideration in ECtHR case-law

- existence of preliminary and verifiable information concerning the pre-existing criminal intent must be verifiable; the authorities must be able to demonstrate at any stage that they had good reasons for mounting the covert operation,
- previous criminal record of the person concerned (depending on circumstances) and his or her past involvement in any criminal activities
- the applicant's demonstrated familiarity with the details of criminal activity (e.g. current prices for drugs and ability to obtain drugs at short notice)



Right to a fair trial

Evidence obtained by police incitement (entrapment)

Criteria taken into consideration in ECtHR case-law

- whether the person was subjected to any pressure by the police or undercover agents (forms of prohibited active behaviour - taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms).



Right to a fair trial

Evidence obtained by police incitement (entrapment)

Criteria taken into consideration in ECtHR case-law

When applying the above criteria, the Court places the burden of proof on the authorities. To that end it has held that “it falls to the prosecution to prove that there was no incitement, provided that the defendant’s allegations are not wholly improbable” (see Ramanauskas, cited above, § 70). In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation.

The person has to have an opportunity to raise allegation that he/she was incited to commit a crime during trial.



Right to a fair trial

Evidence obtained by police incitement (entrapment)

Where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded (absolute rule). This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards.



Right to a fair trial

Evidence obtained in violation of the right to privacy

The question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined **with regard to all the circumstances of the case, including, respect for the applicant's defence rights and the quality and importance of the evidence in question.**



Right to a fair trial

Evidence obtained in violation of the right to privacy

In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular **whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use.** In addition, **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.** While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (no automatic exclusion)



Right to a fair trial

Evidence obtained in violation of the right to privacy

CASE OF BYKOV v. RUSSIA (Application no. 4378/02)

JUDGMENT of 10 March 2009 – dissenting opinion

The use during a trial of evidence obtained in breach of Article 8 should have called for an extremely rigorous examination by the Court of the fairness of the proceedings. As the Court has already had occasion to emphasise, the Convention is to be read as a coherent whole. I agree with the partly concurring, partly dissenting opinion expressed by Judge Loucaides in *Khan v. the United Kingdom* and reiterated by Judge Tulkens in her above-mentioned partly dissenting opinion in *P.G. and J.H. v. the United Kingdom*:

“It is my opinion that the term 'fairness', when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. I do not think one can speak of a 'fair' trial if it is conducted in breach of the law.”

Further reading:

Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) – p. 42-50.

<https://prawo.uni.wroc.pl/node/45303>