

The Rights of the Defence According to the ECtHR and CJEU

Academy of European Law: EU Criminal Law for Defence Counsel

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Article 5 – Right to Liberty and Security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful [detention](#) of a person after [conviction](#) by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful [arrest](#) or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 5 – Right to Liberty and Security

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 5 – Arrest and Detention

- Arrest must be in accordance with the law and not arbitrary (*Saadi v UK* (2008) 47 EHRR 17)
- Right to be informed promptly of reasons for arrest (*Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157)
- Right to be brought promptly before a judicial authority (*McKay v UK* (2007) 44 EHRR 41)
- Right to challenge lawfulness of detention (*Musuc v Moldova App* 42440/06)
- Record of detention (*Mensheheva v Russia* (2007) 44 EHRR 56)
- Right of access to a lawyer (*Lebedev v Russia* (2008) 47 EHRR 34)
- Right not to be held incommunicado (*McVeigh, O'Neill and Evans v UK* (1981) 5 EHRR 71)

Article 5 – Bail

- No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law (*Steel v UK* (1999) 28 EHRR 603)
- ...“for the purpose of bringing him before the competent legal authority” (*Lawless v Ireland (no. 3)* (1979-80) 1 EHRR 15)
- ...“shall be entitled to trial within a reasonable time or to release pending trial” (*Gault v UK* (2008) 46 EHRR 48)

Article 5 – Bail

- **Reasons for detention**
 - > Failure to appear for trial
 - > Interference with the administration of justice
 - > Defendant's own protection
 - > Preservation of public order
 - > Commission of further offences
- **Lack of reasons for refusal of bail (*Aleksanyan v Russia* (2011) 52 EHRR 18)**
- **Duties following release on bail (*Schmid v Austria* (1985) 44 DR 195)**
- **Conduct of bail hearings**

Article 7 – No punishment without law

- 1.** No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2.** This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7

Requirements for offences

- *R v Rimmington (Anthony)* [2006] 1 AC 459
- *Turk v Denmark* (2008) 47 EHRR 28
- *R v Sadique (Omar)* [2011] EWCA Crim 287
- *HM Advocate v Harris (Mark)* [2010] HCJAC 102

Sentencing

- *Engels v Netherlands* (1976) 1 EHRR 647
- *Welch v UK* (1995) 20 EHRR 247
- *R (Uttley) v SSHD* [2004] UKHL 28

Article 6 – Right 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 interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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 the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (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 understand or speak the language used in court.

Article 6 – Fair Trial

- Public hearing (*Riepan v Austria*, decision of November 14, 2000 ECHR 2000-XII)
- Length of proceedings (reasonable time) (*Botazzi v Italy*, decision of July 28, 1999; *De Clerck v Belgium* decision of September 25, 2007)
- Independence and impartiality of tribunal
- Tribunal established by law (*Campbell and Fell v UK* (1985) 7 EHRR)
- Presumption of innocence
- Information about the charge
- Adequate time and facilities for the preparation of defence (*Ocalan v Turkey* (2005) 41 EHRR 45)
- Presence in court
- Legal representation
- Right to call witnesses

Article 6 - Evidence

- Whether proceedings as a whole were fair (*Khan v UK* (2001) 31 EHRR 45)
- “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”
- Hearsay evidence
- Entrapment
- Right not to incriminate oneself (*Saunders v UK* (1997) 23 EHRR 313)

Article 6 – Disclosure

- “adequate time and facilities for the preparation of his defence” (Art 6(3)(b))
- Equality of arms (*Jespers v Belgium* (1981) 27 DR 61)
- A failure of disclosure is not automatically a violation of Article 6 (*Edwards v UK* (1992) 15 EHRR 417)
- Public Interest Immunity: exceptions should be strictly necessary and counterbalanced by procedural safeguards to ensure adequate judicial protection (*Rowe and Davis v UK* (2000) 30 EHRR 1)

- Article 6 of the Treaty on European Union (as inserted by the Lisbon Treaty) provides that:

"the Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

Protocol 30 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom (2007)

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- The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
- In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.
- To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Article 47 - Right to an effective remedy and to a fair trial

- Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48 - Presumption of innocence and right of defence

- 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
- 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49 - Principles of legality and proportionality of criminal offences and penalties

- 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
- 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
- 3. The severity of penalties must not be disproportionate to the criminal offence

Article 53 – Level of Protection

- Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

Radu ([C-396/11](#))

- Advocate-General's opinion – EU law should set higher standards than ECHR as regards refusal of extradition requests (Article 6 ECHR)
- Judgment does not mention issue

Melloni ([C-399/11](#))

- “The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law...Such an interpretation of Article 53 of the Charter cannot be accepted.”