



Casebook on European fair trial standards in administrative justice

Arman Zrvandyan



FBA

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Foreword

The interest in administrative justice, in particular with the establishment of new administrative courts dealing with the judicial review of administrative acts, has been growing in many countries recently. At the core of an accountable and transparent administration is the right to effectively challenge acts and decisions that affect civil rights and obligations, and so also the daily life of individuals. Effective means of redress against administrative decisions require a functioning system of administrative justice that provides fair trial guarantees.

The Folke Bernadotte Academy (FBA) has been engaged in developing practical tools in the field of rule of law in public administration and administrative justice for several years. With this casebook, we encourage practitioners in the field of administrative justice to adhere to fair trial standards and by doing so further strengthen the rule of law and the accountability and transparency of public administration and administrative justice.

Under international law, the practical implications of a fair trial entail several principles. An administrative process should be public, held within a reasonable time, undertaken by an independent and impartial tribunal established by law, and result in an enforceable judgment that shall be pronounced publicly. This meaning has been interpreted by the European Court of Human Rights ("the Court"), whose case law on administrative proceedings is analysed in this casebook. In addition to interpreting the rights, the Court has pointed out that it must be borne in mind that the European Convention on Human Rights ("the Convention") is intended to guarantee rights that are practical and effective.

The FBA and the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) have previously published a *Handbook for Monitoring Administrative Justice*, a unique diagnostic tool for monitoring administrative justice. The handbook provides an overview of core fair trial standards and practical guidance on running a trial monitoring operation in the field of administrative justice. In connection to specific rule of law principles, the handbook provides numerous references to international and regional case law on fair trial standards applicable to administrative proceedings. This *Casebook on European fair trial standards in administrative justice* is the first collection of the most significant cases decided by the European Court of Human Rights. It complements the handbook with an in-depth understanding of fair trial standards and seeks to better facilitate both academic discussions and reform efforts in the area of administrative justice.

The FBA and the Council of Europe would like to express their sincere appreciation to Arman Zrvandyan for suggesting the project and for bringing it to a successful conclusion.

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The opinions expressed in this work are, however, the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.

Introduction

WHY IS ADMINISTRATIVE JUSTICE IMPORTANT?

The public administration of a country represents the main interface between the state and its citizens. The acts and decisions of administrative authorities have a direct impact on the daily life of individuals as they deal with issues such as taxes, public registries, education, social services or health. These acts and decisions contribute to creating conditions for security, stability and public trust, which are prerequisites for the development of stable and democratic societies.¹

A proper public administration requires that the public is empowered to effectively challenge administrative acts, and to hold the public officials accountable for their decision making. Administrative justice therefore constitutes a core component of democratic governance, and its existence is fundamental in any society based on the rule of law, as it entails that the government, and thereby its administration, acts within the scope of legal authority. Notwithstanding, administrative justice has for long been a neglected area implying consequences for individuals.

Central to the effective protection of human rights and respect for the rule of law is the right for individuals to appeal against administrative decisions, and to have the possibility to seek legal redress through the application of fair administrative procedural rules whenever their rights, liberties or interests have been affected. This is applicable to administrative decisions just as it is to criminal and civil law proceedings, with the main difference being that the responsibility is more burdensome for the individual in administrative processes. The aim of an administrative justice system is to ensure that administrative acts can be reviewed in proceedings adhering to fair trial standards by a competent, independent and impartial court or tribunal. It should help people to resolve disputes with the providers of public services, guarantee that the decision makers are held accountable, and enhance public trust in the administrative justice system.

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1. In 2008, the Folke Bernadotte Academy published a study entitled “Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development” specifically addressing the necessity of rule of law programmes targeting public administrations in countries in transition.

The interest for administrative justice, in particular for the establishment of new specialised courts, tribunals or chambers within regular courts dealing with judicial review of administrative acts, has recently grown in many countries. This trend has been visible in Central and Eastern Europe (Ukraine, Albania), the South Caucasus (Georgia, Armenia, Azerbaijan), and Central Asia (Kazakhstan). The international community, donors and aid agencies have demonstrated strong interest in supporting initiatives to both establishing new administrative justice systems and modernising the existing ones. However, public awareness about access to administrative justice, and the standards it is subject to, remains low. The problem is enhanced by the fact that administrative justice places most of the responsibility on the private person to initiate administrative proceedings against the state in a judicial system that can be difficult to understand, and often without access to free legal aid.

Regardless of whether administrative justice includes a determination of the lawfulness of the decision, or facts of the appeal, a minimum of fair trial standards should apply. Some of these standards can be found within the right to a fair trial through the concepts of civil rights and obligations as stipulated under Article 6(1) of the Convention, which is the main subject of this casebook.

MONITORING ADMINISTRATIVE JUSTICE PROCEEDINGS

Monitoring administrative justice – appeal processes and judicial review proceedings – can provide valuable information on the strengths and weaknesses of the system, as well as information on rule of law issues in the public administration generally. In many post-conflict and developing countries, individuals’ awareness about fair trial standards in proceedings is relatively low and few are aware of their right to challenge administrative acts and decisions that affect them. For this reason, monitoring administrative proceedings can generate and disseminate knowledge on the right to appeal and procedural guarantees, and facilitate capacity-building initiatives for the benefit of executive, judicial, and legislative powers.

Sharing the objective of promoting rule of law in public administration, the FBA and ODIHR have published a *Handbook for Monitoring Administrative Justice* (“the handbook”) to support OSCE field operations and those monitoring administrative cases before courts. The handbook is a diagnostic tool complementing existing trial monitoring tools developed by the OSCE.² It provides an overview of core fair trial standards and practical guidance on running a trial monitoring operation in the field of administrative justice, with the aim of increasing national and international capacities to support administrative justice reforms – not least legislative reforms of administrative law and administrative procedure – and to enhance adherence to international and European fair trial standards. Although different instruments have been adopted in the field of administrative law, such as legal instruments from the Council of Europe on the protection of the individual in relation to the acts of the administrative authorities, and the publication “The Administration and you”,

2. The handbook is meant to be read as a complement to ODIHR’s *Trial Monitoring: A Reference Manual for Practitioners*.

prior to the handbook there was no tool specifically addressing trial monitoring of administrative justice.³ In monitoring administrative justice proceedings, however, it became clear that one fundamental impediment was a lack of access to a compilation of fair trial standards in the field.

CASEBOOK ON EUROPEAN FAIR TRIAL STANDARDS IN ADMINISTRATIVE JUSTICE

From this perspective, the casebook on European fair trial standards in administrative justice, comprising relevant case law from the Court on administrative justice, is a useful addition to the handbook. It can serve to facilitate reform efforts and academic discussions, and support the implementation of international standards and principles of administrative justice in domestic legal systems.

Objectives of the casebook

The overall goal of the casebook is to strengthen the rule of law by enhancing the implementation of international obligations, principles, commitments and standards on fair trial. The casebook further aims to:

- ▶ promote administrative justice reforms;
- ▶ complement the handbook with an in-depth understanding of some of the most salient fair trial standards in administrative justice;
- ▶ guide policy makers and legislators when drafting or amending legislation on administrative justice;
- ▶ guide judges adjudicating administrative acts and decisions, thereby contributing to the development of national administrative procedure law in line with fair trial standards of the Court;
- ▶ function as a resource guide for international and regional organisations, international professional associations, national non-governmental and civil society organisations working in the fields of rule of law, judicial and legal reform, good governance, public administration and human rights; and
- ▶ support higher legal education for professionals.

Structure and content of the casebook

The casebook provides some of the most important judgments of the Court up to 2014 on the right to a fair trial in administrative proceedings, including leading judgments and decisions in which the Court has elucidated and further developed the rules established under Article 6(1) and in its previous case law. The focus of the casebook is on fair trial standards in administrative proceedings, which is why its

3. The handbook has been translated into Russian and Albanian, and is scheduled to be translated into Ukrainian in 2017.

scope has been limited to cover only Article 6(1) of the Convention. There are other articles in the Convention that might be of interest for administrative law, such as Articles 5, 8 and 13. However, since Article 6(1) is a *lex specialis* in relation to these articles, cases concerning these articles have not been included in this publication.

The casebook begins with a general introduction to the scope of Article 6(1) of the Convention, explaining the distinction between administrative issues from civil and criminal proceedings. It is structured according to key principles on fair trial applicable to administrative proceedings under Article 6(1), and builds upon the principles and the case law outlined in the handbook. These include a definition of courts and tribunals; access to court; public and oral hearings; equality of arms and adversarial trial; trial within a reasonable time; public and reasoned judgment; and the execution of judgments.

The casebook consists of 95 judgments and decisions, and refers in total to 125 judgments and decisions. The cases are briefed and analysed, with particular focus on landmark and significant judgments. The casebook excludes, however, any evaluation of the Court's holding or reasoning. Unlike other similar casebooks of the Court's case law, or collections on fair trial rights in criminal and civil proceedings, the casebook includes both the circumstances under which a decision was taken, the facts, and what the Court has held. The casebook is therefore the first collection of excerpts of the most significant cases decided by the Court with regard to administrative proceedings.

Target group

The casebook is primarily intended to be used by policy and decision makers; legislators; legal experts engaged in reforming or creating new administrative justice systems; legal professionals (judges, lawyers); academics; trial monitoring teams or practitioners who wish to set up monitoring activities in the field of administrative justice; members of the high judicial councils; civil society groups; and others who are engaged in judicial and legal reform in the field of administrative justice. It can also be a valuable tool for Council of Europe member states wanting to establish, or who are in the process of establishing, new administrative jurisdictions.

Chapter 1

The scope of Article 6(1)

INTRODUCTION

The right to a fair trial, enshrined in Article 6 of the Convention and interpreted in the case law of the Court, is one of the most fundamental principles of any democratic society. Article 6 is applicable in all circumstances where the determination of an individual's civil rights and obligations (the civil component of the article) or any criminal charge (the criminal component of the article) against an individual is at stake.

The first paragraph of Article 6 states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair trial 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 in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

This chapter deals with the scope of Article 6(1). It examines the substance of, and difference between, the civil and criminal components and the circumstances where a case falls under the scope of the respective component. To achieve this, the chapter first discusses what constitutes civil rights and obligations for the purposes of Article 6(1). It then focuses on sanctions imposed by administrative authorities on individuals and explores whether or not they are covered by the civil or criminal components of Article 6(1). Finally, it considers cases of an administrative or public law nature that are excluded from the scope of Article 6(1).

A. Administrative cases of a “civil law” nature

This casebook includes European Court of Human Rights⁴ cases originating from domestic administrative justice systems or otherwise related to a dispute under domestic public law that falls within the scope of Article 6(1). A case originating from a domestic administrative justice/public law system must, unless it comes under the criminal component of the article, involve the “determination of civil rights and obligations” to come within the ambit of Article 6(1). This section deals with administrative/public law cases that the Court has considered to fall within the concept of “civil rights or obligations”.

4. Throughout this publication, the terms “the Court” and “the Convention” are used to signify, respectively, the European Court of Human Rights and the European Convention on Human Rights.

Dispute over a civil right under domestic law

Ringeisen⁵ is one of the leading cases in which the Court clarified the concept of “civil rights and obligations”. The applicant concluded a land transaction and submitted the contract of sale to the District Real Property Transaction Commission (RPTC) for approval. After the District RPTC’s refusal to approve the contract the applicant appealed to the Regional RPTC, which dismissed the appeal. Though approval of a real property transaction contract by an administrative authority is a classic example of an administrative action, the Court held that the case involved the determination of the applicant’s civil rights and obligations. The Court reasoned that the concept of “civil rights and obligations” under Article 6(1) did not require the dispute to be between two private persons. Disputes between administrative authorities and individuals before administrative or judicial authorities may, therefore, fall under the concept of “determination of civil rights and obligations”.

The French expression “contestations sur (des) droits et obligations de caractère civil” covers all proceedings the result of which is decisive for private rights and obligations. The English text “determination of ... civil rights and obligations”, confirms this interpretation.

The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.⁶

In *Ringeisen*, neither the domestic classification of the procedure of determining the applicant’s civil rights and obligations, nor the body competent to conduct such determination, were decisive for the applicability of Article 6(1) under its civil component. What was important instead was that the result of such proceedings, however domestically classified, was decisive for the private rights and obligations of the applicant. The Court’s approach concentrated on the result of the proceedings for individuals and avoided including any complex legal or theoretical issues distinguishing between different branches of the law. In this case the applicant retained the right to have the contract for sale approved under the domestic law if he fulfilled the legislative requirements. Though the Regional RPTC was an administrative authority applying administrative law, its decision had been decisive for the relations in civil law (between the applicant and another private person) affecting their property rights, which were civil rights.

The Court also reiterated that for Article 6(1) to be applicable under its civil component, there must be a dispute (“contestation”) over a “right” that could be (at least on arguable grounds) recognised under the domestic law. Such a dispute must be genuine and serious; it should relate not only to the actual existence of a right but also to its scope and the way in which it can be exercised. The outcome of the proceedings must also be directly decisive for the right in question: mere tenuous connections or remote consequences are not sufficient to bring Article 6(1) into play.⁷ The first step in the Court’s analysis in such cases has been to assess whether or not the applicant

5. *Ringeisen v. Austria*, 16 July 1971, Series A No. 13.

6. *Ibid.* § 94.

7. *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 47, Serie A No. 43.

possessed a right under the domestic law. The Court has then proceeded by determining whether there was a dispute over that right under the domestic law.

In *Tre Traktörer Aktiebolag*⁸ the applicant's claim concerned the withdrawal of a licence to serve alcoholic beverages granted for the applicant company's restaurant on the grounds of certain discrepancies in the restaurant's book-keeping, as well as the lack of judicial review of the decision to withdraw the licence. In contrast to *Ringeisen*, which concerned a dispute between the applicant and an administrative authority affecting the applicant's civil law relationships with other private persons, this case involved a revocation of a licence – a textbook example of an administrative act where administrative authorities grant or refuse to grant individuals certain services. The applicant company contested before the Court that there had been a violation of Article 6(1), since the applicant could not have the revocation of the licence reviewed by a court. The question before the Court was whether or not a domestic dispute over an administrative act was decisive for the civil rights and obligations of the applicant, thus rendering the fair trial guarantees of Article 6(1) applicable. The Court found that Article 6(1) was applicable.

Under the domestic law the licence conferred a "right" on the applicant to sell alcoholic beverages in the restaurant. The applicant therefore retained a "civil right" to run a business under the licence and to enter into private contractual relationships with other persons. Thus even if the dispute under the domestic law involved the classic form of an administrative act (a licence), the guarantees of Article 6(1) applied under the civil component, if the dispute was decisive for the applicant's civil rights. The Court concluded that most disputes involving a licence to run a private business render Article 6(1) guarantees applicable, since running a private business entails contractual relationships with other persons – which is a civil right.

In the following cases, the Court held that Article 6(1) was applicable because the applicants' civil rights and obligations had been determined by domestic authorities (although the dispute and the right in question was not considered to be of a private law nature under the domestic legal system).

- ▶ ***Emine Araç v. Turkey***: refusal by a public university to enrol the applicant as a student on the grounds that the applicant's identity photograph did not satisfy the regulations. The right to enrol at a public university, as a user of a public service, was considered to be a civil right.⁹
- ▶ ***Gorraiz Lizarraga and Others v. Spain***: appeal against the construction of a dam by an association on behalf of its members on the grounds that the construction would affect their lifestyles and properties. The association came within the protection of Article 6(1) as it sought the recognition of specific rights and interests of its members.¹⁰
- ▶ ***Pocius v. Lithuania***: the revocation of the applicant's gun licence under domestic administrative law affected the applicant's reputation, which was protected under civil law in the domestic system.¹¹

8. *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989, Series A No. 159.

9. *Emine Araç v. Turkey*, No. 9907/02, ECHR 2008.

10. *Gorraiz Lizarraga and Others v. Spain*, No. 62543/00, ECHR 2004-III.

11. *Pocius v. Lithuania*, No. 35601/04, 6 July 2010.

Social benefits

Many of the cases where the Court has been required to determine whether or not the contested right was civil or public have concerned social security benefits under domestic law. The right to social security is a human right under international law¹² and a constitutional right of many contracting states, and thus imposes obligations on the contracting state. In several cases concerning disputes over social security matters, the Court has noted private law elements and has held that Article 6(1) is applicable.

In the case of *Feldbrugge*,¹³ the administrative authority examined the applicant and decided to discontinue a payment of sickness allowances on the grounds that the applicant was fit to work. In this case, for the first time, the Court had to assess whether or not the right to health insurance benefits that the applicant enjoyed under the domestic law was a “civil right” within the meaning of Article 6(1). The Court first examined the domestic laws of the Council of Europe member states to establish whether health insurance was a public or a private law right, and found that there existed “no common standard pointing to a uniform European notion in this regard. An analysis of the characteristics of the Netherlands’ system of social health insurance discloses that the claimed entitlement comprises features of both public law and private law”.¹⁴ The Court singled out those factors indicating a public law nature, and those of a private law nature, and compared the two groups of factors to see which one was the most dominant. Considering the personal and economic nature of the applicant’s right, the connection with the employment contract and the affinities with the insurance under the ordinary law, the Court concluded that the disputed right was more civil than public in nature.¹⁵

Similarly, in *Deumeland*,¹⁶ applying its approach in distinguishing public law rights from private law rights in the field of social security benefits adopted in *Feldbrugge*,¹⁷ the Court held that entitlement to industrial-accident insurance benefits under the social security scheme in Germany was a “civil right” for the purposes of the Convention.

Public service

The regulation of public service has traditionally been governed by the rules of general public law, administrative law or constitutional law, depending on the national legal tradition and classification. While disputes relating to the recruitment, careers and termination of service of civil servants, as a general rule, fall outside the scope of Article 6(1),¹⁸ they have not followed that in certain other cases where civil servants

12. International Covenant on Economic, Social and Cultural Rights, Article 9; and European Social Charter, Article 12.

13. *Feldbrugge v. the Netherlands*, 29 May 1986, Series A No. 99.

14. *Ibid.* § 29.

15. *Ibid.* § 31-40.

16. *Deumeland v. Germany*, 29 May 1986, Series A No. 100.

17. *Feldbrugge v. the Netherlands* (op. cit.).

18. *Massa v. Italy*, 24 August 1993, § 26, Series A No. 265-B; *Neigel v. France*, 17 March 1997, § 43, Reports of Judgments and Decisions 1997-II.

would otherwise fall outside the scope of the article.¹⁹ In *Francesco Lombardo*,²⁰ the Court held that the right of a *carabiniere* to receive an “enhanced ordinary pension” was a “civil right” because in performing its obligation to pay a pension to a public servant, the state might be compared to an employer who was a party to a contract of employment governed by private law. The Court stressed that this case did not concern the recruitment or the careers of public servants, but rather pecuniary matters after the termination of service.²¹

In *Benkessiouer*,²² while working as a civil servant in the post office, the applicant made an application for extended sick leave, which was refused. The applicant instituted judicial review proceedings aiming to quash the decision refusing him extended sick leave and the suspension of payment of his salary. A grant of such leave would have enabled the applicant to enjoy the salary benefits envisaged by law. The Court distinguished this case from those involving recruitment, careers and termination of service of civil servants²³ and applied the *Lombardo* “purely economic” right test.²⁴ The Court found Article 6(1) applicable on the grounds that the payment of a salary was essentially an economic right – hence, the applicant’s claims were “civil” within the meaning of Article 6(1).²⁵ By contrast, in *Huber*, where the applicant challenged the decision of an administrative authority to send him on compulsory leave, which resulted in the suspension of payment of the applicant’s salary, the Court ruled that where the dispute primarily concerned the career of a public servant, the mere fact that the proceedings had some pecuniary consequences was not sufficient to bring it within the scope of Article 6(1).²⁶

The Court later acknowledged that there was uncertainty for contracting states as to the range of their obligations under Article 6(1) in disputes raised by employees in the public sector over their conditions of service. The Court set itself the task of clarifying its case law in *Pellegrin*,²⁷ which marked a turning point in its case law relating to disputes involving public servants. The French ministry recruited the applicant under contract as a technical adviser. After the termination of the contract, the ministry intended to give the applicant a new contract if he satisfied, *inter alia*, certain medical requirements. After medical examinations, the applicant was found unfit to serve overseas and was therefore denied the post. The applicant lodged an application in the Administrative Court to set the decision aside. The Court concluded that Article 6(1) was not applicable, since the post occupied by the applicant involved a specific obligation that entailed direct participation in the exercise of powers

19. *Glaserapp v. Germany*, 28 August 1986, § 49, Series A No. 104.

20. *Francesco Lombardo v. Italy*, 26 November 1992, Series A No. 249-B.

21. See also *Massa* (op. cit.) concerning a dispute involving an obligation on the state to pay a reversionary pension to the husband of a public servant in accordance with the legislation in force.

22. *Benkessiouer v. France*, 24 August 1998, Reports of Judgments and Decisions 1998-V.

23. Such as in *Neigel v. France* (op. cit.), p. 14; and *Huber v. France*, 19 February 1998, Reports of Judgments and Decisions 1998-I.

24. *Francesco Lombardo v. Italy* (op. cit.), p. 14.

25. *Benkessiouer v. France*, § 30 (op. cit.), p. 14.

26. *Huber v. France*, § 37 (op. cit.).

27. *Pellegrin v. France* [GC], No. 28541/95, ECHR 1999-VIII.

conferred by public law and the performance of duties designed to safeguard the general interests of the state, which did not attract the application of Article 6(1). Thus, while the Court denied this application, it in fact expanded the scope of Article 6(1) under its civil component to all cases involving public servants, provided that their duties did not entail direct participation in the exercise of powers conferred by public law and the performance of duties designed to safeguard the general interests of the state. This, however, changed with the judgment in *Vilho Eskelinen and Others*,²⁸ where the Court adopted a new approach (see below).

In *Martinie*,²⁹ an obligation to pay surcharges was imposed on the applicant, who was an accountant in a public school. The applicant unsuccessfully tried to challenge this burden in the Court of Audits. The general issue before the Grand Chamber was whether or not the civil component of Article 6(1) was applicable to the proceedings before the Court of Audits, considering the fact that the applicant was an accountant in a public institution. Following the functional test in *Pellegrin*,³⁰ the specific question before the Grand Chamber was whether the applicant's post entailed direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. The Grand Chamber ruled that Article 6(1) was applicable because neither the nature of the duties carried out by the applicant as an accountant, nor the responsibilities attached to them, supported the view that he participated "in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities".

The functional test in *Pellegrin*³¹ marked a significant development in the case law of the Court involving disputes by public servants as it shifted the approach from being confined to the economic aspects of claims raised by public servants in domestic proceedings, to the nature and role of the powers and functions of public servant applicants.³² It expanded the scope of application of Article 6(1), but it was still restrictive and relatively uncertain since it was difficult to identify the nature of the functions of the civil servant applicants. Nearly eight years after *Pellegrin*, the Court decided to expand and further clarify the scope of the civil component under Article 6(1) in its judgment in *Vilho Eskelinen*.³³

In *Vilho Eskelinen*, the applicants were civil servants working for the district police and were entitled to a special allowance for working in a remote area. The allowance was later withdrawn and, as a compensation, they were given individual wage supplements. However, after being moved to another duty police station, the applicants lost their special allowances. The issue of the applicants' entitlement to receive a

28. *Vilho Eskelinen and Others v. Finland* [GC], No. 63235/00, ECHR 2007-II.

29. *Martinie v. France* [GC], No. 58675/00, ECHR 2006-....

30. *Pellegrin* (op. cit.).

31. *Pellegrin* (op. cit.), p. 16.

32. See, for example, Francesco Lombardo (op. cit.), p. 14; Massa (op. cit.), p. 14; and *Benkessiouer v. France* (op. cit.).

33. *Vilho Eskelinen and Others v. Finland* (op. cit.), p. 15.

wage supplement was examined and rejected by the County Administrative Board and administrative courts of Finland.³⁴

With reference to the *Pellegrin* test, the government objected to the applicability of Article 6(1) on the ground that the applicants, except for the assistant, were police officers, which entailed a direct participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state.³⁵ The Court dismissed this argument and found Article 6(1) to be applicable. The *Vilho Eskelinen* judgment marked a turning point in which the Court abandoned its *Pellegrin* test and established a new test for cases involving public servants. In accordance with this new approach:

... in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. [...] [T]here can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies.³⁶

The *Vilho Eskelinen* two-pronged test thus expanded and clarified the scope of application of Article 6(1) under its civil component, as well as strengthened Strasbourg's supervision over disputes involving civil servants by creating a presumption in favour of the applicability of Article 6(1).³⁷ The *Vilho Eskelinen* test has not changed since its creation in 2007, and has since been reaffirmed in several cases.³⁸

B. Administrative/disciplinary cases of a “criminal law” nature

Cases originating from domestic justice or public law systems that do not involve the determination of civil rights and duties may fall under the scope of the criminal component of Article 6. This section focuses on the Court's consideration of cases that might come under the criminal limb of Article 6, regardless of the domestic classification as disciplinary proceedings or administrative offences.

In *Engel*,³⁹ the applicants serving as conscript soldiers in the armed forces were subjected to various penalties for offences against military discipline under the Netherlands' disciplinary law. Before discussing the applicants' substantive claims regarding the violations of their fair trial rights, the Court had to decide whether

34. *Ibid.*

35. *Pellegrin* (op. cit.), p. 15.

36. *Vilho Eskelinen and Others v. Finland*, § 62 (op. cit.), p. 15.

37. *Vilho Eskelinen and Others v. Finland* (op. cit.), p. 15.

38. See, for instance, the recent judgments of the Court in the cases of *Oleksandr Volkov v. Ukraine*, No. 21722/11, ECHR 2013; *Jokšas v. Lithuania*, No. 25330/07, 12 November 2013; and *Ivan Stoyanov Vasilev v. Bulgaria*, No. 7963/05, 4 June 2013.

39. *Engel and Others v. the Netherlands*, 8 June 1976, Series A No. 22.

or not Article 6(1) was applicable. To resolve this, the Court first had to determine whether or not the applicants were subject to a criminal charge within the meaning of the article. Taking into account the degree of severity of the penalty that the applicants risked incurring – deprivation of liberty – the Court found that three out of five applicants were subject to a “criminal charge” within the meaning of Article 6(1), although the domestic law classified these measures as disciplinary.

With this judgment, the Court established the famous “Engel test”, which has since remained unchanged. The Court has applied the Engel test in several subsequent cases in order to distinguish those involving the determination of a “criminal charge” within the meaning of Article 6(1), from those of a disciplinary nature falling outside the scope of this provision. In order to determine the applicability of the “criminal component” of Article 6(1) to the facts alleged by the applicants, the Court introduced the following three aspects of the offence in question.

- ▶ The domestic classification of the offence as disciplinary, criminal or both concurrently.
- ▶ The nature of the offence in relation to the aims pursued by the sanction, and the general application of the rule.
- ▶ The nature and the degree of severity of the penalty.

While the domestic classification was important, it was not decisive. If the domestic law classified the offence as criminal, Article 6(1) would apply automatically. If the domestic law excluded the offence from its criminal law, the Court would have to determine the nature of the offence and the sanction. In particular, the Court looked at the aims pursued by the state’s application of the rule. If the penalty had deterrent and punitive aims characteristic to criminal law, the applicant was criminally charged and Article 6(1) should apply. On the other hand, if the sanction only aimed to serve a mere pecuniary compensation for the damage to the state or the community caused by the offender, without intending to deter or punish the offender, the offence would not be considered of a criminal nature⁴⁰ and Article 6(1) would not apply under its criminal component.

Another question the Court had to consider regarding the nature of the offence was whether or not the rule had general applicability under domestic law⁴¹ or if it only applied to specific groups of persons – that is, to members of certain professions – in which case the offence would be considered disciplinary. The Court also had to examine the nature and the degree of severity of the sanction⁴² for the offence in question. If the analysis of each criterion did not lead to the conclusion of Article 6(1) being applicable, the Court would continue with a cumulative approach of all three criteria of the Engel test.⁴³

40. *Pierre-Bloch v. France*, 21 October 1997, Reports of Judgments and Decisions 1997-VI.

41. *Paykar Yev Haghtanak Ltd v. Armenia*, No. 21638/03, 20 December 2007.

42. *Benham v. the United Kingdom*, 10 June 1996, Reports of Judgments and Decisions 1996-III.

43. *Garyfallou AEBE v. Greece*, 24 September 1997 Reports of Judgments and Decisions 1997-V; *Lauko v. Slovakia*, 2 September 1998, Reports of Judgments and Decisions 1998-VI; *Ziliberg v. Moldova*, No. 61821/00, 1 February 2005.

In the following cases, the Court has held that the offences were criminal in nature without them being classified as criminal under the domestic law.

- ▶ **Öztürk v. Germany:** fine of 60 deutschmarks for the violation of road traffic rules and for causing an accident.⁴⁴
- ▶ **Garyfallou AEBE v. Greece:** fine of 500 000 drachmas, with the risk of receiving the maximum fine (which is triple the amount of the initial fine), and in the event of non-payment, the seizure of the company's assets and the detention of its directors (for a period of up to one year).⁴⁵
- ▶ **Galstyan v. Armenia:** three days' detention in a detention centre for an "administrative offence" with the risk of possible detention for up to 15 days.⁴⁶
- ▶ **Paykar Yev Haghtanak Ltd v. Armenia:** fine of 3 797 281 Armenian drams (approximately 5 400 euros) for breach of the tax legislation with the risk of a fine ranging from 5% to 50%, and surcharges for the period of delay cumulatively amounting from about 5% to 43%, of the tax due.⁴⁷

C. Administrative offences

The distinction between disciplinary and criminal law measures is not the only area where the Court has used the Engel test for determining the applicability of Article 6(1). Many Council of Europe member states have initiated a "decriminalisation" process, whereby some of the offences previously belonging to criminal law have been transferred to regulatory or administrative law.⁴⁸ As a result, the Court has been obliged to employ the Engel test in cases involving "administrative offences" or minor offences⁴⁹ for determining the applicability of Article 6(1). An important question for the Court has been whether or not member states could classify an offence as administrative under their domestic laws and thus escape from the fair trial guarantees of Article 6(1) on the grounds that the person was not charged with a criminal offence. While states are completely free in the domestic classification of various branches of the law, the enjoyment of Convention rights within a certain branch of a domestic law is not subordinate to the sovereign will of the state.⁵⁰ Latitude extending thus far might lead to results that are incompatible with the purpose and the objectives of the Convention.⁵¹

In *Öztürk*, the administrative authorities imposed a fine of 60 deutschmarks on the applicant for the offence of careless driving and for causing an accident with another vehicle, as well as 13 deutschmarks in fees and costs. The act committed by the

44. *Öztürk v. Germany*, 21 February 1984, Series A No. 73.

45. *Garyfallou AEBE v. Greece* (op. cit.).

46. *Galstyan v. Armenia*, No. 26986/03, 15 November 2007.

47. *Paykar Yev Haghtanak Ltd v. Armenia* (op. cit.).

48. See *Öztürk v. Germany* (op. cit.) for the government's justification for decriminalisation of minor offences.

49. *Öztürk v. Germany* (op. cit.); *Galstyan v. Armenia* (op. cit.); *Ziliberg v. Moldova* (op. cit.); and *Lauko v. Slovakia* (op. cit.).

50. *Engel and Others v. the Netherlands*, 8 June 1976, § 81.

51. *Öztürk v. Germany* (op. cit.), p. 18, § 49.

applicant was classified as a “regulatory offence” under the domestic law, and not as a criminal offence. The question before the Court was whether or not the applicant was charged with a criminal offence within the autonomous meaning of Article 6(1). Turning to the Engel test for guidance, the Court underlined that it had confined the Engel test to the facts of that case (to the context of military service). The Court, nevertheless, considered that the principles set forth in the Engel judgment were also relevant, *mutatis mutandis*, in the present case.

With regard to the first criterion, the Court held that the regulatory offences were closely linked to the criminal procedure, although they were not classified as criminal under the domestic law. The Court then turned to the second criterion – the nature of the offence in relation to the corresponding penalty – which carried more weight for the assessment of the offence. In particular, the Court noted:

It is a rule that is directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law – but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction – and this the Government did not contest – seeks to punish as well as to deter ... Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature.⁵²

Based on these arguments, the Court held that the applicant was charged with a criminal offence, in which case the applicant should have been afforded all guarantees under Article 6 of the Convention. Since this conclusion was reached at the second step of the Engel test, it was not necessary to assess the severity of the penalty. There is nothing in the text of Article 6(1) suggesting that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. The relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal nature.⁵³

Tax surcharges

Generally, disputes related to tax assessment⁵⁴ fall outside the ambit of Article 6(1), since they do not involve the determination of a “criminal charge” or “civil rights or obligations”.⁵⁵ Tax law is traditionally rather considered to be one of the special branches of general administrative law. However, some domestic tax disputes draw the application of Article 6 under its criminal component, either because of the nature of the tax offence or because of the degree of severity of the penalty imposed on individuals for tax violations.

In *Janosevic*,⁵⁶ the tax authority imposed a tax liability on the applicant, who operated a taxi firm, as well as surcharges amounting to 20% or 40% of the tax liability

52. Ibid. § 53.

53. Ibid. § 54.

54. See, for example, *Ferrazzini v. Italy*, No. 44759/98, ECHR 2001-VII.

55. See section B of this chapter for administrative cases decisive for civil rights or obligations of individuals and section C for administrative cases falling outside the scope of Article 6(1).

56. *Janosevic v. Sweden*, No. 34619/97, ECHR 2002-VII.

depending on the type of tax. The question before the Court, among others, was whether or not Article 6 of the Convention applied to the case under its criminal component. The government argued that it did not. It reasoned, in particular, that:

- ▶ under the Swedish legal system, tax surcharges belonged to the administrative law;
- ▶ the main purpose of the surcharges was not deterrent or punitive but rather fiscal, protecting the financial interests of the state and the society;
- ▶ the surcharges were imposed on the applicant on objective grounds without any determination of guilt or criminal intent or negligence;
- ▶ the substantial amount of the surcharges alone did not turn it into a criminal punishment.

The Court disagreed with the government noting that “the proceedings concerning the tax surcharges imposed on the applicant involved a determination of a “criminal charge” within the meaning of Article 6”.⁵⁷ The Court took a cumulative approach to the second and third criteria of the Engel test.

Thus, even if disputes relating to the assessment of tax obligations of individuals do not fall under Article 6, in light of the criteria laid down in the Engel test, surcharges imposed on individuals as a result of tax assessments might fall under this provision. The Grand Chamber of the Court confirmed this approach in *Jusilla*⁵⁸ in 2006, and has applied it in subsequent cases.⁵⁹

D. Administrative or public law cases falling outside the scope of Article 6(1)

Where an applicant has demonstrated that a domestic authority has determined his or her civil rights and obligations, and irrespective of the domestic classification of the substantive and procedural rules, Article 6(1) is applicable under its civil component. This means that many public rights of individuals that are not regarded as “civil” under the meaning of the Convention fall beyond Article 6(1), unless the determination of the public rights in question is decisive for the civil rights of the applicant. The determination of subjective public law rights that are not decisive for civil rights and obligations does not grant an individual the right to claim the protection of Article 6(1) before domestic courts. This limits the scope of application of fair trial guarantees under Article 6(1).

In *Pierre-Bloch*,⁶⁰ the applicant was elected as a member of the National Assembly and submitted his campaign accounts to the National Commission on Election Campaign Accounts and Political Funding (National Commission). The National Commission considered the submission and, after adding the costs for the opinion poll and the journal publications to the accounts originally submitted, rejected

57. Ibid. § 71.

58. *Jussila v. Finland* [GC], No. 73053/01, ECHR 2006-XIV.

59. See in particular *Paykar Yev Haghtanak Ltd v. Armenia* (op. cit.), p. 18.

60. *Pierre-Bloch v. France* (op. cit.), p. 18.

the campaign accounts for exceeding the statutory ceiling. The applicant lodged a complaint claiming that the National Commission violated the adversarial principle by adding the aforementioned costs without first granting him a hearing. The application was dismissed. Meanwhile, the Constitutional Council disqualified him from standing for election for a year and declared that he had forfeited his seat as a member of parliament. The applicant claimed before the Court that he had not had a fair hearing before the Constitutional Council, in particular because the proceedings had been neither adversarial nor public. The Court found Article 6 inapplicable under both its civil and criminal components, and found that the applicant's right was political in nature:

The Constitutional Council held that the sum in question had on this occasion been exceeded and disqualified the applicant from standing for election for a year and declared that he had forfeited his seat, thereby jeopardising his right to stand for election to the National Assembly and to keep his seat. Such a right is a political one and not a "civil" one within the meaning of Article 6 § 1, so that disputes relating to the arrangements for the exercise of it – such as ones concerning candidates' obligation to limit their election expenditure – lie outside the scope of that provision.⁶¹

Since the applicant was also required to pay a certain sum to the state treasury, there was an issue as to whether the pecuniary element in the case was sufficient to attract the application of Article 6(1). The Court held that the political rights and the proceedings did not become "civil" merely because they raised an economic issue.⁶² The payment of the sum was so closely linked to, and was the result of the forfeiture of the political seat held by the applicant, that this aspect could not be separated from the political aspect of the case.

In *Maaouia*,⁶³ the Court held that rights relating to immigration and residence are not "civil" in nature. The applicant was prosecuted for failing to comply with a deportation order served on him and was sentenced to one year's imprisonment and 10 years' exclusion from the French territory. He applied for a rescission of the 10-year exclusion order, which was granted within four years from the submission of the application. The Court found Article 6(1) inapplicable and stated that, by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens, the states parties clearly expressed their intention not to include such proceedings within the scope of Article 6(1).

In *Ferrazzini*,⁶⁴ the company of which the applicant owned almost the entire share capital, and represented it, applied to the tax authorities for a reduction of certain taxes payable on transfer of property, meanwhile paying only the sum considered to be due. Following the application, the tax authorities served a number of supplementary tax assessments on the applicant's company, concluding that the company was not eligible for the reduced tax rate it referred to. Accordingly, the company was requested to pay the taxes due, as well as the applicable penalties. The applicant lodged appeals with the District and Regional Tax Commissions to set aside the supplementary tax assessments.

61. Ibid. § 50.

62. Ibid. § 51.

63. *Maaouia v. France* [GC], No. 39652/98, ECHR 2000-X.

64. *Ferrazzini v. Italy* [GC], No. 44759/98, ECHR 2001-VII.

In considering the applicability of Article 6(1) to the instant case, the Court restated its position that the Convention was a living instrument, and the Court was minded to review whether or not, in light of the present-day conditions in democratic societies, the scope of Article 6(1) should be extended to cover disputes between citizens and public authorities as to the lawfulness of tax authorities' decisions under domestic law. The Court found that the developments in democratic societies in the tax field had not entailed a further intervention by the state into the civil sphere of the individual's life and did not affect the fundamental nature of the obligation of individuals or companies to pay taxes. Tax matters were still public authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Hence, despite the pecuniary effects that tax disputes necessarily produced for the taxpayer, they fell outside the sphere of civil rights and obligations, and thus beyond the scope of Article 6.⁶⁵

In the relatively recent case of *Boulois*,⁶⁶ the Court clarified the applicability of Article 6(1) under its civil component in disputes involving decisions of penitentiary authorities. While serving a prison sentence, the applicant submitted several requests for temporary leave of absence, which were all refused by the decision of the Prison Board. The applicant lodged an application for judicial review of those decisions, but the administrative courts declined jurisdiction.

In order to determine whether Article 6 was applicable under its civil component to the proceedings regarding the decision for refusing a prison leave, the Court had to establish whether the applicant possessed a "right" within the meaning of that provision. According to Luxembourg legislation, prison leave was a privilege rather than a right, the granting of which was not automatic and ultimately remained at the discretion of the post-sentencing authority. Additionally, the administrative courts had declined jurisdiction to examine the application for judicial review. It was therefore apparent that the applicant could not claim to possess a right recognised in the domestic legal system. Finally, neither the Convention, nor its Protocols, expressly provide for a right to prison leave and the right to prison leave was not recognised under any principle of international law. There was no consensus among member states on the status of such leave, and no arrangements for granting it. Based on that, the Court found Article 6 to be inapplicable.

65. Compare this ruling with those in the cases concerning tax surcharges imposed on individuals by tax authorities under the criminal component of Article 6(1).

66. *Boulois v. Luxembourg* [GC], No. 37575/04, ECHR 2012.

Chapter 2

Courts and tribunals

INTRODUCTION

Administrative law cases that involve the determination of “civil rights and obligations” of individuals are initially considered by domestic administrative agencies. Upon request for judicial review, such cases may also be adjudicated in special courts or in courts of general jurisdiction possessing the competence to try administrative law cases.

Article 6(1) of the Convention recognises the right of every person to a fair trial before an “independent and impartial tribunal established by law”. This right is expressly applicable to both criminal and civil proceedings, and engages three main elements: that the tribunal is established by law; that it is competent to decide on matters brought before it; and that it is both independent and impartial.

The main thrust of this chapter is to present the Court’s interpretation of an “independent and impartial tribunal” based on the key characteristics that domestic bodies in the Council of Europe member states must satisfy to be considered as “tribunals” within the meaning of Article 6(1). The Court’s case law on the interpretation of a “tribunal” can be a valuable guideline for legislators and policy makers because it carefully describes the scope of the judicial review powers of administrative courts. This could be particularly useful for member states wanting to establish (or being in the process of establishing) new administrative jurisdictions, or where the Court’s case law indicates shortcomings in relation to the scope of powers of existing administrative jurisdictions. The chapter first discusses the nature and the range of competence and powers of domestic state bodies, and then examines the requirements of independence and impartiality as stipulated under Article 6(1).

Defining the “tribunal”

The notion of “tribunal” has been gradually defined through the Court’s case law. While the Court has developed some of the guarantees of a fair trial that do not expressly appear under Article 6(1), such as the right to an oral hearing, other fair trial guarantees, such as public hearings, the independence and impartiality of a tribunal, and the requirement that civil (and criminal) proceedings must be conducted by a tribunal established by law, are specifically mentioned in the Convention. The “right to a tribunal” or “to a court”, terms that have been applied by the Court interchangeably, are expressly mentioned under Article 6(1). This right is closely linked to the right of access to a court (which will be further discussed in Chapter 3):

... Article 6 para. 1 ... secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.⁶⁷

Article 6(1) only applies if the Court finds that the domestic body that determined a “criminal charge” or “civil rights and obligations” possessed the required qualities of a tribunal. State organs that do not satisfy the requirements of a tribunal, due to a lack of certain qualities expressly and impliedly included under Article 6(1), are not bound by Article 6. Hence individuals may not expect Article 6(1) guarantees from these bodies. The task of the Court in such cases is to check whether or not the domestic body possesses the required qualities of a tribunal.

According to the Court’s extensive case law, there may be public bodies technically belonging to the executive government that are regarded as tribunals, and judicial courts that lack the key characteristics of a tribunal as required under Article 6(1). The Court has decided that the domestic classification of the public organ as “judicial” or “administrative” is not decisive. Instead, the main legal issue in such cases is whether or not the determination of a “criminal charge” or “civil rights and obligations” by bodies other than traditional courts, is compatible with the Convention. If the determination was made by a judicial court, the legal question to determine is whether the court satisfied the requirements under Article 6(1) of a tribunal.

As early as 1983, the Court held in its *Albert and Le Compte* judgment that:

In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 is applicable, conferring powers in this manner does not in itself infringe the Convention ... Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6.⁶⁸

It will be demonstrated in this chapter that the key principles that the Court established in this case have been continually and consistently used to determine whether or not a domestic legal system ensures “the right to court” for individuals.

In *Öztürk*,⁶⁹ the Court held that:

Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.⁷⁰

Thus it is not in itself a breach of the Convention when a state confers on the administrative and professional authorities that do not satisfy the requirements of

67. *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A No. 18.

68. *Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A No. 58.

69. *Öztürk v. Germany* (op. cit.), p. 18. For more detailed discussion of the *Öztürk* judgment see above, pp. 21–22.

70. *Ibid.* § 56.

a tribunal the powers to impose on individuals administrative measures (such as tax surcharges, road traffic penalties and so on) amounting to a “criminal charge” within the meaning of the Convention or its disciplinary measures. However, in such cases, the Convention requires that the domestic legal system ensures one of the following criteria: that the individuals concerned are able to challenge such measures before a judicial authority with full jurisdiction,⁷¹ including the power to quash them both on grounds of law and fact;⁷² or where the administrative/disciplinary authority itself meets the required criteria of a tribunal established by law, as prescribed by Article 6(1).

In the determination of the question of whether or not the domestic body that decided the applicant’s case constituted a tribunal for the purposes of Article 6(1), the Court has adopted the following substantive, rather than formal, approach:

According to the Court’s case-law, a “tribunal” is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.⁷³

This is a functional test in which the Court ascertained whether the state body concerned was exercising judicial functions. In cases where the domestic body in question has been located within the organisation of the executive government, the Court might still consider it to be a tribunal for the purposes of the Convention, on the grounds of the judicial functions it exercised and the guarantees it offered.⁷⁴ In addition to the possession of the judicial functions by the domestic organ concerned, in order to qualify as a tribunal, it must also meet a number of other requirements expressly or impliedly required by Article 6(1). More specifically, these include:

independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1).⁷⁵

Scope of competence and powers of domestic tribunals

In cases where the Court’s examination revealed that a domestic body had judicial functions, possessed the qualities and offered the guarantees inherent in a judicial function, the Court also examined the scope of competence and the nature of the powers of that body to determine whether or not it satisfied the requirements of Article 6(1).⁷⁶

In principle, it is not contrary to Article 6(1) for administrative authorities that do not meet the requirements of a tribunal under the Convention to determine “civil rights or obligations”, provided that their decisions are subject to review by a judicial authority

71. *Steininger v. Austria*, No. 21539/07, § 46, 17 April 2012.

72. *Janosevic v. Sweden* § 81 (n. 56), p. 20.

73. *Belilos v. Switzerland*, 29 April 1988, § 64, Series A No. 132.

74. *Sramek v. Austria*, 22 October 1984, § 36, Series A No. 84.

75. *Belilos v. Switzerland*, § 64 (op. cit.).

76. See for example *Fazliyski v. Bulgaria*, No. 40908/05, 16 April 2013; *Zumtobel v. Austria*, 21 September 1993, Series A No. 268-A; and *Galina Kostova v. Bulgaria*, No. 36181/05, 12 November 2013.

vested with “full jurisdiction”.⁷⁷ A domestic tribunal has “full jurisdiction” if it has the power to examine both questions of law and fact,⁷⁸ and if the domestic court has provided “sufficient review” or exercised “sufficient jurisdiction” in a particular case.⁷⁹

When examining the reviewing powers and the scope of competence of domestic courts, the Court has been careful to note that it is not acting as a fourth instance court. It has also refrained from giving abstract assessments on whether or not the domestic system of the respondent government generally complied with the requirements of Article 6(1). Instead, the Court has confined its assessment to the specific circumstances brought to its attention by the applicant in regard to the definition of a tribunal and the “right to court”.⁸⁰ In these cases,⁸¹ the Court examined whether or not the applicants had access to a tribunal that satisfied the requirements of Article 6(1), including the possession and the exercise of full jurisdiction to review key points of facts and law.

In *Sigma Radio Television Ltd*, the Court developed a number of guiding criteria for determining the completeness and sufficiency of the jurisdiction of domestic administrative courts and tribunals:

In assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question ... and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialized issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal.⁸²

In cases where the national administrative jurisdiction has been precluded from independently reviewing the decisive issues of fact or law raised by individuals and, in particular, if they have been bound by the findings of fact or law of the administrative authorities, the Court has found that the scope of review of those courts has not satisfied the requirements of Article 6(1).⁸³ On the other hand, even with limited jurisdiction, a national organ might be considered to be a tribunal with “sufficient jurisdiction” if it was able to review the decisive aspects of the regulatory

77. *Fischer v. Austria*, 26 April 1995, § 28, Series A No. 312.

78. *Fazliyski v. Bulgaria*, § 57 (op. cit.); and *Capital Bank AD v. Bulgaria*, No. 49429/99, § 98, ECHR 2005-XII (extracts).

79. *Steininger v. Austria*, § 49 (op. cit.) p. 24; and *Sigma Radio Television Ltd v. Cyprus*, Nos. 32181/04 and 35122/05, § 152, 21 July 2011.

80. *Kleyn and Others v. the Netherlands* [GC], Nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 198, ECHR 2003-VI.

81. For example, the Court has clarified that it is not its function to review whether a Minister of Justice erred in striking the applicant from the list of persons qualified to act as liquidator of insolvent companies (see *Galina Kostova v. Bulgaria*, § 54 (op. cit.) p. 25, whether the refusal by the Supreme Administrative Court to review the Minister’s action under the head of proportionality was required under domestic law (ibid. § 64), or whether the dismissal of the applicant from his public post was lawful or correct (see *Fazliyski v. Bulgaria*, § 56 (op. cit.), p. 25).

82. *Sigma Radio Television Ltd v. Cyprus* (op. cit.), p. 25 §154.

83. Ibid. § 157.

body's decision regarding the applicant.⁸⁴ However, if the national court's judicial review was limited to checking the boundaries of discretionary powers exercised by administrative authorities, this limited review might not suffice for the domestic body to qualify as a tribunal under the Convention.⁸⁵

It is apparent from the Court's case law that where the decision of an administrative authority decisive for the "civil rights and obligations" of the individuals was not amenable to review by any judicial instance satisfying the requirements of Article 6(1), the Court has found a breach of the "right to court" without giving any detailed consideration to the other aspects of the case.⁸⁶

Even in cases in which the domestic body satisfied the requirements of Article 6(1) in relation to the scope of competence and sufficient review powers of the tribunals, the concept of a tribunal requires that the tribunals should conduct a proper examination of the submissions by the individuals:

The Court has also held that the effect of Article 6 § 1 is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.⁸⁷

Thus a tribunal with a sufficiently wide scope of competence and powers to review (when exercising administrative justice) might still breach the requirements for "tribunals" under Article 6(1) for failure to properly examine the evidence adduced by the parties. Such practice might also raise issues under the right of access to a court, which is part of the right to a tribunal.⁸⁸

Independence and impartiality of a tribunal

The independence and impartiality of a tribunal are central elements of the right to a fair hearing and expressly appear in the text of Article 6(1). While the independence of the judiciary is a prerequisite for ensuring a fair judicial process, free from undue influence, and for holding the government accountable for acts and decisions taken against private persons that might affect their enjoyment of fundamental rights and freedoms, impartiality refers to the objectivity of a judge when evaluating the merits of the arguments and the evidence before rendering a judgment.

Through its case law, the Court has developed general principles on how to determine the independence and impartiality of a tribunal. In *Findlay*, the Court outlined the criteria that should be taken into account when establishing if a body should be considered to be independent:

... in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of

84. *Zumtobel v. Austria*, § 32 (op. cit.), p. 25; *Fischer v. Austria*, § 34 (op. cit.), p. 25; and *Sigma Radio Television Ltd v. Cyprus*, § 156 (op. cit.) p. 25.

85. See *Obermeier v. Austria*, 28 June 1990, Series A No. 179.

86. *Allan Jacobsson v. Sweden (No. 1)*, 25 October 1989, § 75-76, Series A No. 163.

87. *Van de Hurk v. the Netherlands*, 19 April 1994, § 59, Series A No. 288; and *Jokšas v. Lithuania*, No. 25330/07, § 66, 12 November 2013.

88. See the discussion on the link between the two rights in Chapter 3.

office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence... As to the question of “impartiality”, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.⁸⁹

Regarding the requirement of impartiality, the Court highlighted in this case the following two components: that the judges did not allow their judgment to be influenced by personal bias or prejudice (referred to as “subjective impartiality”), and that the tribunal must appear to be impartial (referred to as “objective impartiality”). The Court recognised that it was difficult to establish a breach of Article 6 based on the grounds of subjective impartiality, and has for this reason, in the vast majority of cases involving complaints of impartiality, focused on the objective characteristics of impartiality. The Court has repeatedly stated that even if a judge has not been subjectively biased, the mere appearance of impartiality is fundamental in a democratic society, where a court should inspire confidence in the public.⁹⁰ When determining whether or not the individual judge lacked impartiality, the Court has stressed that “the standpoint of the person concerned was important but not decisive. What was decisive was whether that fear could be held to be objectively justified”⁹¹ The Court therefore looked for ascertainable facts that might raise doubts as to the judge’s impartiality, thus objectively justifying the applicant’s fear regarding the lack of impartiality of the tribunal.

CASE LAW

A. Defining the “tribunal”

Part A of this chapter focuses on cases concerning the Court’s approach to the definition of the notion of a “tribunal established by law” under Article 6(1). The Court’s approach to defining a tribunal has been developed on a case-by-case basis and has been developed with regard to different factors, including the scope of competence of domestic courts, the intensity of review and the review of issues of both facts and law.

In the following leading cases, the Court has developed its jurisprudence in determining whether or not an administrative body can be qualified as a tribunal with full jurisdiction under Article 6(1). As will be analysed in the following chapters, the Court has referred to these decisions in numerous subsequent cases.

- ▶ ***Belilos v. Switzerland***: on whether or not a Police Board fulfilled the requirements of a tribunal under Article 6(1), and if the applicant could challenge the decision of a body that did satisfy those requirements.
- ▶ ***Obermeier v. Austria***: on whether a Disabled Persons’ Board and a Provincial Governor could be regarded as independent tribunals within the meaning

89. *Findlay v. the United Kingdom*, 25 February 1997, § 48, Reports of Judgments and Decisions 1997-I.

90. *Piersack v. Belgium*, 1 October 1982, § 30, Series A No. 53; and *Sramek v. Austria*, § 42 (op. cit.), p. 25.

91. *Wettstein v. Switzerland*, No. 33958/96, § 44, ECHR 2000-XII.

of Article 6(1). Also on whether the domestic court's lack of jurisdiction to fully examine the board's decision resulted in no effective review of the administrative decision which violated the applicant's right of access to a court.

- ▶ **Zumtobel v. Austria:** the first case in which the Court examined the limited judicial review of an Administrative Court with regard to acts of administrative authorities.
- ▶ **Fischerv. Austria:** where the Court had to determine the scope of jurisdiction exercised by an Administrative Court in light of the requirements of Article 6(1).
- ▶ **Steininger v. Austria:** an important authority clarifying the Court's approach in defining the elements of a tribunal under Article 6(1). In this judgment, the Court recapitulated its previous case law on the elements of a tribunal determining "civil rights and obligations" and reiterated that it had taken a different approach to reviewing the scope of competence of a tribunal determining "criminal charges" imposed by administrative authorities.

▶ *Belilos v. Switzerland*⁹²

In this case, a Police Board, consisting of a single municipal civil servant, fined the applicant for participating in a demonstration without prior permission. The applicant, who was not present at the hearing, challenged the decision before the Criminal Cassation Division of the cantonal court, and argued that in view of the requirements of Article 6(1), the Police Board was not an adequate tribunal with powers to make such a decision. The Cassation Division dismissed the claim with reference to the interpretive declaration of Switzerland under Article 6(1), according to which administrative authorities deciding on administrative fines were not obliged to hold public and oral hearings that satisfied the requirements of Article 6(1).⁹³ The applicant unsuccessfully appealed against this judgment before the Federal Court.

The applicant complained to the Court about the lack of independence and impartiality of the Police Board because of it being subordinate to the police. He also complained about the limitations in jurisdiction and the legality of the decisions from the Cassation Division and the Federal Court.

The questions before the Court were (1) whether the Police Board satisfied the requirements of impartiality and independence, and (2) whether the powers of the domestic courts limited to review on points of law were sufficient to qualify them as tribunals under Article 6(1).

The Court firstly analysed the organisation of the Police Board and the appointment of members and their relationships with other executive authorities. Though the Police Board consisted of a single senior civil servant responsible for other departmental duties and appointed by the municipality, he could not in principle be dismissed during the term of office served in his personal capacity and was not subject to orders in his decision-making role. Thus the fact that the body exercising "judicial powers" was appointed by the executive was not sufficient to cast doubt on its

92. *Belilos v. Switzerland* (op. cit.), p. 25.

93. Because the courts, which satisfied the mentioned requirements, exercised control over the legality of the decisions of the authorities.

independence and impartiality, especially in considering the fact that in a number of Council of Europe member states the executive makes appointments to judicial positions. The Court stated that the concept of a tribunal should be characterised in the substantive sense by its judicial function, rather than in the classic sense integrated within a standard judicial system (paragraph 64).

Nonetheless, the Court stressed that even appearances are important and that a number of other considerations related to functions and internal organisation should be taken into consideration:

In Lausanne the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues.⁹⁴

This perception is incompatible with the reputation that the judiciary should enjoy in a democratic society. The fact that the member of the Police Board was a serving police officer was seen as undermining the appearance of independence. The Court thus concluded that the applicant could legitimately have doubts as to the independence and organisational impartiality of the Police Board, which was incompatible with the requirements of Article 6(1).

Since the administrative authority determining the applicant's "civil rights and obligations" did not satisfy the requirements of a tribunal, the Court had to examine whether or not the applicant could challenge the decision before a body that did satisfy those requirements. Referring to its judgment in *Öztürk*,⁹⁵ the Court analysed the powers of both the Cassation Division of the cantonal court and the Federal Court with a view to discovering whether their reviewing powers had satisfied the requirements of a tribunal under Article 6(1). Considering that the Cassation Division lacked the powers of examining the facts as established by the administrative authorities,⁹⁶ of admitting new evidence and oral hearings, and was limited to reviewing the legality of the decision, the Court reaffirmed its position on the concept of a "tribunal with full jurisdiction" established in its *Albert and Le Compte* judgment.⁹⁷ It concluded that the Cassation Division was not a tribunal that satisfied the requirements of Article 6(1). Turning to the Federal Court, the Court concluded that this court did not satisfy the requirements of Article 6(1) either, since it could hear neither points of law nor of fact, but could only ensure that the process was not arbitrary. Thus no tribunal satisfying the requirements of Article 6(1) was available to the applicant, which therefore constituted a breach of the mentioned provision.

► *Obermeier v. Austria*⁹⁸

The applicant in this case was dismissed from his employment after his employer had obtained an authorisation from the Disabled Persons' Board (the board) exercising discretionary powers under the applicable statute. The Provincial Governor,

94. Ibid. § 67.

95. *Öztürk v. Germany* (op. cit.), p. 18.

96. See *Obermeier v. Austria* (op. cit.), p. 26.

97. *Albert and Le Compte v. Belgium*, § 29 (op. cit.), p. 24.

98. *Obermeier v. Austria* (op. cit.), p. 26.

who was authorised to hear appeals against the board's decisions, confirmed the authorisation for dismissal. The governor's decisions were subject to appeal before the Administrative Court. The applicant launched a series of lawsuits against his employer and the board in the Labour Courts and the Administrative Court concerning his suspension and dismissal from the company. The Administrative Court concluded that the administrative authorities did not abuse the boundaries of their discretionary powers and acted pursuant to the object and purpose of the law. The applicant then complained before the Court that he did not have access to a tribunal with full jurisdiction for the resolution of his case.

The Court was quick to note that neither the board nor the Provincial Governor could be considered to be a tribunal within the meaning of the Convention. Thus the Article 6(1) requirements would be satisfied only if their decisions were subject to appeal before a judicial authority with full jurisdiction. To that end, the Court analysed the law and practice of reviewing the decisions of the board by the Administrative Court and stated the following:

... the Austrian Administrative Court has itself inferred that the Administrative Court can only determine whether the discretion enjoyed by the administrative authorities has been used in a manner compatible with the object and purpose of the law. This means, in the final result, that the decision taken by the administrative authorities, which declares the dismissal of a disabled person to be socially justified, remains in the majority of cases, including the present one, without any effective review exercised by the courts.⁹⁹

The Administrative Court's limited review could not be considered to be an effective judicial review satisfying the requirements of a tribunal in Article 6(1). Having reached that conclusion, the Court stated that it was no longer necessary to analyse the scope of jurisdiction of the Administrative Court on the assessment of facts and law in order to assess whether or not its jurisdiction was sufficient within the meaning of the Convention.

► *Zumtobel v. Austria*¹⁰⁰

Zumtobel was the first case in which the Court examined the limited judicial review powers of an Administrative Court with regard to acts of administrative authorities. It concluded that they were compatible with the requirements of Article 6(1).

The Highway Authority of the Provincial Government initiated expropriation proceedings against the applicant, Zumtobel Partnership, and ordered expropriation of a parcel of land belonging to the applicant for the purpose of constructing a highway. The applicant unsuccessfully challenged the decision before the Constitutional Court. The matter came within the jurisdiction of the Administrative Court, but the appeals before the Administrative Court, as well as the appeals on points of law in the Supreme Court, were unsuccessful.

The Court noted the disagreement between the parties on whether or not the Highway Authority constituted a tribunal within the meaning of Article 6. The Court stated that the Constitutional Court could not qualify as a tribunal because its review was

99. Ibid. § 70.

100. *Zumtobel v. Austria* (op. cit.), p. 25.

limited to issues of constitutionality and not to the determination of facts. The Court went on looking at the scope of competence of the Administrative Court in order to determine whether it constituted a tribunal. The Court started by distinguishing the facts of this case from that of *Obermeier*, in which the Disabled Persons' Board enjoyed exclusive discretionary powers on employment disability matters. Unlike *Obermeier*, the power of the government office in this case (to take expropriation decisions) was not exclusively discretionary.¹⁰¹ The Court concluded that in this particular case the intensity of the review provided by the Administrative Court met the requirements of Article 6(1) because it carefully, and in detail, answered all the claims by the applicant and never declined to exercise its jurisdiction to determine the facts.

► *Fischer v. Austria*¹⁰²

This case concerned a revocation of a tipping licence by a land governor. The applicant appealed against this decision before the Minister of Agriculture and Forestry, claiming his right to be heard. The minister dismissed the appeal and held that in revocation procedures a hearing was not required. The applicant launched a lawsuit against the administrative authorities before the Administrative Court, requesting a hearing to seek to quash the decision, but the Administrative Court refused a hearing. It reasoned that a hearing was not required in the procedures before the administrative authorities and dismissed the applicant's claim. The Constitutional Court also dismissed the applicant's complaint, including the issue of the right to be heard.

The applicant complained before the Court that none of the state bodies that heard his case could be considered to be a "tribunal with full jurisdiction" within the meaning of Article 6(1).

The Court referred to its position on the Austrian Constitutional Court expressed in *Zumtobel* and affirmed that the latter did not qualify as a "tribunal with full jurisdiction" in accordance with the requirements of Article 6(1). Thus, the main question for the Court to determine was whether or not the Administrative Court met the mentioned requirements.

The Court distinguished the circumstances of this case from those in *Obermeier*, where the Disabled Persons' Board exercised exclusive discretion in authorising dismissal from employment, and found it similar to *Zumtobel*, where the exercise of the discretionary powers by the administrative authority were guided by criteria prescribed by the authorising statute. In this case, the decision to revoke the licence was not exclusively within the discretion of the administrative authorities and it was satisfied that the limited discretion was exercised in accordance with objective criteria. After examining the extensive discussion and reasoning of the Administrative Court, the Court concluded that the Administrative Court had considered all the submissions made by the applicant, point by point, and had never declined jurisdiction, including that concerning the clarification of facts. This was sufficient for the Court

101. It was for the Administrative Court to review the lawfulness of the expropriation decision of the Highway Authority which would require the Administrative Court to examine the lawfulness of the factual findings by the administrative authority.

102. *Fischer v. Austria* (op. cit.), p. 25.

to conclude that the scope of jurisdiction exercised by the Administrative Court had in this case met the requirements of a tribunal under Article 6(1).

The positions expressed by the Court in the *Obermeier*, *Zumtobel* and *Fischer* judgments demonstrated that the wider the discretionary powers of the administrative authority determining the “civil rights and obligations” of the applicant, the wider the scope should be of the judicial review exercised by the administrative courts upon appeal from the applicant. In cases where the administrative authority determining the applicant’s civil rights and obligations enjoyed wide or unbridled discretionary powers, as was the case in *Obermeier*, and where subsequent judicial review was limited, the Court is likely to hold that Article 6(1) was breached on the grounds of insufficient judicial review. On the other hand, where the domestic law specified the scope of the discretionary powers of the administrative authority determining the applicant’s civil rights and obligations, as in *Zumtobel* and *Fischer*, and the Administrative Court had jurisdiction to review the discretionary decision and strike it out if it contravened legal boundaries, the Court is likely to find that there had not been a breach of the requirements of Article 6(1) on the scope of jurisdiction of the national tribunal. In other words, the exercise of discretionary powers determining the applicant’s civil rights and obligations that were unreviewable by courts are in breach of Article 6(1), while any judicial review should be “sufficient” – such as the review of “decisive facts”.¹⁰³

► *Potocka and Others v. Poland*¹⁰⁴

In *Potocka*, the Court assessed the scope of jurisdiction of the Supreme Administrative Court of Poland, which tried the applicants’ case related to real property rights. Referring to its positions on tribunals whose review powers were limited to points of law, as expressed in *Zumtobel* and later confirmed in *Bryan*,¹⁰⁵ the Court analysed the scope of jurisdiction of the Supreme Administrative Court of Poland in light of the requirements of Article 6(1) and came to the following conclusions.

... the extensive reasoning given by that court in its judgment shows that it considered all the applicants’ submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining the relevant facts.¹⁰⁶

... the Supreme Administrative Court had regard, first, to the expediency aspect of the case and criticised the administrative authorities, under the head of procedural fairness, for their failure to conduct a detailed examination of the applicants’ submissions in respect of their claim to the right of perpetual use of the property in issue. That court further examined the lawfulness of the contested decisions and found them lawful, having regard to the fact that the 1990 application did not satisfy either the formal or the substantive criteria set by the applicable laws. It delivered a judgment which was carefully reasoned, and the applicants’ arguments relevant to the outcome of the case were dealt with thoroughly.¹⁰⁷

103. See the Court’s judgment in *I.D. v. Bulgaria*, No. 43578/98, 28 April 2005, for the concept of “decisive facts”.

104. *Potocka and Others v. Poland*, No. 33776/96, ECHR 2001-X.

105. See the analysis of *Bryan v. the United Kingdom*, 22 November 1995, Series A No. 335-A, on page 45.

106. *Potocka and Others v. Poland*, § 57 (op. cit.), p. 32.

107. *Ibid.* § 58.

Thus, even when the national Administrative Court has limited review, it might still comply with the requirements of a tribunal under Article 6(1) if it exercised “sufficient” review of the relevant law and facts.

► *I.D. v. Bulgaria*¹⁰⁸

In *I.D.*, the Court had to decide whether the judicial review of the domestic courts had been sufficient. The case concerned an applicant who was, on paper, employed as a dormitory supervisor and a facilities and social events co-ordinator by the Bulgarian Communist Party. In reality, however, she was employed as a typist – a position that did not appear in the staff table. The applicant felt pain and numbness in her arms and fingers, especially after periods of typing. The Diagnostic Expert Commission (DEC) examined the applicant and concluded that she was suffering from vegetative polyneuropathy of the upper limbs, and later from osteochondrosis cervicalis, which were included in the Table of Occupational Diseases. However, on the basis of the applicant’s job description as it appeared on paper, the DEC concluded that the diseases were non-occupational. The applicant appealed against the conclusion before the Central Diagnostic Expert Commission (CDEC) and submitted that her actual job was a typist, and requested admission of evidence. The CDEC refused to admit the evidence or witnesses on the applicant’s behalf, and endorsed the conclusion by the DEC. The applicant sued her employer, claiming that her conditions had developed as a result of her work. The domestic court heard the applicant’s witnesses and independent experts who concluded that her conditions could have been the result of her work as a typist. The court dismissed the applicant’s action, reasoning that it was an absolute condition for employer liability to obtain the relevant conclusion on occupational conditions from the specialised administrative bodies established for that purpose – in this case, from the DEC and CDEC. The appellate instance and the Supreme Court endorsed the trial judgment.

The applicant complained before the Court that none of the domestic judicial instances heard her case on its merits, because they accepted the findings of the administrative commissions as binding, and refused to admit new evidence. As a result, she complained that her “right to a court with full jurisdiction” under Article 6(1) had been breached.

The Court firstly recalled its previous case law in similar cases, *Obermeier and Terra Woningen B.V.*,¹⁰⁹ in which it held that where national courts were bound by the decisions of the administrative authorities, that did not in themselves meet the requirements of a tribunal under Article 6(1), they were in breach of the same provision. Thus the Court reiterated its established case law, according to which Article 6(1) required that either the administrative authorities determining civil rights or obligations must meet the requirements of Article 6(1), or the applicants should have access to a judicial authority with full jurisdiction to try both issues of law and fact. Unlike the national tribunals in *Zumtobel*, *Fischer* and *Potocka*, the national courts in this case showed

108. *I.D. v. Bulgaria* (op. cit.), p. 32.

109. *Terra Woningen B.V. v. the Netherlands*, 17 December 1996, Reports of Judgments and Decisions 1996-VI.

great deference to the administrative authorities' findings of fact and declined to review the facts that were decisive for the resolution of the case:

... the domestic courts examining the applicant's action did not themselves assess a fact which was crucial for the determination of the case and instead chose to defer to the findings of an administrative body ... They thus deprived themselves of jurisdiction to examine all questions of fact and law relevant to the dispute before them, as required by Article 6 § 1.¹¹⁰

While the "judicial" tribunals declined to exercise full jurisdiction, the administrative authorities (DEC and CDEC) themselves fell short of the Convention requirements of a tribunal, since they did not enjoy the independence of the executive, impartiality, security of tenure and other guarantees expected of judicial authorities under Article 6(1). Turning to the last question – whether or not there was any possibility under the domestic law to appeal the decisions of the administrative authorities to a judicial authority with full jurisdiction – the Court concluded that such a tribunal did not exist at the material time under Bulgarian law and practice. The Court restated that the remedies must be effective and accessible to individuals and it reasoned that the authorities had failed to demonstrate any effective remedy for the applicant to challenge the decisions of the DEC and CDEC under Bulgarian law.

► *Steininger v. Austria*¹¹¹

Steininger is an important authority clarifying the Court's approach in defining the elements of a tribunal under Article 6(1). In this judgment, the Court recapitulated its previous case law on the elements of a tribunal determining "civil rights and obligations", and reiterated that it had taken a different approach to reviewing the scope of competence of a tribunal determining a "criminal charge" imposed by administrative authorities. Whether or not the scope of competence of the domestic organ satisfies the requirements of a tribunal under the Convention depends, among other things, on the subject matter of the appeal against the administrative authorities' decision before the judicial bodies. A domestic court's purview of jurisdiction, and its review powers, might satisfy the requirements of a tribunal in a civil case, while in cases involving a criminal charge the Court might find that the same court's range of competence and review powers do not satisfy those requirements. Thus, when administrative authorities impose administrative penal sanction on individuals, the scope of review powers of the judicial authority hearing the appeal against the sanction is expected to be wider than that of the review powers of the judicial authority determining the civil rights and obligations.

In this case, the applicant company challenged the decision of the Agriculture Authority (AMA) on imposing surcharges before the Minister of Agriculture and requested an oral hearing. The minister dismissed the complaint without a hearing. The applicant challenged the administrative decisions before the Administrative and Constitutional Courts, claiming that the surcharge violated its property rights. The Administrative and Constitutional Courts dismissed the applicant's claims without hearing the merits of the case.

110. *I.D. v. Bulgaria*, § 50 (op. cit.), p. 32.

111. *Steininger v. Austria* (op. cit.), p. 24.

The applicant company complained before the Court that there was no tribunal available to it for challenging the imposed surcharges. The main issue before the Court was whether or not the applicant had the opportunity to gain access to a tribunal that satisfied the requirements of Article 6(1).

The Court first excluded the AMA and the minister as tribunals for the purposes of Article 6(1) on the grounds that both were administrative bodies that formed part of the government vested with administrative functions. The Court then considered the judicial bodies, the Administrative and the Constitutional Courts, to determine whether or not they could qualify as tribunals within the meaning of the Convention. Since this case concerned an imposition of surcharges that were criminal in nature, the Court held that the Constitutional Court could not be considered to be a “judicial body with full jurisdiction” determining criminal charges. The final and decisive question before the Court was whether or not the Administrative Court had exercised “full jurisdiction” to be qualified as a tribunal. The Court referred to its previous case law on the Austrian Administrative Court’s limited review in administrative criminal justice cases, and reiterated that such limited review was insufficient for the Administrative Court to be qualified as a tribunal:

In the present case ... the power of review of the Administrative Court is limited ... and has already been found by the Court insufficient for regarding it a tribunal within the meaning of the Convention in respect of proceedings that were of a criminal nature for the purposes of the Convention. In this respect the Court cannot overlook that the Austrian Constitutional Court itself has considered that the limited review carried out by the Administrative Court was insufficient in respect of criminal penalties within the meaning of the Convention.¹¹²

The Court reasoned that the Administrative Court’s summary decision contained simple reference to its previous decisions on similar matters and refused to consider the applicant’s complaints relating to facts, in which case it could not be regarded as a tribunal vested with full reviewing powers required of tribunals determining “criminal charges”.

► *Fazliyski v. Bulgaria*¹¹³

In *Fazliyski*, the applicant was dismissed from his job at the Ministry of Internal Affairs on the grounds of a psychological assessment report conducted by an institute subordinate to the ministry. The applicant sought judicial review of the dismissal in administrative jurisdictions and challenged in particular the credibility of the psychological assessment statement. The Supreme Administrative Court dismissed the applicant’s claims and refused to review the psychological assessment report on the grounds that such assessments were non-reviewable. The appeal on points of law was also rejected.

The Court first examined the scope of competence of the Supreme Administrative Court in light of the requirements of a tribunal under Article 6(1). The Supreme Administrative Court had not only relied on the psychological assessment test

112. Ibid. § 56.

113. *Fazliyski v. Bulgaria* (op. cit.), p. 25.

conducted by the institute, but also felt bound by it and refused to exercise its jurisdiction of review of substantive and procedural aspects of the assessment.¹¹⁴

... in its exclusive reliance on that assessment in the applicant's case the Supreme Administrative Court refused independently to scrutinize a point which was crucial for the determination of the case, and thus deprived itself of jurisdiction to examine the dispute before it.¹¹⁵

The second question that the Court had to answer was whether or not the institute that had conducted the assessment satisfied the requirements of a tribunal under Article 6(1). The Court's finding was negative, since the institute was subordinate to the Ministry of Internal Affairs, did not possess the judicial functions characteristic of judicial bodies and was not independent from the executive. The last and decisive question was whether the psychological assessment test was directly amenable to judicial review under domestic law and practice. The Court found that there was no such possibility under the domestic law.

No justification has been offered for this situation. It is true that the applicant held the rank of major at the National Security Directorate of the Ministry of Internal Affairs and that his duties related to the gathering and processing of intelligence ... It is also true that this Court has, albeit in different contexts, held that legitimate national security considerations may justify limitations on the rights enshrined in Article 6 § 1 of the Convention ... However, neither the Supreme Administrative Court in its reasoning nor the Government in their observations sought to justify this denial of access to a court with adequate jurisdiction in terms of either the legitimacy of the aim pursued or its proportionality. It is noteworthy in this connection that in other cases the Supreme Administrative Court held that an assessment of mental fitness for work which prompts the dismissal of an officer employed by the Ministry of Internal Affairs should be amenable to judicial scrutiny even if it touches upon national security, and that in May 2006 the law was changed to provide for direct judicial review of the mental fitness assessments of all members of the Ministry's staff.¹¹⁶

The Court noted the similarities of this case with the I.D. case. In both cases, the domestic courts felt bound by the findings of fact from the administrative authorities that could not be considered as tribunals themselves, and refused to review the substance of the decisions of those administrative authorities (an assessment of psychological fitness to work and an assessment of occupational disease). In both cases, the same domestic courts (the Constitutional and the Administrative Court) also demonstrated highly deferential approaches to administrative decision making. The Court found that, in such situations, the applicants had been deprived of access to justice, and to an effective remedy. Such an approach deprived those courts of the status of a tribunal vested with "full jurisdiction" for the purposes of Article 6(1).

► *Galina Kostova v. Bulgaria*¹¹⁷

In this case, the Minister of Justice decided to strike the applicant off the list of persons qualified to act as liquidator of insolvent companies on the grounds that

114. Compare with Obermeier (op. cit.), p. 26.

115. *Fazliyski v. Bulgaria*, § 59 (op. cit.).

116. *Ibid.* § 62.

117. *Galina Kostova v. Bulgaria* (op. cit.), p. 25.

she failed to complete her tasks within statutory time limits. The applicant sought judicial review in administrative jurisdictions on the basis (among other grounds) that the decision was disproportionate. The Supreme Administrative Court reviewed the applicant's actions that served as the basis for the exclusion from the list, and dismissed the complaint on the grounds that there was no breach of substantive law. It further refused to review the disputed decision under the principle of proportionality, reasoning that the disputed administrative action was not reviewable on such grounds. The applicant complained before the Court of the refusal of the Supreme Administrative Court to review the minister's decision on the grounds of the principle of proportionality.

Pursuant to its established case law, the Court began examining the scope of competence of the Supreme Administrative Court. As mentioned in the *Fazliyski* case, the scope of competence of administrative jurisdictions deals with whether or not a refusal from national administrative jurisdictions to review a finding of fact by an administrative authority that was decisive for the resolution of a case could satisfy the requirements of Article 6(1) regarding the right to a tribunal. After examining the powers of the Supreme Administrative Court, the Court noted that in this case it had the power to quash the minister's decision on a number of grounds and thereby distinguished this case from those where the administrative courts were unable or unwilling to review administrative decision making on points of law or fact.¹¹⁸ The narrow issue before the Court was thus whether the refusal of the Supreme Administrative Court to review the minister's decision on the grounds of proportionality was compatible with the requirements of Article 6(1) on tribunals:

... the Court notes that, apart from removal from the list of persons qualified to act as liquidators, Bulgarian law does envisage lighter sanctions – fine and removal from a particular case – which can be imposed on a liquidator by the insolvency court within the framework of a particular insolvency case ... However, under the 1991 Act the power to impose those sanctions is not given to the Minister of Justice, and Article 6 § 1 of the Convention does not in itself guarantee any particular content for civil “rights and obligations” in the substantive law of the Contracting States ... It is not for this Court, in the examination of complaints under Article 6 § 1 of the Convention, to substitute its own views as to the proper interpretation and content of domestic law.¹¹⁹

In accordance with its “no fourth instance court” policy, the Court refused to engage in the assessment of whether or not the interpretation by the Supreme Administrative Court of the domestic requirements and applicability of the principle of proportionality was correct. Article 6(1) only required the Court to assess the range of the reviewing powers of the Supreme Administrative Court of Bulgaria, which, it concluded, was sufficient to satisfy the intensity of review required by Article 6(1).

118. See, for example, *I.D. v. Bulgaria* (op. cit.), p. 102; *Fazliyski v. Bulgaria* (op. cit.), p. 25; and *Obermeier v. Austria* (op. cit.), p. 26.

119. *Galina Kostova v. Bulgaria*, § 64 (op. cit.), p. 25.

► *Baka v. Hungary*¹²⁰

In *Baka*, the applicant was elected President of the Supreme Court and the National Council of Justice of Hungary for six years. In those capacities the applicant provided official opinions on certain pieces of legislation affecting the functioning of the judiciary as proposed by the new government. During his term as President, the legislation¹²¹ proposed by the government, and adopted by parliament, terminated the mandates of the President of the Supreme Court and the National Council of Justice, and its members. As a consequence of this, the applicant's position as a judge was terminated three-and-a-half years before the end of his terms, and the applicant lost his presidential remuneration and pension supplement for life.

The applicant complained before the Court of the breach of his "right to court" under Article 6(1), since there was no possibility under the domestic law to review the legislation at the constitutional level, not even by the Constitutional Court. Applying the two-limb *Eskelinen* test,¹²² the Court found that the applicant's claim was within the scope of Article 6(1) under its civil head, and since the case was within the reach of Article 6(1) and the *Eskelinen* "exclusionary" tests could not apply, the Court concluded that the exclusion of the applicant from gaining access to a domestic court to contest his premature dismissal from the judicial post was in breach of the "right to court" under Article 6(1). Thus an incorrect application by a government of the *Eskelinen* two-pronged test might deprive a public servant applicant of the right to a court as required by Article 6(1).

B. Independence and impartiality

As mentioned in the introduction to this chapter, the guarantees of "independence and impartiality" are expressly mentioned in the text of Article 6(1). The following part presents cases in which the Court has clarified the content of those requirements.

The cases listed below have become particularly important in setting up criteria for defining the independence and impartiality of a tribunal.

- ***Ringeisen v. Austria***:¹²³ one of the earliest and most important cases of the Court, on the interpretation of the notion of "civil rights and obligations" and the "independence and impartiality" of a "tribunal" under Article 6(1).
- ***Sramek v. Austria***:¹²⁴ on the question of impartiality and the outward appearance of independence of a regional authority.
- ***Procola v. Luxembourg***:¹²⁵ on questions over the impartiality of the Conseil d'Etat, as a result of its members' dual functions in the same case.

120. *Baka v. Hungary*, No. 20261/12, 27 May 2014.

121. Bill No. T/5005 on the Transitional Provisions of the Fundamental Law of Hungary, introduced on 20 November 2011.

122. *Vilho Eskelinen and Others v. Finland* (op. cit.) p.15. See analysis above, pp. 18-19.

123. *Ringeisen v. Austria* (op. cit.), p. 11.

124. *Sramek v. Austria* (op. cit.), p. 25.

125. *Procola v. Luxembourg*, 28 September 1995, Series A No. 326.

- ▶ ***Bryan v. the United Kingdom***:¹²⁶ on the independence of a housing and planning inspector, and a High Court's jurisdiction.
- ▶ ***McGonnell v. the United Kingdom***:¹²⁷ on the lack of "objective impartiality" of a bailiff possessing both judicial and non-judicial functions.
- ▶ ***Wettstein v. Switzerland***:¹²⁸ on whether an Administrative Court had satisfied the requirement of "objective impartiality".
- ▶ ***Kleyn and Others v. the Netherlands***:¹²⁹ on whether there were objective grounds justifying the applicants' fear of the lack of impartiality of an Administrative Jurisdiction Division within a Council of State due to its dual functions. A leading case in which the Court developed the criteria for determining whether a body can be considered to be "independent" and what constitutes involvement in the same case.
- ▶ ***Sacilor Lormines v. France***:¹³⁰ on the appearance of independence of the members of the Conseil d'Etat, and on the exercise of judicial and advisory functions concerning "the same case" or "the same decision".
- ▶ ***Ringeisen v. Austria***¹³¹

Ringeisen is one of the earliest and most important authorities of the Court, on the interpretation of the notion of "civil rights and obligations" in Article 6(1). The case also presents an interesting judgment on the "independence and impartiality" of a tribunal under the same provision.

In this case, the applicant concluded a land transaction and submitted the contract of sale to the District Real Property Transaction Commission (RPTC) for approval. The application was refused, and the applicant unsuccessfully appealed against the refusal to the Regional RPTC. The applicant appealed against the regional authority's rejection before the Constitutional Court claiming that the members of the authority, including its president, were biased. The Constitutional Court rejected this appeal. Before the Court, the applicant complained of the violation of his right to a fair trial on the grounds that the Regional RPTC was biased and consequently could not be regarded as an impartial tribunal within the meaning of Article 6.

The Court disagreed with the applicant and concluded that the proceedings had not been unfair. First, the Court found that the regional authority was to be regarded as a tribunal for the purposes of Article 6(1) and that it satisfied the requirements of "independence":

... the Regional Commission is a "tribunal" within the meaning of Article 6, paragraph (1) ... of the Convention as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees.¹³²

126. *Bryan v. the United Kingdom* (op. cit.), p. 32.

127. *McGonnell v. the United Kingdom*, No. 28488/95, ECHR 2000-II.

128. *Wettstein v. Switzerland* (op. cit.), p. 28.

129. *Kleyn and Others v. the Netherlands* (op. cit.), p. 25.

130. *Sacilor Lormines v. France*, No. 65411/01, ECHR 2006-XIII.

131. *Ringeisen v. Austria* (op. cit.), p. 11.

132. *Ibid.* § 95.

The Court then turned to answer the main complaint under the heading of whether or not the Regional Commission could be regarded as an impartial tribunal:

In the case of such a board with mixed membership comprising, under the presidency of a judge, civil servants and representatives of interested bodies, the complaint made against one member for the single reason that he sat as nominee of the Upper Austrian Chamber of Agriculture cannot be said to bear out a charge of bias. The same holds true for the complaint made against a member who was alleged by Ringeisen to have made certain statements the precise tenor of which the Regional Commission was, moreover, at pains to restore ... Nor, finally, can any grounds of legitimate suspicion be found in the fact that two other members had participated in the first decision of the Regional Commission, for it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.¹³³

The Court concluded that even if all the allegations regarding the impartiality of the members of the regional authority were true, there would still not have been a breach of the Article 6(1) requirements of impartiality of a tribunal.

► *Sramek v. Austria*¹³⁴

In *Sramek*, the applicant concluded a real estate transaction and submitted the contract to the local Real Property Transactions Authority (RPTA) for approval. The Transactions Officer appealed this approval claiming that it was contrary to the social and economic interests of the region. A hearing was held in the Regional RPTA during which it was decided to refuse the approval of the transfer of title. The decision was appealed to the Constitutional Court, which dismissed the appeal and affirmed that the regional authority was a tribunal within the meaning of Article 6 of the Convention.

In her submission to the Court, the applicant claimed that the Regional RPTA was not an “independent and impartial tribunal”. The Court disagreed with all the assertions raised by the applicant except for one – on the question of impartiality of the regional authority. Even though the applicant did not provide the actual evidence of bias by the member of the authority subordinate to the Transactions Officer, the Court concluded that, in order to determine whether a tribunal can be considered to be independent, appearances may also be of importance:

... the present case is distinguishable from the *Ringeisen* case in that the Land Government, represented by the Transactions Officer, acquired the status of a party when they appealed to the Regional Authority against the first-instance decision in Mrs *Sramek*'s favour, and in that one of the three civil servants in question had the Transactions Officer as his hierarchical superior. That civil servant occupied a key position within the Authority: as rapporteur, he had to set out and comment on the results of the investigation and then to present conclusions; the secretariat was provided by his department, namely division III b. 3 ...

As was pointed out by the Government, the Transactions Officer could not take advantage of his hierarchical position to give to the rapporteur instructions to be followed in the handling of cases ... and there is nothing to indicate that he did so on the present occasion.¹³⁵

133. Ibid. § 97.

134. *Sramek v. Austria* (op. cit.), p. 25.

135. Ibid. § 41.

The Court found that the involvement of the Transactions Officer as a party to the case during the appeal of the local authority's decision before the regional authority gave the applicant reasons for legitimate doubts as to the impartiality of the authority. In particular, the Court found it unacceptable that one of the three civil servant members of the authority was subordinate to, and reported to, the Transactions Officer. Such a situation, the Court concluded, could not inspire the public trust that tribunals must enjoy in a democratic society. Because of the composition of the regional authority, there was an appearance of lack of independence of the executive government, which was incompatible with the requirements of an independent and impartial tribunal under Article 6(1).

► *Procola v. Luxembourg*¹³⁶

In a number of European countries, the Conseil d'Etat, or Council of State, operates as the highest administrative jurisdiction that sometimes hears a case as the first and only instance. One of the characteristics of such councils is that they combine their judicial function with a number of other non-judicial functions, such as providing advisory opinions to the government on proposed legislation. Another characteristic is that they are technically located within the structure of the executive government. Because of the variety of functions and organisational aspects, applicants frequently challenge the impartiality and independence of these bodies before the Court.

In *Procola*, the Court had to assess the impartiality of the Conseil d'Etat of Luxembourg in light of its dual function as both an advisory and judicial body. The main legal question before the Court was whether or not the applicant's fear as to whether the four members of the council exercising both advisory and judicial functions in the same case (thus lacking impartiality) was justified:

The Court notes that four members of the *Conseil d'Etat* carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'Etat* the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, *Procola* had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given.¹³⁷

The Court found that this was a sufficient and legitimate ground for the applicant to fear that the tribunal trying the case was not impartial, and that the applicant's fear was justified. The dual function of the members of the Conseil d'Etat constituted a breach of the requirements of impartiality of a tribunal under the provision of Article 6(1).

► *Bryan v. the United Kingdom*¹³⁸

In this case the applicant raised two issues with regard to the elements of a tribunal under the Convention – the impartiality and independence, and the scope of review of domestic tribunals.

136. *Procola v. Luxembourg* (op. cit.) p. 38.

137. *Ibid.* § 45.

138. *Bryan v. the United Kingdom* (op. cit.), p. 32.

Under the Town and Country Planning Act, the applicant received an enforcement notice from the administrative authority to demolish two brick buildings on his land and to remove the demolished materials within three months. Upon the applicant's appeal to the Secretary of State for the Environment, a Principal Housing and Planning Inspector was appointed to conduct the examination. The inspector, who is appointed by the Secretary of State on approval of the Lord Chancellor, is a civil servant and a salaried member of the Department of the Environment. The inspector rejected the applicant's appeal, but allowed the extension of demolition time from three to six months. The High Court dismissed the applicant's appeal on points of law against the decision. The leave to appeal to higher instances was also rejected. The Court had to decide (a) whether the inspector had satisfied the requirements of Article 6(1), and (b) whether the High Court enjoyed the "independence and impartiality" required by the Convention.

On the first issue, the Court concluded that the review exercised by the inspector did not satisfy the requirements of Article 6(1), because the Secretary of the State could, at any time, even during the proceedings, revoke the power of the inspector to exercise a review of the appeal. The mere existence of such power, though rarely exercised in practice, was sufficient to conclude that the inspector was dependent on the executive government, which was incompatible with the Convention's requirement of independence.

On the second issue, the Court first noted that the High Court's jurisdiction was narrower than in the cases of *Zumtobel* and *Obermeier*. The High Court would normally confine its examination to points of law, and would not review the findings of fact by the inspector, who was experienced in planning law matters. In this regard, the Court noted that it was not uncommon at the time within Council of Europe member states to exclude a rehearing of issues of fact heard in the course of administrative procedure from judicial review by courts with limited review for factual matters. Though the High Court would not substitute its own judgment for that of the specialist inspector on matters of fact, the Court was satisfied that it had the power to make sure that the findings of fact, or the inferences drawn by the inspector, were neither "perverse nor irrational". In addition to the powers of quashing such decisions, under English law, the High Court was empowered to review the inspector's decision on a number of procedural grounds. Finding no violation of the requirements of Article 6(1) with regard to the sufficiency of the review of the High Court, the Court reasoned:

Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialized areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1 (art. 6-1) ... It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.¹³⁹

139. *Ibid.* § 47.

► *McGonnell v. the United Kingdom*¹⁴⁰

In *McGonnell*, the applicant made a number of planning applications requesting a permit for the residential use of land, which were all refused. An appeal was filed with the Royal Court comprising a judge who had presided as the deputy bailiff during the States of Deliberation when the Detailed Development Plan No. 6 (DDP6) was adopted. This was the very act which was at issue in the applicant's case before the Royal Court. The applicant contended before the Court that non-judicial functions of the bailiff gave rise to close connections between the bailiff, as a judicial officer, and the legislative and executive functions of government, and that the bailiff no longer possessed the independence and impartiality required under Article 6(1). The applicant's complaint concerned the appearance of (rather than the actual) independence and impartiality of the Royal Court.

Using its "judicial function" test, the Court first noted that the bailiff possessed both judicial and non-judicial functions.¹⁴¹ It then proceeded to analyse the question of whether or not the bailiff's non-judicial functions interfered with the requirements of Article 6(1) on the independence and impartiality of a tribunal. The mere fact that the bailiff had previously participated in the adoption of the plan as a deputy bailiff, and later presided over the applicant's trial in the Royal Court, was sufficient to justify the applicant's fear that the bailiff might be influenced by his prior decision making.

The Court stressed that it was against the requirements of independence and "objective" impartiality under Article 6(1) if a judge was deciding a case in which he or she had previously participated. The Court compared the circumstances of this case with those in *Procola*, where four of the five members of the Conseil d'Etat exercised both advisory functions to the government, and judicial functions in relation to the applicant in the same case:

... in both cases a member, or members, of the deciding tribunal had been actively and formally involved in the preparatory stages of the regulation at issue. As the Court has noted above, the Bailiff's non-judicial constitutional functions cannot be accepted as being merely ceremonial. With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.¹⁴²

The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6.¹⁴³

Though none of the provisions of the Convention require a separation of powers, nor impose any constitutional doctrine upon the states parties, domestic systems

140. *McGonnell v. the United Kingdom* (op. cit.), p. 38.

141. For the Court's analysis on the combination and exercise of "dual functions" by the same bodies see *Procola v. Luxembourg* (op. cit.), p. 38; *Kleyn and Others v. the Netherlands* (op. cit.), p. 25; and *Sacilor Lormines v. France* (op. cit.), p. 39.

142. *McGonnell v. the United Kingdom*, § 55 (op. cit.), p. 38.

143. *Ibid.* § 57.

must be organised in such a way to avoid situations where judicial, executive and legislative functions exercised by the same official, or body, could lead to legitimate and justified doubts about their impartiality to an objective observer.

► *Wettstein v. Switzerland*¹⁴⁴

In *Wettstein*, the applicant was involved in parallel sets of proceedings, with the same person as a judge in one proceeding and as legal representative in another. The Court found that the applicant had reason to fear a lack of impartiality from the judge.

The applicant was involved in proceedings before the Administrative Court and the Federal Court relating to disputes on property rights. The lawyers of the opposing parties of those disputes (Mr W. and Mr R.) shared office premises with another lawyer (Mr L.), who together with Mr R. also acted as a part-time administrative judge in the Administrative Court in the same canton. During one of the applicant's property disputes, the bench of the Administrative Court was composed of five judges involving Mr R. and Mr L. as part-time judges. The Administrative Court rejected the applicant's action. The Federal Court, upon appeal from the applicant, noted the fact of interrelated interests that the part-time judges Mr L. and Mr R. might have held in contravention of the Constitutional requirement of impartiality, but dismissed the appeal by reasoning that the applicant had failed to demonstrate their actual bias in the contested decision. The applicant complained before the Court of the lack of impartiality of the two Administrative Court judges, Mr R. and Mr L. Those judges had themselves, or through their office partner Mr W., acted against the applicant in other proceedings, in violation of the requirement of impartiality under Article 6(1).

The Court briefly mentioned that issues of subjective impartiality were not involved in this case, and turned to assessing the question of whether or not the Administrative Court had satisfied the requirement of "objective impartiality" when deciding the applicant's case. The Court particularly stressed the fact that in the applicant's case before the Administrative Court, Mr R. was acting as a part-time judge, while in the meantime acting as a legal representative of another party opposing the applicant in the Federal Court. This fact was sufficient for the Court to conclude that in the proceedings before the Administrative Court, the applicant could have had legitimate fears that Mr R. could still view him as an opponent. Finally, the Court noted that the fact that Mr W., who shared office space with the judges Mr R. and Mr L., and represented the applicant's opponent in another proceeding, could contribute to the applicant's fear of lack of impartiality in the Administrative Court. The Court thus held that the requirement of an impartial tribunal under Article 6(1) had been breached.

In the two cases against the Netherlands and France presented below (*Kleyn, Sacilor Lormines*), the Court was required to determine whether or not the Dutch Council of State, and the French Conseil d'Etat, could be considered to be independent and impartial tribunals for the purposes of Article 6(1), considering the fact that those bodies exercised a number of other functions, including advisory and judicial functions. In both cases the Court concluded that the applicants' fear of the lack of impartiality

144. *Wettstein v. Switzerland* (op. cit.), p. 28.

of the councils on the ground of combined advisory and judicial functions was not justified, therefore no breach of the Article 6(1) requirements was found.¹⁴⁵

► *Kleyn and Others v. the Netherlands (GC)*¹⁴⁶

In this case, the Court reasoned that the applicant's fear of the lack of impartiality of a Division of the Council of State could not be justified. The Council of State had provided an advisory opinion on the Transport Infrastructure Planning Bill, which was later adopted by parliament. On the basis of this legislative act, the government decided to build new railways passing near a number of residential houses, causing nuisance and vibration. The government provided for a number of measures for the reduction of the effects of the railway on the nearby residents. The applicants appealed the relevant administrative regulations in the Administrative Jurisdiction Division of the Council of State (the division) complaining of the negative effects of the railway route on their households. The division's bench, composed of three councillors, heard, and dismissed, the applicants' appeals on a number of grounds. They challenged both the impartiality of the division, and the councillors hearing their case. The applicants reasoned that it was incompatible with the requirements under Article 6(1) for the Plenary Council of State to provide positive advice to the government on the proposed legislation, and members of the same council to apply the adopted legislation against them. The Special Chamber of the division rejected the challenge in part, and found it inadmissible in part. The division made a decision on the merits of the appeals and rejected a number of appeals and upheld other appeals awarding relevant costs.

The applicants complained before the Court that the division was not an independent and impartial tribunal under the requirements of Article 6(1), and reasoned that the Council of State exercised both advisory and judicial functions. The Court first mentioned that no issue arose with regard to the independence of the Council of State regarding the manner of appointing its members and the terms of office. The Court further noted the lack of any indication by the applicants of insufficient guarantees of independence by the Council of State, and held that no indication of any subjective bias among the councillors could be found. The main legal issue before the Court was thus whether or not there were objective grounds justifying the applicants' fear of the lack of impartiality of the division in view of its advisory and judicial functions.

The Court distinguished this case from the *Procola* and *McGonnell* cases, which was decisive for the outcome of this case. The Council of State had provided an advisory opinion to the government on the Transport Infrastructure Bill, which established the procedural framework for decision making in a major transport infrastructure, whereas the applicants had been affected by and appealed against the specific routing decisions of the executive authorities. The Court concluded that, unlike in

145. Compare and contrast with the Court's conclusions in *Procola v. Luxembourg* above, where the Court found breach of the requirement of impartiality of Article 6(1) on the grounds that the exercise of advisory and judicial functions by the four members of the Judicial Committee of the Conseil d'Etat cast doubt on its "structural impartiality".

146. *Kleyn and Others v. the Netherlands* (op. cit.), p. 25.

the two cases above, in Kleyn and Others the trying matters of fact in the division were not involved in “the same case” or “the same decision” as such:

In the present case the Plenary Council of State advised on the Transport Infrastructure Planning Bill, which laid down draft procedural rules for the decision-making process for the supra-regional planning of new major transport infrastructure. The applicants’ appeals, however, were directed against the routing decision, which is a decision taken on the basis of the procedure provided for in the Transport Infrastructure Planning Act. Earlier appeals against the outline planning decision are not at issue as they were based on a different legal framework.¹⁴⁷

The decisive factor in this case, which was absent in Procola and McGonnell, was the Court’s approach on what constituted involvement in “the same case”. The Court concluded that, in the circumstances of this case, the applicants’ fears of the lack of impartiality of the division’s composition could not be objectively justified, which meant that there had been no breach of Article 6(1).

► *Steck-Risch and Others v. Liechtenstein*¹⁴⁸

In Steck-Risch and Others, two plots of land belonging to the applicants were designated as non-construction land by the area zoning plan adopted by the municipality, later confirmed by the government. The applicants maintained that the designation of their lands as non-building areas amounted to *de facto* expropriation and claimed compensation for the damages they incurred, which the Government of Liechtenstein, sitting in camera, dismissed. The applicants appealed this decision to the Administrative Court arguing, in particular, that the elements on which the government based its decision had not been established in an adversarial hearing. The Administrative Court dismissed the applicants’ appeal, and the applicants filed a constitutional complaint with the Constitutional Court arguing that the Administrative Court failed to conduct an adversarial hearing. After being notified of the five-member panel of the Constitutional Court, the applicants filed a motion challenging the impartiality of judge H. H. on the grounds that judge H. H. was a partner in a law firm of judge G. W., who was presiding over the proceedings in the Administrative Court. The Constitutional Court dismissed the applicants’ complaints, including the motion.

The Court disagreed with the applicants and held that Article 6(1) had not been violated, because the applicants’ fear that judge H. H. was biased could not be objectively justified. The Court drew parallels between this and the Wettstein case, in which the Court found that the applicants had had a legitimate reason to fear that the judge was biased because the same judge had acted as the legal representative of the opponent of the applicant in another case. By contrast, in this case, neither judge H. H. nor judge G. W. had exercised dual functions in the same case involving the applicant. The Court noted that, though sharing office space in a law firm might create an appearance justifying the applicants’ fears, it decided to analyse the particular circumstances of the case to avoid making abstract evaluations on whether or not the sharing of offices in a law firm by two judges was compatible with the

147. Ibid. § 199.

148. *Steck-Risch v. Liechtenstein*, No. 63151/00, 19 May 2005.

requirements of impartiality under Article 6(1). The Court pointed to the following factors in finding that the applicants' fears were unjustified.

- ▶ Judge H. H. and judge G. W. only shared office space, which did not involve financial or professional dependence. The two judges did not earn a common income in the law firm.
- ▶ This case was different from *Sramek* and similar cases, where the judge was subordinated to other officers. Neither of the two judges in this case were subordinated to each other nor to external entities.
- ▶ Quashing of a lower court's judgment was part of the normal functioning of a judicial system, which did not cast doubt on the competence of the judge in the lower court.
- ▶ There was nothing indicating close friendship between the two judges, nor was there anything pointing to the fact that they had shared or discussed sensitive information about this case.

The mere fact that the lower and higher courts' judges shared office space could not justify the applicants' fear that judge H. H. had lacked impartiality in their case.

▶ *Sacilor Lormines v. France*¹⁴⁹

One of the main questions in *Sacilor Lormines* was the appearance of independence of the members of the Conseil d'Etat (the conseil). The Court noted that what is decisive is whether the fear of the party concerned can be held to be "objectively justified". Another important issue was whether there had been an exercise of judicial and advisory functions concerning "the same case" or "the same decision". The applicant company launched procedures for the termination of its iron extraction mine operation concessions. The renunciation procedure was over when the competent authority accepted the renunciation. During this process, the administrative authorities imposed a number of measures and obligations on the applicant, which the applicant unsuccessfully challenged before the Minister of Economic Affairs, Finance and Industry, and later before the conseil.

The applicant complained before the Court of a lack of impartiality and independence on the part of the conseil, and put forward two groups of arguments, one against the independence and impartiality of the members of the conseil, the other against the combination of advisory and judicial functions within the same institution.

On the manner of appointment and careers in the conseil, the applicant contended that one of the senior members of the conseil sitting on the bench that delivered the judgment dismissing the applicant's complaints was subsequently appointed Secretary General of the Ministry of Economic Affairs, Finance and Industry – the same administrative authority whose actions the applicant was challenging before the conseil. The applicant further asserted that the members of the conseil were in practice open to extraneous influences due to an intermingling of administrative and judicial careers and functions within the conseil, as well as the fact that all members were appointed by the Cabinet and were not members of the legal profession, unlike

149. *Sacilor Lormines v. France* (op. cit.), p. 39.

the members of the Conseil d'Etat of Luxembourg.¹⁵⁰ The applicant concluded that, under these circumstances, one could not obtain a truly independent judge in the conseil, which was in contravention of the requirements of Article 6(1).

On the duality of advisory and judicial functions, the applicant contended that the conseil was not an independent and impartial tribunal because its judicial division was considering the same legal questions concerning mining law that its administrative divisions considered during the reforms of that legislation. The applicant complained that where the administrative divisions of the conseil provided legal advice to the government, in practice the judicial division could not make rulings contrary to those legal positions.

The Court first noted that the “organic” connection of the conseil with the government was not sufficient for it to lack independence and impartiality. The mere fact that a judicial officer was appointed by the executive government was not sufficient to conclude that the manner of appointment of the judge deprived the judge of his or her independence. One of the main legal questions before the Court was whether or not the national law and practice provided sufficient guarantees for the “appearance of independence” of the Judicial Division of the Conseil (the judicial division). Pointing to the fact that the senior member of the conseil, who participated in the deliberations in the applicant’s case, was later appointed Secretary General of the Ministry of Economic Affairs, Finance and Industry, the Court found that it could objectively justify the applicant’s fear on the lack of impartiality of the conseil, which was in breach of Article 6(1).

Turning to the last question on the exercise of advisory and judicial functions by the conseil, the Court repeated its well-established position that the Convention does not impose any constitutional theory on the separation of powers on states. As a result, the Court refused to review in abstract whether or not such combination of functions was compatible with the Convention. However, it agreed to answer a specific question on the requirements of Article 6(1) – whether or not the advisory opinion of 1997 provided by the Public Works Division of the conseil on the mining legislation prejudged the ruling of the judicial division in 2000 in the applicant’s case.

The Court noted that there was nothing in the case suggesting that members of the judicial division had been involved in the preparation of the opinion by the Public Works Division, which distinguished the circumstances of this case from those in *Procola*, in which four of the five members had been directly involved in both advisory and judicial functions in the same case. The Court had to ascertain whether or not the questions submitted to the Public Works Division, and the dispute examined by the judicial division, involved the “same question” or the “same decision” in the applicant’s case. In *Kleyn and Others*, the Court answered a similar question in the negative and found that there had not been a breach of the Article 6(1) requirement of impartiality of a tribunal because of the combination of advisory and judicial functions. In this case, the advisory opinion of 1997 concerned the powers of the administrative authorities regarding mining companies on the prevention of mining-related risks, while the applicant’s litigation concerned the question of whether

150. See *Procola v. Luxembourg* (op. cit.), p. 38.

or not regulatory measures could still be imposed on the applicant company, considering the fact that it had stopped operating its mines and had filed renunciation of its mining concessions. The Court admitted that although the legal questions were clearly related, similar to *Kleyn and Others*, it concluded that they did not constitute the “same decision” or the “same case”. Thus the applicant’s fear that the judicial division was biased in delivering its ruling in 2000 on the grounds of the opinion of the Public Works Division in 1997 was not objectively justified.

► *Tsfayo v. the United Kingdom*¹⁵¹

In *Tsfayo*, the domestic court was found not to have jurisdiction to determine the central issue in the dispute. The applicant had obtained a housing and council tax benefit from her local council. On the grounds that she failed to renew her application for the benefits, the council decided to cease the benefits and refused to consider a backdated renewal application pointing to a lack of “good cause”. The applicant appealed the decisions before the Hammersmith and Fulham Council Housing Benefit and Council Tax Benefit Review Board (the HBRB), consisting of three councillors from the council, which dismissed the appeal. The applicant contended that the HBRB was not an impartial and independent tribunal under Article 6(1). She sought judicial review of the HBRB’s rejection before the High Court, which rejected her application for leave to apply for judicial review. The High Court reasoned that the HBRB’s decision was neither unreasonable nor irrational and that the Convention had not been incorporated into English law. The applicant complained before the Court that the HBRB lacked the independence and impartiality required by Article 6(1).

The Court first noted that the elected councillors of the HBRB were from the same local council that would pay the benefits to the applicant, if awarded. This was sufficient, and the government conceded such a position and held that the HBRB lacked the structural independence necessary for a tribunal under Article 6(1). The government, however, contended that the proceedings as a whole were fair because the High Court satisfied the requirements of Article 6(1). The Court repeated that the requirements of Article 6(1) regarding the “right to court” were met only if the applicant, whose civil rights had been determined by a domestic body that did not itself satisfy the requirements of a tribunal, had access to a tribunal that did satisfy those requirements. The Court concluded that there had been a breach of Article 6(1), because the High Court did not have the power to rehear the evidence heard by the HBRB or substitute its position with the administrative authority.¹⁵²

► *Peruš v. Slovenia*¹⁵³

Peruš concerned the participation of the same judge in different stages of the proceedings concerning the applicant’s claim in the Labour Court against his company for transferring him to another position within that company. The applicant obtained

151. *Tsfayo v. the United Kingdom*, No. 60860/00, 14 November 2006.

152. *Ibid.* § 48-49.

153. *Peruš v. Slovenia*, No. 35016/05, 27 September 2012.

a judgment in his favour, but the Higher Labour Court reversed it on appeal by the company, which was then upheld by the Supreme Court on points of law. The applicant complained that judge L.F., who was on the panel of the Supreme Court that heard his appeal, could not be considered impartial because he was previously on the panel of the Higher Labour Court that had tried the same case. The applicant lodged an appeal before the Constitutional Court claiming lack of impartiality on the part of the Supreme Court, but the Constitutional Court dismissed the complaint on procedural grounds because the applicant's company had been bankrupt and deleted from the registry of companies.

After repeating the general principles on independent and impartial tribunals, the Court noted that there was no issue of subjective impartiality. The main legal question before the Court was whether or not the participation of judge L.F. on the panel of the Supreme Court in deciding the applicant's appeal was in breach of the requirement of impartiality under Article 6(1), considering the fact that the same judge had been on the panel of the Higher Court that passed the judgment in the applicant's favour. The Court clarified the factors that could be taken into consideration when determining the objective justification for the applicant's fear:

... such factors as the judge's dual role in the proceedings, the time which elapsed between the two participations, and the extent to which the judge was involved in the proceedings may be taken into consideration.¹⁵⁴

The Court first acknowledged the passage of nine years between the two proceedings with the participation of judge L.F. at two levels of the judicial hierarchy. However, it noted that both in the Higher Labour Court and the Supreme Court, the role of judge L. F. was significant and, at both levels, the applicant's case was heard on its merits ending with an unfavourable resolution for the applicant. The Court concluded that the impartiality of the Supreme Court was open to doubt both for the applicant and in general. Finding a breach of the requirement of impartiality of a tribunal under Article 6(1), the Court also saw risks with a system where the judge is not warned about his or her prior involvements in particular cases.

► *Oleksandr Volkov v. Ukraine*¹⁵⁵

In this case, the practice of renewing judges' terms of office for an indefinite period, after their statutory term of office had expired, was found to be contrary to the principle of a "tribunal established by law", as stated in Article 6(1). Upon deliberation and submission by the High Council of Justice (HCJ), the competent parliamentary committee approved the dismissal of the applicant from its position as a judge on the grounds of a "breach of oath". The dismissal was also approved by parliament in a plenary session. The applicant challenged the dismissal before the High Administrative Court (HAC), which declined to review the acts of the HCJ for lack of jurisdiction. The applicant complained, among other things, of a lack of an independent and impartial tribunal established by law due to its composition, subordination to other state organs and subjective bias by some of its members. The applicant further complained

154. Ibid. § 37.

155. *Oleksandr Volkov v. Ukraine* (op. cit.), p. 17.

that the HAC lacked full jurisdiction to review the acts of the HCJ, contrary to the requirements of Article 6(1).

The Court repeated that the notions of independence and impartiality were closely related and resolved to examine both issues together in relation to the HCJ and the HAC.

The Court first reviewed the composition of the HCJ and concluded that the majority of its 20 members were appointed by the executive and legislative governments. Only three judges and 16 non-judicial members were present at the hearing of the applicant's dismissal case by the HCJ. The Prosecutor General and the Minister of Justice were *ex officio* members of the HCJ. The Court concluded that:

the role of those members in bringing disciplinary charges against the applicant, based on the results of their own preliminary inquiries, throws objective doubt on their impartiality when deciding on the merits of the applicant's case.¹⁵⁶

In deciding the applicant's dismissal, the HCJ could not have been considered to be an impartial and independent tribunal because its composition raised serious issues of structural impartiality, and also because some of its members demonstrated an appearance of personal bias towards the applicant. Referring to its previous case law, and the documents of the Council of Europe, the Court reasoned that a tribunal may satisfy the requirements of Article 6(1) if at least half of its members, including the chairman with a casting vote, were judges.

On the parliamentary meetings and deliberations on the applicant's dismissal, the Court held that:

the subsequent determination of the case by Parliament, the legislative body, did not remove the structural defects of a lack of "independence and impartiality" but rather only served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers.¹⁵⁷

The Court reasoned that the parliament had not been the appropriate forum to determine the issues of law and fact, for assessing the evidence, or for characterising the facts under the relevant law.

Since the HCJ and the hearings by parliament did not satisfy the Article 6(1) requirements of impartiality and independence of a tribunal, the Court went on to review whether or not the shortcomings in the determination of the applicant's case had been remedied by the HAC. In accordance with the principles established in its case law, the Court found that the review provided by the HAC was not "sufficient" to eliminate the defects in the fairness of the domestic proceedings at the early stages of the applicant's case. With regard to powers, the Court noted that the HAC was vested with the power of declaring the decisions of the HCJ and parliament unlawful, but it could not quash them. Even if the applicant succeeded in the HAC, he would not have been reinstated in his position automatically, but would have had to institute separate proceedings. On the manner in which the HAC decided the applicant's case, the Court noted that it had declined to review and respond to important issues brought before it by the applicant, including the evidence. Finally,

¹⁵⁶. Ibid. § 115.

¹⁵⁷. Ibid. § 119.

in finding that the domestic authorities had failed to ensure that the applicant's case was determined by an impartial and independent tribunal established by law, the Court emphasised that the HAC lacked the independence and impartiality required by Article 6(1). The Court reasoned that the HAC had to determine the lawfulness of the acts by the HCJ, which played a significant role for the appointment, discipline and promotion of judges, including those of the HAC.

Chapter 3

Access to a court

INTRODUCTION

The right to a fair trial includes not only the conduct of proceedings in court but also the right to initiate such proceedings. Under international law, access to a court or a tribunal must be effectively guaranteed to ensure that no person is deprived of his or her right to justice. This applies equally to administrative cases as in criminal cases.

When referencing Article 6(1), the Court in its case law makes a distinction between the terms “right to a court” and “right of access to a court”. While the right to a court is expressly mentioned in Article 6, the right of access to a court is implied within the right to a court and refers to the right to institute proceedings in civil matters:

Article 6 para. 1 ... secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.¹⁵⁸

The “right of access to a court” is an inherent part and precondition of the right to a fair and public hearing. Obstacles that hinder the individual’s right of access to a court render the fair trial guarantees of Article 6(1) meaningless:

... that provision embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in paragraph 1 of Article 6. The fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated.¹⁵⁹

Individuals may expect and claim access to a court from the moment they can demonstrate an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law.¹⁶⁰ The right of access to a court does not require that states establish appeals or cassation courts. However, in states where such tribunals exist, the right of access to a court also applies to them.¹⁶¹

158. *Golder v. the United Kingdom*, § 36 (op. cit.), p 23.

159. *Kreuz v. Poland*, No. 28249/95, § 52, ECHR 2001-VI.

160. *Karin Andersson and Others v. Sweden*, No. 29878/09, § 68, 25 September 2014.

161. *Andrejeva v. Latvia* [GC], No. 55707/00, § 97, ECHR 2009.

The right of access to a court is closely linked to the “right to a court”.¹⁶² While the latter refers to the qualities that a domestic tribunal must possess under Article 6(1), the right of access to a court rather refers to issues such as rules of standing before domestic courts, unduly high court fees, lack of legal aid, time limitations, physical access and other issues that might obstruct access.

Limiting access to a court

The Court has in numerous cases repeated that “the right to a court” is not an absolute right and might be limited and subjected to the “very essence” test.¹⁶³ Access to a court under Article 6(1) cannot be limited in such a way so as to deprive individuals of the opportunity of challenging the administrative acts of administrative authorities affecting their civil rights. However, in certain cases, the immunity of an international organisation¹⁶⁴ and a member of parliament¹⁶⁵ from lawsuits, which in practice results in the denial of access to a court for the individuals concerned, could be compatible with the requirements of Article 6(1). Any limitation on the right of access to a court must also pursue a legitimate aim and be proportionate to that aim.¹⁶⁶ The Court has further found that the right of access to a court under Article 6(1) may be breached by uncertain¹⁶⁷ or strict¹⁶⁸ rules on time limitations,¹⁶⁹ preconditions for the admissibility of cases, unduly high court fees,¹⁷⁰ inaccessible legal aid,¹⁷¹ legislative bars on instituting lawsuits in certain types of dispute¹⁷² or by other structural or practical legal difficulties arising from a country’s national administrative justice system. Practical obstacles to public access by parties to proceedings might also arise. Parties might for instance be prevented from gaining access to the judicial system because of a lack of information on the place and time of a hearing or because of its location, which might make it difficult or impossible for the parties to get to it. Impediments to access might also arise from a lack of facilities to allow physical access for disabled persons. Although states enjoy certain freedoms in setting out their domestic procedural rules, including the conditions of admissibility, this should not prevent individuals from obtaining access to an available remedy.¹⁷³ Such procedural rules must satisfy the requirements of legal certainty under the Convention. Uncertainty of procedural rules on who has standing before the Administrative Court and when

162. See Chapter 2.

163. *De Geouffre de la Pradelle v. France*, 16 December 1992, § 28, Series A No. 253-B.

164. *Waite and Kennedy v. Germany* [GC], No. 26083/94, ECHR 1999-I.

165. *A. v. the United Kingdom*, No. 35373/97, ECHR 2002-X.

166. *Melikyan v. Armenia*, No. 9737/06, § 45, 19 February 2013.

167. *De Geouffre de la Pradelle v. France* (op. cit.).

168. *Eşim v. Turkey*, No. 59601/09, 17 September 2013.

169. *Ibid.* § 20.

170. *Kreuz v. Poland* (op. cit.), p. 52; and *Hüseyin Özel v. Turkey*, No. 2917/05, 10 January 2012.

171. *Mehmet and Suna Yiğit v. Turkey*, No. 52658/99, 17 July 2007.

172. *Marinković v. Croatia*, No. 9138/02, 21 October 2004.

173. *Eşim v. Turkey*, § 19-20 (op. cit.).

a case is “ripe” for bringing it before the Administrative Court¹⁷⁴ might also breach the provisions of Article 6(1) on access to a court.

Legal aid and assistance

In many situations, individuals whose civil rights are affected can gain access to justice only with the help of some type of legal aid or assistance. The Court has recognised that persons charged with criminal offences have the right to free legal aid under Article 6.¹⁷⁵ In its subsequent case law, the Court has held that, in certain civil cases, individuals may expect legal aid under Article 6(1) if the legal aid was required to ensure a fair hearing.¹⁷⁶ However, as with other guarantees of Article 6, the right to legal aid and assistance is not an absolute right. The authorities deciding over the applications for legal aid can consider factors such as the importance of what would be at stake for those individuals requesting legal aid, the complexity of the national law and procedure, the capacity of the individual for self-representation,¹⁷⁷ the prospects of success of the applicant’s case, and the applicant’s financial situation.¹⁷⁸ Individuals may also need various kinds of legal aid and assistance – for instance, legal representation, legal advice, or full or partial exemption from court fees. Any denial of the provision of legal aid must be justified under the principles of Article 6(1), in particular under the principle of proportionality and the fairness of the proceedings as a whole.

CASE LAW

There follows below some of the Court’s leading judgments on the right and access to a court or tribunal.

- ▶ **Andrejeva v. Latvia:**¹⁷⁹ on the importance of procedural rules to ensure a proper administration of justice and a compliance with the fundamental principle of legal certainty.
- ▶ **De Geouffre de la Pradelle v. France:**¹⁸⁰ on how domestic rules on the notification of administrative acts can restrict the applicant’s access to a court. The Court stressed in this case that the right of access to a court or tribunal requires a coherent system that is sufficiently certain in its requirements, so that applicants have a clear, practical and effective opportunity to exercise their right.
- ▶ **Kreuz v. Poland:**¹⁸¹ a leading example of how an individual’s right of access to a court may be impaired by specific circumstances such as excessive court fees.

174. *Karin Andersson and Others v. Sweden* (op. cit.), p. 52.

175. *Benham v. the United Kingdom*, 10 June 1996, Reports of Judgments and Decisions 1996-III.

176. *Airey v. Ireland*, 9 October 1979, Series A No. 32.

177. *Serap Demirci v. Turkey*, No. 316/07, § 26, 10 January 2012.

178. *Hüseyin Özel v. Turkey*, § 27 (op. cit.), p. 53.

179. *Andrejeva v. Latvia* (op. cit.), p. 52.

180. *De Geouffre de la Pradelle v. France* (op. cit.), p. 53.

181. *Kreuz v. Poland* (op. cit.), p. 52.

Costs relating to the procedure should not exclude access to courts or tribunals.

- **Aerts v. Belgium:**¹⁸² where a refusal to grant legal aid to an applicant who did not have sufficient means to pay for legal counsel had impaired the applicant's right to a court.

A. Procedural rules

Trial schedule and proper notice

- *Andrejeva v. Latvia (GC)*¹⁸³

In *Andrejeva*, the Court highlighted the importance of procedural rules to ensure a proper administration of justice and a compliance with the fundamental principle of legal certainty. In this case, the applicant was a resident of Latvia. The Social Insurance Agency of Latvia had decided to exclude the whole period of the applicant's employment in Russian and Ukrainian enterprises based outside the territory of Latvia. It considered that such employment was an "extended business trip", and since the enterprises were based outside of Latvia, and not paying any contributions or taxes in Latvia, the agency did not consider the employment to be an "employment on the territory of the Republic of Latvia". The trial and appellate courts dismissed the applicant's appeal against that decision. The Supreme Court admitted the public prosecutor's complaint against the appellate court judgment on points of law. However, the court held the hearing earlier than scheduled, and in the absence of the applicant, and dismissed the complaint. Later the applicant asked the Supreme Court to re-examine the case. The Supreme Court apologised for failing to notify her about the early time of the trial, but refused to reconsider the case.

The Court found that the applicant's right of access to a court had been breached. Under Latvian law, the applicant was entitled to attend the hearing before the Supreme Court and she had not waived this right. Since the Supreme Court held the hearing earlier than scheduled, and without notifying the applicant about these changes, the applicant could not enjoy her right. The Court stressed the role and the importance of procedural rules in this regard:

... procedural rules are designed to ensure the proper administration of justice and compliance with the principle of legal certainty, and that litigants must be entitled to expect those rules to be applied ... This principle applies both ways, not only in respect of litigants but also in respect of the national courts.¹⁸⁴

The Court dismissed the government's argument that, since the prosecutor had adopted a favourable position towards the applicant, and initiated the complaint, it was no longer necessary for the applicant to attend the hearing. While the prosecutor had, under Latvian law, a general duty to protect the legitimate rights and interests of individuals, it was not his primary function. The prosecutor could therefore not represent, nor replace, the parties in the proceedings.

182. *Aerts v. Belgium*, 30 July 1998, Reports of Judgments and Decisions 1998-V.

183. *Andrejeva v. Latvia* (op. cit.), p. 52.

184. *Ibid.* § 99.

Standing

► *L'Erablière A.S.B.L. v. Belgium*¹⁸⁵

This case regarded an appeal submitted by a local environmental protection association for judicial review of planning permission, which involved extending the size of the landfill in the region where the applicant's association was conducting environmental protection activities. Instead of submitting detailed facts to the Conseil d'Etat (the conseil), the applicant referred to the text of the impugned decision stating that this document contained sufficient facts relevant for the complaint. The conseil dismissed the application for judicial review reasoning that the impugned decision could not replace a detailed and accurate statement of facts, as required under domestic law.

The government disputed the applicability of Article 6(1) to the circumstances of this case. It argued that the proceedings launched by the applicant amounted to *actio popularis*, which fell outside the scope of Article 6(1). The Court disagreed with this argument, and held that Article 6(1) was applicable, and had been breached:

... in view of the circumstances of the present case, and in particular the nature of the impugned measure, the status of the applicant association and its founders and the fact that the aim it pursued was limited in space and in substance, that the general interest defended by the applicant association in its application for judicial review cannot be regarded as an *actio popularis*.¹⁸⁶

The reason why *actio popularis* is not covered by Article 6(1) is to allow the Court to function effectively:

The reason why the Convention does not allow an *actio popularis* is to avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not party.¹⁸⁷

The Court held that this case did not fall within the category of cases described above as all the founding members and administrators of the applicant association were residents in the region concerned, and that the association's mission was limited to the environmental issues in the region. Instead, they could claim through the association that the extension of the landfill in the region would have an impact on their right to private life and on the price of their properties located in the region. Thus the rights and values they were attempting to protect were not remote and abstract ends, but specific and personal rights.

Reviewing powers

► *Melikyan v. Armenia*¹⁸⁸

In *Melikyan*, the government adopted a decree on the privatisation of a state closed joint-stock company (the company). The government admitted and examined the request of the employees to privatise the company to them through direct sale. The

185. *L'Erablière A.S.B.L. v. Belgium*, No. 49230/07, ECHR 2009 (extracts).

186. *Ibid.* § 29.

187. *Ibid.*

188. *Melikyan v. Armenia* (op. cit.), p. 53.

government first decided that the company would be privatised through open tender, but finally it was privatised to an individual through direct sale. The employees, including the applicant, filed a lawsuit in the district court requesting a prohibition of the direct sale, a recognition of their pre-emptive right to acquire the company's shares, and an annulment of the government's decree. The district court dismissed all claims and terminated the proceedings, reasoning that the legality of the government decree was not subject to review by the courts of general jurisdiction in accordance with paragraph 2 of Article 160(1) of the Code of Civil Procedure. The appellate and cassation courts affirmed the judgment. Later, the Constitutional Court of Armenia declared the provisions of the Code of Civil Procedure unconstitutional on the grounds that they were contrary to the right of access to a court.

The Court examined the applicant's claims under the "right of access to a court" and found that the respondent had breached that provision:

... the Court considers that the domestic courts, by imposing such indiscriminate restriction on the applicant's right to seek judicial protection against an allegedly unlawful act of the executive, violated the very essence of the applicant's right to access to court.¹⁸⁹

As in the case of *Allan Jacobsson* (No. 1),¹⁹⁰ the applicant had no access to any domestic court to be able to challenge the lawfulness of the act of the executive government that allegedly infringed the applicant's individual rights. The ban on judicial review of the legality of all acts of the executive power could not pursue legitimate aims and was by definition disproportionate. However, unlike *Jacobsson*, in *Melikyan* the Constitutional Court of Armenia confirmed the unconstitutionality of the rules prohibiting individuals to challenge the legality of governmental acts before ordinary courts. The Constitutional Court established that there was a judicial practice that interpreted the rule so as to deny courts of general jurisdiction subject matter jurisdiction over the legality of governmental acts, as such jurisdiction was reserved for the Constitutional Courts. The incorrect and restrictive interpretation by the courts of the scope of their competence resulted in the breach of the "very essence" of the right of access to a court.

► *Karin Andersson and Others v. Sweden*¹⁹¹

In this case, the government issued a permit to the National Rail Administration (NRA) for the construction of a 10 km railway across an area where the applicants lived and owned a property. The applicants applied to the Supreme Administrative Court with a request to quash the government's construction permit. The Supreme Administrative Court dismissed the request on the grounds that the applicants lacked *locus standi*, indicating that the applicants were not entitled to initiate or participate in the legal proceedings and reasoned that, before the adoption of the specific railway plan, it was impossible to determine whether or not the applicant had sufficient interest to sue the government for the construction permit. Later, the NRA adopted the railway plan. The applicants appealed the plan before the government claiming that it would create nuisance and vibrations affecting their property. The

189. Ibid. § 48.

190. *Allan Jacobsson v. Sweden* (op. cit.), p. 26.

191. *Karin Andersson and Others v. Sweden* (op. cit.), p. 52.

government dismissed the appeal on the grounds that it had previously decided that the route of the railway was permissible. The applicants applied to the Supreme Administrative Court seeking to quash the railway plan on a number of grounds. The Supreme Administrative Court dismissed their judicial review application, reasoning that the railway plan complied with the decision of the government's construction permit. It further reasoned that the permissibility of the railway construction was under the exclusive competence of the government, and that all the other public bodies were bound by it and could not decide on permissibility issues. The Supreme Administrative Court concluded that the applicants should have argued the railway construction permissibility issues earlier. Notwithstanding that the applicants had done so, the domestic court reasoned that they had lacked *locus standi*.

The Court held that the applicants' right of access to a court was breached. During the various stages of the national proceedings, no domestic tribunal had provided full judicial review of the government's construction permit, including the question of whether the applicants' property rights had been breached. The fact that the applicants were parties to the proceedings before the Supreme Administrative Court did not by itself satisfy the requirements of the rights of access to a court and to a tribunal. The latter required that the applicants not only had formal access to a court, but that the domestic court possessing full jurisdiction had provided sufficient review of the issues put before it.

In this case the applicants' access to a court was breached due to inconsistent judicial practice by the Supreme Administrative Court, which raised issues under the principle of legal certainty. When the applicants first gained access to the Supreme Court, and asked it to review the government's construction permit, the court dismissed the complaint on the grounds that the case was not "ripe" because the applicants could not demonstrate personal interest to sue the government at that stage of the proceedings. Once the railway plan was adopted, the applicants were able to demonstrate such interest, the same domestic court dismissed the applicants' claims on the grounds that at that stage it was too late to raise the issues of the railway construction permit, which contradicted the domestic court's earlier finding. This case also demonstrated how unclear or inconsistently applied domestic rules of administrative law on standing before administrative jurisdiction, and "ripeness" of legal issues, can lead to a violation of the international law on access to a court.

Judicial time limitations

► *De Geouffre de la Pradelle v. France*¹⁹²

In *De Geouffre de la Pradelle*, the complex domestic rules on the notification of administrative acts restricted the applicant's access to a court. The Court stressed that the right of access to a court or tribunal requires a coherent system that is sufficiently certain in its requirements, so that applicants have a clear, practical and effective opportunity to exercise the right. The Minister for the Environment designated the applicant's property as a protected area of national beauty and

192. *De Geouffre de la Pradelle v. France* (op. cit.), p. 53.

public interest. An extract of the decree was published in the Official Gazette on 12 July 1983 and the applicant received the full text on 13 September 1983. The applicant lodged an objection against the decree before the Conseil d'Etat (the conseil) on 27 October 1983, which was declared out of time. The conseil reasoned that the running of the two-month time limitation started on the day of the official publication of the decree, and not on the day that the applicant had received the full text of the decree.

The Court had to examine whether the rules of notification of the administrative acts could prevent the applicant from access to a court by creating confusion on the calculation of the time limitations:

... the Court cannot but be struck by the extreme complexity of the positive law resulting from the legislation on the conservation of places of interest taken together with the case law on the classification of administrative acts ... such complexity was likely to create legal uncertainty as to the exact nature of the decree designating the Montane valley and as to how to calculate the time-limit for bringing an appeal.¹⁹³

The Court concluded that the applicant's right of access to a court was restricted, and in breach of Article 6(1) because:

the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own; in particular, he should have had a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right of property.¹⁹⁴

The applicant complained of the complexity of the domestic rules regarding the notification of individual and general administrative acts, which had created legal uncertainty and confusion, and had led the applicant to assume that the ministerial act was an individual act requiring individual notice by the competent authorities after which the applicant would challenge it before the administrative jurisdictions.

The classifications of acts adopted by public authorities have both theoretical and practical significance. In the practice of many European countries, depending on whether the disputed act is individual or normative, individuals must request different remedies from administrative jurisdictions. In addition, in many countries, the rules on the entry into force, notification, duration of validity of individual and normative acts also differ. While the theory and practice of administrative law in France, and other "civil law" countries, acknowledges the difficulties of drawing clear lines between normative acts and individual administrative acts,¹⁹⁵ they cannot serve as acceptable justifications for the limitation of the right of access to court under the Convention. It is for the states parties to the Convention to design their legal systems in ways that comply with their obligations under the Convention.

193. Ibid. § 33.

194. Ibid. § 34.

195. See, for instance, Richter, I., Schuppert, G. F., *Casebook Verwaltungsrecht* (C. H. Beck'sche Verlagsbuchhandlung, 1995) for discussion of the challenges of such distinctions under German administrative law.

► *Eşim v. Turkey*¹⁹⁶

During a fight with a group of armed terrorists in 1990 the applicant, a conscript in the army, sustained gunshot wounds and became permanently disabled. He was treated in a number of military hospitals. In 2007, a CT scan revealed a bullet in the applicant's head but its removal was deemed to be life-threatening. The applicant claimed compensation from the Ministry of Defence alleging negligence on the part of the military hospitals for failing to detect the bullet and, as a result, for miscalculating his disability pension. After the dismissal of the claims, the applicant filed lawsuits before the Supreme Military Administrative Court. Although the applicant did not know of the existence of the bullet in his head until 2007, the claims before the Supreme Military Administrative Court were rejected on the grounds that the law required the applicant to file the compensation claims within five years of the incident.

After reaffirming the general principles in its case law, the Court concluded that the applicant's right of access to a court had been breached:

... the Supreme Military Administrative Court's strict interpretation of the time-limit precluded a full examination of the merits of the case. Thus, by imposing a disproportionate burden on the applicant, the Supreme Military Administrative Court impaired the very essence of the applicant's right of access to a court.¹⁹⁷

The Court reasoned that it was not reasonable to require the applicant to apply to domestic courts for compensation before he had learned about the damage. With reference to its previous case law, the Court reasoned that "the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court".¹⁹⁸

Judicial costs

► *Kreuz v. Poland (No. 1)*¹⁹⁹

Kreuz is a leading example in which the specific circumstances, in this case excessive court fees, can impair an individual's right of access to a court. The Court reasoned that the excessive level of court fees amounted to a disproportionate restriction on the applicant's right of access to a court, and ruled that the amount of the fees should be considered in light of the particular circumstances of the case, including the applicant's ability to pay and the phase of the proceedings at which the fees were imposed.²⁰⁰

The Supreme Administrative Court quashed the administrative authorities' decisions by reasoning that the refusal of the applicant's zoning approval for the construction of a car wash was unlawful and arbitrary. On the basis of that judgment, the applicant launched compensation proceedings claiming payment of damages caused by the unlawful decisions of the administrative authorities. The Plock Regional Court

196. *Eşim v. Turkey* (op. cit.), p. 53.

197. *Ibid.* § 26.

198. *Efstathiou and Others v. Greece*, No. 36998/02, § 24, 27 July 2006.

199. *Kreuz v. Poland (No. 1)* (op. cit.), p. 52.

200. *Ibid.* § 60.

ordered the applicant to pay a court fee of PLZ 100 000 000. The applicant asked the domestic courts for exemption from the court fees on the grounds that such payment would entail a substantial reduction in his standard of living. The Plock Regional Court reasoned that the applicant should have foreseen litigation costs and ensured sufficient means to that end. The Warsaw Court of Appeal dismissed the applicant's appeal and affirmed the trial court's decision. The applicant refused to pay the fees and, as a result, his lawsuit was returned and never heard on its merits.

The Court found that the limitation imposed on the applicant's right of access to a court by the authorities was disproportionate. The court fee was excessive with regard to the particular circumstances of the case. The Court first noted that imposing financial limitations on individuals for obtaining access to a court was not per se incompatible with the provisions of Article 6(1), as this should be subject to the principle of proportionality and could depend on a number of considerations, such as:

the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access and had "a ... hearing by [a] tribunal".²⁰¹

The Court then assessed whether or not the imposition on the applicant of a judicial fee of PLZ 100 000 000 impaired the very essence of his right of access to a court. The amount of the court fee was substantial when viewed from the perspective of the "ordinary litigant", since it was equivalent to the average annual income in Poland at that time. The applicant declared his financial means to the courts and stated his inability to pay those fees. However, the domestic courts refused to grant an exemption based on their own assumptions rather than the applicant's actual ability to pay. Finally, the Court dismissed the argument of the authorities that it was predictable for the applicant that by engaging in business litigation costs might well be incurred. The only reason why the applicant initiated the litigation was to recover his losses as a result of damage that the administrative authorities had caused him by their unlawful and arbitrary action, which was confirmed by the Supreme Administrative Court. The applicant was not under an obligation to predict unlawful administrative action by the administrative authorities.

► *Hüseyin Özel v. Turkey*²⁰²

In *Hüseyin Özel*, the applicant claimed that the administrative authorities should provide him with compensation of approximately 90 000 euros for damage sustained on his property, as a result of him being forced to live away from his village for 10 years for security considerations. The claim was denied and the applicant challenged the denial before the Malatya Administrative Court and requested legal aid to cover the court fees of approximately 1 200 euros. The grant of aid was denied and the case was discontinued because the applicant did not pay the court fees. The denial of legal aid was based on Articles 465 and 468 of the Civil Code, which required that individuals requesting legal aid proved that they were indigent persons by submitting a number of certificates on their income, property and paid taxes.

201. *Hüseyin Özel v. Turkey*, § 60 (op. cit.), p. 53.

202. *Ibid.*

The Administrative Court reasoned that since the applicant was represented by a lawyer he ought to have been able to cover the court fees.

The Court held that the limitation imposed on the applicant's right of access to a court was disproportionate. The court fee was approximately 1 200 euros, while the minimum monthly wage was about 260 euros. The fact that the applicant had been represented by a lawyer did not automatically entail that he was not indigent. Finding a breach of the applicant's right of access to a court, the Court observed that the Malatya Administrative Court had failed to provide any reason for rejecting the grant of legal aid to the applicant and that the refusal had resulted in a disproportionate limitation of his right of access to a court.

The Court reminded itself that it had on several occasions assessed the legal aid system of Turkey relating to court fees in the administrative justice system.²⁰³ In particular, the Court mentioned that:

it has already examined similar grievances in the past and has found a violation of Article 6 § 1 of the Convention on the ground, *inter alia*, that the legal aid system in Turkey fails to offer individuals substantial guarantees to protect them from arbitrariness.²⁰⁴

The Court further mentioned that it did not find any changes in the system of court fees and legal aid, and held that such a system, in light of the particular circumstances of the case, had breached the applicant's right of access to a court under Article 6(1). On the same day, 12 January 2012, the Court also delivered another judgment in the case of Serap Demirci, where it found a breach of the applicant's right of access to a court under identical circumstances to those found in the present case. On 7 February 2012 the Court found a further violation by Turkey on the right of access to a court under Article 6(1) in the Alkan case. The Court repeated that the reason for such breaches was the legal aid system in force under the administrative justice system in Turkey, where legal aid decisions were taken on the basis of the case file where applicants were not heard and where there was no factual reasoning – only a reference to the legislative provisions.²⁰⁵ The Court concluded that the facts of this case were identical to those in a number of similar cases involving legal aid under the administrative justice system in Turkey.

B. Legal aid and assistance

► *Aerts v. Belgium*²⁰⁶

Aerts concerned a refusal to grant legal aid to an applicant who did not have sufficient means to pay for legal counsel, which impaired the applicant's right to a court. The applicant was placed in a detention facility's psychiatric wing on charges of assault pending trial. The Mental Health Board (the board) of the facility decided to transfer

203. See, for example, *Bakan v. Turkey* (No. 50939/99, paras. 74-78, 12 June 2007); *Mehmet and Suna Yiğit*, §31-39 (op. cit.), p. 53; *Eyüp Kaya v. Turkey* (No. 17582/04, paras. 22-26, 23 September 2008); *Kaba v. Turkey* (No. 1236/05, § 19-25, 1 March 2011).

204. *Hüseyin Özel v. Turkey*, § 29 (op. cit.), p. 53.

205. *Ibid.* § 26-27.

206. *Aerts v. Belgium* (op. cit.), p. 54.

the applicant to a social protection centre. The applicant asked the court to order his immediate transfer to that centre, which was granted, but was later reversed on appeal. The appellate court reasoned that the board's transfer decision was an administrative act which fell outside the jurisdiction of ordinary courts, and that the administrative authorities had not violated the applicant's rights. The applicant sought legal aid from the Legal Aid Board of the Court of Cassation in order to appeal the appeal court's decision on points of law, but the board rejected the grant for legal aid on the grounds that the applicant's appeal was unfounded.

The Court held that the refusal of the board to provide such legal aid breached the very essence of the right of access to a court. The Court reasoned that the board's decision on legal aid amounted to a decision on the merits of the applicant's complaint, which was actually for the Cassation Court to decide. Thus, the applicant's right of access to a court had been limited even before he was able to file any submissions before the court.

► *Subicka v. Poland*²⁰⁷

In *Subicka*, the applicant's legal aid lawyer refused to lodge a cassation appeal with the Supreme Administrative Court reasoning that she could not find grounds for appeal. Under the national law, the time period of 30 days for lodging a cassation complaint began to run on the day that the lawyer representing the individual was served with a copy of the judgment of the Regional Administrative Court. Since the applicant was assigned a legal aid lawyer after she had received the judgment, the time period for lodging a cassation complaint started to run on the date she received the judgment. Thus, the applicant's lawyer had less time to prepare and file a cassation complaint than those lawyers who represented a client after receiving the copy of the judgment. Moreover, when the applicant's legal aid lawyer was assigned, the 30-day time limit for lodging the cassation complaint had expired.

The Supreme Administrative Court had previously settled such situations in its jurisprudence. In particular, it held that where the legal aid lawyer was appointed after the expiry of the time limit for lodging a cassation complaint, administrative courts should grant leave to file a complaint out of time. The Court was satisfied that such a solution was compatible with the Convention and ensured access to the cassation procedure. However, it stressed that the legal issue in this case, under the right of access to a court, was the refusal of the legal aid lawyer to file a cassation complaint on the grounds of a lack of a legal basis for the complaint.

Under domestic law, the jurisprudence developed different approaches to time limits for lodging cassation complaints depending on whether the appeal arose in civil or criminal proceedings. Referring to its previous cases on the matter, the Court reminded itself that it was compatible with the right of access to a court under Article 6(1) when the time limit for lodging a cassation complaint started *de novo* after the legal aid lawyer refused to lodge the complaint in a criminal case, while in a civil case, the Court reminded itself that it had held that it was incompatible with the right of access to a court when the individual had no alternatives for lodging a

207. *Subicka v. Poland*, No. 29342/06, 14 September 2010.

cassation complaint after a legal aid lawyer had refused to prepare it. The domestic law did not provide for a certain regulation in a situation where a legal aid lawyer refused to file a cassation complaint after the expiry of the time limit to lodge such complaints, thus creating legal uncertainty for individuals benefiting from legal aid. In this regard, the Court stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is an important factor to be taken into account when assessing the state's conduct.²⁰⁸

Hence, as long as the legislature does not address this problem by adopting such rules, or, failing that, as long as the case law of the Supreme Administrative Court does not offer an adequate solution, the Court cannot accept that the existing procedural situation is compatible with the requirements of Article 6 of the Convention.²⁰⁹

Such uncertainty, the Court held, was sufficient to hold that the applicant's right of access to a court was breached. Due to the absence of regulation of the particular situation, the applicant did not know what the consequences were for her and what procedural alternative she had for lodging a cassation complaint after the refusal of a legal aid lawyer. The policy of the Court's holding is that states are under a positive duty to lay down clear rules, whether through legislation or case law, on gaining access to the cassation procedure by individuals supported by legal aid.

208. Ibid. § 47.

209. Ibid. § 48.

Chapter 4

Public and oral hearings

INTRODUCTION

Public and oral hearings constitute an integral part of the right to a fair trial as enshrined in Article 6(1).²¹⁰ As listed in the article, these rights can be subject to certain limitations. The case law of the Court on the right to public and oral hearings shows that the Court has adopted a distinctive approach to domestic criminal and civil (administrative) proceedings. States enjoy a wider margin of appreciation for limiting oral proceedings and for conducting written proceedings in civil (administrative) proceedings than they do in criminal matters. This chapter presents the case law of the Court, which discloses the nature of the right to oral and public hearings, as well as the conditions and scope of limitations under Article 6(1).

Oral and public hearings

The right to an oral hearing is not an absolute right in administrative proceedings. However, the refusal to allow such a hearing must be reasoned by a court or a tribunal. The early case law of the Court gradually developed a general principle according to which the right to a public hearing necessarily entailed an oral hearing.²¹¹ The rationale behind extending the rule on public hearings to oral hearings was that, in the absence of an oral hearing where the parties, witnesses and experts did not provide any oral evidence in public at an open court session, the publicity of the hearing would be easily undermined by the mere exchange of procedural documents between the parties and the bench. By “injecting” the oral hearings element under Article 6(1) in its case law, the Court aimed at enhancing the public nature of the hearings as one of the fundamental safeguards of a fair trial. Publicity ensures greater visibility of the administration of justice to any society, which helps to achieve the core aims of Article 6(1) – that is, the fairness of a trial.²¹² The requirements of public and oral hearings also entail the right of the person concerned to be present at trial. In the case of a person who has not been duly notified of the date, time and place of the trial and, as a result, was not able to attend the hearing, the question of whether or not the hearing was conducted publicly and orally becomes irrelevant.

210. *Håkansson and Stureson v. Sweden*, 21 February 1990, § 66, Series A No. 171-A.

211. *Salomonson v. Sweden*, No. 38978/97, § 34, 12 November 2002; *Döry v. Sweden*, No. 28394/95, § 3, 12 November 2002.

212. *Axen v. Germany*, 8 December 1983 § 25, Series A No. 72.

It is noteworthy that the Court has stressed that Article 6(1) entails an entitlement to an “oral hearing”, that is to say a hearing of the parties (or their representatives, or both) in person by the court, whether the trial was conducted in public or in private.²¹³ Even if the case were to be heard in camera, when justified by reasons listed in Article 6(1), the hearing must still be conducted orally in the presence of all parties. Thus while the right to an oral hearing stems from, and is part of, the right to a public hearing, the oral hearing is a separate entitlement under Article 6(1). The grounds for the limitation of publicity under Article 6(1) relate to the exclusion of the public and the press from the hearing, but not to the exclusion of the parties to the proceedings. While publicity aims to strengthen public trust in the judiciary, and to protect litigants from the effects of the administration of justice in secret,²¹⁴ the aim of the presence of the parties to the proceedings is the hearing of the parties by the court. The parties are still entitled to be heard orally by a domestic court, even in cases where the press and public have been lawfully excluded from the hearing.²¹⁵ The procedural statutes of a number of Council of Europe member states are enshrined under the “principle of immediacy” as a fundamental procedural standard, where a judge can conduct an immediate examination of the evidence (that is, of the oral testimony of the parties, witnesses, experts and so on) rather than merely examining the documents provided by the parties to the court. The oral hearing is also an extension of the principle of immediacy of the examination of evidence.

Other legal grounds for exclusion include the exclusion in the interests of morals; public order;²¹⁶ national security in a democratic society;²¹⁷ private lives of the parties;²¹⁸ and waiving the right to a public hearing (as discussed below).

Appropriate stage of the proceedings

Individuals are entitled to a public and oral hearing at least once during the litigation within the hierarchy of tribunals in a given legal system. The same applies to proceedings before only one instance.²¹⁹ The Court has observed that, pursuant to the needs of a proper administration of justice, and the principles of efficiency, it is preferable to hold an oral hearing in the first instance court,²²⁰ bearing in mind that in most jurisdictions it is in that instance where important issues of fact are

213. *Schädler-Eberle v. Liechtenstein*, No. 56422/09, § 82, 18 July 2013.

214. *Axen v. Germany*, § 25 (op. cit.), p. 64.

215. *Schädler-Eberle v. Liechtenstein*, § 91 (op. cit.), p. 64.

216. Security concerns might justify the exclusion of the public from a trial. See *Hummatov v. Azerbaijan*, Nos. 9852/03 and 13413/04, § 150, 29 November 2007, where the court noted that security Problems were a common feature of criminal proceedings and concluded that there were no such security concerns in that case.

217. See *Kennedy v. the United Kingdom*, No. 26839/05, §184-191, 18 May 2010, where the Court concluded that the restrictions on the applicant’s rights were both necessary and proportionate and did not impair the applicant’s rights under Article 6(1) of the Convention.

218. Where the private lives of the parties so require, the press or the public may be excluded from judicial proceedings, see *Diennet v. France*, 26 September 1995, § 34-35, Series A No. 325-A.

219. *Håkansson and Sturesson v. Sweden*, § 64 (op. cit.) p. 64; and *Miller v. Sweden*, No. 55853/00, § 29, 8 February 2005.

220. *Salomonsson v. Sweden*, § 37 (op. cit.), p. 64.

determined. However, if in a particular case, the highest judicial instance in administrative matters, such as for example the Supreme Administrative Court, acts as the first instance court, then the right to an oral and public hearing should be enjoyed in that instance.²²¹

Where proceedings are held in private, both in the first and second instances, without the individuals concerned having the opportunity to request a public hearing, these proceedings cannot in principle be regarded as being compatible with Article 6(1).²²² In the absence of an oral hearing at first instance, the individual should at least have the right to request an oral hearing at the appeal instance. In the absence of such opportunity, the legal system will be deemed incompatible with the requirements of Article 6(1). Once the individual has enjoyed the right to an oral and public hearing at the trial court, the requirements of a public and oral hearing should be less strict at the appellate level and may be conditioned by a number of factors present in the particular circumstances of the case. As the Court reiterated in *Miller v. Sweden*:

... provided a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 ... Regard must be had to the nature of the national appeal system, to the scope of the appellate court's powers and to the manner in which the applicant's interests are actually presented and protected in the appeal, particularly in the light of the nature of the issues to be decided by it, and whether these raise any questions of fact or questions of law which cannot be adequately resolved on the basis of the case-file.²²³

The right to a public and oral hearing may be claimed before domestic bodies that satisfy the requirements of a tribunal for the purposes of Article 6. If the Court has reached a contrary view, that is to say if the domestic body considering the applicant's case cannot be considered as a tribunal under the Convention, it may dismiss the claims by the applicants related to a public and oral hearing, since determining such a claim by the Court would not serve any meaningful purpose.²²⁴ However, even if the Court were to dismiss an applicant's complaint on the right to a public and oral hearing, it might still admit the case under Article 6(1) on the grounds of the "right to a court".²²⁵

Waiver of rights to public and oral hearings

In cases where the issue before the Court was related to whether the lack of an oral or public hearing was justified, respondent governments have frequently argued that the applicant waived his or her right to such hearing by failure to request it or by failure to appeal against the lack of a hearing before a higher instance.²²⁶ The Court

221. *Fredin v. Sweden* (No. 2), 23 February 1994, § 21-22, Series A No. 283-A.

222. *Martinie v. France*, § 42 (op. cit.), p. 15.

223. *Miller v. Sweden*, § 30 (op. cit.), p. 65.

224. *Fischer v. Austria*, § 44 (op. cit.), p. 25; *Julius Kloiber Schlachthof GmbH and Others v. Austria*, Nos. 21565/07, 21572/07, 21575/07 and 21580/07, § 38, 4 April 2013.

225. See Chapter 2 for the "right to a fair trial" and the definition of "tribunal".

226. *Håkansson and Sturesson v. Sweden*, § 65 (op. cit.) p. 64; *Salomonsson v. Sweden*, § 30 (op. cit.), p. 64.

has continually emphasised that while individuals are generally entitled to an oral and public hearing, that right is not absolute and may be waived by the applicant either expressly or tacitly.²²⁷ In a number of cases, the Court has noted that the applicant had tacitly waived his or her right to a public and oral hearing in situations where the applicant had the right, under the domestic law, to request an oral hearing from the domestic court.²²⁸ Where the domestic law provides for a written procedure in the administrative jurisdictions, individuals must request an oral hearing at least in one instance in order to be able to complain before the Court of the lack of such hearing. In most cases, failure to request such a hearing will amount to a tacit waiver of the right granted under Article 6(1).

Dispensing with oral and public hearings

As stated above, the Court has held that the entitlement to public and oral hearings is not an absolute right and that exceptional circumstances might justify dispensing with it. A hearing might not be necessary due to the exceptional circumstances of a case, for example, “when it raises no questions of fact or law that cannot be adequately resolved on the basis of the case file and the parties’ written observations.”²²⁹ It rests with the respondent government to demonstrate to the Court the exceptional circumstances justifying dispensing with a public and oral hearing. Such circumstances have included situations where the case in question raised no issues of fact or law which could not be adequately resolved on the basis of the case file and the parties’ written observations. In *Miller*, the Court explained that the exceptional character of circumstances justifying the lack of an oral hearing “comes down to the nature of the issues to be decided by the competent national court” and not to the “frequency of such situations”. The Court further stressed that many disputes concerning social security benefits may be better dealt with in writing than in oral arguments, and that national authorities should have regard to the demands of efficiency and economy as systematically holding hearings could be an obstacle to the particular diligence required in such cases.²³⁰

Other practical obstacles to public and oral hearings

Apart from the legal grounds for exclusion, as stated under Article 6(1), or the formal exclusion of the public from a hearing by an order of a judge, there may be other obstacles excluding the public from a hearing. The Court has held that unjustified restrictions on private persons’ access to court premises violate the requirements under Article 6(1) of the Convention.²³¹ Moreover, the lack of publicity of hearings,²³²

227. *Håkansson and Stureson v. Sweden*, § 66 (op. cit.) p. 64; *Schuler-Zraggen v. Switzerland*, 24 June 1993, § 58, Series A No. 263.

228. *Håkansson and Stureson v. Sweden* (op. cit.) p. 64.

229. *Salomonsson v. Sweden*, § 37 (op. cit.), p. 64; *Schuler-Zraggen v. Switzerland*, § 58 (op. cit.), p. 66.

230. *Miller v. Sweden*, § 29 (op. cit.), p. 65.

231. *Zagorodnikov v. Russia* No. 66941/01, § 26-27, 7 June 2007.

232. *Riepan v. Austria*, No. 35115/97, § 29, ECHR 2000-XII or *Hummatov v. Azerbaijan*, § 144 (op. cit.), p. 65 where the Court stated that “a trial complies with the requirement of publicity only if the

an inaccessible venue,²³³ insufficient courtroom space or unreasonable conditions on entry into the courtroom²³⁴ have all been said to obstruct the physical access to a court and thus transgress the right of access to a court.

CASE LAW

In the following cases, the Court has developed its interpretation of public and oral hearings, including exceptional circumstances that may justify dispensing with a hearing.

- ▶ ***Håkansson and Sturesson v. Sweden***: on the waiver of the right to a public hearing. Article 6(1) does not prevent an individual from waiving his right to a public hearing, but such a waiver must be made in an unequivocal manner.
- ▶ ***Schuler-Zgraggen v. Switzerland***: on exceptional circumstances, such as cases of a highly technical nature, that are better dealt with in writing and may justify the lack of an oral hearing.
- ▶ ***Fischer v. Austria***: on the right to an oral hearing at least before one instance, unless there are exceptional circumstances that justify dispensing with a hearing.
- ▶ ***Miller v. Sweden***: on exceptional circumstances that required the domestic courts to gain a personal impression of the applicant so that the applicant could explain his personal situation in person.
- ▶ ***Martinie v. France***: on exceptional situations where the national authorities must have regard to the demands of efficiency and economy. In all such proceedings, the litigant must, at least at some point, have had the opportunity to request an oral hearing.

▶ *Håkansson and Sturesson v. Sweden*²³⁵

In this case, the applicant did not express any waiver of the right to a public hearing and the Court had to decide whether or not there had been a tacit waiver. The applicants acquired land through an auction, but were denied a property retention permit required by law by the County Agricultural Board. Later, the Administrative Board acquired this land through compulsory auction. The applicants launched two sets of proceedings, one before the administrative authorities and the other before the courts. The applicants' appeals to the National Board of Agriculture and the government were rejected. The Göta Court of Appeal considered but dismissed the applicants' claims on the lawfulness of the compulsory auction held in 1985. The

public is able to obtain information about its date and place and if this place is easily accessible to them". Courts must make information available to the public regarding the time and venue of the oral hearing.

233. Ibid.; the venue should be easily accessible to the public.

234. Reasonable identity and security checks do not in themselves deprive the hearing of its public nature, see *Hummatov v. Azerbaijan*, § 143 (op. cit.), p. 65.

235. *Håkansson and Sturesson v. Sweden* (op. cit.) p. 64.

request for leave to appeal to the Supreme Court was also rejected. The complaint before the Göta Court of Appeal thus involved the first and only consideration of the applicants' complaint by a judicial authority.

The Court found that the right of the applicants to a public hearing under Article 6(1) was not violated by the Göta Court of Appeal. The Court reasoned that, in light of the domestic practice of conducting such proceedings without holding public hearings, the applicants could have been expected to request a public hearing. The applicants did not challenge the absence of a public hearing in their appeal to the Supreme Court. The Court therefore concluded that the applicants had tacitly waived their right to a public hearing.

► *Schuler-Zgraggen v. Switzerland*²³⁶

A hearing may not be required where there are exceptional circumstances justifying the lack of such hearing. Such exceptional circumstances include cases of a highly technical nature, such as those dealing with social security benefits, which are better dealt with in writing. In *Schuler-Zgraggen*, an Invalidity Insurance Board decided to discontinue the applicant's disability payments. The applicant unsuccessfully tried to examine documents and make photocopies from her case file held by the competent administrative authorities in order to appeal against the termination decision. Upon appeal to the Insurance Court, the applicant and her lawyer were provided access to the case file in order to supplement the appeal. The applicant claimed before the Court that the lack of a hearing before the Insurance Court violated her right to a fair trial under Article 6(1).

The Court disagreed with the applicant and held that Article 6(1) had not been breached. First, the Court reaffirmed its position in *Håkansson and Stureson* that the applicant had tacitly waived her right to a public hearing by failure to request such a hearing in the Insurance Court. The Court then went beyond its position in *Håkansson and Stureson* and adduced four other arguments justifying the absence of a hearing before the Insurance Court in light of the requirements of Article 6(1):

- the case was not of such public importance so as to necessitate a public hearing;
- the issue before the Insurance Court was highly technical, in which case it was better dealt with in writing;
- the private nature of medical information involved in the proceedings would have deterred the applicant from discussion of these matters in a public trial;
- drawing on the position expressed in *Deumeland*,²³⁷ the nature of social security cases called for special diligence and justified resort to procedural economy and speedy proceedings without undue delay.

It appears from the position taken by the Court in relation to waivers that, where the domestic law or practice of court proceedings is such that, as a rule, certain types of hearing are not conducted publicly and orally, it rests with the applicant to

236. *Schuler-Zgraggen v. Switzerland* (op. cit.) p. 66.

237. *Deumeland v. Germany* (op. cit.), p. 14.

request a public hearing before the trial courts or to challenge its absence before the higher courts. In the absence of such a request by applicants, the Court would be expected to conclude that the applicant tacitly waived the right to a public and oral hearing under Article 6(1).

► *Fischer v. Austria*²³⁸

In *Fischer*, the Court stressed that unless there are exceptional circumstances that justify dispensing with a hearing the right to a public hearing under Article 6(1) implies a right to an oral hearing at least before one instance.²³⁹ The Land Governor revoked the applicant's tipping licence for the purposes of environmental protection. The applicant appealed the revocation decision before the Minister of Agriculture and Forestry claiming that he had the right to be heard before revocation. The minister dismissed the appeal, upheld the reasons for revoking the licence, and held that in revocation procedures a hearing was not required. The applicant initiated a lawsuit against the administrative authorities in the Administrative Court, asking it to hold a hearing before it and to quash the revocation decision. The Administrative Court dismissed the applicant's claim, refused to hold a hearing and reasoned that a hearing was also not required in the procedures before the administrative authorities. The Administrative Court provided detailed reasons for its decision by addressing all essential arguments raised by the applicant. The Constitutional Court also dismissed the applicant's complaint, including the claim on the right to be heard.

The Court referred to its position regarding the Austrian Constitutional Court expressed in *Zumtobel*²⁴⁰ and affirmed that the latter did not qualify as a "tribunal with full jurisdiction" in meeting the requirements of Article 6(1). Thus, the main question was whether the lack of a hearing before the Administrative Court was compatible with the requirements of Article 6(1):

... there do not appear to have been any exceptional circumstances that might have justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which Mr Fischer's case was brought; it was able to examine the merits of his complaints; the review addressed not only issues of law but also important factual questions. This being so, and having due regard to the importance of the proceedings in question for the very existence of Mr Fischer's tipping business, the Court considers that his right to a "public hearing" included an entitlement to an "oral hearing".²⁴¹

The Court noted that the applicant expressly requested an oral hearing in the Administrative Court and therefore did not waive his right to an oral hearing. Article 6(1) was breached on the grounds of lack of an oral hearing before the Administrative Court. The Court reasoned that the case raised important issues of fact, in addition to those of law, that the Administrative Court was the first and only judicial instance with full jurisdiction to hear the applicant's case, and there were no exceptional circumstances explained in *Schuler-Zraggen* justifying the lack of an oral hearing. The justification mentioned by the Administrative Court was that

238. *Fischer v. Austria* (op. cit.), p. 25.

239. *Ibid.* § 44.

240. *Zumtobel v. Austria* (op. cit.), p. 25.

241. *Ibid.* § 179.

holding an oral hearing was unlikely to contribute to the clarification of the case and that dispensing with the oral hearing could not alone justify the lack of an oral and public hearing.

► *Eisenstecken v. Austria*²⁴²

Eisenstecken is another interesting case involving the issue of lack of an oral hearing where the domestic law expressly excluded the possibility of an oral hearing for a specific category of cases. Also interesting is the Court's reasoning in its rejection of the government's argument based on Austria's reservation under Article 6(1) concerning the publicity of hearings. The Court held that the reservation was invalid due to the absence of sufficient guarantees that the reservation would not be abused.

The applicant expressly requested an oral hearing before the Regional Real Property Transactions Authority (Regional RPTA) trying a real property dispute with the applicant's involvement, but the case was heard in camera. The applicant's complaints before the Administrative and Constitutional Courts about the lack of an oral hearing at the Regional RPTA were dismissed. The main issue before the Court was whether or not the lack of a public hearing in the real property transaction dispute complied with Article 6(1). The government argued that the applicant waived his right to an oral hearing by failing to expressly request an oral hearing before the regional administrative authority, that an oral hearing was not required in the public interest, and that the case did not involve an important question of law or fact so as to necessitate the applicant's presence.

First, on the issue of the waiving of the right to an oral hearing, the Court stressed that a waiver was irrelevant where the national law excluded oral hearings in such cases. The result was that in situations where the domestic law excluded oral hearings, the applicant, unlike the applicants in the cases of Håkansson and Sturesson²⁴³ and Schuler-Zgraggen,²⁴⁴ was not expected to expressly request an oral hearing. Second, the Court distinguished the nature and complexity of the legal issues involved in this case from those in Håkansson and Sturesson and Schuler-Zgraggen. It stressed that the legal question concerning real property transaction under the dispute was not of particular complexity and therefore did not warrant the use of measures of procedural economy – that is, written proceedings – which were deemed to be justified in Schuler-Zgraggen on the grounds of complexity. The applicant could have contributed to the fair solution of the case if provided with the opportunity to be heard. Third, the Court found no exceptional circumstances justifying the absence of a public hearing and stressed the importance of what was at stake for the applicant – the conferral of an ownership right over a large parcel of land.

242. *Eisenstecken v. Austria*, No. 29477/95, ECHR 2000-X.

243. *Håkansson and Sturesson v. Sweden* (op. cit.), p. 64.

244. *Schuler-Zgraggen v. Switzerland* (op. cit.), p. 66.

► *Salomonsson v. Sweden*²⁴⁵

After an unsuccessful application to the competent agency for disability benefits, the applicant challenged the refusal in the Administrative Court which dismissed the applicant's claims without an oral hearing. The applicant did not expressly ask for such a hearing and the Administrative Court of Appeals refused to grant leave to appeal. The applicant again unsuccessfully applied to the agency for disability benefits and challenged the second refusal in the Administrative Court, which upheld the arguments of the applicant. There was no oral hearing in the Administrative Court, nor did the applicant request one. The agency appealed this judgment in the Administrative Court of Appeals and submitted new medical evidence. The applicant twice requested an oral hearing before the Administrative Court of Appeals reasoning that he would like to be heard in person about the circumstances of his disability. The Administrative Court of Appeals invited the applicant to submit his observations against the new medical evidence in written form but denied the applicant's motion for an oral hearing. It also reversed the second judgment of the Administrative Court granting the applicant disability benefits, thus upholding the initial refusal of the agency to provide benefits. The applicant was refused an oral hearing before the Supreme Administrative Court as well as leave to appeal.

The Court first observed that since the proceedings in the Country Administrative Courts were normally held in writing, the applicant would have been expected to request an oral hearing in that instance, but he did not. In the interests of proper administration of justice and expediency, the oral hearing should normally take place in the first instance court, rather than in the appellate instance. The Court then observed that the applicant's appeal before the Supreme Court could have been resolved on the basis of written submissions. The main issue before the Court was whether or not the lack of an oral hearing before the Administrative Court of Appeals, which the applicant expressly requested, was justified by exceptional circumstances.

The Court found that Article 6(1) was breached on account of the lack of an oral hearing before the Administrative Court of Appeals which was trying not only matters of law but also of fact, as for instance with regard to the admission of new medical evidence. With four medical experts providing differing conclusions, the applicant could have provided useful information at the oral hearing to clarify the contradictory statements, which were essential to the final resolution of the dispute. The Court found no exceptional circumstances to justify dispensing with an oral hearing to which the applicant was entitled.

► *Miller v. Sweden*²⁴⁶

Miller illustrates one of the cases where holding a hearing was deemed necessary due to the exceptional circumstances that required the domestic courts to gain a personal impression of the applicant so that the applicant could explain his personal situation in person. In the judicial review proceedings initiated by the applicant in the Administrative Court against the refusal of social security benefits by the

245. *Salomonsson v. Sweden* (op. cit.), p. 64.

246. *Miller v. Sweden* (op. cit.), p. 65.

administrative authority, the applicant complained of the lack of an oral hearing, including the opportunity to invite witnesses, despite expressly requesting an oral hearing. The applicant justified his request for an oral hearing by the need to demonstrate his reduced functional capacity and to explain the extra costs he incurred because of his illness. He further maintained that at an oral hearing he would have been able to explain the details of his daily life under his medical condition and to supplement existing evidence. The applicant also unsuccessfully requested an oral hearing before the Administrative Court of Appeals and the Supreme Court.

The Court first noted that the applicant expressly requested an oral hearing in the first instance, at the most appropriate stage of the proceedings. It compared this case with *Salomonsson*, where the applicant had failed to request an oral hearing until it reached the appellate level. The only issue before the Court was whether the lack of an oral hearing in the first instance Administrative Court could be justified by exceptional circumstances.

The Court concluded that there was a breach of Article 6(1) in this case, because in the motion for an oral hearing before the national courts, the applicant mentioned key factual issues that could have been better clarified at an oral hearing:

... in the Court's view, the question of the degree of disability was apparently not straightforward. For example, the Court is unable to accept the Government's argument that, because of the passage of time, oral evidence from the applicant's personal doctor was unlikely to add anything useful. On the contrary, it is not inconceivable that the doctor could have fleshed out at an oral hearing the various observations he had made in the relevant medical records, and could have given his opinion on their implications for the issues raised before the County Administrative Court.

The Court considers that the issues raised by the applicant's judicial appeal were not only technical in nature. In its view, the administration of justice would have been better served in the applicant's case by affording him a right to explain, on his own behalf or through his representative, his personal situation, taken as a whole at the relevant time, in a hearing before the County Administrative Court.²⁴⁷

Similar to *Eisenstecken*,²⁴⁸ where the Court ruled that the issues the applicant would clarify at an oral hearing were not of particular complexity, the Court held that the questions the applicant attempted to clarify at an oral hearing in this case were not only of a technical nature. Justice would have been better served had the applicant been given the opportunity to explain his situation orally in the Administrative Court. On those grounds the Court found that there were no exceptional circumstances justifying dispensing with an oral hearing before the Administrative Court, entailing a breach of the requirements of Article 6(1).

► *Martinie v. France (GC)*²⁴⁹

The right to a public hearing implies a public hearing before a relevant court. However, in light of the special circumstances of a case, Article 6(1) does not prohibit courts from deciding to derogate from this principle.²⁵⁰ As explained in the cases above, in

247. Ibid. § 34.

248. *Eisenstecken v. Austria* (op. cit.), p. 70.

249. *Martinie v. France* (op. cit.), p. 15.

250. Ibid. § 40.

exceptional circumstances, where the case is better dealt with in written submissions, a domestic court may dispense with an oral hearing. Such exceptional circumstances include situations, as for example in *Martinie*, where the national authorities must have regard to the demands of efficiency and economy. In all such proceedings, the litigant must, at least at some point, have had the opportunity to request an oral hearing (though the domestic court may refuse the request and hold the hearing in private).²⁵¹ The Regional Audit Office imposed an obligation on the applicant, who was an accountant in a public education institution, to pay surcharges. The applicant unsuccessfully challenged the decision in the Court of Audit. The domestic law did not provide for an opportunity to request an oral hearing in both the first and higher instances. The applicant complained that the hearing before the Court of Audits was not public and that he and his lawyer did not have the opportunity of being present at the hearing, which constituted a breach of the requirements of Article 6(1).

First, the Grand Chamber noted that the annual check of accounting documents was a highly technical exercise that might well be better dealt with in writing. It also expressed some sympathy for the government's argument, that making all such hearings public would be costly for the community. However, since such an audit might result in the financial responsibility of the accountant, the latter might need to seek protection through the public scrutiny of his accounts at least at the appellate instance. The Court explained that, in such circumstances, neither the technical nature of the issues under dispute nor the public costs of public hearings sufficed to justify private hearings in two instances. The Court concluded that it would be compatible with the Convention to hold audits by regional offices in private, provided that the accountants retained the right to request public hearings before the Court of Audit. In the absence of such a right, under the circumstances of the case, the requirements of publicity under Article 6(1) had been breached.

► *Schädler-Eberle v. Liechtenstein*²⁵²

In *Schädler-Eberle*, the applicant unsuccessfully contested the lawfulness of the land development plan limiting her property rights before the municipality and the government, and contested the rejections before the Administrative Court. The applicant had explicitly requested the Administrative Court to hold a public hearing and named several witnesses to be heard in oral proceedings. However, the Administrative Court decided that a public and oral hearing was not necessary and that the administrative action in question was lawful, even if the witness testimony were to prove the applicant's allegations. The Constitutional Court also dismissed the applicant's claims on public and oral hearings, reasoning that the requirements of Article 6(1) on oral hearings did not apply to proceedings conducted by the Administrative Court on the grounds of the reservation that Liechtenstein entered in respect of public hearings under Article 6(1). The Constitutional Court concluded that the Administrative Court had discretion in assessing the necessity of oral hearings and had exercised its discretion in accordance with the case law of the Court.

251. *Ibid.* § 42.

252. *Schädler-Eberle v. Liechtenstein* (op. cit.), p. 64.

The Court agreed with the applicant that she was entitled to an oral hearing before the first instance Administrative Court, which could have been limited on the grounds of exceptional circumstances. The Court upheld the Administrative Court's finding that "there were not ... any contested facts relevant to the outcome of the case or any issues of credibility which necessitated further clarification in a hearing". The applicant was given an opportunity to submit written materials, as well as to respond to those submitted by the opponent, which satisfied the requirements of adversarial trial and equality of arms. The Court concluded that the Administrative Court could fairly consider the applicant's claims related to her property and make a decision on the basis of written observations and materials. Since the absence of an oral hearing was justified, there was no violation of the notion of "fairness" under Article 6(1).

Chapter 5

Equality of arms and adversarial trial

INTRODUCTION

The nature of the rights

In interpreting the notion of a fair trial, the Court has expressly mentioned that the principle of equality of arms is part of the broader concept of fair trial and that Article 6(1) requires a “fair balance between the parties where each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent(s)”²⁵³ These two principles apply in all types of judicial proceedings irrespective of their domestic classification – whether administrative, criminal, civil or commercial. They are inter-related terms and, in many cases, the Court has employed them interchangeably. However, depending on the particular circumstances of a case, the Court may use either the principle of “equality of arms” or “adversarial trial”:

The principle of equality of arms ... requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent ...²⁵⁴

... the concept of a fair hearing also implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision.²⁵⁵

253. See e.g. *Fretté v. France*, No. 36515/97, § 47, ECHR 2002-I; and *Gorraiz Lizarraga and Others v. Spain*, No. 62543/00, § 56, ECHR 2004-III.

254. *Kress v. France* [GC], No. 39594/98, § 72, ECHR 2001-VI.

255. *Křemář and Others v. the Czech Republic*, No. 35376/97, § 39-40, 3 March 2000.

At the core of the principle of an adversarial trial is the duty of domestic courts to ensure that both parties to the proceedings know the evidence in the possession of the court and have the opportunity to comment on it with a view to influencing the outcome of the case. It is of little importance whether the source of the evidence emanates from the plaintiff, the respondent or a third party, or if the court obtained it on its own motion.²⁵⁶ The domestic courts should not make assumptions on which evidence needs disclosure to one or all of the parties.²⁵⁷ The parties may legitimately expect to be consulted by the judicial authorities as to whether or not a particular document calls for their comment.²⁵⁸ The parties may also expect to have knowledge of, and comment on, every document in their files with the court.²⁵⁹

As with most other rights enshrined in Article 6(1), the rights of equality of arms and adversarial trial are not absolute rights and may be limited for a number of legitimate reasons:

In any court proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the defence. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that a person receives a fair hearing, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.²⁶⁰

Article 6 does not explicitly guarantee the right to have witnesses called or other evidence admitted by a court in civil proceedings. Nevertheless, any restriction imposed on the right of a party to civil proceedings to call witnesses, and to adduce other evidence in support of a particular case, must be consistent with the requirements of a fair trial within the meaning of Article 6(1), including the principle of equality of arms.²⁶¹

Government intervention in judicial process

Where the government interferes in judicial proceedings involving a dispute between private persons and the government by the adoption of legislation with a view to influencing the outcome of the case, the procedural balance between the parties may change in favour of the government, thus creating issues with the principles of equality of arms and adversarial trial.²⁶² However, since the rights enshrined in Article 6(1) are not absolute, the Court has allowed a limited exception for legislative interference with the administration of justice:

256. Ibid.

257. *Steck-Risch and Others v. Liechtenstein*, No. 63151/00, § 57, 19 May 2005.

258. *Maravić Markeš v. Croatia*, No. 70923/11, § 43, 9 January 2014; and *Krčmář and Others v. the Czech Republic*, § 43 (op. cit.).

259. *Krčmář and Others v. the Czech Republic*, § 43 (op. cit.).

260. *Užkauskas v. Lithuania*, No. 16965/04, § 46, 6 July 2010.

261. *Ivan Stoyanov Vasilev v. Bulgaria*, § 31 (op. cit.), p. 17.

262. Among the earliest cases, see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A No. 301-B.

The Court has repeatedly ruled that although the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute.²⁶³

In a relatively recent case, with reference to the principle of the rule of law and the notion of a fair trial, the Grand Chamber specified the limits of enacting retroactive legislation by a government in order to influence the outcome of an ongoing judicial process:

The Court reiterates that, although, in theory, the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing law, the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.²⁶⁴

Though the language of the Court is not absolutely prohibitive with regard to retroactive legislation affecting the outcome of a judicial process in a decisive manner, the exception is narrowly drawn and thus renders it difficult for states to resort to the “compelling grounds of the general interest” to justify such interference. Respect for the rule of law and the notion of a fair trial both require that any reasons adduced to justify such measures are treated with the greatest possible degree of circumspection.²⁶⁵ For instance, financial considerations cannot by themselves warrant the legislature substituting itself for the courts in order to settle disputes.²⁶⁶ The exception to the rule on non-interference is that the administration of justice on public interest grounds is not only restrictive and must not be arbitrary. An interference is arbitrary when, for instance, an authority loses the case in court but then obtains the reopening of the case by introducing new legislation with retroactive effect.²⁶⁷

CASE LAW

The following cases present some of the most significant cases of the Court’s interpretation of the equality of arms and adversarial proceedings.

- ▶ **Krčmář and Others v. the Czech Republic:** on the opportunity of the parties to a proceeding to have knowledge of, and possibility to comment on, all the evidence adduced by the other party. The right to disclosure of information also applies between the court and the parties, in this case between the Constitutional Court and the litigants.
- ▶ **Kress v. France:** on procedural opportunities. In cases where submissions, in this case from a government commissioner, were not communicated in

263. *Maggio and Others v. Italy*, Nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08 § 43, 31 May 2011.

264. *Scordino v. Italy* (No. 1) [GC], No. 36813/97, § 126, ECHR 2006-V.

265. *Stran Greek Refineries and Stratis Andreadis v. Greece*, § 49 (op. cit.), p. 76.

266. *Scordino v. Italy* (No. 1) [GC], § 132 (op. cit.), p. 76.

267. *Bulgakova v. Russia*, No. 69524/01, § 42, 18 January 2007.

advance to the parties, regard must be had to the contents and effects of the submissions.

- ▶ ***Fretté v. France***: on the violation of the applicant's right to an adversarial proceeding due to the lack of information about the hearing, thus restricting the applicant from familiarising himself with the content of a government commissioner's submissions before the hearing.
- ▶ ***Steck-Risch and Others v. Liechtenstein***: on procedural opportunities where the applicants were not afforded an opportunity to have knowledge of, or comment on, a municipality's submissions which were decisive for the outcome of the case. The Court found that the domestic authorities had breached the requirement of an adversarial trial under Article 6(1).
- ▶ ***Jokšas v. Lithuania***: on administrative courts' failure to assist the applicant in obtaining evidence and to give it consideration. The domestic courts' limited review was considered to deny the applicant essential means to argue his case.

Access to case files and evidence

▶ *Schuler-Zgraggen v. Switzerland*²⁶⁸

The principle of equality of arms requires that the parties to a proceeding must be allowed access to the facilities on equal terms. As has been explained in Chapter 4, in the *Schuler-Zgraggen* case the Court was not persuaded by the applicant's arguments on lack of access to the case files and found that Article 6(1) had not been breached. The Court reasoned that while the applicant did not have access to her case file during the administrative procedure, both the applicant and her lawyer had sufficient access to it later during the administrative proceedings in the Insurance Court. This was sufficient for the Court to conclude that the trial as a whole was fair in that regard. The applicant was able to know of all the submissions against her and to prepare arguments against the opponent, which is the essence of the principle of an adversarial trial.

▶ *Krčmář and Others v. the Czech Republic*²⁶⁹

In *Krčmář and Others*, the Court stressed that the right to adversarial proceedings must be capable of being exercised in satisfactory conditions and that a party must have the opportunity to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, content and authenticity in an appropriate form and within an appropriate time.²⁷⁰ This case dealt with the nationalisation and restitution of private property. The applicants instigated proceedings before the trial and appellate instances claiming restitution of their company, which had been nationalised by the state in 1946. After their claims were dismissed by the ordinary courts, the applicants instituted a constitutional complaint. On its own initiative, the Constitutional Court collected additional evidence to that presented by the parties. During the oral hearing, the Constitutional Court referred to the evidence examined

268. *Schuler-Zgraggen v. Switzerland* (op. cit.), p. 66.

269. *Krčmář and Others v. the Czech Republic* (op. cit.), p. 75.

270. Ibid. § 42.

by the lower courts and affirmed the lower courts' findings against the applicants. However, although this evidence formed the basis for the Constitutional Court's decision, it was not disclosed to the parties.

According to the Court, the collection of documentary evidence by the Constitutional Court was not itself incompatible with the provisions of Article 6. The main issue before the Court was whether or not the non-communication to the parties regarding the evidence collected by the Constitutional Court on its own motion was compatible with the notion of fairness under Article 6(1).

Since none of the parties was aware of the evidence collected and used by the Constitutional Court on its own motion, the issue of equality of arms did not arise, as both parties were equally disadvantaged by the lack of knowledge of the evidence. The Court viewed and resolved the issue in light of the principle of adversarial proceedings. Noting that the Constitutional Court had collected the evidence with the intention of influencing the outcome of the proceedings before it, since the evidence was decisive in the case, the Court found a breach of Article 6(1) by the respondent state:

From the record of the oral hearing before the Constitutional Court, it does not appear that the documentary evidence in issue was read out. The Court considers, however, that even if such evidence was submitted and read during the oral hearing, this would not have satisfied the right of the applicants to adversarial proceedings, given the character and importance of this evidence. A party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance.²⁷¹

The Constitutional Court had exercised its "inquisitorial" powers for collecting the relevant evidence *ex officio* for the purpose of establishing the "truth" irrespective of and in addition to the parties' submissions. While public law courts defend the public interest, they traditionally have more inquisitorial powers, or so-called *ex officio* duties, for establishing the facts in a given case. However, Article 6(1) requires that they also comply with their international duties to ensure an adversarial trial and equality of arms, even in constitutional proceedings. Without undermining or discouraging the *ex officio* powers of the Constitutional Court, the Court concluded that the proceedings in this case were not adversarial.

Legislative intervention with the administration of justice

► *Stran Greek Refineries and Stratis Andreadis v. Greece*²⁷²

In this case, the Court stressed that the requirement of fairness applies to proceedings in their entirety and is not confined to hearings *inter partes*.²⁷³ This case concerned the annulment of an order for damages for an improper termination of a construction tender. The applicant concluded a contract with the Greek state (at the time governed by the military junta) for the construction of a crude oil factory. During the construction of the factory, the state failed to fulfil its obligations and ordered

271. Ibid. § 42.

272. *Stran Greek Refineries and Stratis Andreadis v. Greece* (op. cit.), p. 76.

273. Ibid. § 49.

the police to stop the work. The new democratic government adopted a special Law No. 141/1975 which terminated certain contracts concluded by the former state, including the contract with the applicant, on the grounds that such contracts were prejudicial to the national economy. The applicant launched proceedings against the government in the ordinary courts claiming compensation for the damages incurred during the validity of the contract. The government insisted that the ordinary courts lacked jurisdiction and the case was referred to the arbitration court. The arbitration court granted the applicant's claims and the government challenged the validity of the arbitration award before the ordinary courts, arguing that the arbitration court could not have decided the case. The government lost the case at the trial and appellate instances. During the proceedings before the Court of Cassation, the parliament enacted Law No. 1701/1987, according to which all arbitration awards granted pursuant to contracts invalidated Law No. 141/1975 and should be invalid and unenforceable, as well as time-barred. This meant that the arbitration court's award in favour of the applicant was retroactively invalidated and the applicant was time-barred from continuing the litigation.

The Greek government argued before the Court that the adoption of Law No. 1701/1987 aimed at restoring the rule of law and democratic order in the Greek state. Without questioning the aims sought by the government, the Court made the following statement on the general principle under the Convention:

... by rejoining the Council of Europe on 28 November 1974 and by ratifying the Convention, Greece undertook to respect the principle of the rule of law. This principle, which is enshrined in Article 3 of the Statute of the Council of Europe, finds expression, *inter alia*, in Article 6 (art. 6) of the Convention. That provision secures in particular the right to a fair trial and sets out in detail the essential guarantees inherent in this notion as applied to criminal proceedings. As regards disputes concerning civil rights and obligations, the Court has laid down in its case law the requirement of equality of arms in the sense of a fair balance between the parties. In litigation involving opposing private interests, that equality implies that each party must be afforded a reasonable opportunity to present his case – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.²⁷⁴

The Court examined both the timing and manner of adoption of the law in question. The law was adopted at the time when the case was pending before the Court of Cassation and after the judge-rapporteur had recommended that the Court of Cassation dismissed the government's appeals. The Court concluded that the state had interfered with the administration of justice with the adoption of the new law:

The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art. 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of Article 12 [of the Law No. 1701/1987] taken together effectively excluded any meaningful examination of the case by the First Division of the Court of Cassation. Once the constitutionality of those paragraphs had been upheld by the Court of Cassation in plenary session, the First Division's decision became inevitable.²⁷⁵

The adoption of the law by the Greek parliament determined the outcome of the proceedings and resulted in the demonstration by the state of its unequal "procedural" powers by which it could influence the outcome of the case. The Court found this

274. Ibid. § 46.

275. Ibid. § 49.

method of participation in domestic court proceedings to be incompatible with the notions of equality of arms and adversarial trial inherent in Article 6(1).

► *Maggio and Others v. Italy*²⁷⁶

In this case, the factual circumstances were identical for all the applicants. While being Italian nationals, they had for some time worked and made social contributions in Switzerland. Upon their return to Italy, they asked the competent authority, Istituto Nazionale della Previdenza Sociale (INPS), to recalculate their old-age pension on the basis of their actual remuneration received in Switzerland. The INPS rejected the requests and the applicants instituted judicial proceedings against the authority in the respective tribunals. The first and second instances rejected the applicants' claims reasoning that, even though contributions paid in Switzerland and transferred to Italy had been calculated on the basis of much lower rates than those established under Italian legislation, they had to apply the former legislation. By a judgment adopted in 2008, the Court of Cassation rejected the applicants' claims on the grounds of Law No. 296/2006 adopted in 2006. The Court of Cassation reasoned that this law had retroactive effect and was found to be constitutional by the Constitutional Court. The Court analysed the provisions of Law No. 296/2006 and came to the following conclusions:

Indeed, the enactment of Law 296/2006, while the proceedings were pending, in reality determined the substance of the disputes and the application of it by the various ordinary courts made it pointless for an entire group of individuals in the applicants' positions to carry on with the litigation. Thus, the law had the effect of definitively modifying the outcome of the pending litigation, to which the State was a party, endorsing the State's position to the applicants' detriment.²⁷⁷

The main legal question before the Court was whether there was any "compelling general interest" justifying such an interference with the course of justice, which the Court had previously ruled to be against the rights of equality of arms and a fair trial. The Court held that:

The Court cannot imagine in what way the aim of reinforcing a subjective and partial interpretation, favourable to a State's entity as party to the proceedings, could amount to justification for legislative interference while those proceedings were pending, particularly when such an interpretation had been found to be fallacious on a majority of occasions by the domestic courts, including the Court of Cassation.²⁷⁸

While the Court accepted that the adoption of the new legislation to re-establish equilibrium in the pension system served general interests, it was not compelling enough to overcome the dangers inherent in the use of retroactive legislation which interfered with the judicial determination of a pending dispute, and thus with the administration of justice. In conclusion, the state infringed the applicants' rights under Article 6(1) by intervening in a manner to ensure that the outcome of the proceedings, to which the state was a party, was favourable to it.²⁷⁹

276. *Maggio and Others v. Italy* (op. cit.), p. 76.

277. Ibid. § 44.

278. Ibid. § 48.

279. Ibid. § 50.

► *Cataldo and Others v. Italy and Biraghi and Others v. Italy*²⁸⁰

The facts, domestic law and practice in these two similar sets of cases were identical to those in *Maggio*.²⁸¹ Many of the applicants in the *Cataldo* and *Biraghi* cases did not appeal the first instance judgments, which rejected their claims on the recalculation of their social security payments before the second or third instances, because they viewed such an appeal to be futile when considering Law No. 296/2006.

After the Court had delivered its judgment in *Maggio* in 2011, the matter came back to the attention of the Italian Constitutional Court in 2012. As a result, the Constitutional Court found that Law No. 296/2006 was compatible with the constitution. With reference to the *Maggio* judgment, the Constitutional Court emphasised that under the Court's case law, a state may intervene in the administration of justice, thus influencing in a decisive manner the outcome of the case, upon the existence of compelling general interests. The Constitutional Court stressed that under the principle of margin of appreciation, it was for the state to determine whether or not there was a compelling general interest warranting such an intervention. In particular it reasoned that Italian nationals employed in Switzerland paid four times lower social security contributions than those employed in Italy, which created inequality and unfairness among the beneficiaries of Italy's pension system. Law No. 296/2006 was aimed at eliminating this inequality and retroactively establishing fairness in the system, which was a compelling general interest justifying the intervention with the administration of justice under the case law of the Court concerning Article 6(1). The government further argued that retroactive legislation influencing pending cases was also justified by correcting the flaws of the existing legislation with reference to cases in the jurisprudence of the Court – where the state had intervened in the administration of justice with the aim of eliminating a lacuna in the law – which allowed individuals to gain undue benefits. The Court dismissed this argument and distinguished the circumstances of these cases from those relied upon by the government on the grounds that there was no flaw in the law unduly benefiting some individuals in the Italian pension system. The Court reasoned that, prior to the adoption of Law No. 296/2006, most domestic courts judged in favour of those individuals who had worked and made contributions in Switzerland, thus creating a domestic case law in favour of the applicants.

The Court reaffirmed its considerations stated in *Maggio* and held that Article 6(1) was breached. As the Court earlier mentioned in *Maggio*, the government could have restored equality and fairness in the pension system without resorting to such drastic measures as retroactive legislative intervention in pending cases. The Court concluded that establishing equality and fairness in the pension system served general interests, but that this reason was not sufficiently compelling under the circumstances.

280. *Cataldo and Others v. Italy*, Nos. 54425/08, 58361/08, 58464/08, 60505/08, 60524/08 and 61827/08, 24 June 2014; and *Biraghi and Others v. Italy*, Nos. 3429/09, 3430/09, 3431/09, 3432/09, 3992/09, 4100/09, 11561/09, 15609/09, 15637/09, 15649/09, 15761/09, 15783/09, 17111/09, 17371/09, 17374/09, 17378/09, 20787/09, 20799/09, 20830/09, 29007/09, 41408/09, and 41422/09, 24 June 2014.

281. *Maggio and Others v. Italy* (op. cit.), p. 76.

Procedural opportunities

► *Ruiz-Mateos v. Spain*²⁸²

The right to adversarial proceedings means the opportunity for the parties to a trial to have knowledge of, and comment on, all the evidence adduced by the other party. *Ruiz-Mateos* concerned a denial of request to make submissions that applied to the review of the applicants' case before the Constitutional Court. The applicants held 100% of the shares of the RUMASA group. By adopting new legislation, the government ordered the expropriation of all shares of the companies in the RUMASA group. In order to finance the group's companies, its banks had taken risks considered to be disproportionate in relation to their solvency, thereby jeopardising the stability of the banking system and the interests of the depositors, employees and third parties. The domestic court conducting the applicants' restitution proceedings referred the relevant provisions of the disputed law to the Constitutional Court for constitutional review. These provisions restricted the applicants' right of access to a court regarding the expropriated property matters. The Constitutional Court informed a number of state bodies about the time limits for written submissions and received their observations. The Constitutional Court found that the latter was compatible with the relevant provisions of the constitution. After notice of the Constitutional Court's judgment, the first instance court dismissed the applicants' restitution claims, which the applicants appealed in Madrid's Audiencia Provincial. At the request of the applicants, the audiencia referred new questions on the constitutionality of relevant provisions of the disputed law to the Constitutional Court, which found the provisions to be constitutional. Again, the Constitutional Court received a number of observations from a number of state bodies.

The Court emphasised the special characteristics of constitutional proceedings and distinguished proceedings that concerned a specific number of persons:

If in such a case the question whether that law is compatible with the Constitution is referred to the Constitutional Court within the context of proceedings on a civil right to which persons belonging to that circle are a party, those persons must as a rule be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations.²⁸³

The fact that the Constitutional Court admitted and considered the observations of the state counsel and that the applicants did not have the opportunity to comment on them (which would be expected in such a situation) meant that a procedural inequality was created between the state and the applicants before the Constitutional Court, even if the applicants were not formal parties to the proceedings. The government's argument that the Constitutional Court had examined the voluminous submissions by the applicants did not persuade the Court that the proceedings as a whole were fair – since the state bodies had advance knowledge about these submissions and were able to reply to them before the final judicial instance, while the applicants were deprived of such an opportunity.

282. *Ruiz-Mateos v. Spain*, 23 June 1993, Series A No. 262.

283. *Ibid.* § 63.

► *Kress v. France*²⁸⁴

In *Kress*, a government commissioner (an independent member of the national legal service) failed to communicate its observations to the litigants. The Court reiterated that in cases where such submissions were not communicated in advance to the parties, regard must be had to the contents and effects of the submissions. After undergoing surgery, the applicant suffered from a number of health issues and applied to the Strasbourg Administrative Court for compensation. The Administrative Court appointed experts to investigate the applicant's allegations. The applicant disagreed with the findings of the experts and claimed before the Administrative Court that she was entitled to compensation. The Administrative Court granted the compensation in part, which the applicant unsuccessfully appealed before the Nancy Administrative Court of Appeals. The Conseil d'Etat (the conseil) also dismissed the applicant's complaint after hearing the observations of the reporting judge, the parties' lawyers and the government commissioner.

The applicant complained before the Court that she had not received a fair trial in the administrative jurisdictions on two grounds. First, she claimed that neither she nor her lawyer had had an opportunity to examine the government commissioner's submissions before the hearing, or to comment on them at the hearing. Second, the violation of equality of arms and adversarial proceedings was aggravated by the fact that the commissioner attended the deliberations of the conseil, which were held in private.

The Court first recapitulated the principles of its relevant case law in the context of domestic civil and criminal proceedings. In particular, it reiterated that it had previously found a violation of the principle of adversarial trial in cases where the applicants did not have the knowledge of, or the opportunity to comment on, the submissions of government representatives, even though they represented an independent national legal service. The Court discussed how these principles applied to the present case, which concerned proceedings in the Administrative Court. With regard to the position of the government commissioner in the French administrative justice system, the Court stressed that what was important for its analysis was not the abstract evaluation of the status of the government commissioner in administrative proceedings, but rather the fairness of a trial:

No one has ever cast doubt on the independence or impartiality of the Government Commissioner, and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court is of the view that the Commissioner's independence and the fact that he is not responsible to any hierarchical superior, which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial. Indeed, great importance must be attached to the part actually played in the proceedings by the Government Commissioner, and more particularly to the content and effects of his submissions.²⁸⁵

284. *Kress v. France* (op. cit.), p. 75.

285. *Ibid.* § 70.

On the first ground of the complaint the Court mentioned that the right to equality of arms had not been breached, since the commissioner's submission had not been disclosed to any party, thus none of the parties was at a procedural disadvantage compared with the other:

The applicant cannot derive from the right to equality of arms that is conferred by Article 6 § 1 of the Convention a right to have disclosed to her, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench.²⁸⁶

On the principle of adversarial proceedings, the Court did not find a breach of Article 6(1), reasoning that the proceedings at the conseil contained sufficient guarantees against abuse. First, the parties were able to ask the government commissioner, before the hearing, to indicate the general tenor of his submissions, which would enable them to prepare their responses. Second, the parties were able to reply to the government commissioner's submissions by means of a memorandum for the deliberations, which the applicant's lawyer had done in this case. Third, in the event of the government commissioner raising oral submissions at the hearing, the presiding judge would be in a position to adjourn the case to enable the parties to present arguments on such points.

On the second ground of the applicant's complaint concerning the attendance of the commissioner at the deliberations of the conseil, the Court, in finding a breach of Article 6(1), reasoned that the French system did not afford a guarantee to litigants that the government commissioner would not influence the outcome of cases by his presence at the private deliberations in the chambers.

► *Fretté v. France*²⁸⁷

In *Fretté*, the applicant was restricted access to a government commissioner's submissions before the hearing because of a lack of information about the date of the hearing. The Court found that the applicant's right to an adversarial proceeding under Article 6(1) had been violated. The applicant's request for authorisation to adopt a child was denied by the social services, the main reason being that he was single and homosexual. The Paris Administrative Court quashed the decision of social services, and the applicant appealed to the Conseil d'Etat (the conseil). The government commissioner submitted to the conseil that the appeal by the social services against the judgment of the Paris Administrative Court was well founded. The conseil upheld the appeal and quashed the judgment in favour of the applicant. The applicant complained under Article 6(1) that he was unable to attend the hearing of his case before the conseil because he was not notified about the date of the hearing, despite telephoning the registry to inquire about the hearing.

The Court drew parallels between this and the *Kress*²⁸⁸ case, but ultimately distinguished between them. While in both cases the procedural role and functions of the government commissioner in the proceedings before the conseil was a central

286. Ibid. § 73.

287. *Fretté v. France* (op. cit.), p. 75.

288. *Kress v. France* (op. cit.), p. 75.

legal question, the circumstances differed significantly. In *Kress*, the applicant was represented by a lawyer who learned about the general tenor of the submission by the government commissioner before the hearing and filed a memorandum for the deliberations. This fact compensated for the lack of opportunity for the applicant to comment on the commissioner's submissions because the commissioner always spoke last. In contrast to *Kress*, the applicant in this case had no knowledge of the date of the hearing and was not represented by a lawyer. He was therefore unable to establish the general tenor of the government commissioner's submissions before the hearing in order to submit a memorandum in response.

The applicant's absence from the hearing and the lack of legal representation deprived the applicant of the opportunity to learn and comment on the state commissioner's submissions before the conseil. He was thereby deprived of the opportunity to influence the opinion of the conseil under the same conditions as his opponent, which was incompatible with the notion of an adversarial trial under Article 6(1).

► *Gorraiz Lizarraga and Others v. Spain*²⁸⁹

In this case, the Minister of Public Works approved by decree the building of a dam which would have flooded the applicants' village. The applicants challenged together the ministerial decree before the Audiencia Nacional, which partly granted the appeal and ordered the suspension of the construction works.

The Parliament of the Autonomous Community of Navarre adopted Autonomous Community Law No. 9/1996, which, according to the applicants, aimed at creating a legal basis for the continuation of the construction of the dam. The counsel for the state and the government of the Autonomous Community of Navarre appealed the judgment of the Audiencia Nacional. The Supreme Court adopted a judgment that limited the size of the dam and the area to be flooded, which excluded the applicants' properties and the village in which they lived. The government claimed it was impossible to implement the judgment of the Supreme Court, because the new law removed the protection zone status from the construction area. The applicants argued that the law was inapplicable to the situation, since it had been adopted after the judgment of the Audiencia Nacional and the two enforcement orders.

Upon receiving the applicants' motion, the Audiencia Nacional referred Law No. 9/1996 to the Constitutional Court for a preliminary ruling. The Constitutional Court received the submissions from a number of state bodies on the disputed provisions of the community law, including the applicants' submissions. The Constitutional Court ruled that the disputed law was compatible with the constitution and reasoned that it was impossible to implement the judgments of the Supreme Court because the new law made it lawful to implement the construction works of the dam. The Constitutional Court also referred to the case law of the Court on retroactive legislative intervention with the administration of justice under Article 6(1) and found no breach of that provision. It reasoned that environmental protection was a protected value under the constitution and prevailed in these circumstances over the interests of implementing the final judgments of the Supreme Court. The applicants argued

289. *Gorraiz Lizarraga and Others v. Spain* (op. cit.), p.13.

before the Court that (i) they did not enjoy the same procedural equality before the Constitutional Court as the state counsel and (ii) that the enactment of Autonomous Community Law No. 9/1996 breached Article 6(1) because it amounted to a legislative intervention on the outcome of the judicial dispute, as a result of which the final judgments had remained unexecuted.

On the first complaint, the Court held that the very essence of the principle of equality of arms had not been infringed. The Court first noted that under domestic law there was no possibility open for the exchange of legal material between the parties, nor were there public hearings in the constitutional proceedings. It emphasised that the Audiencia Nacional had forwarded the materials submitted by the applicants to the Constitutional Court, which had joined all the materials in the case file before ruling on the matter of constitutionality. The Court also noted that the applicants did not attempt to request leave from the Constitutional Court to participate in the hearings, though they could have done so referring to the previous case law. Finally, the Court was satisfied that “the Constitutional Court replied at length in its judgment to the arguments submitted by the applicants throughout the entire proceedings”.²⁹⁰

The Court found no breach of the very essence of the principle of equality of arms because there was nothing in the case suggesting that the state bodies that had made submissions to the Constitutional Court possessed any procedural advantages over the applicants.

The Court also held that there was no breach of Article 6(1) under the second complaint. The Court found significant differences between this case and similar cases,²⁹¹ where it had found breaches of the principle of equality of arms and the right to a fair trial on the grounds of the state’s retrospective legislative intervention, with the administration of justice affecting the outcome of the case:

A common feature of the cases previously examined by the Court lies in the fact that the State’s intervention through legislative acts was intended either to influence the outcome of pending judicial proceedings, to prevent proceedings being opened, or to render void final and enforceable decisions which recognised personal rights to receive payment.²⁹²

The Court concluded that:

- ▶ at all points during the national proceedings, the administrative authorities complied with the judgments of the domestic courts, including with the orders suspending the construction works;
- ▶ this case significantly differed from *Stran Greek Refineries and Stratis Andreadis*²⁹³ in that here the aim of the enactment of the new law was not to remove jurisdiction from Spanish courts examining the lawfulness of the dam project. The law did not specifically focus on the dam project, but covered all protected nature reserves and nature sites of the Navarre province;

290. Ibid. § 60.

291. *Stran Greek Refineries and Stratis Andreadis v. Greece* (op. cit.), p. 76; *Papageorgiou v. Greece* (No. 59506/00, ECHR 2003-VI (extracts)); *Zielinski and Pradal and Gonzalez and Others v. France* [GC], Nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.

292. *Gorraiz Lizarraga and Others v. Spain*, § 70 (op. cit.), p. 13.

293. *Stran Greek Refineries and Stratis Andreadis v. Greece* (op. cit.), p. 76.

- ▶ the disputed law was not adopted with retroactive effect, as in other cases where the Court found breaches of the principle of equality of arms and the right to a fair trial;
- ▶ the applicants had effective and equal access to the Constitutional Court on the same conditions as the other state bodies.

The Court concluded that, though there was a legislative interference with the course of justice, it did not breach the fairness of the proceedings initiated by the applicants.

▶ *Steck-Risch and Others v. Liechtenstein*²⁹⁴

See Chapter 2 for the background of this case in which the Court decided on different matters under Article 6(1). The applicants complained before the Court that the proceedings before the Administrative Court were not adversarial in that the domestic court not only admitted, but also relied on, the facts submitted by the municipality, facts that the applicants did not know about and were not able to comment on. The Court reaffirmed the principle of equality of arms and applied it to the circumstances of this case:

... the municipality's observations contained a reasoned opinion on the merits of the applicants' appeal. The Court has repeatedly held that in such a situation the effect which the observations actually had on the judgment is of little consequence. What is particularly at stake here is the litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file.²⁹⁵

In fact, the Administrative Court had had regard to the submission of the municipality that the applicants' land was not open for construction, a decisive fact for the outcome of the case. That was sufficient for the Court to find that the domestic authorities had breached the requirement of an adversarial trial under Article 6(1). The applicants were not afforded an opportunity to have knowledge of and to comment on the municipality's submissions to the Administrative Court. Thus the actions of the domestic authorities had restricted the procedural opportunities of the applicants to the point that they were placed in an unequal position vis-à-vis their opponent, which did not ensure an adversarial trial.

▶ *Užkauskas v. Lithuania and Pocius v. Lithuania*²⁹⁶

In *Užkauskas*, the Court found that the applicant did not have the opportunity to obtain knowledge of, and comment on, the evidence against him, which breached the requirements for adversarial proceedings and equality of arms. The applicant was informed that his firearms licence had been revoked on the grounds that he was included in the "operational records file" of the police. The applicant challenged the inclusion of his data before the Kaunas Regional Administrative Court. The Administrative Court dismissed the appeal and found that the entry of his name in the operational list was lawful. The basis of the decision was classified information submitted by the police to the Administrative Court, which was

294. *Steck-Risch and Others v. Liechtenstein* (op. cit.), p. 45.

295. *Ibid.* § 57.

296. *Užkauskas v. Lithuania* (op. cit.), p. 76; and *Pocius v. Lithuania* (op. cit.), p. 13.

not disclosed to the applicant. The applicant appealed to the Supreme Court, arguing that he had no access to the police materials submitted to the court. The Supreme Court upheld the findings of the Administrative Court reasoning that the police submissions constituted state secrets that could not have been disclosed to the applicant.

The Court decided to analyse the domestic decision-making process as a whole to find out whether the process guaranteed equality of arms and an adversarial trial. The Court first noted that in accordance with domestic law and judicial practice, classified state secrets could not be used against individuals as evidence until they were declassified. Even after declassification, such evidence could not be the sole evidence forming the basis of a judgment. However, it appeared that the only evidence of the applicant's alleged danger to society was the operational records file, which was also decisive for the outcome of the case:

In order to conclude whether or not the applicant had indeed been implicated in any kind of criminal activity, it was necessary for the judges to examine a number of factors, including the reason for the police operational activities and the nature and extent of the applicant's suspected participation in alleged crime. Had the defence been able to persuade the judges that the police had acted without good reason, the applicant's name would, in effect, have had to have been removed from the operational records file. The data in this file was, therefore, of decisive importance to the applicant's case.²⁹⁷

The Court thus concluded that it had not been possible for the applicant to have knowledge of and comment on the evidence against him in the same way as by the police. The Court therefore found that the decision-making procedure did not comply with the requirements for adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of the applicant.

On the same day that the Court decided on the Užuokas case, it also decided on Pocius. The cases contained almost identical facts, but with certain differences. In addition to revoking his firearms licence, as in Užuokas, Pocius was also charged with theft when acting in an organised group, and later with covering up a crime committed by others. Unlike Užuokas, Pocius also submitted detailed reasons why he needed the firearms licence. In particular, he was a nature protection inspector and was frequently attacked by poachers; he was in the habit of transferring large sums of money from the office safe to the bank; and he lived in a remote rural area and needed to protect his family. Similar to Užuokas, the applicant was also included in the operational records file and the domestic judiciary relied on police submissions containing state secrets without ever disclosing them to the applicant for adversarial arguments. The Court found a breach of the applicant's rights to equality of arms and adversarial trial. The fact that there were criminal charges against Pocius did not justify the domestic courts' use of and reliance on secret evidence without disclosing it to the applicant in view of adversarial proceedings.

²⁹⁷. Ibid. *Užuokas v. Lithuania*, § 49.

► *Jokšas v. Lithuania*²⁹⁸

In *Jokšas*, the applicant, who was a senior military officer, concluded a five-year professional service contract with the Lithuanian Army in 2002. In 2006, the applicant approached a daily newspaper, which published an article criticising a new Army Disciplinary Statute. The applicant was discontented with certain provisions restricting the procedural rights for the defence of servicemen during disciplinary proceedings against them. A disciplinary action against the applicant established that the applicant did not breach the law and was solely expressing his personal opinions. Another internal investigation concluded that he had failed to discharge his duties properly and imposed a reprimand as a disciplinary measure, which was quashed by the Administrative Court as a result of judicial review initiated by the applicant. Later, the applicant's superiors made a decision to terminate the professional service contract with the applicant on the grounds that he had reached the retirement age.

The applicant asked the Vilnius Regional Administrative Court to quash the termination and reinstate him in his position, arguing that the termination of his contract was discriminatory because four other servicemen were still in service in the same battalion, despite having reached the retirement age. The applicant asked the Administrative Court to order the opponent to produce certain documents relating to his dismissal, as well as the four other servicemen who had reached the retirement age. The Administrative Court dismissed the applicant's action, reasoning that reaching retirement age was a legitimate ground for the termination of his service contract, and that the Minister of Defence had discretion in the interests of the military to extend the military professional service contracts of servicemen who had reached retirement age. The Administrative Court did not address the request of the applicant to order the production of evidence by the opponent on the four servicemen in a similar position. Upon appeal initiated by the applicant, the Supreme Administrative Court confirmed the lower court's judgment.

The Court stressed that it would examine the complaints under the head of "fairness of a trial as a whole, including the way in which evidence was obtained". The Court noted that, considering the fact that the applicant argued that his termination was discriminatory, a comparison between his situation and that of the four other servicemen was indispensable for him to be able to present his grievance. Without such evidence, which was in the possession of the respondent authorities, the applicant was unable to base his claims before the first and second instance administrative courts. Despite repeated requests by the applicant, the domestic courts limited their review to the letter of the law on military service, which stated that retiring at the age of 50 was mandatory. Under those circumstances, the Court stated that the domestic courts should have addressed the applicant's arguments on discriminatory treatment, and held that the national proceedings as a whole were not fair:

... given that the applicant had given full details of which specific evidence he wished to obtain and why it was directly relevant to his complaint and to his wish to influence the courts' decision, and considering that at that stage of the proceedings it was not yet clear whether that evidence was necessary in order to determine the applicant's discrimination claim, the Court finds that the administrative courts' failure to assist the applicant in obtaining

298. *Jokšas v. Lithuania* (op. cit.), p. 16.

evidence and to give it consideration, or at least to provide reasons why this was not necessary, denied the applicant essential means to argue his case. In disputes concerning civil rights, such as the present one, such a limited review cannot be considered to be an effective judicial review under Article 6 § 1.²⁹⁹

The Court's formulation that "the administrative courts' failure to assist the applicant in obtaining evidence and to give it a consideration" is especially noteworthy. Since the evidence sought by the applicant was in the possession of his procedural opponent, the only way that the applicant could have supported his allegations of discrimination was through the Administrative Court.

In many European states, Administrative Court judges bear the duty of establishing facts of cases *ex officio*. This principle requires that the judge seek from the parties and other sources all the necessary evidence to establish the truth of a case, even in cases where the parties do not make any motions in that regard. In this case, the applicant specifically asked the court to order the production of the evidence in the possession of the respondent authority as the only means for proving his claims. However, once the Administrative Court found that the applicant had reached the retirement age, and although the allegations of discrimination made before it had not been proved or rejected, the domestic court did not address this request because it found that the truth had been established.

The wording used by the Court also refers to the rules of the burden of proof in administrative proceedings. It is a widely accepted principle of the burden of proof in such proceedings that each party bears the burden of proving his or her claims, unless one party establishes that the proof necessary for proving a fact is in possession of the opponent. In such cases, the party concerned may well expect the court to assist in obtaining the evidence – or at least provide reasons for not doing so. In cases involving allegations of discrimination such judicial assistance becomes crucial, as it is sometimes the only means of ensuring that the party in question is able to effectively argue his or her case. One form of discrimination, as alleged by the applicant in this case, is when the administrative authority treats individuals in similar positions differently. In these "similarly situated" cases, the alleged victims of discrimination need to gather and submit to relevant bodies the evidence attesting to the fact that they have been similarly situated with others, but received differential treatment.

► *Maravić Markeš v. Croatia*³⁰⁰

In *Maravić Markeš*, the applicant sought a severance fee from the Municipal Office for her dismissal from the Municipality's Secretariat, which was denied on the grounds that she was required to request the fee within three days of dismissal. The Chief of the Municipality dismissed the applicant's appeal, which the applicant appealed before the Administrative Court. The Administrative Court referred the appeal to the Municipal Office for comment, which sent its observations to the Administrative Court, but not to the applicant. After the Administrative Court dismissed the applicant's complaint, the applicant unsuccessfully filed a constitutional complaint with the Constitutional Court claiming that the proceedings before the Administrative Court were not adversarial.

299. Ibid. § 58.

300. *Maravić Markeš v. Croatia* (op. cit.), p. 75.

The applicant complained before the Court that she had not had an opportunity to comment on the observations of the Municipal Office that were submitted to the Administrative Court, which had breached her right to an adversarial trial under Article 6(1). The applicant particularly emphasised the fact that the Administrative Court based its decision on the new arguments, which were submitted to the Administrative Court by the Municipal Office and never communicated to her.

The Court upheld the arguments of the applicant and found that the respondent state had violated her right to equality of arms and an adversarial trial under Article 6(1). In its objections against the applicant's submissions, the government raised an argument of admissibility before the Court based on Protocol 14 to the Convention. In particular, it argued that the applicant did not suffer any significant disadvantage because her severance claim for dismissal from employment was time-barred under domestic law. Therefore, even if the Administrative Court had communicated the Municipal Office's submissions to the applicant, the outcome of the case would have been the same. The Court joined this admissibility argument to the merits and dismissed it on the following grounds:

It is true that the Court has already used the "no significant disadvantage" criterion to declare inadmissible similar complaints of failure to forward the observations of domestic authorities to the applicant (see *Holub v. Czech Republic* (dec.), No. 24880/05, 14 December 2010). However, the present case has to be distinguished from *Holub*, as in that case the domestic authorities did not raise new arguments in their observations. As described in paragraph 49 above, in the present case not only did the Municipal Office raise new arguments in their observations, but the Administrative Court relied on those arguments when rendering its judgment. In this connection, the Court cannot assess the validity of arguments which the applicant had no opportunity to present ... Although these arguments would be irrelevant for the outcome of the present case, as the applicant's claim was in any event time-barred, such practice on the part of the Administrative Court raises a serious issue as regards to the principle of equality of arms, enshrined in Article 6 § 1 of the Convention.³⁰¹

The Court reminded itself that in previous similar factual circumstances, it had found a breach of Article 6(1).³⁰² In particular, the Court found a breach of the requirements of equality of arms and adversarial trial under Article 6(1) in similar circumstances in the case of Croatia (as for example in *Hrdalo*) where the Administrative Court had similarly failed to communicate to the applicant and had relied on new arguments submitted to it by the other party to the proceedings. Thus, the Court saw no reasons for departing from its previous approach under the similar circumstances in *Maravić Markeš*. In fact, when dismissing the government's objection, the Court demonstrated concern over influencing the practice of the Administrative Court in breaching the requirements of equality of arms and adversarial trial, even in cases that had no prospect of success under the domestic law because of time-barring.

► *Placi v. Italy*³⁰³

Before and during his military service, the applicant underwent a number of medical and psychological examinations, which found that he suffered from a number of psychological and mental conditions but remained fit for military service. After discharge from service, the applicant's doctor concluded that his present and

301. Ibid. § 52.

302. *Steck-Risch and Others v. Liechtenstein* (op. cit.), p. 45; and *Schaller-Bossert v. Switzerland* No. 41718/05, 28 October 2010.

303. *Placi v. Italy*, No. 48754/11, 21 January 2014.

aggravated condition was caused by the military service on the basis of which the applicant sought compensation from the Ministry of Defence. The Ministry of Defence dismissed the request reasoning that: (a) the medical commissions of the military hospital found that the applicant's obsessive-compulsive disorder existed before his conscription and that military service could not have seriously influenced its progression; and (b) the request was submitted out of time. The applicant sought on several occasions from the military all administrative and medical documentation on his illnesses produced during his military service, requests which remained unanswered.

The applicant challenged the denial before the Lecce Regional Administrative Tribunal. In particular, the applicant asked the tribunal to declare that there was a causal link between his illness and his military service or, alternatively, declare that the authorities were liable for conscripting him with his pre-existing illness. The tribunal found that the applicant's illness was pre-existing, but it did not establish the government's liability nor did it award damages, which the applicant appealed before the Supreme Administrative Court (CS). The Supreme Court appointed a specialised examination (Medical Board of the Ministry of Defence) to ascertain whether or not a causal link existed between the applicant's infirmity and his military service. The Medical Board consisted of three experts from the military, a police expert and an independent neurologist. The applicant's doctor submitted to the Supreme Court his conclusions, according to which there was a causal link between the applicant's condition and his military service. The Medical Board concluded that the applicant's infirmity was not caused or aggravated by his military service, on the basis of which the Supreme Administrative Court dismissed the applicant's complaints and refused to assess the merits of expert conclusions, reasoning that it had limited review powers.

Without finding it necessary to examine the complaints of the applicant related to the non-disclosure of documentation regarding his health, the Court found that Article 6(1) was breached, holding that:

the applicant had legitimate reasons to fear that the Medical Board had not acted with the appropriate neutrality in the proceedings before the CS. It further transpires that, as a result of the Board's composition, procedural position and role in the proceedings before the CS the applicant was not on a par with his adversary, the State, as he was required to be in accordance with the principle of equality of arms. That conclusion suffices to find that the applicant was not afforded a fair hearing before an impartial tribunal and at a par with his adversary in the proceedings before the CS.³⁰⁴

The Court particularly emphasised the fact that the Medical Board, which was appointed by the Supreme Administrative Court, was subordinate to the Ministry of Defence, which was the respondent in this case. The fact that one of the five board members was a civilian was insufficient to alter the opinion of the Court. Though this finding was important in the light of the case law of the Court on the independence and impartiality of the court-appointed experts, it was not decisive for the Court. The Court's conclusion was shaped by the fact that the Supreme Administrative Court based its decision entirely on the conclusions of the Medical Board, while these conclusions had only been submitted at the appeal stage and that the Supreme Court

304. Ibid. § 79.

lacked powers to assess them. In such a procedural situation, while the Ministry of Defence was able to influence the opinion of the Supreme Court by submitting the conclusions of the Medical Board, the applicant was unable to influence the opinion of the Supreme Court due to the stage of proceedings and lack of sufficient powers of the Supreme Court. Such a situation, the Court concluded, was incompatible with the principle of equality of arms.

Chapter 6

Trial within reasonable time

INTRODUCTION

The right to a hearing “within a reasonable time” is one of the fair trial rights expressly envisaged by Article 6(1). Under this provision, states are obliged to organise their legal systems and take all reasonable steps to ensure that their courts are able to secure for all a trial within a reasonable time.³⁰⁵ However, although Article 6(1) grants states a wide margin for its implementation, the Court has continually dismissed the arguments of respondent governments claiming that their domestic courts were unable to deliver final judgments within short time periods due to excessive caseloads,³⁰⁶ including delays caused by lawyers’ strikes.³⁰⁷ This chapter will focus on a number of judgments of the Court on the commencement and end of the time period relevant for calculating the “reasonableness” of a trial period, as well as the underlying principles for making such an assessment.

Where “reasonable time” starts and ends

In cases where applicants allege a violation of the right to a fair hearing within a reasonable time the Court has invariably begun its analysis by ascertaining two essential circumstances:

- a. the moment when the time relevant to calculating the reasonableness of the trial period started; and
- b. the total period of the domestic proceedings.³⁰⁸

305. *Frydlender v. France* [GC], No. 30979/96, § 45, ECHR 2000-VII.

306. *Deumeland v. Germany* (op. cit.), p. 14.

307. *Arvanitaki-Roboti and Others v. Greece*, No. 27278/03, § 15, 18 May 2006.

308. *Golder v. the United Kingdom* (op. cit.), p. 23; *König v. Germany*, 28 June 1978, Series A No. 27; and *Vilho Eskelinen and Others v. Finland* (op. cit.), p. 15.

The text of Article 6(1) refers to the reasonableness of the time of a “fair and public hearing ... by an independent and impartial tribunal”. The provision does not, however, explicitly refer to the reasonableness of time of administrative procedure conducted by administrative authorities that do not constitute a “tribunal” within the meaning of Article 6(1).³⁰⁹ It would be logical to assume that the calculation of the reasonableness of the trial period starts at the moment of the launch of the court proceedings and ends at the end of those proceedings. However, for a number of valid reasons, the Court’s case law has developed in another direction. The calculation of the period relevant to the reasonableness of the trial period may start even before the commencement of the judicial proceedings, thus including the time of the administrative procedure conducted by the administrative agencies,³¹⁰ and end at the moment of the execution of court judgments by the administrative authorities. The Court has suggested a practical justification for reading Article 6(1) as proceedings are often delayed, not by judicial instances but by the administrative authorities conducting the administrative procedures. In many countries, until the administrative authority has issued the administrative act in respect of the applicant, the latter will be unable to initiate any judicial proceedings against it. In *Vilho Eskelinen*³¹¹ it took four years for the County Administrative Board to decide the applicants’ request for wage supplements, with no acceptable justification. Only after this delayed decision were the applicants able to launch judicial review proceedings against the decisions, which then took three years to end in two hearing instances. Thus, the starting point for the calculation of reasonableness of time may start at the moment the applicant files a complaint or appeal with administrative authorities.³¹² Such policy reminds all state authorities, both judicial and administrative, that their procedural acts may affect the Convention rights of individuals.

The ending point of the relevant time of a trial may be the end of the trial or the final execution of the judgment by the administrative authorities. Execution proceedings, though conducted by the administrative authorities in many member states, have been considered to be an integral part and the last stage of a “trial” under Article 6(1).³¹³

Once the Court has determined the starting and ending points of the relevant time, it can determine the total period of time of the proceedings and its reasonableness. In complex domestic proceedings, where the applicant might be involved in a number of interrelated proceedings conducted by various courts, the Court will determine the time of the judicial proceedings that should or should not be included in the total period of the “trial”.³¹⁴

309. See Chapter 2 for the definition of a tribunal.

310. *Golder v. the United Kingdom* (op. cit.), p. 23; *König v. Germany* (op. cit.); *Janssen v. Germany*, No. 23959/94, 20 December 2001.

311. *Vilho Eskelinen and Others v. Finland* (op. cit.), p. 15.

312. See also *König v. Germany* (op. cit.), p. 93.

313. *Hornsby v. Greece*, 19 March 1997, Reports of Judgments and Decisions 1997-II.

314. *Deumeland v. Germany* (op. cit.), p. 14.

Assessing the reasonableness of time

The Court assesses the reasonableness of the time of a trial by taking into consideration the particular circumstances of each case. The Court has, however, never determined an abstract period of excess by which the time of the trial is automatically ruled to be unreasonable. In cases where the Court has had to determine the issue of excessive length of domestic trials, it has reiterated that the following assessment criteria should be applied:

... the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.³¹⁵

Complexity of the case

The complexity of the case depends on the complexity of the factual and legal issues involved in light of the time the domestic bodies had to allocate to resolve the issues in question. In cases where the Court has considered the issue of the excessive length of the domestic proceedings, it has found, for example, that those involving a denial to renew a gun licence,³¹⁶ consideration of a request for a wage supplement³¹⁷ and judicial review of the denial of pay for overtime work³¹⁸ were not particularly complex so as to warrant excessively long proceedings. However, it should be noted that the Court has confined its analysis to all the circumstances of a particular case. As a result, there may be disputes related to the above-mentioned issues that appear to be more complex and thus warrant more time for the domestic authorities concerned to resolve.

Actions of the applicant and the authorities

In the assessment of the actions of the parties contributing to a delay, the Court has proceeded to analyse individual and cumulative contributions to its cause. Even where the actions of the applicant have contributed to the overall delay in domestic proceedings, the Court might well find a breach of Article 6(1) by the respondent government if the various domestic courts have been seen to contribute to an overall delay in their separate sets of proceedings.³¹⁹

The issue at stake for the applicant

The more serious the consequences of delay are for the applicant, the more the Court will be inclined to reject the justifications of the respondent government for prolonging the proceedings. The Court has stressed that certain categories of cases call by their very nature for particular expedition. Such cases include employment

315. *Rumpf v. Germany*, No. 46344/06, § 41, 2 September 2010; and *Frydlender v. France*, § 43 (op. cit.), p. 93.

316. *Ibid. Rumpf v. Germany*.

317. *Vilho Eskelinen and Others v. Finland* (op. cit.), p. 15.

318. *Arvanitaki-Roboti and Others v. Greece* (op. cit.), p. 93.

319. *Deumeland v. Germany*, § 90 (op. cit.), p. 14.

disputes, since they affect the means of subsistence of the applicant.³²⁰ In *Bock* the Court found that Article 6(1) was breached because:

one after the other, proceedings based on Mr Bock's alleged mental ill-health failed. A guardianship application was dismissed in 1975; a further action for a declaration of his incapacity was turned down in the following year. Yet doubts still persisted in the national courts as to his soundness of mind, although, by the time of the final divorce judgment, there was a total of five reports attesting Mr Bock's soundness of mind against one whose author had been disqualified. Moreover, this case concerned matters central to the enjoyment of private and family life, namely relations between spouses, as well as between the parents and their children.³²¹

The Court has noted that particular diligence is also required in cases concerning civil status and legal capacity of a person.³²²

CASE LAW

The following cases mark some of the Court's most significant case law on a trial within a reasonable time.

- ▶ ***König v. Germany***: on the determination of the length of the proceedings which depends on the particular circumstances of the individual case.
- ▶ ***Deumeland v. Germany***: on the assessment of the reasonable time requirement. While different delays may not themselves give rise to any issue, they may, when viewed cumulatively, result in a reasonable time being exceeded. In this case the trial time resulted in almost 11 years.
- ▶ ***Frydlender v. France***: on the reasonableness of the length of the proceedings that must in each case be assessed according to the particular circumstances, and in light of the following criteria: the complexity of the case; the conduct of the applicant and of the relevant authorities; and what was at stake for the applicant in the dispute.
- ▶ ***Scordino v. Italy***: on the importance of administering justice without delays which might jeopardise its effectiveness and credibility, and on the conduct of the competent authorities, in that it is for the contracting states to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time.

▶ *König v. Germany*³²³

In *König* the Court stressed that the starting point of the relevant period may include the mandatory preliminary administrative procedure. As when the period ends, the whole of the proceedings should be taken into account, including appeal proceedings.³²⁴ The

320. *Frydlender v. France*, § 45 (op. cit.), p. 93.

321. *Bock v. Germany*, 29 March 1989, § 48, Series A No. 150.

322. *Ibid.* § 49.

323. *König v. Germany* (op. cit.), p. 93.

324. *Ibid.* § 98.

applicant, who was a plastic surgeon and ran a clinic, was deprived of the necessary licences to run his clinic and to practise medicine as a result of disciplinary proceedings brought against him by the competent professional body. The applicant challenged the withdrawal of both licences before the administrative jurisdictions and later complained before the Court of the excessive length of the domestic proceedings.

The Court first declined the argument of the government that the starting point of the relevant period should be the date on which the applicant filed an appeal with the first instance Administrative Court. The Court reiterated its position in cases involving the determination of a criminal charge, where the calculation of reasonableness of time may start before the commencement of court proceedings. The Court similarly reaffirmed its previous position in *Golder*, where it held that:

it is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.³²⁵

The time relevant to the principle may start running from the moment the applicant lodges an appeal against the impugned administrative act before the competent administrative organ. Applying these general principles in the present case, the Court held that the relevant time should have been calculated from the moment Dr König filed an objection against the revocation of his licences. The Court also stressed that, as a general principle, the time under assessment included both trial and appeals proceedings, as far as both proceedings included the determination of civil rights or obligations.

Turning to the assessment of the reasonableness of time of the trials regarding the withdrawal of the authorisation to run a clinic, the Court first noted that it took 10 years for the first instance Administrative Court to rule on the applicant's appeal. After careful analysis of the complexities of the case and actions of the courts, and of the applicant and the administrative organs that could have caused the delays, the Court concluded that the excessive delay could not be attributed to the behaviour of the applicant (including change of lawyers and the suspensive effect of appeals, etc.), but rather to the treatment of the applicant's case by the domestic courts. A trial of almost 11 years within administrative jurisdictions was deemed to be excessive and therefore in breach of Article 6(1).

With regard to the trial on the withdrawal of the authorisation to practise, the Court noted that it took substantial time for the administrative jurisdictions to deliver the judgment, though this case was less complex than the case concerning the withdrawal of the licence to run the clinic. The Court noted that the applicant's conduct (for example, the change of a lawyer and other procedural actions) had affected the length of the trial. However, the Court concluded that the primary cause of the excessive delay in the proceedings was the fact that the courts did not conduct the necessary expeditious investigation of the facts. In particular, there was no justification for the suspension of the case for almost a year, or for the lack of any major investigatory steps for some four years between 1971 and 1975.

325. *Golder v. the United Kingdom*, § 32 (op. cit.), p. 23.

► *Deumeland v. Germany*³²⁶

In *Deumeland*, the Court stressed that, while different delays may not themselves give rise to any issue, they may, when viewed cumulatively, result in a reasonable time being exceeded. In this case, because of a number of delays, the trial time resulted in almost 11 years. The Court found that the applicant's case was not heard within a reasonable time.³²⁷ The applicant applied to the domestic social courts claiming a pension following her husband's death from an industrial accident. After almost 11 years of litigation, she complained before the Court of the length of the trial that she had commenced in the social courts. The Court first ascertained which of those trial proceedings it would take into account for assessing the reasonableness of the time of these proceedings. In particular, it mentioned that, though the Constitutional Court could not rule on the merits of the applicant's case, its decision was capable of affecting its outcome – therefore those proceedings must be taken into consideration. The Court concluded that the moment when the “time” as defined by Article 6(1) started to run was with the institution of the case by the applicant in the Berlin Social Court in 1970 and the moment the trial ended was with the adoption of the decision by the Constitutional Court in 1981. The Court then had to assess whether almost 11 years of trial time was reasonable in light of the Article 6(1) requirements.

The Court assessed the established facts of the case in light of the criteria of the complexity of the case, the conduct of the applicant and the conduct of the domestic courts. On the first criterion, the Court concluded that the case was not particularly complex when one considered the fact that no difficult legal issue was involved, that the domestic courts could establish certain key facts by hearing witnesses and that the applicable law was clear. Regarding the behaviour of the applicant, the Court concluded that the applicant had not displayed the diligence expected of a party to that kind of litigation and had contributed to prolonging the proceedings.³²⁸

Turning to the conduct of the domestic authorities, the Court evaluated every major action and inaction by each domestic tribunal involved in the litigation. After careful analysis, the Court concluded that 11 years of overall litigation was abnormal, especially when one considered the necessity of diligence in social security cases. The Court ruled that the specific delays caused by the state authorities amounted to a breach of the requirements of Article 6(1).

► *Frydlender v. France (GC)*³²⁹

In *Frydlender*, the Court reiterated that the reasonableness of the length of the proceedings must be assessed in each case according to the particular circumstances, and with reference to the following criteria: the complexity of the case; the conduct of the applicant and of the relevant authorities; and what was at stake for the applicant in the dispute.³³⁰ The applicant was employed by the Ministry for Economic

326. *Deumeland v. Germany* (op. cit.), p. 14.

327. *Ibid.* § 90.

328. *Ibid.* § 80.

329. *Frydlender v. France* (op. cit.), p. 93.

330. *Ibid.* § 43.

Development on the basis of a consultancy contract. Through a series of letters, in late 1985 and early 1986, the minister dismissed the applicant on the grounds of inadequate performance. The applicant sought judicial review of his dismissal before the Administrative Court in 1986, which dismissed his claims in 1989. The applicant appealed before the Conseil d'Etat in 1990, but the appeal was dismissed in 1995.

First, the Court noted that the overall length of the relevant trial was almost 10 years. Holding that the respondent breached its obligations under Article 6(1), the Court reasoned that the case was not of particular complexity, nor could such excessive length be attributable to the applicant. It emphasised that the Conseil d'Etat delivered its judgment nearly six years after the referral of the appeal, and that the respondent government failed to provide satisfactory explanation for such a delay. The Court then reiterated that cases concerning the termination of employment call by their very nature for more expeditious proceedings, since a person would be deprived of the means of subsistence with the loss of the employment.

► *Mete v. Turkey*³³¹

In 1997, the local authority revoked the applicant's licence to serve alcohol in his restaurant and barred the applicant from operating his restaurant. The applicant initiated judicial review proceedings before the Administrative Court and asked the court to stay the revocation decision. The Administrative Court refused and dismissed the applicant's claim in 1998. The applicant launched appeal proceedings in the Supreme Administrative Court and entered a motion for a stay of the revocation decision. The Supreme Administrative Court refused to grant the motion in 1998, upheld the judgment of the Administrative Court on points of law in 2001 and delivered its final decision dismissing the applicant's claims in 2002.

The Court noted that the relevant administrative proceedings had lasted four years and eight months, and analysed the circumstances of this delay in light of the four criteria for assessing the reasonableness of the length of the proceedings. It took nearly two years and eight months between the date of the Administrative Court's decision in 1998 and the determination of the appeal of that decision by the Supreme Administrative Court in 2001. The Court noted that there was about one year and four months between the first and final decisions of the Supreme Administrative Court. In both cases, the Court did not find satisfactory explanations in the submissions of the government justifying those delays. The Court held that the excessive delay was not attributable to the applicant's conduct, but to the appeal system of the respondent state, and found that the requirement of reasonableness of time of trial enshrined in Article 6(1) had been breached.

► *Scordino v. Italy (No. 1) (GC)*

In *Scordino*, the Court reiterated that it is for the contracting states to organise their legal systems in such a way that their courts can meet the obligation to hear cases within a reasonable time,³³² and stressed the importance of administering justice

331. *Mete v. Turkey*, No. 39327/02, 25 October 2005.

332. *Scordino v. Italy (No. 1)*, § 183 (op. cit.), p. 76.

without delays which might jeopardise its effectiveness and credibility.³³³ In this case, the land inherited by the applicants was subjected to expropriation under the general development plan approved by the authorities. In 1990, the applicants initiated judicial proceedings before the Court of Appeal against the district council responsible for determining the amount of compensation and the co-operative that would carry out building works on the land in question. In 1996, the Court of Appeal reached a decision stating that the applicants were entitled to compensation. The co-operative appealed the decision to the Cassation Court in 1996, following which, on 31 January 1997, the applicants and the district council likewise appealed. In 1998, the Court of Cassation allowed the co-operative's appeal, while upholding the remainder of the lower court's decision. In 2002, the applicants instituted judicial proceedings complaining about the excessive length of their proceedings (so-called "Pinto" proceedings – a compensatory remedy for cases of excessive length). In 2002, the domestic court found that the length of the proceedings had been excessive and ordered the Ministry of Justice to pay the applicants non-pecuniary damages and to award them the legal costs.

Several states intervened in the case as third parties and submitted to the Court their concerns regarding (a) the lack of precision of how the Court arrived at the conclusion that the respondent state had violated the "reasonable time" requirement, and (b) the lack of clarity of the principles of awarding non-pecuniary damages in "reasonable time" cases.

The Court first emphasised the difficulties it faced in the examination of thousands of similar cases concerning the "reasonable time" requirement, including in cases with Italy:

The Court next draws attention to the fact that since 25 June 1987, the date of the *Capuano v. Italy* judgment ... it has already delivered 65 judgments in which it has found violations of Article 6 § 1 in proceedings exceeding a "reasonable time" in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1,400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 for the same reason.

The frequency with which violations are found shows that there is an accumulation of identical breaches, which are sufficiently numerous to amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy.

This accumulation of breaches accordingly constitutes a practice that is incompatible with the Convention.³³⁴

The Court had also to respond to the government's objection to the victim status of the applicants, given that they were afforded the "Pinto" remedy under domestic proceedings, which recognised the Convention violation for exceeding the limits of "reasonable time" and awarded damages to the applicants on an equitable basis. The Court held that whether the applicant may still be considered to be a victim in respect of the length of the proceedings depended on the effectiveness of the domestic remedy provided to the applicant, and stressed that a judicial system

333. Ibid. § 224.

334. *Scordino v. Italy* (No. 1), § 175 (op. cit.), p. 76, referring to *Bottazzi v. Italy* [GC] No. 34884/97, § 22, ECHR 1999-V; *Ferrari v. Italy* [GC], No. 33440/96, § 21, 28 July 1999; *A.P. v. Italy* [GC], No. 35265/97, § 18, 28 July 1999; and *Di Mauro v. Italy* [GC], No. 34256/96, § 23, ECHR 1999-V.

designed to prevent proceedings from becoming excessively lengthy was the most effective remedy:

Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy of the type provided for under Italian law for example.³³⁵

Some countries prefer to combine compensatory remedies with those that expedite the proceedings while others choose only compensatory remedies for excessive delays in proceedings. Once a state has introduced a new remedy in cases concerning the “length of proceedings”, it is for the Court to assess its effectiveness and compatibility with the requirements of Article 6(1) and Article 13 of the Convention, which is compatible with the principle of subsidiarity of the Court’s jurisdiction.

On the effectiveness of the Pinto remedy in Italy, the Court stressed that it complied with the first criterion of an effective remedy for excessive delays of proceedings – that is to say, the appellate court recognised a Convention breach due to delays of proceedings. However, it failed to meet the second criterion required by an effective remedy in such cases, that is, to provide “appropriate and sufficient redress”. The amount of compensation the applicants obtained under the Pinto procedure was only 10% of what the Court would have granted in such cases concerning Italy. This factor in itself, the Court concluded, was consistent with its case law and made the results of the use of such a remedy “manifestly unreasonable”. The Court held that as a result of the excessive length of the proceedings, Article 6(1) had been breached. It emphasised that such a breach stemmed from state practice in Italy that was incompatible with the Convention.

► *Arvanitaki-Roboti and Others v. Greece*³³⁶

In April 1994, the applicants – workers at a public hospital – requested the Athens Administrative Court of Appeal to set aside the hospital’s decision refusing to pay them for overtime work. After seven postponements, the first hearing took place in November 1999, and the applicants’ request was granted in December 1999. In April 2000 the hospital appealed, and in February 2003 the Supreme Administrative Court set aside the judgment of the Administrative Court of Appeals on the grounds that the ministerial decision forming the basis of the applicants’ claim was not properly published and therefore could not serve as a basis for such claims.

The Court had to assess whether the domestic proceedings that continued for about nine years in two instances were conducted within a reasonable time, when one considered the complexity of the proceedings, the actions of the applicants and the government, and the impact of the proceedings on the applicants. The government did not provide a plausible explanation for such a delay. Although the strikes by the lawyers could have contributed to the increase of the backlog of cases in the courts,

335. *Scordino v. Italy* (No. 1), § 183 (op. cit.), p. 76.

336. *Arvanitaki-Roboti and Others v. Greece* (op. cit.), p. 93.

it was for the domestic authorities to organise their judicial systems in such ways that ensured trials within a reasonable time.

At the request of the government the case was referred to the Grand Chamber. On 15 February 2008, the Grand Chamber confirmed that there had been a violation of “reasonable time” under Article 6(1).

► *Rumpf v. Germany*³³⁷

The applicant, who operated a private security service, was denied renewal of his gun licence in 1993 and lodged an administrative appeal, which was dismissed in March 1994. The applicant’s request for interim measures was also dismissed. In 1994 the applicant launched an action in the Administrative Court against the refusal to renew the licence. In 1995, the Administrative Court requested the applicant to submit reasons for the action. The judgment was made in May 1996, which the applicant appealed. The Administrative Court of Appeals held a hearing in 1998, but the final judgment was not delivered until May 2004. During this period, written communication was conducted between the applicant’s lawyers and the appellate instance on various issues, including documents that went missing from the court’s case file, on legal aid and other matters. The applicant’s request for leave to appeal was dismissed and affirmed on appeal in 2005. The applicant finally lodged a constitutional complaint, which was dismissed in 2007.

First, the Court established the period to be assessed in light of the Article 6(1) requirements, which started in 1993 and ended in 2007 – some 13-and-a-half years in four judicial instances. Drawing on its well-established case law on the criteria of assessment of the reasonableness of length of proceedings, the Court found that the case was not of particular complexity justifying such a delay. The Court went on to assess the applicant’s conduct. In particular, it found that changes of lawyers several times by the applicant, as well as late submissions of additional reasons to the courts, caused some delay in the proceedings, but were not excessive. Turning to the assessment of the conduct of the national authorities, the Court particularly noted that the proceedings in the Administrative Court of Appeals had lasted for about eight years. The fact that the court file was missing some documents was the responsibility of the respondent government, and could not be used to justify the delays. The Court also stressed that motions challenging the impartiality of the judge, as well as legal aid requests, could not justify excessive delays and absence of hearings. Finally, the Court held that the outcome of the proceedings was important for the applicant because his business depended on it. Had the applicant had earlier knowledge of the outcome of the trial, he would have been able to relocate or reorganise his business. The Court held that on those grounds Article 6(1) had been breached.

337. *Rumpf v. Germany* (op. cit.), p. 94.

Chapter 7

Public and reasoned judgment

INTRODUCTION

The right to a reasoned judgment is not explicitly mentioned in Article 6(1) of the Convention but it is a central feature of the right to a free and fair trial. A reasoned judgment is also important for the full realisation of other fundamental fair trial rights, and the Court has recognised that this requirement is closely linked to the proper administration of justice.³³⁸ A right to a public and reasoned judgment does not require that courts provide detailed answers to every submission made by the parties.³³⁹ Rather, the reasoned judgment serves three important purposes:

- ▶ by responding to the key arguments of the parties, the domestic courts demonstrate to the parties that they have been heard;
- ▶ it enables the parties to appeal the judgment and for the appellate instance to exercise its review powers;³⁴⁰
- ▶ it enables the public to exercise scrutiny of the administration of justice.³⁴¹

Public scrutiny of the administration of justice, an inherent part of any democratic society, is exercised not only by the reasoning of judgments, but also by publicly pronouncing them:

Public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 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.³⁴²

338. *Hirvisaari v. Finland*, No. 49684/99, § 30, 27 September 2001.

339. *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A No. 288; and *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A No. 303-A.

340. See *K.M.C. v. Hungary*, No. 19554/11, 10 July 2012, where the complete lack of reasoning of the decision of the lower authority resulted in a breach of the applicant's right of access to court.

341. *Tatishvili v. Russia*, No. 1509/02, § 58, ECHR 2007-I.

342. *Axen v. Germany*, 8 December 1983, § 25 (op. cit.) p. 64.

The text of Article 6(1) explicitly requires the public pronouncement of judgments. It states that “judgments shall be pronounced publicly, press and the public may be excluded from all or part of the trial”. Such restrictions are only permitted for legitimate aims specified in the same provision. From this provision it follows that even where access of the press and the public to a trial has been lawfully restricted, the judgment should still be pronounced publicly. Moreover, any limitations on the public character of proceedings with reference to Article 6(1) should be narrowly interpreted.³⁴³

CASE LAW

In the following cases, the Court has developed the interpretation of a public and reasoned judgment.

- ▶ ***Hirvisaari v. Finland***: on court judgments that should adequately state the reasons on which they are based. Although Article 6(1) obliges courts to give sufficient reasons for their decisions, it does not require a detailed answer to every argument. In principle it is sufficient for an appellate body to simply endorse the reasoning of a decision in a lower body, if this decision has been adequately reasoned. In *Hirvisaari*, the brevity of the Pension Board’s reasoning on the applicant’s entitlement to a disability pension, which was endorsed by the domestic Insurance Court, was not regarded to be adequate.
- ▶ ***Ryakib Biryukov v. Russia***: on the public pronouncement of judgments. In *Ryakib Biryukov*, only the operative part of the judgment was read out in public. The Court found that it must be ascertained whether the public had access by other means to the reasoned judgment which was not read out. As the reasons explaining why the applicant’s claim had been rejected were inaccessible to the public, the Court found that Article 6(1) had been breached.

Adequate reasoning

- ▶ ***Hirvisaari v. Finland***³⁴⁴

Court judgments should adequately state the reasons on which they are based. Although Article 6(1) obliges courts to give sufficient reasons for their decisions, it does not require a detailed answer to every argument.³⁴⁵ In *Hirvisaari*, the brevity of the Pension Board’s reasoning on the applicant’s entitlement to a disability pension, which was endorsed by the domestic Insurance Court, was not regarded as adequate. The applicant was granted a full temporary invalidity pension, which was extended several times. Later the pension fund reviewed its previous decision and reduced the applicant’s full pension to a partial one, reasoning that the applicant no longer qualified for a full pension. The applicant appealed the reduction to the

343. *Delcourt v. Belgium*, 17 January 1970, § 25, Series A No. 11.

344. *Hirvisaari v. Finland* (op. cit.), p. 102.

345. *Ibid.* § 30.

Pension Board, which rejected the appeal. In its decision the Pension Board referred to the relevant provisions of the law. It acknowledged the fact that the applicant's health had deteriorated, but concluded that the symptoms of his illness were mild. The Insurance Court endorsed the Pension Board's decision.

The Court stressed that the brevity of the Pension Board's reasoning was not, as such, incompatible with the Convention's requirement of reasoning. However, it failed to satisfy the standard in the particular circumstances of this case:

In view of the fact that the applicant had earlier received a full invalidity pension, the reference to his deteriorating state of health in a decision confirming his right to only a partial pension must have left the applicant with a certain sensation of confusion. In these circumstances the reasoning cannot be regarded as adequate.³⁴⁶

Article 6(1) does not require a detailed answer in the judgment to every argument raised by the parties and it allows higher courts to simply endorse the reasons given by the lower instance courts without repeating them.³⁴⁷ On the reasoning provided by the Insurance Court, the Court also stressed that while it might be sufficient for an appellate body to simply endorse the reasoning in the decision of the lower body, it could not have been adequate in this case because the decision of the Pension Board itself was not adequately reasoned and the applicant's main complaint in the Insurance Court was against the reasoning behind the Pension Board's decision. It appears from the holding of the Court that if the Pension Board's decision had been adequately reasoned, the Convention standard for reasoning would have been met.

► *Tatishvili v. Russia*³⁴⁸

Tatishvili concerned the domestic court's incoherent and inadequate reasoning. The applicant, who was born in Georgia and was a stateless person residing in Moscow, submitted five documents to the passport department of the Moscow police for the purpose of residence registration: a USSR passport; a consent form signed by the flat owner and certified by the housing maintenance authority; an application form for residence registration; a document showing payment of housing maintenance charges; and an extract from the residents list. The registration was denied on the grounds that she had failed to file a complete set of the required documents, but did not specify which document was missing. The applicant appealed the rejection before the court. While dismissing the applicant's claim, the first instance court reasoned that (i) instead of challenging the state's refusal of registration, the applicant should initiate civil proceedings under the Civil and Housing Codes for the determination of her right to move to a flat, even though the owner of the flat stated to the court that she had no objection to the applicant's registration in her flat; (ii) the applicant was not a Russian citizen, did not state an intention to become one, and was not in possession of an entry visa to Russia, given that there was "a treaty" between Georgia and Russia requiring a visa for entry. The appellate instance dismissed the applicant's appeal by endorsing the reasoning of the lower court and without answering the arguments of the applicant's representative.

346. Ibid. § 31.

347. Ibid. § 32.

348. *Tatishvili v. Russia* (op. cit.), p. 102.

The Court observed that the first reason in the judgment of the first instance court was inadequate, because it failed to justify its finding that there was a dispute between the applicant and the flat owner. The applicant produced the written consent of the flat owner for her registration in the flat, who later confirmed it before the courts, which should have indicated to the court the absence of any civil law or housing dispute between them. The Court noted that the second reason of the first instance court was also inadequate because the court had failed to verify whether or not such “a treaty” had ever existed or whether the applicant was a Georgian citizen:

... the Court finds it anomalous that the District Court relied on a treaty governing the conditions of entry and stay for Georgian citizens without giving any reasons for the assumption that the applicant was a Georgian citizen. As the Court has found above, no evidence to that effect has been produced either in the domestic proceedings or before it.³⁴⁹

Turning to the assessment of the adequacy of reasoning by the appellate instance, the Court, referring to Hirvisaari, recalled that, in principle, it was compatible with the requirement of reasoning under Article 6(1) if the higher court were to simply endorse the adequately reasoned judgment of the lower instance. However, that had not been the case here. The appellate instance had not only failed to correct the inadequacies of the first instance judgment, but had also failed to answer the arguments of the statement of appeal submitted by the applicant’s representative.

Public pronouncement

► *Ryakib Biryukov v. Russia*³⁵⁰

In *Ryakib Biryukov*, only the operative part of the judgment was pronounced in public. The Court found that it must be ascertained whether the public had access by other means to the reasoned judgment which was not publicly pronounced. As the reasons explaining why the applicant’s claim had been rejected were inaccessible to the public, the Court found that Article 6(1) had been breached.³⁵¹ The applicant instituted negligence proceedings at the district court against the hospital where his hand was amputated. After hearing the parties and witnesses, the district court dismissed the applicant’s lawsuit and only read the operative part of the judgment at a public hearing. The judgment with reasons was served to the applicant a few days later. The applicant appealed before the higher court stating that the district court had failed to read out the full text of the judgment at the trial. The appeal was dismissed. The applicant complained before the Court that Article 6(1) was breached because the domestic court had failed to pronounce publicly the judgment in his case.

The Court’s judgment in this case contains a useful recapitulation of the Court’s earlier case law on the principle of public pronouncement of judgments. The Court stressed that in assessing whether the principle of public pronouncement of judgments was satisfied, attention must be paid to the stages of the proceedings and to whether

349. Ibid. § 61.

350. *Ryakib Biryukov v. Russia*, No. 14810/02, § 45, ECHR 2008.

351. Ibid. § 45.

the judgment was limited to points of law or fact, as well as to the consequences for the applicants.

In Ryakib Biryukov, the Court distinguished its earlier case law from this case. It stressed that the main legal question before it was whether or not the requirement of the public pronouncement of judgments was satisfied by reading out the operative part of the judgment at a public hearing and by later providing the reasoned judgment separately to the applicant. The Court found a breach of Article 6(1), reasoning that the main objective of Article 6(1) – ensuring the scrutiny of the judiciary by the public – was not achieved in this case:

Article 203 of the Code of Civil Procedure, to which the appeal court in the domestic proceedings and the Government in the present proceedings referred, mentioned only the participants to the proceedings and their representatives as persons entitled to become acquainted with a reasoned judgment prepared after the public pronouncement of its operative part ... An obligation to serve a copy of a judgment was also limited to the parties and other participants to the proceedings ... As regards depositing court judgments with a court registry, the relevant regulations restricted public access to the texts of judgments. Such access was normally given only to the parties and other participants to the proceedings.³⁵²

The chosen method by the domestic authorities in pronouncing their judgments did not ensure access for the public to the reasons for rejecting the applicant's claims. Had the general public been given the opportunity to obtain access to the judgment in the court's registry, the outcome of the case would have been different, since the Court had already mentioned that the method of pronouncement would satisfy the standard. In this case it was not clear from the judgments how the mentioned legal provisions applied to the specific facts of the case, thus making it inaccessible for those with no relevant legal knowledge.

► *Fazliyski v. Bulgaria*³⁵³

Fazliyski concerned a case that was classified as secret. The Court emphasised that the public character of proceedings before judicial bodies aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness.³⁵⁴ The applicant, who was employed in the National Security Service, was dismissed by the Minister of Internal Affairs based on a proposal from the Director of the National Security Directorate. The proposal highlighted previous disciplinary proceedings against the applicant and the recent results of a psychological examination by the ministry's Psychology Institute, which found the applicant mentally unfit for his position. The applicant initiated judicial review proceedings in the Supreme Administrative Court, which rejected the applicant's appeal. However, the proceedings had been classified and the judgments were not provided to the applicant nor made accessible to the public for a certain period of time.

As a matter of principle, the Court explained that the public pronouncement of judgments was a free-standing requirement. Thus it was not decisive whether or not an applicant had access to a judgment and was able to exercise his or her right of

352. Ibid. § 42.

353. *Fazliyski v. Bulgaria*, § 69 (op. cit.), p. 25.

354. Ibid. § 69.

appeal. The decisive aspect of the principle was whether or not the judgments were made accessible to the public. More specifically, the Court pointed out that because of the classification of the applicant's proceedings in the Supreme Administrative Court, the judgment was not in any form made accessible to the public. The Court also pointed out that the government did not provide any convincing justification for this state of affairs and reaffirmed its previous position stated in *Raza*:

It should be noted in this connection that in a case concerning an expulsion on national security grounds this Court held that the complete concealment from the public of the entirety of a judicial decision could not be regarded as warranted. It went on to emphasise that the publicity of judicial decisions aimed to ensure scrutiny of the judiciary by the public and constituted a basic safeguard against arbitrariness, and pointed out that even in indisputable national security cases, such as those relating to terrorist activities, some States had opted to classify only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others, thus illustrating that there existed techniques which could accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions.³⁵⁵

The Court therefore found a violation of the provisions of Article 6(1).

355. *Raza v. Bulgaria*, No. 31465/08, § 69, 11 February 2010.

Chapter 8

Execution of judgments

INTRODUCTION

While the text of Article 6(1) does not expressly provide for the right to enforcement of judicial acts, a fair trial would be difficult to imagine without the effective execution of court judgments. In its early interpretations of the concept of a “fair trial”, the Court stressed that the rights guaranteed in Article 6(1) would be illusory if the final judicial act remained unenforced.³⁵⁶ The execution of judgments is intrinsically linked to the other guarantees of Article 6(1) and is necessary for their complete fulfilment. Thus, even if litigants were to enjoy the guarantees of Article 6(1) in the various stages of the judicial proceedings, they would be rendered devoid of purpose if the authorities refused, failed or even delayed compliance with the final judgment.³⁵⁷

It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention.³⁵⁸

The execution of judgments is made even more important in the context of administrative proceedings, since litigants often seek not only annulment of a decision but also the removal of its effects. Thus the protection that a judicial proceeding may bring, and the restoration of legality, requires an obligation on the part of the administrative authorities to comply with the judicial decisions. The Court has particularly stressed the role and importance of administrative proceedings and the judicial review of administrative acts in the protection of individual rights:

The Court observes in this connection that the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 (art. 6) enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.³⁵⁹

356. *Hornsby v. Greece* (op. cit.), p. 94.

357. *Immobiliare Saffi v. Italy* [GC], No. 22774/93, § 66, ECHR 1999-V.

358. *Burdov v. Russia*, No. 59498/00, § 34, ECHR 2002-III.

359. *Hornsby v. Greece*, § 42 (op. cit.), p. 94.

The Court views the enforcement proceedings to be an integral part of a “trial” under Article 6(1),³⁶⁰ even though the actual enforcement of judicial acts is usually undertaken by administrative authorities. Moreover, and from a conceptual perspective, viewing enforcement as part of the trial is also justified when one considers that the administrative procedure of enforcement does not pursue aims other than the implementation of judicial acts. In this regard it is important to distinguish enforcement procedures from other administrative procedures – that is, those that do not pursue justice-related aims and therefore are not part of the justice process.³⁶¹

Since all Convention duties rest with the state authorities of the high contracting parties, the enforcement of judicial acts is the responsibility of state authorities. Thus any applicant who has obtained a judgment against the state should not be expected to launch separate enforcement proceedings. Instead, it is the responsibility of the competent authority to know about the judgment, and take the necessary steps to enforce it. The individual is furthermore not required to know which state authority is responsible for the enforcement, nor required to take the initiative of enforcing the judgment in his or her favour.³⁶²

The Court already admitted in the past that a successful litigant may be required to undertake certain procedural steps in order to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means ... Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment ... In the Court’s view, the requirement of the creditor’s cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the Convention to take timely and *ex officio* action, on the basis of the information available to them, with a view to honouring the judgment against the State.³⁶³

Alternatively, the duty of enforcement would shift from the state authorities to private individuals, which would be contrary to the general aims of the Convention and the particular aim of the right to a fair trial under Article 6(1).

A state may not refer to a lack of funds in its justification for non-enforcement of final judgments against the state.³⁶⁴ The state, which possesses legal personality and frequently engages with various transactions as a private or public actor, should secure sufficient means to cover any debts incurred as a result of such transactions, including those following judgments. Some delay in the execution of judgments may be tolerated under Article 6(1), but any delay should not breach the very essence of the same provision.³⁶⁵ In other words, the states should not prevent litigants from benefiting from successful litigation in domestic courts.³⁶⁶

360. Ibid. § 40; *Marinković v. Serbia*, § 36 (op. cit.), p. 53.

361. See in particular *Scollo v. Italy*, 28 September 1995, Series A No. 315-C; and *Immobiliare Saffi v. Italy* (op. cit.).

362. *Metaxas v. Greece*, No. 8415/02, § 19, 27 May 2004.

363. *Akashev v. Russia*, No. 30616/05, § 22, 12 June 2008.

364. *Burdov v. Russia* (No. 2), No. 33509/04, ECHR 2009.

365. *Immobiliare Saffi v. Italy*, § 74 (op. cit.), p. 107.

366. *Burdov v. Russia* (No. 2), § 35 (op. cit.).

The state is not directly responsible for the lack of assets of the private debtor against whom the applicant obtains a judgment from a domestic court. The Court has distinguished and clarified state obligations depending on whether the debtor was a private or public actor and has observed the following criteria:

... the Court observes that where an applicant complains about the inability to enforce a court award in his or her favour the extent of the State's obligations under Article 6 and Article 1 of Protocol No. 1 varies depending on whether the debtor is the High Contracting Party within the meaning of Article 34 of the Convention or a private person. In the former case, the Court's case law usually insists on the State complying with the respective court decision both fully and timeously ... When the debtor is a private actor, the position is different since the State is not, as a general rule, directly liable for debts of private actors and its obligations under these Convention provisions are limited to providing the necessary assistance to the creditor in the enforcement of the respective court awards, for example, through a bailiff service or bankruptcy procedures.³⁶⁷

Thus, the Court stressed that when the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity may, in certain circumstances, engage the state's responsibility on the ground of Article 6(1) of the Convention and Article 1 of Protocol No. 1.³⁶⁸

The Court has also clarified the scope of state obligations with regard to non-enforcement cases involving private debtors:

In cases of the execution of a final court decision rendered against private actors, the State is not, as a general rule, directly liable for debts of private actors and its obligations under Article 6 and Article 1 of Protocol No. 1 are limited to providing the necessary assistance to the creditor in the enforcement of the respective court awards, for example, through enforcement proceedings or bankruptcy procedures ... The Court's task in such cases is to examine whether measures applied by the authorities were adequate and sufficient and whether they acted diligently in order to assist a creditor in execution of a judgment.³⁶⁹

Since the Court distinguishes between state obligations with regard to enforcement of judicial acts depending on whether the debtor is a private or public entity, it has also developed principles for identifying whether the relevant domestic body should be considered a private or a state entity. In particular, in *Kotov* the Grand Chamber of the Court had to determine the legal status of the insolvency liquidator in order to decide whether or not his actions could be attributable to the state during the enforcement proceedings against an insolvent private entity.³⁷⁰ In any case, even where the debt of the private company could not be attributable to the state,³⁷¹ in which case the state would be directly liable for the debts of state enterprises,³⁷² state authorities bear the positive duty of enforcing the final judicial acts in favour of the applicants, irrespective of the private or public nature of the debtors,³⁷³ since the enforcement of judgments, as the final stage of a "trial", is the function of the state – a duty-holder under the Convention.

367. *Anokhin v. Russia* (dec.), No. 25867/02, 31 May 2007.

368. *Ibid.*

369. *Marinković v. Serbia*, No. 5353/11, § 38, 22 October 2013.

370. *Kotov v. Russia* [GC], No. 54522/00, § 99-108, 3 April 2012.

371. *Anokhin v. Russia* (dec.) (op. cit.), p. 108.

372. *Sharenok v. Ukraine*, No. 35087/02, 22 February 2005.

373. *Fuklev v. Ukraine*, No. 71186/01, 7 June 2005; and *Marinković v. Serbia* (op. cit.).

CASE LAW

The cases listed below give further guidance on the Court's interpretation of the execution of judgments.

- ▶ ***Hornsby v. Greece***: on the right to execution of final judicial decisions. The Court stated in this case that "the execution of a judgment given by any court must be regarded as an integral part of the trial for the purposes of Article 6".³⁷⁴
- ▶ ***Burdov v. Russia***: on the lack of state funds, which is not a valid ground for a state's failure to execute a judgment and on the delay in the execution of a judgment.
- ▶ ***Yuriy Nikolayevich Ivanov v Ukraine***: in which the Court reiterated that a person who has obtained a final judgment against the state cannot be expected to launch separate enforcement proceedings. The state is responsible for the enforcement of final decisions if the factors impeding or blocking their full and timely enforcement are within the control of the authorities.
- ▶ ***Burdov v. Russia (No. 2)***: that the defendant state authority, which has been notified of the judgment, must take all necessary measures to comply with it or to transmit it to another competent authority for execution.

▶ *Hornsby v. Greece*³⁷⁵

In *Hornsby v. Greece*, the competent administrative authorities refused the applicants a licence to open a private language school on the grounds that they were not Greek nationals. The applicants successfully challenged the refusal before the Court of Justice of the European Communities. In addition, they obtained two judgments in their favour from the Supreme Administrative Court. However, the administrative authorities did not issue the licence.

In situations where the civil rights of individuals are affected as a result of the administrative proceedings, the Court has emphasised that when individuals seek judicial review from the High Administrative Court, the aim, in addition to the invalidation of the unlawful administrative act, is the removal of the effects of such an act. In this case, the government did not provide any reasons for justifying the non-enforcement of the Supreme Administrative Court judgments. The Court held that more than five years of non-compliance with the final enforceable judgments was incompatible with Article 6(1).

▶ *Immobiliare Saffi v. Italy*³⁷⁶

In this case the Court stressed that the execution of a judgment may not be prevented, invalidated or unduly delayed.³⁷⁷ In 1983, the I. B. company, which owned a flat in

374. *Hornsby v. Greece*, § 40 (op. cit.), p. 94.

375. Ibid.

376. *Immobiliare Saffi v. Italy* (op. cit.), p. 107.

377. Ibid. § 74.

Livorno, served a notice on L. B., a tenant in the flat, to terminate the lease agreement at the end of the expiry period. I. B. later applied to the magistrate, who upheld the validity of the notice and ordered L. B. to vacate the flat. The bailiff made several unsuccessful attempts to enforce this order. The applicant became the owner of the flat as a result of a merger with I. B. and continued the enforcement proceedings against L. B. The bailiff made further attempts to enforce the magistrate's order, but failed, since the applicant was not entitled to police assistance in evictions. Later, the law was changed and the applicant company was entitled to police assistance in eviction, but the Livorno prefect adopted a decree defining the criteria and the order of priority of implementation of a number of eviction orders. The applicant only regained possession of the flat in 1996 following the death of the tenant.

The Court noted and focused its analysis on the new legislation on enforcement of eviction orders and the prefect's decree and its consequences for the applicant. It accepted that the law and the decree pursued the public interest, namely maintaining public order, since the immediate implementation of thousands of eviction orders could potentially result in public disorder. However, the law rendered the final eviction order of the magistrate nugatory:

... the impugned legislation rendered nugatory the Livorno magistrate's ruling in his order of 21 November 1983. Further, from the moment the prefect became the authority responsible for determining when the order for possession would be enforced, and in the light of the fact that there could be no effective judicial review of his decisions, the applicant company was deprived of its right under Article 6 § 1 of the Convention to have its dispute (*contestation*) with its tenant decided by a court. That situation is incompatible with the principle of the rule of law.³⁷⁸

Thus the legislature created a legal basis for the administrative authority to intervene in the judicial process for public interest reasons, which, however, created an insurmountable obstacle for the applicant in the timely implementation of the final judicial order in its favour. The fact that the applicant was barred from launching a full judicial review against the prefectural decree was a factor that contributed to the finding of a violation of Article 6(1) by the Court.

► *Burdov v. Russia*³⁷⁹

In *Burdov*, the Court stressed that the lack of financial resources is not a sufficient reason for a state's failure to execute a judgment, and that a delay in the execution of a judgment, which may be justified in particular circumstances, may not be such as to impair the litigant's right to enforcement of the judgment. In this case, the social security services awarded compensation to the applicant, who suffered from extensive radioactive exposure during operations at the Chernobyl nuclear plant after the accident. The applicant sued the competent authorities and obtained judgments obliging them to pay the assigned compensation. Enforcement procedures were instituted but the judgments were not enforced on the grounds that the defendant state authority lacked sufficient funds.

378. *Ibid.* § 74.

379. *Burdov v. Russia* (op. cit.), p. 107.

While the Court acknowledged that there might be justifiable delays in the enforcement of final judgments, it reminded itself that lack of state funds was not one of the grounds for justifying the non-enforcement of judicial acts:

It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1 ... In the instant case, the applicant should not have been prevented from benefiting from the success of the litigation, which concerned compensation for damage to his health caused by obligatory participation in an emergency operation, on the ground of alleged financial difficulties experienced by the State.³⁸⁰

The Court concluded that the failure of the domestic authorities to take the necessary steps in the enforcement of the applicant's judgments deprived the provisions of Article 6(1) of all useful effect.

► *Sharenok v. Ukraine*³⁸¹

In *Sharenok*, the applicant instituted a lawsuit in 1997 in the district court seeking the recovery of his salary against his former employer, the state-owned Atomspetsbud company. The applicant's claim was granted and partly implemented. In 2003, the government's representative informed the applicant's lawyer about the large number of writs of execution against the company. The enforcement of the applicant's judgment by way of attachment of property required special authorisation from the Ministry of Emergency, owing to the location of the company in the Chernobyl area contaminated by radiation, which was not granted. Following a liquidation of the debtor company and the establishment of a liquidation commission in 2002, the bailiff service terminated the enforcement proceedings and forwarded the writ of execution to the liquidation commission as a creditor's claim. The full enforcement of the judgment was still pending by the time the Court made its judgment in this case in 2005.

In its preliminary objections, the government argued that though the company was state owned it was a separate legal entity, thus suggesting that the government was not responsible for the debts of the insolvent company. In dismissing this objection, the Court referred to its previous case law with regard to Ukraine involving the same company:

In this respect the Court considers that the Government have not demonstrated that Atomspetsbud enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions.³⁸² The Court notes that it is not suggested by the Government or by the materials in the case file that the State's debts to the company ... had ever been paid in full or in part, which implies that the State is liable for the company's ensuing debts. The debtor company had operated in the highly regulated sphere of nuclear energy and conducted its construction activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control on account of environmental and public-health considerations ... This control even extended to the applicants' terms of employment by the company, including their salaries ... The State prohibited the seizure of the company's property on account of possible contamination ... Moreover, the management of the company was

380. *Ibid.* § 35.

381. *Sharenok v. Ukraine* (op. cit.), p. 109.

382. *Ibid.* § 44.

transferred to the Ministry of Energy as of May 1998 ... **In the Court's opinion, these elements confirm the public nature of the debtor company regardless of its formal classification under domestic law** (*emphasis added*). Accordingly, the Court concludes that there are sufficient grounds to deem the State liable for Atomspetsbud's debts to the applicants in the special circumstances of the present case, despite the fact that the company was a separate legal entity.³⁸³

On the substance of the applicant's complaint the Court held that more than six years of inaction by the state in the enforcement of the final judgment breached the requirements of Article 6(1). The Court reasoned its findings:

... given the finding of State liability for the debts to the applicant in the present case, the period of non-execution should not be limited to the enforcement stage only, but should include the ongoing period of debt recovery in the course of the liquidation proceedings. Therefore, the period of debt recovery in the applicant's case has so far lasted six years and three months.³⁸⁴

► *Fuklev v. Ukraine*³⁸⁵

In *Fuklev*, the Court considered that the state has a positive obligation to organise a system for the enforcement of judgments in disputes between private persons that is effective both in law and practice.³⁸⁶ The applicant was dismissed from his employment in the Iskra Brick Factory (IBF) at his own request, while the latter owed the applicant unpaid wages. A liquidation commission was established following the bankruptcy of IBF. Later the bankruptcy proceedings against IBF were terminated in the domestic courts on the grounds of a friendly settlement between IBF and its creditors.

In February 1998, the Berdiansk City Court granted the applicant's claim against IBF to pay the unpaid salary arrears. In May 1998 the bailiff served a notice on IBF to pay the applicant the sums granted by the Berdiansk Court. Between this date and 2002 the bailiff took a number of actions in enforcement of the applicant's judgment, but they remained unenforced. In June 2002 the bailiff informed the applicant that his office was no longer responsible for the enforcement of the applicant's judgment and that the enforcement proceedings would be terminated and the writs of execution transferred to the liquidation commission of IBF. The domestic courts had informed the applicant about the friendly settlement between IBF and its creditors but the applicant had failed to file a request to be included in the list of creditors during the bankruptcy proceedings. The applicant was barred from challenging the lawfulness of the friendly settlement or to file a request to be included in the list of creditors.

The applicant challenged before the court the inactivity of the bailiff in enforcing his judgment and the resolution of the bailiff on the termination of the enforcement proceedings. The court granted the first claim and declared that the inactivity of the bailiff for about four years and nine months was unlawful, while dismissing the claim regarding the lawfulness of the termination resolution.

383. Ibid. § 45.

384. Ibid. § 27.

385. *Fuklev v. Ukraine* (op. cit.), p. 109.

386. Ibid. § 84.

The Court had to determine and dismiss the preliminary objection of the government with regard to the exhaustion of domestic remedies by the applicant. In particular, the Court reasoned that:

the Court has found that the applicant does not have to exhaust domestic remedies if the debtor is a State body and the enforcement is impeded by lack of appropriate legislative measures or where a State assumes liability for the debts of a State-owned legal entity ... In the instant case the debtor is not a State entity; however, the applicant's complaints about non-enforcement relate to the alleged inactivity of the domestic authorities in enforcing the judgment and not to the inactivity of the debtor company.³⁸⁷

With this holding on exhaustion the Court stressed that the timely enforcement of judgments is the responsibility of the state, represented by the bailiff in this case, even where the dispute was between a private creditor and a private debtor. The Court concluded that the applicant's complaint regarding the inactivity of the bailiff from the moment the relevant judgment became final to the moment of the formation of the liquidation commission was admissible under Article 6(1).

With regard to the substance of the complaint, the Court held that:

the State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without any undue delay. The Court, taking into account the considerations as to the liability of the State for the acts or omissions of private persons ... finds that there was a lack of action on the part of the State Bailiffs' Service, as was acknowledged by the Berdiansk City Court on 20 November 2002, to enforce the judgment given in the applicant's favour within a reasonable time and to exercise effective supervision of the enforcement of the judgment by the IBF liquidation commission. In particular, the judgment was given on 24 February 1998, and the writs of execution were issued on 22 April 1999. However, they were not transmitted to the liquidation commission until 27 June 2002, more than 3 years later.³⁸⁸

The Court concluded that failure by the bailiff to act or to supervise the enforcement proceedings breached the requirements of Article 6(1). The Court also noted that though the domestic courts had held the bailiff liable for the delays of the enforcement, they failed to provide any redress or reparation to the applicant.

► *Anokhin v. Russia (dec.)*³⁸⁹

In *Anokhin*, the applicant was employed by the coal mining company OAO Rostovugol, a limited liability joint-stock company, in which the federal government owned 66.9% of the stock, the regional government 20% and private shareholders the remainder. In 1990 the company faced difficulties and accumulated debts, predominantly salary arrears. In 2001-2002 the federal authority intervened and introduced a programme of liquidation of the company, auctioning off its assets and financing its debt, partly by the government. Shortly after dismissal from the company, the applicant instituted five sets of proceedings against it for unpaid salary and social benefits and obtained final judgments in all sets of proceedings. The first judgment was enforced in over four months, the second in two years, two months and 24 days, the third in 10 months and five days. The writ of execution for the fourth judgment was accepted by the winding-up committee of the company and was included in

387. Ibid. § 72.

388. Ibid. § 84.

389. *Anokhin v. Russia (dec.)* (op. cit.), p. 108.

the list of priority 2 creditors to be enforced after priority 1 creditors' debts had been paid and additional sales of the company's assets. The applicant submitted the writ of execution for the fifth judgment to the company only three years after it became final. The winding-up committee of the company was still waiting for the applicant to submit the copy of the writ and the judgment in order to include him in the list of priority 2 creditors. The State Institution Sotsugol, a state agency set up to solve problems arising out of the restructuring of the coal mining industry, informed the applicant that his complaint about the delays in enforcing his judgments had been forwarded to OAO Rostovugol and that the president of the winding-up committee had been asked to pay the debts as soon as possible.

The first legal issue before the Court in this case was whether or not the Russian Federation was a "High Contracting Party" within the meaning of Article 34 of the Convention for the purposes of the responsibility for the debt of OAO Rostovugol. The Court answered this question in the negative. OAO Rostovugol was a limited joint-stock company under private law, with separate personality from its shareholders and the ability to own its own assets. The fact that the state was one of the shareholders did not make the state liable for the debts of the company:

... the State, like any other shareholder, is only liable for debts of the company in the amount invested in the company's shares and the Court finds nothing in the case file or in the applicant's submissions to suggest, at least as regards the period after 5 May 1998 – the date of the Convention's entry into force in respect of Russia – that the State was directly responsible for the company's financial difficulties, siphoned the corporate funds to the detriment of the company and its stakeholders, failed to maintain an arm's-length relationship with the company or otherwise abused the corporate form.³⁹⁰

One can contrast this analysis with that of *Sharenok*³⁹¹ above, where the Court held that the state was directly liable for the debts of the company. In that case the company was so tightly controlled by the state that at some point the management was transferred to the Ministry of Energy. Thus, the state was liable for the debts of the company because it *de facto* and *de jure* controlled the enterprise. This case was different. The Court upheld the well-known principle of corporate law that shareholders, even where the state was among them, should not be liable for the debts of the separate legal personality, except when there was evidence that those shareholders' actions led the company to bankruptcy and failure. The Court found no such evidence in this case.

Regarding the delays in implementing the first three judgments, the Court ruled that:

the State was not initially responsible for the company's debts, that it voluntarily undertook certain steps aimed at provision of financial assistance to OAO Rostovugol and that proper administration of this assistance required some additional administrative and logistical efforts by the authorities.³⁹²

The second issue before the Court was whether or not the measures applied by the authorities in respect of the fourth and fifth judgments were adequate and sufficient and whether they acted diligently in order to assist a creditor in the execution of a judgment. The Court answered this question in the negative. The

390. *Ibid.*

391. *Sharenok v. Ukraine* (op. cit.), p. 109.

392. *Ibid.*

applicant had failed to demonstrate any action or inaction on the part of the winding-up committee, the courts or the bailiffs that had led to the non-enforcement of the two judgments. There was also nothing in the case suggesting that the state interfered with the enforcement proceedings or its financial assistance was used in an improper or unlawful way.

► *Akashev v. Russia*³⁹³

In 2003 the applicant obtained a judgment against the Ministry of Finance granting him an award for the failure of the state to provide him with a car within the terms of the state's savings scheme to which he had subscribed. The court sent the writ of enforcement to the bailiff, who returned it to the court reasoning that it must be implemented by the Ministry of Finance. The applicant collected the writ from the court and submitted it to the Ministry of Finance. The latter applied to the court for a supervisory review of the judgment in favour of the applicant. In 2004 the Presidium of the Supreme Court of Yakutia granted the request and quashed the applicant's judgment. The applicant received a copy of the decision in 2005. In 2005 the Ministry of Finance paid part of the monetary award to the applicant under the state programme of redemption of in-kind debentures.

In its preliminary objections to the applicant's complaints the government mentioned that the delay was partly attributable to the actions of the applicant, thus such delay should not be considered unreasonable. In particular, the government mentioned that it took the applicant four months and eight days to collect the writ of enforcement from the court and mail it to the Ministry of Finance. This fact did not persuade the Court. First, the Court noted that under the requirement of enforcement of final judgments, creditors' co-operation may be required. In particular, the creditors may be required to take certain procedural steps, and produce additional documents – for example, bank details. Though such co-operation might be expected, it should not tacitly shift the burden of the state duty of enforcement to the creditors:

... the requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the Convention to take timely and *ex officio* action, on the basis of the information available to them, with a view to honouring the judgment against the State.³⁹⁴

While some limited co-operation might be expected of the creditors in enforcement procedures, it would be unreasonable to expect that the individual had a duty to inform the competent state body about the judgment in his favour. It should rather be expected that domestic courts and other public authorities, who bore Convention duties, would put all competent state bodies on notice of the judgment³⁹⁵ for its timely execution. Though the applicant had collected the writ from the court after four months, it was the responsibility of the court to send the writ to the competent authority for a timely enforcement.

393. *Akashev v. Russia*, No. 30616/05, 12 June 2008.

394. *Ibid.* § 22.

395. See in particular *Burdov v. Russia* (No. 2), § 68 (op. cit.), p. 108; *Yuriy Nikolayevich Ivanov v. Ukraine*, No. 40450/04, § 46, 15 October 2009.

► *Burdov v. Russia (No. 2)*³⁹⁶

After the Court's judgment in the case of Burdov on 7 May 2002, in the period between 2003 and 2007 Mr Burdov obtained five judgments awarding him monetary compensations on various grounds. All judgments were enforced. However, the applicant complained to the Court of insufficient regular payments, delays in the execution of the five judgments and lack of diligence on the part of the enforcement authorities. The Court assessed the enforcement of each of the five judgments separately in light of its established case law.

On the judgment of 17 April 2003 the Court first ascertained the date when the respondent state authorities' duty to enforce it started. It found that the date was 9 July 2003, even though the applicant submitted the writ of execution one month after the judgment became final. The Court explained that the judgment became enforceable on 9 July 2003 and the applicant was not expected to bring separate enforcement or similar proceedings. The competent authorities had at their disposal all they needed for payment of the sums – for instance, the bank account details and address of the applicant. The mentioned judgment was implemented on 19 August 2005 – two years and one month after the judgment became final. The Court concluded that such a delay could not be justified in light of the Convention requirements, particularly when one considered that enforcement was not complex, that the applicant did not contribute to the delay and the subsequent inaction on the part of the various authorities. The Court also stressed that the multilevel budgetary system claimed by the respondent state did not justify the inaction and lack of effective co-operation among the competent authorities, which amounted to a breach of the Article 6(1) requirement of the right to court.

In respect of the judgment of 4 December 2003, the Court noted that it became enforceable on 15 December 2003 and was implemented two years and 10 months after that date, on 18 October 2006. The Court also acknowledged that this judgment was modified twice. However, such modification could answer only for a fraction of the overall delay. The Court concluded that such long delays, which the respondent was unable to justify, were incompatible with the requirements under Article 6(1).

With regard to the judgment of 24 March 2006, the Court noted that it became final on 22 May 2006 and was partly implemented on 2 November 2006. It was only fully implemented on 17 August 2007. In order to assess compliance with Article 6 requirements in enforcing this judgment, the Court noted that it had to assess the period from the moment the judgment became final until its full implementation, while noting the relative diligence of the government in partial implementation of the judgment within six months. The Court found that the justification adduced by the respondent (namely, the lack of administrative procedures and time needed to adopt it for the full implementation of the judgment) was unjustified, since the right to court would be illusory if it were to be conditional on the adoption of general administrative procedures. In concluding that the respondent's enforcement delay of one year and three months was incompatible with the right to court under Article 6(1), the Court further dismissed the respondent's argument that the sums

396. *Burdov v. Russia (No. 2)* (op. cit.), p. 108.

to be paid to the applicant were not significant for him, since these were ordered as compensation for the harm to the applicant's health.

On the judgments of 22 May 2007 and 21 August 2007, the Court noted that they were enforced within six and three months respectively, after becoming final. The Court concluded that those delays did not impair the very essence of the right to court enshrined in Article 6(1) and thus did not constitute a breach of that provision.

► *Yuriy Nikolayevich Ivanov v. Ukraine*³⁹⁷

In 2001 the Cherkassy Regional Military Court satisfied the applicant's claims against the Ukrainian Army and granted an award for his entitlement to retirement payments and compensation for his uniform. This judgment became final and the applicant's award was paid in part. During the enforcement proceedings, the bailiff informed the applicant that they had frozen the debtor's bank accounts and that they could not identify any funds. In 2002 the Ministry of Defence informed the applicant that legislative provisions entitling him to compensation for his uniform were suspended and that there was no budgetary allocation to compensate for the uniform. The new military unit that succeeded the one where the applicant served informed him about the lack of funds and that it was prohibited by law to forcibly sell the assets of the military units.

In 2002 the applicant sought judicial review of the bailiff's inaction, which the Leninsky District Court of Kirovograd granted and ordered the bailiff to identify and freeze the bank accounts of the debtor military unit. In 2003 the applicant had to apply to the same court against the bailiff's inaction claiming pecuniary and non-pecuniary damages, which the court partially granted. This judgment also became final and enforceable. In 2004 the applicant asked the Leninsky District Court to issue a writ of execution for its 2003 judgment, but the request remained unanswered and the judgment unenforced.

First, the Court noted the period of delay of the enforcement of the judgment of the Cherkassy Regional Military Court. This was seven years and 10 months, while the delay of enforcement of the Leninsky District Court judgment was five years and 11 months. The Court found no acceptable justification adduced by the state and noted that "the State is responsible for the enforcement of final decisions if the factors impeding or blocking their full and timely enforcement are within the control of the authorities"³⁹⁸ and listed the factors that led to the non-enforcement of the judgments:

... the delays were caused by a combination of factors, including the lack of budgetary funds, omissions on the part of the bailiffs, and shortcomings in the national legislation, as a result of which there existed no possibility for the applicant to have the judgments enforced in the event of a lack of budgetary allocations for such purposes ... The Court considers that those factors were not outside the control of the authorities and thus holds the State fully responsible for this state of affairs.³⁹⁹

397. *Yuriy Nikolayevich Ivanov v. Ukraine* (op. cit.), p. 116.

398. Ibid. § 54.

399. Ibid. § 55.

In finding that those obstacles to timely enforcement were within the control of the authorities, and in referring to its previous case law where it found breaches of Article 6(1) by Ukraine in similar cases, the Court concluded that it was not persuaded to reach a different conclusion in this case.

► *Marinković v. Serbia*⁴⁰⁰

The applicant worked in a debtor company in Uzice and was dismissed from his employment in 2008. In 2007 the applicant had initiated three sets of proceedings against the debtor company. The applicant obtained three judgments, which became final, from the Uzice Municipal Court, ordering the company to pay the applicant sums of money in salary arrears, pension and other benefits. In 2008 the Pozega Municipal Court issued enforcement orders at the request of the applicant for enforcing those judgments. In 2010 the Uzice Commercial Court opened insolvency proceedings against the debtor company. As a result, the enforcement proceedings in the Pozega Municipal Court were stayed and the applicant was duly registered as a secured creditor.

The Court noted that the debtor company was no longer state owned. The company was privatised in 2002, but the privatisation contract was annulled in 2007. After the annulment of the privatisation contract, the state owned 58.18% of the shares in the debtor company. The Court observed that in September 2007 when the judgments in favour of the applicant and against the debtor company became final, the company was owned by the state. The question was to what extent, if any, the privatisation of the company relieved the state of its Convention obligations:

... the fact that the State sold a large part of its share in the company it owned to a private person could not release the State from its obligation to honour a judgment debt which had arisen before the shares were sold. If the State transfers such an obligation to a new owner of the shares ... the State must ensure that the new owner complies with the requirements, inherent in Article 6 § 1 of the Convention ... that a final, binding judicial decision does not remain inoperative to the detriment of a party.⁴⁰¹

What was important in this case was the fact that the debtor was state owned at the time the judgments against it became final. From that moment the state directly held Convention duties of timely enforcement of the judgments. If states could rid themselves of their international duties by privatising state entities⁴⁰² or delegating state functions to private bodies, the principle of the rule of law would have been seriously undermined and many Convention rights in various situations would be rendered meaningless. Since enforcement of a judgment is a state function, the state in this case was still under a duty of enforcement, even after the debtor was “alienated” from the state.

► *Nekvedavicius v. Lithuania*⁴⁰³

On 27 November 2001 the Regional Administrative Court partly granted the applicant’s claims in property restitution proceedings by ordering the county governor to restore the applicant’s property rights over a parcel of land, but did not specify

400. *Marinković v. Serbia* (op. cit.), p. 53.

401. *Ibid.* § 39.

402. See, for example, *Costello-Roberts v. the United Kingdom*, 25 March 1993, Series A No. 247-C.

403. *Nekvedavicius v. Lithuania*, No. 1471/05, 10 December 2013.

the form of restitution or any deadline. This decision was not appealed and became final. The writ of execution was issued on 27 March 2002. In 13 July 2007 the county governor adopted a decision on restoring the applicant's property rights over the disputed land by providing the applicant with compensation in the form of Lithuanian government bonds. As a result of the applicant's appeal, the Supreme Administrative Court quashed this decision for lack of competence by the county governor. The applicant was included in the list of persons eligible for compensation and whose property rights had not been available to restitution *in natura* since 2000. At the time of the determination of the present case by the Court, it was not clear whether the applicant's property rights had been restored.

The Court's main task in this case concerning the complaint of non-execution was whether or not the administrative authorities took speedy and necessary measures in a diligent manner to comply with the binding final judgment. The Court acknowledged the complexities of executing a restitution judgment. However, it listed a number of actions taken by the administrative authorities in the execution of the mentioned judgment and qualified them as unnecessary, superfluous, repetitive and ineffective, resulting in the delay of the execution process. The Court refrained from assessing the adequacy of government bonds as a method of compensation chosen by the authorities, but it noted that this decision was also procedurally flawed because it was set aside by the domestic courts, which consequently prolonged the period of non-enforcement. The Court emphasised that when individuals obtain a judgment against a state it is primarily for the state authorities to use all appropriate means to execute it. In finding a breach of Article 6(1), the Court also stressed the fact that even though the applicant was included in the list of persons eligible for a new plot of land as restitution, no further efforts had been made in that regard.

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Interest in administrative justice and the judicial review of administrative acts has been growing in many countries recently, including many Council of Europe member states. At the core of an accountable and transparent administration is the right to effectively challenge acts and decisions that affect civil rights and obligations, and the daily life of individuals. Effective means of redress against administrative decisions require a functioning system of administrative justice that provides fair trial guarantees. An administrative process should be public, held within a reasonable time, undertaken by an independent and impartial tribunal established by law and result in an enforceable judgment that is pronounced publicly.

This casebook, the first of its kind, provides a systematic and accessible overview of what administrative justice means for Council of Europe member states. The case law of the European Court of Human Rights on the right to a fair trial is described and analysed as it relates to administrative proceedings.

It is the hope of the Council of Europe and the Folke Bernadotte Academy that this casebook will help practitioners in the field of administrative justice to ensure fair trial standards and their principles applicable under Article 6, paragraph 1, of the European Convention on Human Rights are respected and, by doing so, further strengthen the rule of law and the accountability and transparency of public administration and administrative justice in the member states of the Council of Europe.

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