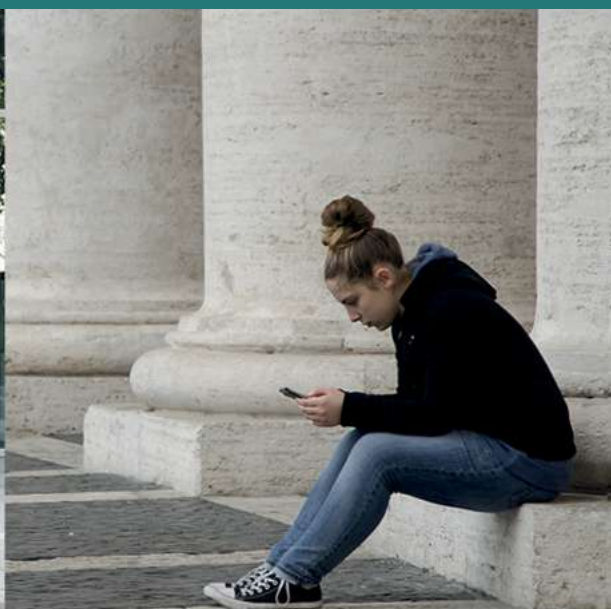


# THE ADMINISTRATION AND YOU

## A handbook



Principles of administrative law  
concerning relations between  
individuals and public authorities

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

# **THE ADMINISTRATION AND YOU**

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**Principles of administrative law  
concerning relations between  
individuals and public authorities**

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# Introduction

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**P**eople rely on public authorities for many aspects of their daily lives. In many cases, the decisions taken by a public authority will have important consequences for each individual's economic and social well-being. It is important, therefore, that legal systems provide and apply principles of administrative law that are effective in establishing and maintaining public trust in the fair and proper functioning of public authorities. The principles set out in this handbook are of primary importance in protecting the rights and interests of individuals in their relations with public authorities, whether in respect of requests made by them, individually or collectively, for action or services, or in respect of actions taken by a public authority at its own initiative. These principles cover the decision-making processes that public officials go through, the quality of the administrative decisions they make, as well as the opportunities the public have for challenging those decisions, and the role of tribunals, courts or other non-judicial bodies in reviewing them.

The principles of this handbook commonly concern decisions taken by public authorities in economic and social matters (referred to as "administrative decisions"): for example, applications to undertake some form of commercial activity, permission to build or develop land or change its use, access to a local school, allocation of public housing, and hospital and nursing care. Decisions are most commonly taken at regional and local level depending on the nature of the public service. The principles will also be applicable to decisions taken by central and federal government authorities, for example decisions in relation to tax matters, vehicle licensing and passport applications. Where decision making is conducted via an internet platform, the physical location of a public authority may not be relevant. Nonetheless, the principles apply equally, irrespective of the location or whether or not the service is delivered via an internet platform or digitally. Given the specific character of online services provided by public authorities, it is particularly important that steps are taken by them to ensure that the principles in this handbook are properly applied.

## Sources

This handbook sets out and explains principles that have been adopted by the Council of Europe which are relevant to relations between public authorities and the people they serve. The Council of Europe instruments from which these principles are drawn are listed in Appendix I. The reader should note that these instruments are the authoritative texts, as they are the result of political agreement between the member states of the Council of Europe and have been adopted (and opened for signature, as the case may be) by its Committee of Ministers. While recommendations and resolutions of the Committee of Ministers of the Council of Europe are not legally binding on its member states, they do have political and moral authority by virtue of each member state's agreement to their adoption (unless, and to the extent which they have expressed a reservation to the text at the moment of its adoption) and the extent to which they are widely applied in the law, policy and practice of member states.

Attention is drawn to a European Union (EU) resource similar to this handbook – *A toolbox for practitioners on quality of public administration* (2017 edition, available in English only).

## Terminology and key concepts

Inevitably, over time, the terminology used by the Council of Europe has evolved and this is reflected in its texts in the area of administrative law. As a general rule, this handbook adopts the terminology used in Recommendation CM/Rec(2007)7 on good administration, and the definitions contained therein.

- ▶ “Administrative decisions” refer principally in the context of this handbook to non-regulatory decisions taken by public authorities in relation to individual measures that concern one or more individuals. Actions by public officials consequent to an administrative decision represent implementation or execution of that decision and are not separate, independent decisions. Regulatory decisions of general application (orders, bye-laws and regulations) are also covered. The handbook does not deal with decisions made in the exercise of a judicial function or the participation of a public authority in a criminal investigation, or those decisions relating solely to the internal organisation or functioning of public authorities.
- ▶ “Public authority”, sometimes also referred to as the administrative authority or the public administration, means a body established by public law, whether at national, regional or local level, for the purpose of providing a public service or acting in the public interest, as well as any private law body vested with such powers.
- ▶ “Discretionary power” means a power that leaves a public authority some degree of discretion as regards the nature of the decisions it can take, enabling it to choose from several legally admissible solutions the one which it considers the most appropriate.
- ▶ “Individuals” refer to both natural persons and legal persons (i.e. bodies created by law), as well as persons who by virtue of national law have the right to claim a specific collective interest.

- ▶ “Public official” refers to any members of staff, whether statutory or contractual, employed by state authorities or departments, whose salary is paid out of the state budget, excluding elected representatives. For the purposes of this handbook, this term includes staff employed by a private law body which discharges public or quasi-public functions.

## Public authorities and the rule of law

In carrying out their functions public authorities must balance individual interests with the interests of the community they serve, in other words the “public interest”. Administrative law regulates the exercise of powers by public authorities and provides for the control of their use. In some countries, there are special administrative law proceedings and courts to resolve disputes arising from the exercise of these powers whereas, in others, such disputes are resolved by ordinary courts. In many cases, non-judicial review of decisions made by public authorities will also be available.

Given the privileged place that public authorities have in democratic societies and the public character of their role, it is natural that the rule of law is the primary source of many of the principles in this handbook. The rule of law ensures that everyone – individuals and public authorities – is subject to the law; that there is legal certainty and that everyone knows what his or her rights and duties are under the law; that public authorities cannot act in an arbitrary manner; that proper application of the law is ensured by an independent and impartial judiciary whose judgments are enforced; and that human rights are respected, especially the principles of non-discrimination and equality of treatment.<sup>1</sup>

These principles still give public authorities a legal margin of discretion in decisions they make, which must be left to them so public affairs are managed fairly and efficiently.

## Public sector reform

Over time, privatisation and nationalisation can change the public sector and the services it provides. Change can also arise as a result of changes in funding arrangements where the state decides in specific cases to be no longer responsible for the direct delivery of particular services (for example, in the areas of health and education). The state may instead decide to confer responsibility for the delivery of services to a private agency or possibly the voluntary sector whose operations might be supported either wholly or in part by public funds. In addition, decentralisation or federalisation can bring delivery of some public services closer to the individual, while centralisation can move them away, unless the centralised agency delivers its services through a local office. Whatever the context, the principles in this handbook

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1. A useful definition of the rule of law is set out in the “Report on the rule of law”, European Commission for Democracy through Law (Venice Commission), [CDL-AD\(2011\)003rev](#); and also in the “Rule of law checklist”, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), [CDL-AD\(2016\)007](#).



are relevant so long as the service provided and the decision-making process that relates to it retains a public character. This is also the reason why these principles apply not only to public officials but also to private bodies which discharge public or quasi-public functions (see the definition of “public official”, above).

## European Convention on Human Rights

Many of the decisions taken by public authorities will concern individual rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5 – hereinafter “the European Convention on Human Rights” or “the Convention”). Of particular importance in this context is the general prohibition against public authorities discriminating against anyone on any ground, such as those indicated in Protocol No. 12, Article 1,<sup>2</sup> and the rights to a fair trial (Article 6) and to an effective remedy (Article 13). Other rights, such as the right to respect for private and family life (Article 8), the protection of property (Protocol No. 1, Article 1) and the right to education (Protocol No. 1, Article 2), will be relevant to decisions of public authorities on typical issues such as land use, building controls, regulation of businesses and professional bodies, schooling, pensions, social security benefits and care proceedings in relation to children.

The fair trial guarantees of Article 6 will apply to the procedures that enable the decisions of public authorities to be challenged (see Chapter IV). The reference in Article 6 to the determination of a person’s civil rights and obligations includes legal disputes between individuals and a public authority provided their outcome is decisive for the individual’s private rights and obligations (*Ringeisen v. Austria*). Certain types of disputes are excluded from Article 6. These arise from the exercise of state sovereignty, sometimes referred to as “hard-core” public authority prerogatives, and include disputes over taxation (*Ferrazzini v. Italy*), immigration (*Maaouia v. France*) and standing for elections (*Pierre-Bloch v. France*). Public officials also enjoy the protection of Article 6 in relation to disputes with their public employer. They will only lose this protection where national law specifically denies them access to a court in the particular circumstances of the dispute and where such an exclusion can be justified by the state concerned on objective grounds (namely where there exists a special bond of trust and loyalty between the public official and the state, and the subject matter of the dispute in issue relates to the exercise of state power or it has called into question the special bond) (*Vilho Eskelinen and Others v. Finland*). Note also that characterising the proceedings as administrative law procedures (rather than as civil law proceedings) will not preclude the application of Article 6, as the European Court of Human Rights applies an autonomous interpretation of national legal proceedings for the purposes of its application of the Convention.

A number of significant judgments of the European Court of Human Rights, relevant to or recognising the importance of the principles in this handbook, have been selected in order to illustrate the application of these principles, but it should be remembered that the principles themselves are, of course, not the subject of these judgments. The relevant selected cases referred to are listed in Appendix II.

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2. These grounds are sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## Chapter I

# Substantive principles

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**T**he principles contained in this chapter apply to public authorities when determining matters that affect the rights and interests of people living or working in the areas they administer or in which they deliver public services.

These principles concern the quality of administrative decisions. They reflect key elements of the rule of law (objectivity, impartiality, legality) and the social need for a fully transparent and participative environment between the community and public authorities.

### **Principle 1 – Lawfulness and conformity with statutory purpose**

Public authorities shall act in accordance with the law and within the rules defining their powers. They shall not act arbitrarily.

#### **Source**

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 2)

#### **Commentary**

The content of decisions taken by public authorities and the manner in which they are taken must have a basis in law. Where a public authority acts outside or beyond its powers (*ultra vires*), then that action will be unlawful. So that the public may understand the nature and extent of a public authority's powers, these powers should be clear, precise and published widely.

Public authorities must act where they have a legal obligation to do so except where circumstances arise beyond their control (*force majeure*). *Force majeure* is accepted as a valid reason for not fulfilling a contractual obligation. In this context, the state must ensure that public authorities have the necessary resources to fulfilling their legal obligations, or the necessary powers to secure such resources by their own means (for example, local taxes).

Public authorities must act in accordance with the law and their statutory powers, failing which they are at risk of taking unlawful administrative decisions or acting outside or beyond their powers. In order to prevent them acting arbitrarily, public authorities must act with objectivity and impartiality (see below, Principle 3).

No one should benefit from the unlawful conduct of public authorities. Unlawful decisions must be withdrawn, subject to any interests legitimately acquired by individuals relying on impugned decisions (see below, Chapter IV).

The reasons for which public authorities use their powers must correspond to the reasons for which these powers have been granted as laid down by statute. Public authorities must not use their powers for an improper reason or purpose, even if the outcome might be the same. This principle is illustrated under French law by the doctrine of “misuse of public power” (*détournement de pouvoir*) where an administrative decision is not made in the public interest. An example is where a mayor of a village refuses an application for a licence to run a bar in order to prevent competition with a bar (s)he owns. It also applies where an administrative authority makes a decision relying on its power to protect the public interest, but where the decision is in fact made to protect some other interest rather than the public interest. An example is where a power is exercised to safeguard public decency by prohibiting individuals from dressing or undressing on a public beach except in specifically designated cabins available for rent, when the main aim of this prohibition is to benefit those who rent out such cabins.

Ambiguities in relation to the interpretation of a public authority’s powers may be resolved by reference to the preamble of the relevant legislation or preparatory documents leading to its enactment, provided this is permitted by national law.

Relevant sources of law for the purposes of this principle will depend on the legal system of each state but will normally refer to a state’s constitution, statute law and secondary legislation. Also relevant are decisions and orders of its domestic courts and/or general principles of law. Administrative guidelines may also be a source of law to the extent that they can be invoked by domestic courts. Customary and conventional rules of international law will also be relevant in jurisdictions where they have the force of law. The European Convention on Human Rights is a key source of law for member states of the Council of Europe.

## Case law of the European Court of Human Rights

In *Prokopovich v. Russia*, the European Court of Human Rights found that a decision on reallocation to a third party of a state-owned flat occupied by the applicant amounted to a violation of Article 8 of the European Convention on Human Rights because it had no legal basis in domestic law. By contrast, in *Xintaras v. Sweden*, the Court found that withdrawal of the applicant’s driving licence had not violated his property rights under Article 1 of Protocol No. 1 to the Convention because it was provided for in domestic law and pursued the general interest of Swedish society, striking a fair balance between that interest and the individual interests of the

applicant. In *Stretch v. the United Kingdom*, the applicant complained that he had been deprived of the benefit of a renewal option on a lease granted by a local authority. The government of the United Kingdom argued before the European Court of Human Rights that the doctrine of ultra vires provided an important safeguard against abuse of power by public authorities acting beyond the competence given to them under domestic law. The European Court of Human Rights did not dispute this argument and noted that the said doctrine reflected the rule of law underlying much of the European Convention on Human Rights itself. In *Lashmankin and Others v. Russia*, which concerned restrictions imposed by Russian administrative authorities on the location, time and manner of conducting public events, the European Court of Human Rights held that in matters affecting fundamental rights it would be contrary to the rule of law – one of the basic principles of a democratic society enshrined in the European Convention on Human Rights – for legal discretion granted to the executive to be expressed in terms of an unfettered power. The law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.

In *The Sunday Times v. the United Kingdom (No. 1)*, the applicant, a British newspaper, challenged a prohibition to publish an article which, according to the authorities, would constitute contempt of court, as it would influence ongoing negotiations between the parties to a court case. The case concerned claims brought by private persons against a drug manufacturer that the medicine produced by the defendant seriously damaged their children's health. In *Tolstoy Miloslavsky v. the United Kingdom*, the British courts had ordered the applicant to pay £1.5 million in damages for having published defamatory material. The court had also banned further publication of an article containing the material. The applicant sought to appeal but was ordered to pay £124 900 by way of security for costs as a condition. Before the European Court of Human Rights the applicant alleged that his freedom of expression was infringed and his right to appeal against the first instance court decision was unduly restricted. In both cases the European Court of Human Rights noted that the word "law" in the expression "prescribed by law" covers not only statute law but also unwritten law.

## Principle 2 – Equality of treatment

Public authorities shall treat individuals in similar situations the same. Any difference in treatment shall be objectively justified.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 3)
- ▶ European Convention on Human Rights, Protocol No. 12

## Commentary

Public authorities must not discriminate between individuals either directly or indirectly. The principle of equality of treatment requires that individuals in similar situations are treated equally. This means that the enjoyment of any right provided by law must be available to all persons without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, unless the difference in treatment can be objectively justified. Likewise, public authorities must not discriminate between individuals on any of these grounds (Article 1 of Protocol No. 12 to the European Convention on Human Rights). Therefore, where two or more cases are objectively the same, public authorities must treat them the same.

The European Convention on Human Rights does not prohibit differences in treatment provided they are based on an objective assessment of different factual circumstances and if a fair balance has been achieved between protecting the interest of the community and respect for the rights and freedoms safeguarded by the Convention. Parties to the Convention enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of the margin of appreciation varies according to the subject matter and facts presented, with the final decision being a matter for the European Court of Human Rights. The Court has held that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group.

The principle of equality of treatment does not prevent public authorities from treating people differently as a result of changes in administrative policy and practice over time, provided such changes are objectively justified and not made to treat a particular group or groups differently. Public authorities must have regard to the fact that some individuals may have legitimate expectations or have acquired legitimate interests as a result of earlier policy or practice (see below, Principle 5), so where a public authority decides to change policy or practice it is very important to inform the public beforehand.

It is important to highlight that in terms of this principle the situation of children requires special consideration. Children in their relations with public authorities, whether directly or indirectly, should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views as well as the circumstances of their case. In all actions concerning children, public authorities must ensure the best interests of the child are a primary consideration. In cases where a child is capable of forming his or her own views the child should be able to express them freely, with

due weight being given to such views in accordance with the child's age and maturity (see Article 3<sup>3</sup> and Article 12,<sup>4</sup> United Nations Convention on the Rights of the Child).

The principle of equality cannot be relied on to justify a previously illegal decision or practice being applied to other cases. The proper course is for the public authority to revoke, to the extent possible, the earlier decision. Where a penalty or sanction has not been applied in a previous case, in circumstances when it should have been, this will not prevent the public authority from subsequently applying this penalty or sanction in another case.

## Case law of the European Court of Human Rights

In *Zarb Adami v. Malta*, the applicant complained that the way in which jury service had been imposed on him was discriminatory in nature. The European Court of Human Rights held, under Article 14 of the European Convention on Human Rights taken in conjunction with Article 4.3.d, discrimination means treating people who are in relevantly similar situations differently, without objective and reasonable justification. Where there is a difference in treatment in relation to the exercise of a right laid down by the European Convention on Human Rights the action taken must pursue a legitimate aim and there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".

In *Gnahoré v. France*, where the applicant complained that his minor son had been removed from him and placed with foster parents, the European Court of Human Rights noted that in cases of this type the child's interest must come before all other considerations.

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3. Article 3 of the United Nations Convention on the Rights of the Child states:
    - "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
    2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
    3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."
  4. Article 12 of the United Nations Convention on the Rights of the Child states:
    - "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
    2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

## Principle 3 – Objectivity and impartiality

Public authorities shall exercise their powers having regard to relevant matters only. They shall not act in a biased manner or be perceived to do so.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 4)
- ▶ Recommendation No. R (2000) 6 on the status of public officials in Europe (Principle 13)

### Commentary

All factors relevant to a particular administrative decision should be taken into account by a public authority when making its decision, with each factor given its proper weight. Factors that are not relevant must be excluded from consideration. An administrative decision must not be influenced by the personal interests or prejudices of the public official making the decision. Even the appearance of bias must be avoided.

Public authorities have a responsibility to ensure their officials carry out their duties in an impartial manner irrespective of their personal beliefs and interests. No public official should be involved in an administrative decision that concerns his or her own financial or other personal interests, or those of his or her family, friends or opponents. He or she should not be involved in any appeal against an administrative decision that he or she has taken. Other circumstances may arise which could undermine his or her impartiality, for example in the case of “friends or opponents” towards whom a public official has a positive or negative predisposition, or with whom the official has a close relationship (for example, a divorced spouse).

Moreover, public officials are subject to inherent obligations in the exercise of their public functions. These obligations include discretion, accountability, neutrality and, more generally, loyalty to democratic institutions and respect for the rule of law. In order to avoid conflicts of interest and corruption, public officials may be subject to restrictions regarding second jobs and participation in political activities.

### Case law of the European Court of Human Rights

In *Ahmed and Others v. the United Kingdom*, in order to retain their posts in local government, the applicants had to give up their political activities on behalf of political parties. They claimed that the requirement to do so breached, among other provisions, their right to full participation in the electoral process, as guaranteed by Article 3 of Protocol No. 1 to the European Convention on Human Rights. The European Court of Human Rights found no violation, accepting that the restrictions served the legitimate purpose of securing the political impartiality of civil servants.

## Principle 4 – Proportionality

Measures taken by a public authority in pursuance of its powers shall not be excessive in terms of their impact on the rights and interests of individuals, and shall only go as far as is necessary, and to the extent required, in order to achieve the desired goal.

### Source

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 5)

### Commentary

Proportionality constitutes an all-embracing requirement in a state governed by the rule of law. Public authorities may only curtail the rights of individuals vis-à-vis the state to the extent required for the protection of the public interest. A “fair balance” must be struck between the general interest of the community and the requirement to protect the fundamental rights of individuals.

The principle of proportionality will be infringed if the following requirements are not met:

- i. There must be a reasonable relationship between the purpose of the objectives pursued by a public authority and the means chosen to achieve them. Any restriction or interference with the rights of an individual must be appropriate and strictly necessary, and the objectives cannot be achieved by any other means. The prohibition against using excessive means obliges public authorities to use only those means that are necessary to achieve the desired result.
- ii. There must be a reasonable relationship between the restriction imposed on an individual and the public interest to be protected. This restriction imposed on an individual must reasonably relate to the benefit enjoyed by the public.

### Case law of the European Court of Human Rights

In *Soering v. the United Kingdom*, the applicant complained that his extradition to the United States of America, where he would face capital punishment, violated Article 3 of the European Convention on Human Rights. In *Hutten-Czapska v. Poland*, the applicant was one of many landlords in Poland affected by a restrictive system of rent control. The European Court of Human Rights stated in both cases that “inherent in the whole of the European Convention on Human Rights is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. See also *Xintaras v. Sweden*, where the European Court of Human Rights found that withdrawal of the applicant’s driving licence had not violated his property rights under Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Court held the



withdrawal of a driving licence was provided for in domestic law and it pursued the legitimate aim of striking a fair balance between the general interest of Swedish society and the individual interests of the applicant.

## Principle 5 – Legal certainty

Administrative decisions taken by public authorities shall be foreseeable so as to enable individuals to act accordingly. They shall not have retroactive effect unless required by law or if they are for the benefit of persons. There shall be no interference with rights acquired by individuals or interference with legitimate expectations as to future decisions the public authority might take, except in accordance with the law.

### Source

- ▶ Recommendation CM/Rec(2007)7 on good administration (Articles 6, 21)

### Commentary

Legal certainty is essential to public trust in the judicial system and the rule of law. This principle is closely linked to the principle of lawfulness (Principle 1), as it too relates to the concept of predictability. Legal certainty also requires that the law is clear, precise and foreseeable (see also below, Principle 13), so that individuals understand what public authorities expect from them and what they can expect from public authorities. It is fundamental to public confidence how public authorities apply the law.

Everyone should be able to place his or her legitimate trust in public authorities so as to regulate his or her conduct in full knowledge of how public authorities will act. Accordingly, public authorities must be consistent in their decision making and not act in an arbitrary manner. Everyone should be able to rely, in good faith, on administrative decisions made by public authorities whose decisions and actions should always be based on the law regulating the particular situation. The law must be clearly formulated and easily accessible to the general public; the law must also be correctly applied. The revocation of administrative decisions by public authorities raises particular issues for legal certainty and is dealt with separately below.

### Revocation

Where a public authority wishes to revoke an administrative decision it needs to exercise care not to violate the principle of legal certainty and, in particular, not to interfere with an individual's acquired rights. Accordingly, revocation of administrative decisions by a public authority is only permitted in the following circumstances:

- ▶ in cases where the initial administrative decision is unlawful and (i) there is no legitimate expectation to be protected, or (ii) the public interest in revocation of the decision outweighs the rights and interests of the person concerned in maintaining the decision; and

- ▶ in cases where the initial administrative decision is lawful and (i) no legitimate expectation has been placed by the person concerned in maintaining the decision, or (ii) the relevant facts and circumstances have changed and the public interest in revocation outweighs the rights and interests of the person concerned in maintaining the decision.

Revocation of an administrative decision is itself an administrative decision, to which the substantive and procedural principles of this handbook fully apply. The particular problem posed by revocation is the frequent conflict between the principle of lawfulness and public interest on the one hand, and the protection of an individual's legitimate expectation in maintaining the decision on the other hand. National law may determine the extent to which administrative decisions may be revoked. In most member states, public authorities can, under certain conditions, revoke their acts in whole or in part, either at the request of an individual (see below, Principle 18) or on their own initiative.

If the relevant facts and circumstances at the time of the initial decision were not fully known to the public authority and, if known, would have led to another decision, or if the person concerned did not fulfil the conditions specified in the administrative decision or applicable law when the decision was made, then, depending on the precise circumstances, national law will determine whether the initial decision was lawful or unlawful.

Depending on the extent to which the person concerned was aware of, or should have been aware of, the unlawfulness of an administrative decision, and depending on the weight of the public interest at stake, the decision can be revoked with effect as of the date of revocation or even with retroactive effect back to the date when the decision was taken.

There is no legitimate expectation to be protected if the person concerned knew or should reasonably have known that the initial decision was unlawful or if the person concerned provided incorrect or incomplete information to the public authority for the purposes of the initial decision.

It is likely that the length of time elapsed since taking the initial decision will be a factor to weigh in the balance between the public interest in revoking the decision and the legitimate expectation of the person affected in maintaining it. The more time that has elapsed, the more weight will be given to the individual's legitimate expectation.

## Case law of the European Court of Human Rights

In *Marckx v. Belgium*, the applicant complained, under Article 14 of the European Convention on Human Rights, that different inheritance rules were applicable to children born in and out of wedlock. The European Court of Human Rights noted that the principle of legal certainty is inherent in the Convention. The preamble to the Convention declares that the rule of law, of which legal certainty is a fundamental aspect, is part of the common heritage of the contracting states. In *Brumărescu v. Romania*, the European Court of Human Rights considered that there was an interference with the applicant's

right to property, as guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights, in that the Supreme Court of Justice had quashed the final judgment of a lower court awarding the applicant the house, even though the judgment had been executed. In *Khan v. the United Kingdom*, the European Court of Human Rights held that the use of a covert listening device by the United Kingdom authorities was not in accordance with law within the meaning of Article 8 of the European Convention on Human Rights because there was no statutory system to regulate the use of such devices, as this was governed by Home Office guidelines which were neither legally binding nor directly accessible to the public.

In *Rysovskyy v. Ukraine*, a village council revoked its earlier decision on land allocation. The European Court of Human Rights found that it is incumbent on public authorities to put in place internal procedures which foster legal certainty in civil transactions affecting property interests. The Court held that the principle of good governance should not prevent the authorities from correcting occasional mistakes, even those resulting from their own negligence. On the other hand, the need to correct an old “wrong” should not disproportionately interfere with a new right which has been acquired by an individual relying on the legitimacy of the public authority’s action in good faith. In other words, state authorities who fail to put in place or adhere to their own procedures should not be allowed to profit from their wrongdoing or to escape their obligations. The risk of any mistake made by a state authority must be borne by the state itself and errors must not be remedied at the expense of the individuals concerned. In the context of the revocation of a property title granted erroneously, the “good governance” principle may not only impose on authorities an obligation to act promptly in correcting their mistake, but also necessitate payment of adequate compensation or take another form of appropriate remedial action to the person who had acquired the land in good faith (see below, Principle 17).

In *Bélané Nagy v. Hungary*, the applicant complained that withdrawal of her entitlement to disability pension based on newly adopted legislation on the method to be used in assessing health impairment in an occupational context violated her right to the protection of her property. The European Court of Human Rights found in particular that Article 1 of Protocol No. 1 to the European Convention on Human Rights applied to Ms Nagy’s case because she had a legitimate expectation that she would continue to receive the pension granted to her based on the previous legislation. The withdrawal of her pension had been determined to be in accordance with the law (new legislation), and had been in pursuit of a legitimate purpose (saving public funds). However, the Court held the withdrawal had not been proportionate because it involved the complete deprivation of a vulnerable person’s only significant source of income, resulting from retroactive legislation that contained no transitional arrangements applicable to Ms Nagy’s case.

The notion of “legitimate expectation” within the context of Article 1 of Protocol No. 1 to the European Convention on Human Rights was first developed by the European Court of Human Rights in the case of *Pine Valley Developments Ltd and Others v. Ireland*. In that case the European Court of Human Rights found that a “legitimate expectation” arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its

development. The planning permission, which could not be revoked by the planning authority, was held by the Court to be “a component part of the applicant companies’ property”.

Another aspect of the notion of “legitimate expectation” was illustrated in *Pressos Compania Naviera S.A. and Others v. Belgium*. This case concerned claims for damages arising out of shipping accidents allegedly caused by the negligence of Belgian pilots. Under domestic rules of tort such claims came into existence as soon as the damage occurred. The European Court of Human Rights classified the claims as “assets” attracting the protection of Article 1 of Protocol No. 1 to the European Convention on Human Rights. It then went on to note that, on the basis of a series of decisions of the Court of Cassation, the applicants could argue that they had a “legitimate expectation” that their claims deriving from the accidents in question would be determined in accordance with the general law of tort. The “legitimate expectation” identified in this case was not in itself constitutive of a proprietary interest; it related to the way in which the claim qualifying as an “asset” would be treated under domestic law and in particular the fact that established case law of the national courts would continue to be applied in respect of damage which had already occurred. In *Kopecký v. Slovakia*, the European Court of Human Rights considered situations when a claim to a “legitimate expectation” would not arise. In this case, the Court examined whether the applicant’s claim to restoration of property, where he could not fulfil one of the conditions for its return under national law, amounted to a “possession” within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights.

## Principle 6 – Transparency

Public authorities shall allow everyone access to official documents held by them. Access shall be granted without discrimination. Public authorities also have a duty to provide information about their work and decisions, and this duty extends to the publication of official documents.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 10)
- ▶ Recommendation Rec(2002)2 on access to official documents
- ▶ European Convention on Human Rights (Articles 8, 10)
- ▶ Council of Europe Convention on Access to Official Documents

### Commentary

The principle of transparency ensures that the work of public authorities and of their officials is conducted openly. This strengthens public trust and the protection of rights of individuals. Moreover, transparency encourages participation. It is generally recognised that democracies can function more effectively when the public is fully

informed about issues relevant to public life. An informed public is better placed to participate in decisions and policies of public authorities, and to accept and adhere to them (see below, Principle 9). Public authorities too will benefit from feedback received from the public. So it is desirable that public authorities allow open access to records they hold, subject to unavoidable exceptions and limitations.

There is no positive obligation in international law on public authorities to disseminate information to the public. As indicated above, they should be encouraged to provide as much information on their decisions as they can.

Rules on access to official documents must respect the rights to privacy and the protection of personal data, particularly data held in digital or electronic files (see below, Principle 7).

Official documents include all information recorded in any form, drawn up or received and held by public authorities in the exercise of their powers, but do not include documents under preparation. A person requesting access to official documents should not be required to give reasons for their request, or indeed be required to have a direct or personal interest in the content of official documents concerned. Formalities for making such requests should be kept to a minimum. Public authorities may limit access to official documents, but only on the basis of exceptions clearly specified in legislation. Such limitations should be necessary in a democratic society and should be proportionate.

Information should be supplied by a public authority within a reasonable period of time. Obviously, very numerous requests for information from the public can entail a considerable workload for public officials. The processing of requests can result in delays incompatible with good and efficient administration. The principle factors for assessing what is a reasonable period of time include the nature and volume of information to be retrieved and provided. The means by which information is provided may be either oral or written. The inspection of documents and files should also be allowed. The fact that public authorities charge a fee to recover the costs of providing the information requested (copying, printing, mailing, etc.) is compatible with the principle of transparency and that of access developed in Principle 8 below.

Refusal of access to official documents may be justified by a public authority in relation to certain kinds of internal documents, such as personal documents exchanged within the authority or documents prepared as internal working papers. Every working environment, including that of public authorities, has a “private sphere” in which work is done in a rather informal way and which has to be protected.

Higher standards on public access to official documents can be found in the Council of Europe Convention on Access to Official Documents (CETS No. 205). This convention has yet to enter into force.

## Case law of the European Court of Human Rights

In *Loiseau v. France*, the applicant, a former secondary school teacher, complained under Article 6 of the European Convention on Human Rights that the authorities had failed, for a lengthy period of time, to enforce a judgment obliging them to

supply him with a copy of documents relating to his recruitment, his social security contributions and his pay slips. The European Court of Human Rights noted that it is difficult to derive from the European Convention on Human Rights a general right of access to administrative data and documents held by state authorities. However, the Court has consistently recognised that the public has a right to receive information on matters of public interest. See, for example, *Observer and Guardian v. the United Kingdom*, where the applicants complained that imposing a temporary injunction on press publications pending the outcome of a dispute was contrary to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights; and *Thorgeir Thorgeirson v. Iceland*, where the applicant complained that his conviction and sentence for defamation constituted an interference with his right to freedom of expression.

The case law of the European Court of Human Rights in the field of transparency has been developed in relation to freedom of the press. In such cases the Court scrutinises measures taken by a national authority which are capable of discouraging the press, one of society's "watchdogs", from participating in public debate on matters of legitimate public concern. Measures which merely make access to information more cumbersome are included in this context. See *Bladet Tromsø and Stensaas v. Norway*, where the applicants, a newspaper and its editor-in-chief, complained under Article 10 of the European Convention on Human Rights about fines imposed on them by domestic courts for publishing statements which were considered by the courts to be defamatory; and *Jersild v. Denmark*, where the applicant, a journalist, maintained before the European Court of Human Rights that his conviction and sentence for having aided and abetted dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10 of the European Convention on Human Rights. In *Magyar Helsinki Bizottság v. Hungary*, the applicant, an NGO, complained that its request for information contained in an official document was refused in violation of Article 10 of the European Convention on Human Rights. The European Court of Human Rights found that the right to receive information (Article 10 of the Convention) basically prohibits governments from restricting a person from receiving information that others wish or may be willing to impart to him or her. Nonetheless, the right to receive information cannot be construed as imposing a positive obligation on a state to collect and disseminate information of its own motion. Article 10 of the Convention as such does not confer on individuals a right of access to information held by a public authority nor oblige it to impart such information to individuals. Such a right may nevertheless arise, firstly, where disclosure of the information has been imposed by court order and, secondly, where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" where denial would constitute an interference with that right. In *Guja v. Moldova*, the applicant, a former intelligence officer, complained about his criminal conviction for having disclosed information concerning illegal activities of intelligence services. The European Court of Human Rights found that in a democratic society, the acts or omissions of a government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The public interest in disclosing particular information can sometimes be so strong as to outweigh a duty of confidence.

In *Rysovskyy v. Ukraine*, the European Court of Human Rights found that it is incumbent on public authorities to put in place internal procedures which enhance the transparency and clarity of their operations, minimise the risk of mistakes and foster legal certainty in civil transactions affecting property interests. The Court has consistently affirmed a positive obligation on states, pursuant to Articles 2 and 8 of the European Convention on Human Rights, to provide access to essential information enabling individuals to assess risks to their health and lives. See, for example, *Vilnes and Others v. Norway*, where the applicants had not been informed about the risk to their health of professional activities they carried out for the government; and *Budayeva and Others v. Russia*, where the applicants' relatives lost their lives in a natural disaster because the government had failed to inform them in due time of an imminent disaster.

## Principle 7 – Privacy and the protection of personal data

When processing personal data held in digital or any other format, public authorities shall take all necessary measures to guarantee the privacy of individuals and their right to the protection of personal data.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 9)
- ▶ European Convention on Human Rights (Articles 8, 10)
- ▶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, and the protocol amending this convention

### Commentary

Processing (including collecting) personal data by public authorities is of particular importance in the context of their relations with the public. Public authorities must respect the private life of individuals and their right to the protection of personal data.

Public authorities must ensure that people are allowed access to personal data held by them so individuals can check how their personal data is processed, its accuracy and, where appropriate, are given the opportunity to exercise other rights such as the rights to rectify or erase.

Access, rectification and erasure of personal data are rights recognised since 1981 in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, hereafter “Convention 108”). Convention 108 aimed to enable individuals:

- ▶ to establish the existence of data processing, its main purposes, as well as the identity and habitual residence or principal place of business of the controller;
- ▶ to obtain at reasonable intervals and without excessive delay or expense, confirmation of whether personal data is stored and its communication in an intelligible form;

- ▶ to obtain rectification or erasure of personal data if it has been processed contrary to the provisions of domestic law giving effect to the basic principles of the Convention; and
- ▶ to have a legal remedy.

Amendments to Convention 108, introduced by a protocol,<sup>5</sup> provide for further rights to protect the individual. These include in particular:

- ▶ not to be subject to a decision significantly affecting the individual based solely on an automated processing of data without having his or her views taken into consideration;
- ▶ to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her;
- ▶ to object at any time, on grounds relating to his or her situation, to the processing of personal data unless the controller demonstrates legitimate grounds for the processing which override the individual's interests or rights and fundamental freedoms.

It is important that public authorities process personal data lawfully and fairly. To this end, they must take all necessary precautions. The data must be processed only for explicit, specified and legitimate purposes. These purposes for which it is processed must be adequate, relevant and not excessive. The data must be accurate and, where necessary, kept up-to-date. It must be preserved in a form that only allows the individual to be identified for as long as necessary for the purposes for which those data are processed.

Certain types of personal data, called "sensitive data", may not be processed unless domestic law provides appropriate safeguards complementing those of Convention 108. These include notably the processing of:

- ▶ genetic data;
- ▶ personal data relating to offences, criminal proceedings and convictions, and related security measures;
- ▶ biometric data uniquely identifying a person;
- ▶ personal data revealing racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life.

Appropriate security measures have to be taken by public authorities for the protection of personal data held by them against risks such as accidental or unauthorised access to, destruction, loss, use, modification or disclosure of personal data.

A series of recommendations of the Committee of Ministers of the Council of Europe specify how the general principles of Convention 108 should be applied in the different areas of public authorities' responsibilities, namely:

- ▶ employment data (Recommendation CM/Rec(2015)5);

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5. Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), adopted on 18 May 2018 and opened for signature on 10 October 2018.



- ▶ profiling (Recommendation CM/Rec(2010)13);<sup>6</sup>
- ▶ statistics (Recommendation No. R (97) 18);
- ▶ medical data (Recommendation No. R (97) 5);
- ▶ telecommunications (Recommendation No. R (95) 4);
- ▶ communicating data to third parties (Recommendation No. R (91) 10);
- ▶ police data (Recommendation No. R (87) 15);<sup>7</sup>
- ▶ social security data (Recommendation No. R (86) 1).

The European Court of Human Rights, in its case law in relation to the protection of personal data aims to strike a fair balance between the application of the provisions of Article 8 of the European Convention on Human Rights (“right to respect for private and family life”), as well as the articulation of this right with other fundamental rights (such as the right to freedom of expression safeguarded under Article 10 of the Convention).

## Case law of the European Court of Human Rights

In *Klass and Others v. Germany*, the applicants complained about German legislation empowering the authorities to monitor their correspondence and telephone communications without obliging the authorities to inform them subsequently of the measures taken against them. The European Court of Human Rights held that powers of secret surveillance of citizens are tolerable under the Convention only in so far as strictly necessary for safeguarding democratic institutions. In *S. and Marper v. the United Kingdom*, the applicant complained that DNA and fingerprints collected by the authorities could be kept indefinitely and used for purposes other than for which they were collected. The European Court of Human Rights found that the mere storing of data relating to the private life of an individual amounts to an interference with the right to private life. In *Haralambie v. Romania*, the Court found a violation of Article 8 of the European Convention on Human Rights (right to respect for private life) where obstacles were placed in the way of the applicant consulting a personal file created on him by the secret services. The Court reiterated the vital interest of individuals who are the subject of personal files held by public authorities to be able to access them and emphasised that authorities had a duty to provide an effective procedure for accessing such information. In *K.H. and Others v. Slovakia*, the Court found a violation of Article 8 of the Convention where the applicants were not allowed to photocopy their medical records. The Court considered the applicants should not have been obliged to justify why they needed the photocopies. It was a matter for the authority in possession of the data to show compelling reasons for not acceding to the request.

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6. See also the *Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data*, adopted by the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, in January 2017.

7. See also the *Practical guide on the use of personal data in the police sector*, adopted by the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, in February 2018.

By contrast, in *Segerstedt-Wiberg and Others v. Sweden*, the Court held that there had been no violation of Article 8 of the European Convention on Human Rights by the Swedish authorities. Having regard to the wide margin of appreciation available to them, the authorities were entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in learning the full extent of the information about them on the Security Police register. In *Gaskin v. the United Kingdom*, the applicant complained of ill-treatment while he had been in the care of a local authority and living with foster parents; he sought access to his case records held by the local authority but his request was denied. The Court held that the confidentiality of public records can be important to ensure objective and reliable information. Confidentiality may also be necessary for the protection of third persons. A system will comply with the principle of proportionality if it allows access to records either where the contributor consents or where an independent authority authorises access in the event a contributor fails to reply to a request for access or withholds consent.



## Chapter II

# Procedural principles

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**T**he procedural principles contained in this chapter apply to decision-making processes when public authorities determine matters that affect the rights and interests of people living or working in the areas they administer or in which they deliver public services. In most cases, a written or online request will be made by individuals to a public authority for a decision or a service. The process may be formal or informal depending on the service and what is being requested. The processing of a request will depend on its relative complexity and importance, in particular whether or not the decision to be made will have an impact on other members of the public, organisations or businesses and, if so, on how many. These procedural principles reflect key elements of the rule of law, as it should be applied in a democratic society based on human rights.

### Principle 8 – Access

Public authorities shall entertain and respond to requests for administrative decisions from individuals in relation to matters within their competence and in relation to which the individuals concerned have a legitimate interest, including the possibility of initiating an administrative procedure.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Articles 13, 15)
- ▶ Recommendation CM/Rec(2007)4 on local and regional public services (Guidelines 31, 32, 33, 34)
- ▶ Recommendation No. R (97) 7 on local public services and the rights of their users (updated by Recommendation CM/Rec(2007)4) (Guideline 9)
- ▶ Framework Convention for the Protection of National Minorities (Article 10.2)
- ▶ European Charter for Regional or Minority Languages (Article 10)

## Commentary

Everyone has a right to request public authorities to make decisions on matters within their competence, particularly where services are provided to individuals entitled to benefit.

Public authorities must make information on their competences available. They must also provide information on how individuals can make specific applications and include guidance on how forms are to be completed along with the procedures to be followed. Where an individual fails to use the appropriate form, this should not be a ground for the automatic rejection of his or her application. Rather, officials of the public authority should assist the individual in completing the appropriate form in the correct manner or otherwise give appropriate guidance to ensure that the public authority has the information it requires to make a properly grounded decision. Public authorities need to adopt a welcoming and supportive attitude towards individuals who approach them with requests for information, particularly in the case of children or other vulnerable persons.

When giving guidance and information, public officials shall act impartially and ensure that all persons are treated equally and receive the same degree of objective information or guidance, particularly where a decision may concern several individuals (see above, Principle 2). Guidance may extend to drawing up or completing documents but must not include advice as this would compromise the public authority's neutrality and could possibly give grounds for a successful appeal against any administrative decision it might make in a matter.

A public authority is required to answer all requests received but does not have to afford the same attention to manifestly abusive requests, particularly where they are repetitive or are made in large numbers. National law will determine the extent to which minority or foreign languages are to be accepted by public authorities and whether requests made in a foreign or a minority language can be accepted and dealt with where the individual is not able to use the official language of the competent public authority. The European Charter for Regional or Minority Languages (ETS No. 148) and the Framework Convention for the Protection of National Minorities (ETS No. 157) provide for undertakings to be given in relation to the use of regional and minority languages by public authorities and public service providers where the number of persons or their traditional presence so requires. The European Charter for Regional or Minority Languages provides that users of regional or minority languages may submit oral or written requests and receive a reply in these languages.

Where an application is made to a public authority which is not the competent authority, it should, where possible, transfer the application to the competent authority and notify the interested person accordingly. The return rather than transfer of an application might be reasonable if the competent authority cannot clearly be identified or belongs to a totally different branch of the public administration. In such cases the individuals concerned should be informed.

Individuals may be required to contribute to the costs incurred by a public authority in processing their request, such as fees charged for particular procedures. However, any fees charged must be fair and reasonable, and not infringe the right to be heard (see below, Principle 10). Moreover, administrative procedures should be designed in such a way as to keep fees to a minimum.

Simplifying administrative procedures is key to making public authorities accessible to individuals. Recommendation CM/Rec(2007)4 on local and regional public services calls for public services to be designed and organised in the light of the needs of the public rather than those of the public authority. For example, administrative and legal language, while maintaining its rigour, should be simplified and modernised. Administrative procedures should be organised in the most efficient and cost effective way, and be user-friendly. Reception areas and procedures should be rationalised, multiservice counters provided, and mobile offices introduced. Precedence should be given to the setting of uniform standards, which are clear and valid for all local and regional public services, and which all users are able to understand, respect and rely on. See also the earlier Recommendation No. R (97) 7 on local public services and the rights of their users, which Recommendation CM/Rec(2007)4 updates.

## Case law of the European Court of Human Rights

In *Markov and Markova v. Ukraine*, Mrs Markova complained that for a lengthy period of time she had been unable to marry Mr Markov because a public authority had refused to issue him with a document certifying his divorce from his first wife on the basis that Mr Markov was serving a prison sentence and unable to attend the authority's office in person. Although the application was dismissed for non-compliance with the six-month rule, the European Court of Human Rights noted that the authority's refusal to issue the divorce certificate was susceptible to interfering with Mrs Markova's right under Article 12 of the European Convention on Human Rights to marry Mr Markov.

In *Kuharec alias Kuhareca v. Latvia*, the applicant complained her surname was incorrectly spelt in her official documents. The European Court of Human Rights said that linguistic freedom is not one of the rights and freedoms governed by the European Convention on Human Rights. The Court said with the exception of the specific rights stated in Article 5.2 (the right to be informed promptly, in a language one understands, of the reasons for his or her arrest) and Articles 6.3.a and 6.3.e (the right to be informed promptly, in a language one understands, of the nature and cause of the accusation against him or her and the right to have the assistance of an interpreter if he or she cannot understand or speak the language used in court), the Convention per se does not guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one's choice.

## Principle 9 – Participation

Everyone shall have the opportunity to participate in the preparation and implementation of administrative decisions by public authorities which affect his or her rights or interests.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 15)
- ▶ Recommendation CM/Rec(2007)4 on local and regional public services (Guidelines 40, 41, 42, 43, 44)
- ▶ Recommendation No. R (97) 7 on local public services and the rights of their users (updated by Recommendation CM/Rec(2007)4) (Guidelines 14, 15)
- ▶ Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons (Principle IV)

### Commentary

Participation by individuals (as users of public services) in the preparation and implementation of administrative decisions which affect them is a means of bringing the public closer to the public authority. Public participation should be encouraged where feasible to ensure the public interest is taken into account, without fostering corporatism or excessively slowing down the decision making. Only urgent action would be a legitimate reason for public authorities not to respect the principle of participation.

Public participation can be achieved by members of the public participating in ad hoc joint committees or in municipal committees or boards. Another possible method is the organisation of annual meetings involving representatives of service providers and users to meet and discuss the preparation or implementation of administrative decisions based on an agreed agenda.

Effective public participation can entail the involvement of civil society given its work with various sections of the public and its experience of daily life on the ground. Civil society can help public authorities better understand and meet the expectations of the public when providing social, cultural or educational services, for example in relation to: kindergartens, school meals, school transport, libraries, the environment, assistance for the elderly, and health and assistance for children in difficulty at school.

When a public authority proposes to take a non-regulatory decision that may affect the rights and interests of an indeterminate number or large numbers of people, particularly at local level (for example on large construction projects, change of land use, health or educational policies), it should set out procedures allowing for public participation in the decision-making process. Such participation can take the form of written observations, hearings, representation on an advisory body of the

competent authority, consultations and/or public enquiries. Whichever form of participation is chosen, it is important that the public is clearly informed of the proposals in question and given the opportunity to express their views fully.

## Case law of the European Court of Human Rights

In *Hatton and Others v. the United Kingdom*, the applicants living near Heathrow Airport complained that the government policy on night flights violated their rights under Article 8 of the European Convention on Human Rights. The European Court of Human Rights recognised the importance of ensuring that individuals are involved in the decision-making process leading to decisions which could affect their rights under the Convention.

In *Taşkın and Others v. Turkey*, the applicant living near a gold mine challenged the national authorities' decision to issue a permit to use a cyanidation operating process in the mine. The European Court of Human Rights stated that where public authorities have to determine complex questions of environmental and economic policy, they must ensure that the decision-making process takes account of the rights and interests of the individuals whose rights under Articles 2 and 8 of the European Convention on Human Rights may be affected. The individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see below, Principle 20).

### Principle 10 – Right to be heard

Before a public authority takes an administrative decision affecting the rights or interests of an individual, the person concerned shall be given the opportunity to express his or her views and submit information and arguments to the public authority.

## Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Articles 14, 15)
- ▶ Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons (Principles IV, VIII)
- ▶ Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities (Principle I)

## Commentary

The right to be heard is a key principle of good governance in a democratic state. For this, access to official information is important to enable individuals to make relevant and effective submissions in relation to proposed administrative decisions that will or may affect their rights or interests (see above, Principle 6). Procedures



and what matters need to be considered will depend on whether the administrative decision concerns individual or collective interests.

In cases where an individual's rights or interests will be directly and adversely affected, he or she must be informed in good time and by appropriate means to ensure he or she has the opportunity to make submissions. Submissions may be in writing or made orally at a hearing or meeting. In either case, the submissions may include documentary evidence (including reports, plans and photographs), opinions and/or statements. It is important that individuals are allowed sufficient time to make submissions before the public authority takes its decision.

To assist those who wish to make submissions, the public authority should provide full disclosure of the facts, arguments and evidence, as well as the legal basis, on which it intends to make its decision. The submissions of other parties should also be made publicly available. Individuals should be allowed to make submissions on more than one occasion during the course of the administrative procedure, particularly where the procedure is lengthy and new elements come to light. Individuals should also have the right to respond to submissions made by the public authority or other parties.

Individuals who will or may be affected by decisions taken by public authorities in another state or jurisdiction (particularly public authorities in transfrontier or border regions) should be able to participate and exercise their right to be heard in the relevant administrative procedure conducted by the public authority of that state or jurisdiction without discrimination.

In many cases decisions of public authorities will concern a large number of persons, often within the same locality (for example in the context of major installations, industrial plants, urban and rural planning). Persons residing in neighbouring or other states may also be affected. Indeed, local authorities in border regions are increasingly undertaking public works of a transfrontier nature. Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons balances the requirements of good and efficient administration, on the one hand, with the fair and effective protection of a large number of persons on the other hand, including, where appropriate, persons affected by the international effects of administrative acts. The right to be heard is an important principle in this context. It is important that systems are put in place to facilitate participation in relevant administrative procedures, such as public consultations, public hearings, and the setting up of advisory bodies. Notification of administrative procedures may be by publication of public notices. Where administrative decisions concern people living and working in adjoining border areas of another state or jurisdiction, public authorities should take steps to allow these people to also participate effectively in the decision-making process, possibly in co-ordination with relevant public authorities of the other state or jurisdiction.

When urgent administrative action is required (for example in the event of freak weather conditions: flooding, drought, forest fire, etc.), it may not be possible to fully respect this principle allowing persons concerned the right to be heard prior to the taking of administrative decisions. Nonetheless, to the extent possible, individuals likely to be affected by any action taken by public authorities in response to such events should be fully involved and consulted in the preparation of appropriate contingency plans by public authorities.

## Case law of the European Court of Human Rights

In *McMichael v. the United Kingdom* and *Buscemi v. Italy*, both cases concerning decisions of national authorities on child custody, the European Court of Human Rights found that while Article 8 of the European Convention on Human Rights contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and afford due respect to interests safeguarded by Article 8. In light of the serious nature of the decisions to be taken, parents must be involved in the decision-making process, to ensure their interests are properly protected. If not, interference with their family life will not be regarded as “necessary” within the meaning of Article 8.

### Principle 11 – Representation and assistance

If a public authority intends to refuse an individual’s request, or considers that it is likely that the request will be refused, in full or in part, it shall give the individual the opportunity to be represented, or otherwise assisted, in putting forward his or her views, particularly where an administrative decision may directly and adversely affect his or her rights or interests.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 14)
- ▶ Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons (Principle II)
- ▶ Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities (Principle III)

### Commentary

It is important that an individual properly appoints another person to represent him or her and act on his or her behalf. In some cases it will be appropriate for a public authority to verify that the representative has the necessary authority to act. In most, if not all, cases the cost of representation and assistance will be covered by the individual concerned, not by the public authority. In the context of an administrative procedure concerning a large number of persons, public authorities may require that those persons be represented by one or more representatives or by associations or other organisations.

## Case law of the European Court of Human Rights

In *Chahal v. the United Kingdom*, the applicant was due to be deported to India on the basis of national security. The European Court of Human Rights found a violation of his rights under Article 5 of the European Convention on Human Rights, taking into consideration, *inter alia*, that Mr Chahal had not been legally represented before

the public authority (an advisory panel) which had examined his appeal against the deportation order made against him.

## Principle 12 – Time limits

Administrative procedures that may lead to a decision affecting the rights or interests of an individual shall be completed within a reasonable time.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 7)
- ▶ Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities (Principles 5, 10)

### Commentary

Public authorities must make decisions in accordance with time limits prescribed by national law or within a reasonable period of time, thereby ensuring legal certainty for all parties. If an administrative procedure is to proceed in stages it is important that each stage is completed as expeditiously as possible and the final decision is taken within a reasonable period of time from the commencement of the process. The principle applies whether the administrative procedure is initiated by the public authority itself or by an individual. A reasonable time limit depends on the nature of the decision to be made and the administrative procedure to be followed. In all cases, time limits set by public authorities should reflect the principles of good administration.

Where specified time limits are prescribed, they may apply to each stage of the administrative procedure, for example a time frame for lodging applications, filing any supporting submissions, or replying to queries from the public authority or other persons concerned by the proposed decision. To encourage public authorities to respond to requests from individuals in an expeditious manner, national law should specify a time limit by which a decision must be made, whether negative or positive, and provide for internal or judicial review where the public authority fails to respond to a request or fails to make a decision.

### Case law of the European Court of Human Rights

The European Court of Human Rights has frequently found that where an issue of general interest arises involving fundamental human rights, such as property rights, the principle of good governance requires public authorities to act promptly and in an appropriate and consistent manner. See, for example, *Beyeler v. Italy*, where the applicant alleged a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights, claiming the Italian authorities had expropriated a painting of which he claimed to be the lawful owner in breach of the conditions laid down by

the Convention; see also *Öneryıldız v. Turkey*, where the applicant complained, under Article 2 of the Convention, that his relatives had died as a result of an accident at a rubbish tip and that no effective investigation had been carried out into their death; *Moskal v. Poland*, where the applicant complained that divesting her of her acquired right to an early retirement pension had amounted to an unjustified deprivation of property; *Rysovskyy v. Ukraine* (the facts have been set out under Principle 5 above); and *Dubetska and Others v. Ukraine*, where the applicants complained about the negative effects of industrial pollution on their families and homes. The Court held that procedural safeguards available to the applicants may be rendered inoperative and a state may be found liable under the Convention where a decision-making procedure is unjustifiably lengthy or where a decision taken remains unenforced for a lengthy period of time.

### Principle 13 – Form and notification of administrative decisions

Administrative decisions shall be phrased in a simple, clear and understandable manner. They shall include reasons for the decision and specify the relevant legal and factual grounds on which decisions have been taken. Where a decision adversely affects the rights or interests of an individual the decision shall include information about available remedies and appeal procedures, and relevant time limits.

Individuals shall be notified personally of the decision. Only in exceptional circumstances, or if the decision concerns a large number of persons, may general publication methods be used.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Articles 17, 18)
- ▶ Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons (Principle VI)
- ▶ Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities (Principle IV)

### Commentary

The form and notification of an administrative decision is particularly important in the context of formal decisions taken by public authorities. In most legal systems, an administrative decision that has not been properly notified is valid but, for so long as the person concerned has not been personally notified, it cannot have legal effect in relation to him or her.

The administrative decision must include reasons for the decision as they provide a basis for review by a competent administrative or judicial body. A public authority

must set out its reasoning, show that it has acted within the legal powers conferred on it, and show that the decision was taken for appropriate reasons and not arbitrarily (see above, the substantive principles in Chapter I).

While the decision must also explain what remedies and procedures are available to the individual concerned, it is not necessary to include all possible available remedies and procedures, such as an appeal to a constitutional court or an ombudsman.

## Case law of the European Court of Human Rights

*De Geouffre de la Pradelle v. France* concerned access to the Conseil d'État in order to challenge the lawfulness of a decree designating an area as being of outstanding beauty. The European Court of Human Rights found a breach of the applicant's right of access to a court (Article 6 of the European Convention on Human Rights) because French public authorities had notified him of their decision only after the period within which any appeal could be brought had expired.

*Meltex Ltd and Movsesyan v. Armenia* concerned an administrative procedure for obtaining a broadcasting licence. The European Court of Human Rights noted that the manner in which licensing criteria are applied in the licensing process must guarantee against arbitrariness and that the licensing authority must ensure proper reasoning when denying a broadcasting licence.

### Principle 14 – Execution of administrative decisions

Administrative decisions affecting the rights or interests of individuals shall be executed within a reasonable time with due regard to all relevant interests.

## Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 20)
- ▶ Recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law (Principles I.1, I.2)

## Commentary

Principle 14 concerns the implementation of administrative decisions. In certain administrative law systems, it is usual to refer to the "execution" or "enforcement" of the formal administrative decision taken by the public authority rather than its implementation. In other systems or contexts, the term "implementation" of the decision of the public authority is more appropriate. Implementation, enforcement or execution (including forced execution) of an administrative decision may itself require one or more subsequent decisions (including physical acts).

Public authorities shall allow individuals a reasonable period of time to perform the obligations imposed on them by administrative decisions, except in urgent cases

where they shall duly state the reasons for this. In cases where a decision confers rights or benefits on an individual, it shall be implemented by the public authority as soon as possible. Failing to do so can itself be subject to review (see below, Chapter IV). Unless otherwise provided for by law, the lodging of an appeal automatically suspends the implementation or execution of the decision pending the outcome of the appeal.

Implementation or execution of administrative decisions by public authorities should be subject to various guarantees – for example, be expressly provided for by law and be proportionate. Administrative decisions should also clearly set out the action to be taken for their implementation or execution. Administrative decisions must not have retroactive effect and must not be effective any earlier than the date of their adoption or publication. In exceptional circumstances, some countries (such as France) allow a judge to authorise the retrospective application of an administrative decision within limits prescribed by national law. Except in urgent cases, administrative decisions only become operative when they have been appropriately published. Responsibility for giving effect to an administrative decision lies with the public authority that has made it.

## Case law of the European Court of Human Rights

In *Dubetska and Others v. Ukraine*, the European Court of Human Rights found Article 8 of the European Convention on Human Rights had been violated on account of, *inter alia*, the government's delay in executing a decision of the local authority to move the applicants' families from an area affected by industrial pollution. In *Agrokompleks v. Ukraine*, the applicant company complained about the length and alleged unfairness of debt recovery proceedings initiated by it against another company in 1993 which continued until 2004. It submitted that the courts had breached the principle of *res judicata* by reassessing the amount of debt that the final court decision had established was due to it. It also contended that the courts dealing with the case could not be regarded as impartial or independent given the intense pressure exercised upon them by high-ranking state officials. The European Court of Human Rights held that the scope of a state's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6.1 of the European Convention on Human Rights is not limited to the judiciary. Obligations are also imposed on the executive, the legislature and any other state authority to respect and abide by judgments and decisions of the courts, even when they do not agree with them. Respect for the authority of the courts is an indispensable precondition for public trust in the courts and, more broadly, for the rule of law. Constitutional safeguards of the independence and impartiality of the judiciary are not in themselves sufficient; they must also be effectively incorporated into everyday administrative attitudes and practices. In *Hornsby v. Greece*, the applicants complained that refusal by the administrative authorities to comply with the Supreme Administrative Court's judgments had infringed their right to effective judicial protection of their civil rights. The Court found that by refraining for more than five years from taking necessary measures to comply with a final, enforceable judicial decision the Greek authorities had deprived Article 6.1 of the Convention of all useful effect.

## Principle 15 – Administrative sanctions

Administrative sanctions shall be prescribed by law and only imposed by public authorities on individuals within clearly prescribed conditions.

### Sources

- ▶ Recommendation No. R (91) 1 on administrative sanctions
- ▶ European Convention on Human Rights (Article 6)

### Commentary

Principle 15 applies where there has been a breach of an administrative rule or where there has been a failure to comply with an administrative decision. It does not concern measures that public authorities are required to take as a result of civil proceedings or disciplinary sanctions which are not considered to be administrative sanctions.

By way of example, a refusal to grant or renew a licence on the grounds that the applicant no longer fulfils the necessary requirements shall not be considered as an administrative sanction. Rather than being punitive, the prohibition or the withdrawal of a licence may be due to new laws introduced to protect, for example, the environment or public health.

Administrative sanctions may be imposed by public authorities by way of a fine or any other monetary or non-monetary measure. Nonetheless, recourse to administrative sanctions must respect the conditions set out below:

- i. Administrative sanctions must be prescribed by national law and proportionate to the actual breach.
- ii. The administrative procedure leading to an administrative sanction must be completed within a reasonable time and be subject to “fair trial” safeguards, including a decision that concludes the proceedings. The public authority must establish both the breach of the administrative rule and responsibility of the individual in question for it.
- iii. An individual may not be administratively sanctioned twice for the same act on the basis of different rules that protect the same social or public interest. Where the same act gives rise to action by two or more administrative authorities on the basis of rules protecting distinct interests, account should be taken by them of the sanction imposed by the others.
- iv. Administrative sanctions may not be imposed in relation to an act committed by an individual that, at the time when it was committed, was not unlawful or contrary to the relevant administrative rule.

- v. The legality of the administrative decision imposing the administrative sanction shall be subject to review by an independent and impartial court established by law.

Public authorities are entitled to establish appropriate systems of administrative sanctions in order to ensure individuals comply with their decisions. In order to ensure that administrative sanctions are lawfully imposed, the power of public authorities to impose sanctions must be provided for in legislation. The legislation should also lay down the level of pecuniary sanctions that may be imposed by public authorities in particular circumstances and define those cases where sanctions can restrict the exercise of fundamental rights. A margin of discretion may be left to the relevant public authority to determine the specific circumstances in which particular sanctions may be imposed.

The “fair trial” safeguards, a precondition for imposing an administrative sanction, reflect the protections contained in Article 6 of the European Convention on Human Rights and should apply where appropriate. In cases of minor infringements carrying small pecuniary penalties, such safeguards may be relaxed where the individual concerned consents. In certain cases, notably parking fines, the requirement of good and efficient administration may call for simplified procedures, even if the person concerned does not consent. In addition, where an individual has been found to be in breach of a particular administrative rule and the sanctions for this breach have been amended or replaced prior to the determination of the type or level of fine appropriate, he or she should be entitled to benefit from the level or type of sanction most favourable to him or her.

Examples of administrative sanctions other than fines include increases in charges, confiscation of goods, ordering the closure of a business, banning the practice of a professional activity, or suspending or withdrawing licences, permits or authorisations. Whether or not a particular act is an administrative sanction will depend on the relevant administrative rules.

The fair trial safeguards relating to criminal proceedings will apply where the European Court of Human Rights considers that, notwithstanding the national classification of proceedings as civil or administrative, the proceedings are properly to be considered as criminal. These safeguards require that any person faced with an administrative sanction, if found to infringe the law, shall be informed of the reasons as well as the nature of the evidence. Sufficient time shall be given to allow the person to prepare his or her case, an opportunity shall be given for the person to be heard before any decision is taken and the reasons for imposing the sanction (in the event this is decided) shall be set out in the relevant administrative decision.

## Case law of the European Court of Human Rights

In *A. Menarini Diagnostics S.r.l. v. Italy*, the AGCM, an independent public authority in charge of competition, fined the applicant company six million euros for unfair competition in the diabetes diagnostic tests market. All appeals by the company against that decision to the administrative court and the Consiglio di Stato and the Court of Cassation were rejected. Having regard to the various aspects of the case



and their respective weight in the matter, the European Court of Human Rights considered that the fine imposed on the applicant company was a criminal penalty, so the criminal element of Article 6.1 of the European Convention on Human Rights was applicable. However, the Court found no violation of this provision because the administrative decision was duly reviewed by judicial bodies having full jurisdiction.

The criteria of the European Court of Human Rights to establish whether a charge is of a criminal character are commonly known as the “Engel criteria”, named after the case *Engel and Others v. the Netherlands*, where the applicants complained about various disciplinary sanctions and measures imposed on them when they were carrying out their compulsory military service. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not preclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge. National classification does not determine classification by the European Court of Human Rights for the purposes of fair trial obligations under Article 6 of the European Convention on Human Rights, although national classification and the essential nature of the offence are relevant factors.

## Chapter III

# Liability of public authorities, compensation and other remedies

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**T**he principle contained in this chapter concerns the liability of public authorities and the obligation imposed on them to provide redress for the damage or loss caused by their actions or inactions.

Providing a course of action for individuals to establish through the courts the liability of public authorities that cause them to suffer damage or loss (or threaten to do so) as a result of their unlawful or negligent actions or inactions is a fundamental principle for a society based on the rule of law. Providing an effective remedy is a requirement of the European Convention on Human Rights.

### Principle 16 – Liability and redress

Public authorities shall be accountable in law for their unlawful or negligent actions or inactions, and any resulting damage or loss suffered by individuals. Public authorities shall provide full redress for any such damage or loss, including that resulting from actions or inactions of their officials, and also, where provided by national law, as a result of no-fault liability. Court orders or administrative decisions granting redress shall be executed within a reasonable time.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 23)
- ▶ Recommendation No. R (84) 15 relating to public liability
- ▶ Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties
- ▶ Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts
- ▶ Recommendation No. R (81) 7 on measures facilitating access to justice
- ▶ European Convention on Human Rights (Article 13)
- ▶ Civil Law Convention on Corruption (Article 5)

## Commentary

### Liability

This principle concerns the liability of a public authority towards the individual as a result of unlawful or negligent actions or inactions causing loss or damage to the individual. The principle does not extend to loss or damage sustained by individuals due to actions or inactions of public officials engaged in criminal activity, nor does it concern employment matters between officials and public authorities.

Liability arises whenever damage or loss is suffered by individuals as a result of failure by a public authority to comply with standards of conduct reasonably expected to be met in law. Where a public authority has neither acted unlawfully nor negligently, nor failed to conduct itself in a way that can be reasonably expected of it, national law may still impose liability on public authorities if it would be manifestly unfair for individuals alone to bear damage or loss sustained as a result of the public authority's action or inaction.

A public authority will be liable for physical damage or financial loss and even non-pecuniary damage (for example, injury to reputation) where provided by national law. There must be a direct causal link between the action or inaction of the public authority and the damage or loss suffered.

The standards of conduct which public authorities might reasonably be expected by law to observe depend on their functions and the means at their disposal. They must be in a position to perform a wide range of tasks and deliver a large number and variety of services to the community. The definition, scope and nature of these services are established by law.

Damage or loss suffered by an individual as a result of the actions or inactions of a public official acting without legal authority and beyond the scope of his or her powers, may still result in the liability of the public authority. Liability of the public authority in these circumstances will depend on the functions performed by the public official and the circumstances of his or her actions, in particular whether the actions or inactions were of such a nature as to mislead the injured person into thinking that the official was acting within his or her powers, and whether the public authority failed to exercise sufficient control over the official's actions or to clearly explain the role of the official in the particular situation. Some legal systems distinguish between the personal liability of the official concerned (*faute personnelle détachable*) and administrative error (*faute de service*) where the public authority would be responsible.

Public authorities will, as a general rule, be exonerated from liability in the case of *force majeure* where circumstances beyond the control of the public authority arise which are often unpredictable and may have unavoidable consequences. There will also be no liability where the damage or loss is caused as a result of a significant intervention in the chain of events by a third party. In such cases, liability will normally lie with the third party.

An individual's rights and legitimate interests may be infringed, and damage or loss caused, not only when a public authority acts unlawfully or negligently, or fails to properly conduct itself, but also in certain other situations, for example when it acts lawfully but improperly. In these cases, criteria must be established for determining the instances in which the burden of damage or loss should be borne by the injured person alone and when it should be borne by the community. The generally accepted principle of social solidarity requires the public to accept a whole range of inconveniences, damage or loss as a normal consequence of everyday life in society, which are not excessive or serious and affect the population as a whole. Conversely, when damage or loss is excessive or serious and is suffered by only one or some individuals or groups of individuals and it would be unfair for these persons to bear the full burden of the damage or loss themselves, they should be compensated. Accordingly, Recommendation No. R (84) 15 relating to public liability expects member states to provide in their national law rules for granting compensation to the injured person whenever it would be manifestly unjust for him or her alone to bear the burden of damage or loss.

The principle of public liability does not require a separate system of law and procedure relating to public authorities, with special public or administrative law courts. Each state will apply the principle in the manner most appropriate to its own legal system. In some states public authorities must comply with the same rules as individuals, whereas in other states a separate system of liability applies to public authorities because it is considered that specific principles are necessary in relation to the legal responsibilities of public authorities in order to take into account the particular nature of their activities and the fact that they are undertaken in the public interest.

Special rules on public liability may apply in some member states in respect of the armed forces and certain public services such as postal, telecommunication and transport services.

In any case, rules on the liability of public authorities shall not discriminate against individuals on grounds of nationality, sex, race, colour, social origin or on any other ground.

## Redress

Public authorities should in general provide full redress to individuals for damage or loss suffered as a result of unlawful or negligent actions or inactions of public authorities, whether within or outside their powers.

National law may impose an obligation on public authorities to provide redress for damage or loss not resulting from unlawful or negligent actions or inactions of public authorities, where it would be manifestly unfair for the injured individual alone to bear such damage or loss. In these cases redress may be partial, provided it is fair.

When a public authority fails to properly comply with its legal duties resulting in damage or loss to an individual, redress should be available to the individual regardless of any personal liability of public officials who may have caused the damage or loss.

“Redress”, in this context, means all possible forms of making good any damage or loss suffered by an individual as a result of actions or inactions of public authorities. It includes compensation in the form of a monetary payment or other means aimed at compensating an individual for damage or loss that cannot be directly repaired. It also includes restitution (where a contract is rescinded or restoring previous rights or privileges before a contract was entered into), as a result of no-fault liability or an act of corruption committed by a public official. The nature and form of redress may vary and will be determined by national law, including the heads of damage in the case of compensation. The level of redress may be reduced or redress may be denied completely where an individual, or a person for whom he or she is responsible under national law, contributed to the damage or loss incurred or is deemed solely liable.

The principle of “full redress” means that an individual is compensated for all damage caused by the unlawful or negligent action to the extent that it can be given a monetary value and appropriately compensated for. In most legal systems, compensation covers both immediate material damage and consequent loss.

“Fair redress” shall be determined on the basis of the following factors: the nature of the public interest giving rise to the individual’s damage or loss; the prevalence of the incident and the extent to which the action was exceptional or the fact that the resulting damage or loss was exceptional. In the case of special rules on public liability for the armed services and for postal, telecommunication and transport services, the level of redress must be at least adequate.

In cases where damage or loss suffered by an individual has been caused by a public official, legal systems will vary as to whether the individual may choose to make a claim against the employing public authority or against the public official presumed responsible (or against both simultaneously), or whether the individual must invariably make his or her claim against the public authority (leaving the authority concerned to subsequently take action against the official, should it so wish). The Council of Europe advocates a compromise solution, that states should not hinder the individual in the exercise of his or her right to proceed directly against the public authority concerned, with both the public authority and the individual being able to institute legal proceedings against public officials in their personal capacity. However, if the damage or loss is the result of a lawful act, there should be no legal basis for a public authority to recover against a public official the amount of compensation that it has paid, or been ordered to pay, to the injured individual.

Furthermore, contracting states to the Council of Europe Civil Law Convention on Corruption (ETS No. 174) are required to establish appropriate procedures for compensation claims against the state by persons who have suffered damage or loss as a result of an act of corruption by a public official acting in the exercise of his or her functions (Article 5).

An individual’s right to bring a court action against a public authority for redress shall not be subject to prior compulsory or voluntary administrative conciliation procedures. However, before bringing such an action, national law may stipulate that individuals should first seek to resolve the dispute by conciliation. Conciliation and other alternative dispute resolution mechanisms (mediation, negotiated

settlement and arbitration) aimed at achieving friendly settlements without the need for expensive legal proceedings are indeed clearly recommended by the Council of Europe (see below, Principle 17). Where they exist, they should not operate in such a manner that might prevent or dissuade individuals from exercising their legitimate rights or prevent them pursuing their cases before the courts.

Court orders or administrative decisions granting redress to an individual who suffers loss or damage caused by public authorities should be executed within a reasonable time (see above, Principle 14). An injured individual may not always be guaranteed immediate redress if it is offered by a public authority *ex gratia* (voluntarily). In some national systems the decision concerning redress can be enforced immediately; in others, enforcement is a separate special procedure which can engender delay. Other practical obstacles may exist to prevent individuals receiving redress within a reasonable time; for example, lack of funds available to the public authority, inertia within the public authority and rules in some national systems preventing the enforcement of decisions against public authorities. In order to counter these difficulties, Recommendation No. R (84) 15 requires that separate special procedures, where they exist, should be easily accessible and expeditious, and recommends that public authorities have sufficient means to meet orders for compensation. To overcome the inertia or malicious conduct of individual public officials, some national systems provide for the personal liability of the officials concerned for failure to enforce court orders or administrative decisions concerning redress within a reasonable time.

## Case law of the European Court of Human Rights

In *De Souza Ribeiro v. France*, the applicant complained under Articles 8 and 13 of the European Convention on Human Rights that he had had no effective remedy under French law in respect of his complaint of unlawful interference with his right to respect for his private and family life as a result of his expulsion to Brazil. The European Court of Human Rights found that by virtue of Article 1 of the Convention, national authorities are primarily responsible for implementing and enforcing guaranteed rights and freedoms. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an “arguable complaint” under the European Convention on Human Rights and to grant appropriate relief. The scope of the contracting states’ obligations under Article 13 varies depending on the nature of an applicant’s complaint. States are afforded some discretion as to the manner in which they meet their obligations under this provision. However, Article 13 requires that a remedy must be “effective” in practice as well as in law. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for an applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy provided is effective. When the “authority” concerned is not a judicial

authority, the European Court of Human Rights assesses the independence and procedural guarantees offered to the applicant in order to establish if the authority in question has provided an effective remedy. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of state authorities. In addition, particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by excessive delay.

See also *Rysovskyy v. Ukraine*, cited above in Principles 5, 6 and 12, and *Jabari v. Turkey*, a case where the Turkish authorities refused to consider the merits of the applicant's request for asylum because she had lodged the request outside the five-day time limit prescribed by national legislation. The European Court of Human Rights found that the automatic and mechanical application of such a short time limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the European Convention on Human Rights. The Court also found a violation of Article 13 of the Convention because the applicant did not have access to a remedy with a suspensive effect against her deportation.

## Chapter IV

# Reviews and appeals

**C**hapter IV sets out the principles which relate to appeals against decisions of public authorities, including those taken by public authorities on their own initiative, for example decisions relating to the tax liability of individuals or other fiscal charges, or social security contributions.

The opportunity given to individuals to apply for a review of decisions by public authorities is an important element of both modern democratic society and good administration. Appeals to the courts and judicial review of administrative acts are essential elements of a state governed by the rule of law and the separation of powers. Principles 19 to 21 concern, respectively, the right to appeal, the interim or provisional protection and the execution of court decisions. However, other avenues of review, which are quicker, cheaper and less formal are equally important for individuals, namely internal (or administrative) reviews undertaken by the public authority itself and non-judicial reviews by an ombudsperson<sup>8</sup> or similar institution. Principles 17 and 18 deal with these non-judicial forms of review and appeal.

Practical guidance on monitoring appeals against administrative decisions is contained in a handbook published by the Folke Bernadotte Academy (Sweden) and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR).<sup>9</sup> The handbook is aimed at trial-monitoring staff, including managers of monitoring operations, court monitors, legal staff and reporting officers. The handbook may be useful for those (“trial monitors”) interested in setting up systems to monitor the effectiveness, in terms of human rights standards, of proceedings before the courts concerning disputes between individuals and public authorities.

### Principle 17 – Internal review

Everyone adversely affected by an administrative decision made by a public authority shall be entitled to request an internal review of that decision.

8. The term “ombudsperson(s)” is used in the English version in preference to “ombudsman(men)” which appears in the English language source instruments. “Ombudsperson(s)” is used in the French text in the absence of a fully corresponding term, except, where the context permits, the term “mediateur” (mediator) is used.
9. *Handbook for monitoring administrative justice*, 2013, ISBN 978-92-9234-871-7.



## Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Articles 22, 23.2)
- ▶ Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties

## Commentary

The nature of an internal review will depend on the type of administrative decision to be reviewed. It should be carried out by competent persons within the public authority. An internal review may be a prerequisite for an appeal to a court. A request for an internal review should of itself suspend time limits for instigating an appeal to a court. An individual must not suffer any prejudice from a public authority for appealing against an administrative decision or requesting an internal review.

Where courts are not empowered to review the merits of a case or replace a decision when that decision is taken by a public authority exercising its discretion, it lies with the public authority itself to correct any shortcomings in its actions.

The principle of internal review is based on the assumption that internal reviews precede court proceedings and this is the preferred option, although the lodging of an appeal to a court in some legal systems has the effect of suspending the internal review until such time as the appeal is determined by the court.

The substantive and procedural principles described in chapters I and II also apply to internal reviews. In some cases the internal review may form part of the internal decision-making process of the public authority. Where the procedural principles have been complied with when the initial decision was made, the review may curtail these procedures if the individual's rights and interests are not prejudiced.

It is important to distinguish between internal reviews within the public authority itself and formal review bodies established so individuals have access to an administrative appeal. The latter must be independent of the public authority whose decision is being challenged and must comply with Principles 19 to 21 (judicial review and appeals). Internal reviews are one of several alternatives to litigation and court action for resolving disputes between public authorities and individuals. Other alternatives are conciliation, mediation, negotiated settlement and arbitration.

## Case law of the European Court of Human Rights

In *Tsfayo v. the United Kingdom*, the applicant appealed to a local authority Housing Benefit Review Board (HBRB) against the decision of the same local authority (London Borough of Hammersmith and Fulham) to refuse payment of backdated local council tax and housing benefits. The local authority had rejected Ms Tsfayo's claim that she had not received the relevant correspondence about the renewal of her benefits. Her appeal was rejected by the HBRB and subsequently the High Court refused a judicial review of the HBRB's decision. The European Court of Human Rights found a violation of Ms Tsfayo's rights under Article 6.1 of the European Convention on

Human Rights as it did not consider the review board to be independent of the local authority and accordingly not impartial in its processes.<sup>10</sup>

## Principle 18 – Non-judicial review

Independent non-judicial bodies shall have the power to review the lawfulness and fairness of administrative decisions.

### Sources

- ▶ Recommendation No. R (85) 13 on the institution of the *Ombudsman*
- ▶ Resolution (85) 8 on co-operation between the *Ombudsmen* of member states and between them and the Council of Europe

### Commentary

Independent non-judicial bodies for the purposes of this principle include ombudspersons, parliamentary commissioners, public defenders, mediators, and other similar bodies or persons responsible for reviewing the lawfulness and fairness of decisions taken by public authorities. Their role complements the role of the courts and contributes significantly to the protection of individuals in their relations with public authorities.

In order for these bodies to carry out their role effectively, it is important that they have the power to access all oral and written information (relevant correspondence, minutes of meetings and all other relevant records) they consider necessary held by public authorities. This information will allow them to initiate investigations, establish their own working methods (including informal procedures), give conclusions on individual complaints, express opinions and make recommendations for changes in administrative law and practice. Public authorities are under an obligation to co-operate fully with independent non-judicial bodies. Co-operation, at international level, between ombudspersons, parliamentary commissioners, mediators and persons discharging similar functions is particularly encouraged by the Council of Europe.

It is also crucial to maintain public trust in the integrity, impartiality and effectiveness of these independent bodies which should preferably, at least in the case of the ombudsperson, be elected by parliament. The institution of the ombudsperson (often referred to as a parliamentary ombudsperson where this person has been appointed by parliament) has spread to numerous countries in all parts of the world. Experience shows that the opinions of the ombudsperson do not only influence individual cases, where an individual challenges an administrative act or complains about the conduct

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10. Irish Human Rights Commission, IHRC (2012), *European Convention on Human Rights – Guide for the Civil & Public Service*.

of a public official, but may also constitute a major factor in the evolution of general principles and rules governing the functioning of the administration and the conduct of public officials. An ombudsperson elected by parliament can also contribute towards the strengthening of parliamentary control of public authorities.

## Case law of the European Court of Human Rights

In *Leander v. Sweden*, the applicant complained, *inter alia*, under Article 8 of the European Convention on Human Rights that a secret police register contained information relating to his private life and he had not had the opportunity to refute it. The European Court of Human Rights found that, according to Article 13 of the European Convention on Human Rights, where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he or she should have a remedy before a national authority in order both to have the claim decided and, if appropriate, to obtain redress. The authority referred to in Article 13 need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy is effective.

### Principle 19 – Right to appeal

Everyone shall be able to seek judicial review of any administrative decision that directly affects his or her rights and interests regarding both the merits and legality of the disputed decision.

## Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 22)
- ▶ Recommendation Rec(2004)20 on judicial review of administrative acts
- ▶ Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons (Principle VII)
- ▶ Recommendation No. R (81) 7 on measures facilitating access to justice
- ▶ Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities (Principles 9, 10, 11)
- ▶ Resolution (78) 8 on legal aid and advice
- ▶ Resolution (76) 5 on legal aid in civil, commercial and administrative matters
- ▶ European Convention on Human Rights (Article 6)

## Commentary

The right of access to justice and the right to a fair hearing are essential features of any democratic society. The rule of law seeks to ensure that any interference by public authorities with the rights of individuals should be subject to effective control,

normally ensured by the courts. Judicial review offers the best guarantees of independence, impartiality and a proper procedure.

The constitutional traditions and legal systems of different states offer various solutions as to the nature of tribunals which can review administrative decisions. Under the civil law tradition, these are essentially administrative courts, the jurisdiction of which is confined to matters of administrative law and which have no jurisdiction concerning private litigation. In common law countries, the control of administrative acts is carried out in the ordinary courts by judges whose jurisdiction covers both public and private law matters. However, both traditions admit specialised tribunals established by law which are not part of the general system of administrative courts or of the system of ordinary courts, and which have a jurisdiction specifically limited to particular subjects such as social welfare, licensing, patents and statutory compensation for administrative decisions (such as expropriation). If the composition or functioning of such tribunals does not fulfil the requirements set out in Article 6 of the European Convention on Human Rights, their decisions must be subject to appeal before courts which do offer such guarantees.

All persons with a sufficient interest in a disputed administrative decision should be entitled to participate in appeal proceedings. In court appeals involving a large number of persons, the court may, if so provided by law and having due regard to the rights and interests of the persons concerned, take various steps to rationalise the procedure (which, thus, becomes a “collective procedure”). This may consist of requiring individuals with common interests to choose one or more common representatives, the determination of test cases and notifying orders or decisions by public announcement. Moreover, all persons, without discrimination on any ground, shall be entitled to appeal to a court and lack of financial means should not be a barrier to access to justice.

Article 6.1 of the European Convention on Human Rights does not imply that states must provide free legal aid for every dispute relating to a “civil right”. There is a clear distinction between Article 6.3.c – which guarantees the right to free legal aid in criminal proceedings subject to certain conditions – and Article 6.1, which makes no reference to legal aid. However, the Convention is intended to safeguard rights with a view to being practical and effective, particularly in relation to the right of access to a court. Hence, Article 6.1 may sometimes in certain circumstances require states to provide individuals with the assistance of a lawyer when such assistance proves indispensable for effective access to a court. The question whether Article 6 requires the provision of legal representation to an individual litigant in a dispute with a public authority will depend upon the specific circumstances of each case. What has to be ascertained is whether, in the light of all circumstances, the lack of legal aid would deprive the applicant of a fair hearing. Hence, there may be a legal aid system which selects the cases which qualify for it. However, the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness.

The right to appeal applies to administrative decisions taken by any public authority, regardless of the subject matter. There are, however, some restrictions concerning the application of Article 6 of the European Convention on Human Rights, as it is

limited to the determination of “civil rights and obligations”. While the European Court of Human Rights has, since its judgment in *Ringeisen v. Austria*, progressively extended what is covered by this concept for the purposes of Article 6 in the context of disputes between individuals and public authorities, there are disputes that fall outside Article 6 of the Convention.

In broad terms, Article 6 of the Convention will apply to public law proceedings that are “decisive” when determining an individual’s rights and obligations, whether they are of a pecuniary or private nature (for example, use of land, building permits, licences to run a business, disciplinary proceedings), involve social rights (for example, contributory and non-contributory social security benefits) or concern individual rights of a personal nature (for example, right to life, to health or to a healthy environment; the fostering of children; schooling arrangements; restrictions on prisoners’ rights; membership or registration of an association; access to administrative documents).

Public officials in dispute with their employer will also enjoy the fair trial guarantees of Article 6 of the Convention, unless they are expressly excluded by national legislation from access to court and the public official either participates in the exercise of public power or there exists a “special bond of trust and loyalty” between the public official and the state as his or her employer (*Vilho Eskelinen and Others v. Finland*). Disputes relating to public authority prerogatives, such as taxation, immigration policy, civil service employment (if it falls within the test mentioned previously) and political and electoral rights will fall outside Article 6.

The fair trial guarantees of Article 6 require appeal proceedings against an administrative decision: to be before an independent and impartial tribunal; to be heard in public (subject to limitations on grounds of public policy, national security, interests of children, privacy or where strictly necessary in the interests of justice); to ensure decisions are provided within a reasonable time and pronounced in public; and to be adversarial in nature. They must also ensure equality of arms, disclosure of evidence and the personal attendance of individuals to allow them to participate (as appropriate).<sup>11</sup>

It is important to note that judicial review of an administrative decision is a court hearing at first instance and not a hearing on appeal against the decision of a lower court, so the full requirements of Article 6 apply.

The appeal may be to an administrative or civil court and should allow for a review on both the merits and legality of the disputed decision, including decisions taken in the exercise of discretionary powers. It is generally recognised that a public authority cannot be judicially compelled to exercise a power which is purely discretionary. Nonetheless, judicial review of the exercise of discretionary powers by a public authority ensures that such powers are exercised within the limits and purposes provided by law.

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11. For a condensed summary of the principles of the case law of the European Court of Human Rights relating to guarantees for a fair trial in Article 6 of the European Convention on Human Rights and aimed at practising lawyers, see also Vitkauskas D. and Dikov G. (2012), *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, 2012.

## Case law of the European Court of Human Rights

In *Taşkın and Others v. Turkey* (see facts set out under Principle 9), the European Court of Human Rights stated that where public authorities have to determine complex questions of environmental and economic policy, they must ensure that the decision-making process takes account of the rights and interests of the individuals whose rights under Articles 2 and 8 of the European Convention on Human Rights may be affected. Where such individuals consider that their interests have not been given sufficient weight in the decision-making process, they should be able to appeal to a court. In *Klass and Others v. Germany* (see facts set out under Principle 7), the European Court of Human Rights held that the rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the courts, at least as a last resort. Judicial control offers the best guarantee of independence, impartiality and a proper procedure.

In *Airey v. Ireland*, the applicant complained that she did not have effective access to court because legal aid was not available in Ireland in non-criminal cases and she could not hire a lawyer to represent her in divorce proceedings. The European Court of Human Rights found that the European Convention on Human Rights contains no provision on legal aid for non-criminal cases, Article 6.3.c dealing only with criminal proceedings. However, Article 6.1 of the Convention may sometimes compel states to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case. In *P, C. and S. v. the United Kingdom*, where the applicants complained of lack of legal representation in judicial proceedings concerning child care, the Court found that the right of access to a court is not absolute and may be subject to legitimate restrictions. Such restrictions will not be incompatible with Article 6 of the Convention if the limitation does not impair the very essence of the right, if it pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. It may be the case that other factors concerning the administration of justice (such as the urgency of a matter or the rights of others) also play a limiting role as regards the provision of assistance in a particular case, although such reasons would also have to satisfy the tests set out above.

### Principle 20 – Interim or provisional protection

Courts and administrative tribunals shall have the power to grant interim or provisional protection pending the determination of an appeal against an administrative decision.

### Source

- ▶ Recommendation No. R (89) 8 on provisional court protection in administrative matters

## Commentary

Interim or provisional protection is one of the most important means by which an individual can be guaranteed an effective remedy against a public authority because it maintains (or restores) the status quo in his or her favour pending the outcome of the appeal. This is important because, even under the most efficient of judicial systems, the complexity of many cases is liable to result in considerable delay before the appeal can be determined. Suspension of the administrative decision or an injunction restraining its enforcement pending the outcome of the appeal is therefore essential for a system of effective remedies.

Such protection may take the form of suspending execution of the administrative decision (wholly or partially), ordering restoration of the situation prior to the administrative decision (wholly or partially), or any other order appropriate to the circumstances of the case and within the powers of the court or administrative tribunal.

The principle of interim or provisional protection applies particularly in circumstances where an individual will suffer severe damage or loss which the public authority will have difficulty in compensating should the appeal be successful.

Interim or provisional protection arises in those cases where an administrative decision is immediately enforceable, or has already been enforced. Any request to have its enforcement postponed, limited or modified *vis-à-vis* the individual who is challenging it must, therefore, be examined rapidly. This means that standard procedural time limits and time frames may have to be shortened considerably and that full hearings may be limited. The proceedings must, however, remain adversarial, the aim being to arbitrate, albeit provisionally, between the different competing interests. The proceedings should involve the applicant and a representative of the public authority, as well as any other party directly affected by the disputed administrative decision. Other persons not directly affected may be allowed to present their views but may not necessarily be summoned. When urgency requires that the application is to be heard *ex parte* (i.e. with only the appellant present or represented) and the court decides to make an order for provisional protection, it should only be a temporary order pending a hearing with all the parties involved to be organised as soon as possible thereafter.

In deciding whether or not to order provisional protection the court must weigh the interests of the individual in maintaining the pre-existing situation against the public interest and the interests of third parties in enforcing the administrative decision. Relevant factors will include the degree of damage or loss suffered, the possibility of compensation for any damage or loss suffered and the prospects of the appeal being successful (for example, by requiring the individual to establish a *prima facie* or well-founded case without prejudging the outcome of the appeal). The court may impose conditions in the order granting provisional protection and it may subsequently modify the order.

## Case law of the European Court of Human Rights

In *Rousk v. Sweden*, the applicant's apartment was sold at public auction in accordance with a decision of the tax authorities while the applicant's appeal against this decision was pending before a court. The European Court of Human Rights found a violation of the applicant's rights under Article 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention, due to the refusal of the authorities to postpone enforcement pending judicial review of the administrative decision. The Court found that this situation imposed an excessive burden on the applicant.

### Principle 21 – Execution of court decisions

A legal framework shall be in place to ensure that public authorities implement court orders, including orders for the payment of compensation, within a reasonable time.

### Sources

- ▶ Recommendation CM/Rec(2007)7 on good administration (Article 23.3)
- ▶ Recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law (Principles II.1, II.2)

### Commentary

Where a public authority has not implemented a court order following a successful appeal by an individual, an appropriate procedure shall be put in place to ensure its proper execution (*Agrokompleks v. Ukraine*). Orders for compensation shall be executed within a reasonable time (see above, Principle 16). Provision should also be made in national law to make public officials in charge of the implementation of judicial decisions in respect of administrative decisions individually liable in disciplinary, civil or criminal proceedings should they fail to implement them.

## Case law of the European Court of Human Rights

See *Agrokompleks v. Ukraine*, cited in relation to Principle 14.





## Appendix I

# Council of Europe legal instruments in relation to the principles set out in the handbook

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### Conventions

[Convention for the Protection of Human Rights and Fundamental Freedoms \(ETS No. 5\)](#) (also known as the European Convention on Human Rights).

Right to a fair trial (Article 6)

Right to respect for private and family life (Article 8)

Freedom of expression (Article 10)

Right to an effective remedy (Article 13)

Prohibition of discrimination (Article 14)

[Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms \(ETS No. 9\)](#).

Protection of property (Article 1)

Right to education (Article 2)

Right to free elections (Article 3)

[Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms \(ETS No. 177\)](#).

General prohibition of discrimination (Article 1)

[Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data \(ETS No. 108\)](#).

Object and purpose (Article 1)

Definitions (Article 2)

Scope (Article 3)

Duties of the Parties (Article 4)  
Quality of data (Article 5)  
Special categories of data (Article 6)  
Data security (Article 7)  
Additional safeguards for the data subject (Article 8)  
Exceptions and restrictions (Article 9)  
Sanctions and remedies (Article 10)  
Extended protection (Article 11)

[Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data \(CETS No. 223\).](#)<sup>12</sup>

[European Charter for Regional or Minority Languages \(ETS No. 148\).](#)

Administrative authorities and public services (Article 10)

[Framework Convention for the Protection of National Minorities \(ETS No. 157\).](#)

Prohibition of discrimination, measures to promote full and effective equality (Article 4)

Right to impart information and ideas in a minority language (Article 9)

Right to use minority language in private and public (Article 10.1)

Use of minority language in relations with the administrative authorities (Article 10.2)

[Civil Law Convention on Corruption \(ETS No. 174\).](#)

Purpose (Article 1)

Definition of corruption (Article 2)

Compensation for damage (Article 3)

State responsibility (Article 5)

Contributory negligence (Article 6)

Limitation periods (Article 7)

Validity of contracts (Article 8)

Interim measures (Article 12)

[Council of Europe Convention on Access to Official Documents \(CETS No. 205\).](#)<sup>13</sup>

General provisions (Article 1)

Right of access to official documents (Article 2)

Possible limitations to access to official documents (Article 3)

Requests for access to official documents (Article 4)

Processing of requests for access to official documents (Article 5)

Forms of access to official documents (Article 6)

Charges for access to official documents (Article 7)

Review procedure (Article 8)

Complementary measures (Article 9)

Documents made public at the initiative of the public authorities (Article 10)

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12. Not in force at time of publication.

13. Not in force at time of publication.

## Committee of Ministers recommendations and resolutions

(in inverse chronological order)

### [Processing of personal data in the context of employment.](#)

Recommendation CM/Rec(2015)5, adopted by the Committee of Ministers on 1 April 2015 at the 1224th meeting of the Ministers' Deputies

### [Protection of individuals with regard to automatic processing of personal data in the context of profiling.](#)

Recommendation CM/Rec(2010)13, adopted by the Committee of Ministers on 23 November 2010 at the 1099th meeting of the Ministers' Deputies

### [Good administration.](#)

Recommendation CM/Rec(2007)7, adopted by the Committee of Ministers on 20 June 2007 at the 999th bis meeting of the Ministers' Deputies

### [Local and regional public services.](#)

Recommendation CM/Rec(2007)4, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies

### [Judicial review of administrative acts.](#)

Recommendation Rec(2004)20, adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies

### [Execution of administrative and judicial decisions in the field of administrative law.](#)

Recommendation Rec(2003)16, adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies

### [Access to official documents.](#)

Recommendation Rec(2002)2, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies

### [Alternatives to litigation between administrative authorities and private parties.](#)

Recommendation Rec(2001)9, adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies

### [The status of public officials in Europe.](#)

Recommendation No. R (2000) 6, adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers' Deputies

### [Protection of personal data collected and processed for statistical purposes.](#)

Recommendation No. R (97) 18, adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies

### [Local public services and the rights of their users.](#)

Recommendation No. R (97) 7 (updated by Recommendation CM/Rec(2007)4), adopted by the Committee of Ministers on 1 April 1997 at the 587th meeting of the Ministers' Deputies

### [Protection of medical data.](#)

Recommendation No. R (97) 5, adopted by the Committee of Ministers on 13 February 1997 at the 584th meeting of the Ministers' Deputies

### [Protection of personal data in the area of telecommunication services, with particular reference to telephone services.](#)

Recommendation No. R (95) 4, adopted by the Committee of Ministers on 7 February 1995 at the 528th meeting of the Ministers' Deputies

### [Communication to third parties of personal data held by public bodies.](#)

Recommendation No. R (91) 10, adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies

### [Administrative sanctions.](#)

Recommendation No. R (91) 1, adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies

### [Provisional court protection in administrative matters.](#)

Recommendation No. R (89) 8, adopted by the Committee of Ministers on 13 September 1989 at the 428th meeting of the Ministers Deputies

### [Administrative procedures affecting a large number of persons.](#)

Recommendation No. R (87) 16, adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies

### [Regulating the use of personal data in the police sector.](#)

Recommendation No. R (87) 15, adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies

### [Measures to prevent and reduce the excessive workload in the courts.](#)

Recommendation No. R (86) 12, adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies

### [Protection of personal data used for social security purposes.](#)

Recommendation No. R (86) 1, adopted by the Committee of Ministers on 23 January 1986 at the 392nd meeting of the Ministers' Deputies

### [The institution of the \*Ombudsman\*.](#)

Recommendation No. R (85) 13, adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies

### [Public liability.](#)

Recommendation No. R (84) 15, adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies

### [Measures facilitating access to justice.](#)

Recommendation No. R (81) 7, adopted by the Committee of Ministers on 14 May 1981 at its 68th Session

### [The exercise of discretionary powers by administrative authorities.](#)

Recommendation No. R (80) 2, adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies

[Co-operation between the \*Ombudsmen\* of member states and between them and the Council of Europe.](#)

Resolution (85) 8, adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers' Deputies

[Legal aid and advice.](#)

Resolution (78) 8, adopted by the Committee of Ministers on 2 March 1978 at the 284th meeting of the Ministers' Deputies

[Protection of the individual in relation to the acts of administrative authorities.](#)

Resolution (77) 31, adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies

[Legal aid in civil, commercial and administrative matters.](#)

Resolution (76) 5, adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies



## Appendix II

# Case law of the European Court of Human Rights in relation to the principles set out in the handbook

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### Listed alphabetically

- A. Menarini Diagnostics S.r.l. v. Italy*, No. 43509/08, 27 September 2011 (Principle 15)
- Agrokompleks v. Ukraine*, No. 23465/03, 6 October 2011 (Principles 14 and 21)
- Ahmed and Others v. the United Kingdom*, 2 September 1998, *Reports of Judgments and Decisions* 1998-VI (Principle 3)
- Airey v. Ireland*, 9 October 1979, Series A No. 32 (Principle 19)
- Béláné Nagy v. Hungary* [GC], No. 53080/13, ECHR 2016 (Principle 5)
- Beyeler v. Italy* [GC], No. 33202/96, ECHR 2000-I (Principle 12)
- Bladet Tromsø and Stensaas v. Norway* [GC], No. 21980/93, ECHR 1999-III (Principle 6)
- Brumărescu v. Romania* [GC], No. 28342/95, ECHR 1999-VII (Principle 5)
- Budayeva and Others v. Russia*, Nos. 15339/02 and 4 others, ECHR 2008 (extracts) (Principle 6)
- Buscemi v. Italy*, No. 29569/95, ECHR 1999-VI (Principle 10)
- Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V (Principle 11)
- De Geouffre de la Pradelle v. France*, 16 December 1992, Series A No. 253-B (Principle 13)
- De Souza Ribeiro v. France* [GC], No. 22689/07, ECHR 2012 (Principle 16)
- Dubetska and Others v. Ukraine*, No. 30499/03, 10 February 2011 (Principles 12 and 14)
- Engel and Others v. the Netherlands*, 8 June 1976, Series A No. 22 (Principle 15)
- Ferrazzini v. Italy* [GC], No. 44759/98, ECHR 2001-VII
- Gaskin v. the United Kingdom*, 7 July 1989, Series A No. 160 (Principle 7)
- Gnahoré v. France*, No. 40031/98, ECHR 2000-IX (Principle 2)
- Guja v. Moldova* [GC], No. 14277/04, ECHR 2008 (Principle 6)
- Haralambie v. Romania*, No. 21737/03, 27 October 2009 (Principle 7)
- Hatton and Others v. the United Kingdom* [GC], No. 36022/97, ECHR 2003-VIII (Principle 9)



*Hornsby v. Greece*, 19 March 1997, *Reports of Judgments and Decisions* 1997-II (Principle 14)

*Hutten-Czapska v. Poland* [GC], No. 35014/97, ECHR 2006-VIII (Principle 4)

*Jabari v. Turkey*, No. 40035/98, ECHR 2000-VIII (Principle 16)

*Jersild v. Denmark*, 23 September 1994, Series A No. 298 (Principle 6)

*K.H. and Others v. Slovakia*, No. 32881/04, ECHR 2009 (extracts) (Principle 7)

*Khan v. the United Kingdom*, No. 35394/97, ECHR 2000-V (Principle 5)

*Klass and Others v. Germany*, 6 September 1978, Series A No. 28 (Principles 7 and 19)

*Kopecký v. Slovakia* [GC], No. 44912/98, ECHR 2004-IX (Principle 5)

*Kuharec alias Kuhareca v. Latvia* (dec.), No. 71557/01, 7 December 2004 (Principle 8)

*Lashmankin and Others v. Russia*, Nos. 57818/09 and 14 others, 7 February 2017 (Principle 1)

*Leander v. Sweden*, 26 March 1987, Series A No. 116 (Principle 18)

*Loiseau v. France*, No. 46809/99, 28 September 2004 (Principle 6)

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

*Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016 (Principle 6)

*Marckx v. Belgium*, 13 June 1979, Series A No. 31 (Principle 5)

*Markov and Markova v. Ukraine* (dec.), No. 37734/07, 13 October 2015 (Principle 8)

*McMichael v. the United Kingdom*, 24 February 1995, Series A No. 307-B (Principle 10)

*Meltex Ltd. and Movsesyan v. Armenia*, No. 32283/04, 17 June 2008 (Principle 13)

*Moskal v. Poland*, No. 10373/05, 15 September 2009 (Principle 12)

*Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A No. 216 (Principle 6)

*Öneriyıldız v. Turkey* [GC], No. 48939/99, ECHR 2004-XII (Principle 12)

*P., C. and S. v. the United Kingdom*, No. 56547/00, ECHR 2002-VI (Principle 19)

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

*Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A No. 222 (Principle 5)

*Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A No. 332 (Principle 5)

*Prokopovich v. Russia*, No. 58255/00, ECHR 2004-XI (extracts) (Principle 1)

*Ringeisen v. Austria*, 16 July 1971, Series A No. 13 (Principle 19)

*Rousk v. Sweden*, No. 27183/04, 25 July 2013 (Principle 20)

*Rysovskyy v. Ukraine*, No. 29979/04, 20 October 2011 (Principles 5, 6, 12 and 16)

*S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, ECHR 2008 (Principle 7)

*Segerstedt-Wiberg and Others v. Sweden*, No. 62332/00, ECHR 2006-VII (Principle 7)

*Soering v. the United Kingdom*, 7 July 1989, Series A No. 161 (Principle 4)

*Stretch v. the United Kingdom*, No. 44277/98, 24 June 2003 (Principle 1)

*Taşkın and Others v. Turkey*, No. 46117/99, ECHR 2004-X (Principles 9 and 19)  
*The Sunday Times v. the United Kingdom (No. 1)*, 26 April 1979, Series A No. 30 (Principle 1)  
*Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A No. 239 (Principle 6)  
*Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A No. 316-B (Principle 1)  
*Tsfayo v. the United Kingdom*, No. 60860/00, 14 November 2006 (Principle 17)  
*Vilho Eskelinen and Others v. Finland* [GC], No. 63235/00, ECHR 2007-II (Principle 19)  
*Vilnes and Others v. Norway*, Nos. 52806/09 and 22703/10, 5 December 2013 (Principle 6)  
*Xintaras v. Sweden* (dec.), No. 55741/00, 22 June 2004 (Principles 1 and 4)  
*Zarb Adami v. Malta*, No. 17209/02, ECHR 2006-VIII (Principle 2)

## Listed by principle

### Principle 1 – Lawfulness and conformity with statutory purpose

*Lashmankin and Others v. Russia*, Nos. 57818/09 and 14 others, 7 February 2017  
*Prokopovich v. Russia*, No. 58255/00, ECHR 2004-XI (extracts)  
*Stretch v. the United Kingdom*, No. 44277/98, 24 June 2003  
*The Sunday Times v. the United Kingdom (No. 1)*, 26 April 1979, Series A No. 30  
*Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Series A No. 316-B  
*Xintaras v. Sweden* (dec.), No. 55741/00, 22 June 2004

### Principle 2 – Equality of treatment

*Gnahoré v. France*, No. 40031/98, ECHR 2000-IX  
*Zarb Adami v. Malta*, No. 17209/02, ECHR 2006-VIII

### Principle 3 – Objectivity and impartiality

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