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LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ARTICLE 6: THE RIGHT TO A FAIR TRIAL

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

1. ARTICLE 6: GENERALLY

The right to a fair trial has a position of pre-eminence in the Convention, both because of the importance of the right involved and the great volume of applications and jurisprudence that it has attracted.[1] As to the former, the Court has stressed that 'the right to a fair

[1] On Article 6, see Mole and Harby, *The Right to a Fair Trial*, Council of Europe Human Right Handbook No 3, 2nd edn, 2006, and Vitkauskas and Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, 2012. On Article 6 in criminal cases, see Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*, 1993 (hereafter Stavros) and Trechsel, *Human Rights in Criminal Proceedings*, 2005.

trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively'.[2] As to the latter, more applications to Strasbourg concern Article 6 than any other provision. The cases relate mostly to criminal and civil litigation before the ordinary courts. They also involve, to an extent that could not have been predicted, proceedings before disciplinary and administrative tribunals and administrative decisions determining 'civil rights and obligations'.

The application of Article 6 has presented the Court, and formerly the Commission, with various problems. A delicate question is the closeness with which it should monitor the functioning of national courts. The Court has studiously and properly followed the 'fourth instance' doctrine, according to which 'it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[3] The right to a fair hearing, which is one such Convention right, has, as its wording suggests, been interpreted as providing only a procedural, not a substantive, guarantee. Accordingly, the Court will intervene in respect to 'errors of fact or law' by a national court only insofar as they bear upon compliance with the procedural guarantees in Article 6: it does not intervene under Article 6 because such errors are considered to affect the interpretation or application of national law.[4] However, this last statement must be read subject to a limitation that is to be found in the Court's jurisprudence to the effect that there may be a breach of Article 6 where a national court decision on the merits has been 'arbitrary or manifestly unreasonable'.[5] For example, in *Andelković v Serbia*,[6] the Court held that there was not a fair hearing when an appellate court overturned a judgment in favour of the applicant's claim to holiday pay without referring to the facts as found by the trial court or to the relevant law, which clearly supported the applicant's claim. The appellate court's reasoning 'had no legal foundation' and was based on assertions that were 'quite outside' any 'reasonable judicial discretion', resulting in an 'arbitrary' judgment. As to errors of fact, in *Khamidov v Russia*,[7] the Court found that a national court had rejected the applicant's claim for compensation for damage to his land by police units on the basis that it was unproven that the units had even entered upon the land when there was 'abundant evidence' to the contrary. In the Court's view, the 'unreasonableness of this conclusion is so striking and palpable on the face of it', that the national court's decisions were 'grossly arbitrary'. In both of these cases, there was an undefined breach of Article 6, presumably of the residual 'fair hearing' guarantee.

The Court also allows states a wide margin of appreciation as to the manner in which national courts administer justice, for example in the rules of evidence that they use. A consequence of this is that in certain contexts the provisions of Article 6 are as much obligations of result as of conduct, with national courts being allowed to follow whatever particular rules they choose so long as the end result can be seen to be a fair trial.[8]

Although Article 6 applies only to a contracting party's own judicial system, it extends beyond that in the sense that a court of a contracting party that is called upon to confirm or execute a judgment of a court of another state that is not a party to the Convention must ensure that the foreign judgment concerned is the result of a fair trial in accordance with Article 6.[9]

[2] *Perez v France* 2004-I; 40 EHRR 909 para 64 GC. This applies to Article 6 as a whole.

[3] *García Ruiz v Spain* 1999-I; 31 EHRR 589 para 28 GC.

[4] See, eg, *Anderson v UK No 44958/98* hudoc (1999) DA.

[5] See, eg, *Bochan v Ukraine (No 2)* hudoc (2015) para 61 GC.

[6] Hudoc (2013) para 27. Cf *Van Kűck v Germany* 2003-VII; 37 EHRR 973; *Storck v Germany* 2005-V; 43 EHRR 96; and *Mikulová v Slovakia* hudoc (2005).

[7] 2007-; 49 EHRR 326 para 174.

[8] See, eg, *Schenk v Switzerland* A 140 (1988); 13 EHRR 242 PC.

[9] See *Pellegrini v Italy* 2001-VIII; 35 EHRR 44 (Vatican City court judgment annulling marriage).

In criminal cases, the interpretation of Article 6 is complicated by the basic differences that exist between common law and civil law systems of criminal justice.[10] The adversarial and inquisitorial systems that these respectively entail, and the dissimilar methods of investigating crime and conducting a trial that they use, necessarily make for difficulties in the interpretation of a text that provides a framework for legal proceedings throughout Europe. It is a challenge to the Strasbourg Court to meet the needs and circumstances of very different legal systems and still set appropriately high standards for a human rights guarantee of a fair trial.

Another problem has resulted from the application of Article 6 to administrative justice. If the Court, and formerly the Commission, has commendably acted to fill a gap by reading Article 6 as requiring that administrative decisions that determine a person's right, for example, to practise as a doctor or to use their land, are subject to Article 6, it has experienced difficulty in establishing a coherent jurisprudence spelling out the nature of the resulting obligations for states to provide for judicial review or appeals from these decisions. The problem concerning administrative decisions has been compounded in civil as well as criminal cases by the need to apply a text that was designed as a template for trial courts within the classical system of courts to disciplinary, administrative, and other special tribunals, where the same procedural guarantees may not have such full application.[11]

It should also be noted that, despite their importance for the fair adminstration of justice, the procedural rights in Article 6 may be waived by the right holder in both civil and criminal cases. In *Hermi v Italy*,[12] the Grand Chamber stated:

> Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial . . . However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance . . . in addition, it must not run counter to any important public interest.

The Court has made many such pronouncements in the context of particular Article 6 rights.[13] A waiver may be made ad hoc by the accused or civil litigant in the course of ordinary proceedings or as part of an organized summary procedure that may, for example, lead to a reduced sentence.[14] In *Natsvlishvili and Togonidze v Georgia*[15] the Court confirmed that plea bargaining, which is 'a common feature of European criminal justice systems', is permissible under Article 6. By it, the accused obtains 'the lessening of charges' or receives 'a reduction of their sentence for a guilty or *nolo contendere* plea in advance of trial or for providing substantial cooperation with the investigative authority'. It amounts 'in substance' to a a waiver of Article 6 rights and, by analogy with the rules governing waiver, it must comply with the following conditions: '(a) 'the bargain' must 'be accepted . . . in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it [has] . . . been reached between the parties' must 'be subjected to sufficient judicial review'.

Finally, Article 6 has an extra-territorial application in that it is a breach of Article 6 to deport or extradite an individual to another state where there are 'substantial grounds for

[10] For instance, there are differences in the rules of evidence.

[11] See Stavros, p 328. On the application of Article 6 to juvenile criminal proceedings, see *Nortier v Netherlands* A 267 (1993); 17 EHRR 273 para 38 and *V v UK* 1999-IX; 30 EHRR 121 GC.

[12] 2006-XII; 46 EHRR 1115 para 73 GC (case of waiver of attendance at appeal hearing). Cf *Sejdovic v Italy* 2006-II para 86 GC. On waiver, see De Schutter, 51 NILQ 481 (2000).

[13] For details, see the relevant sections in this chapter.

[14] *Scoppola v Italy (No 2) hudoc* (2009) para 139 GC.

[15] Hudoc (2014) paras 90–92.

believing that . . . he would be exposed to a real risk of being subjected to a flagrant denial of justice'.[16] The Court defined a 'flagrant denial of justice' in *Othman (Abu Qatada) v UK*[17] as follows: 'A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the contracting states itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' In the *Abu Qatada* case, which was the first case in which the Court found a breach of Article 6 on this basis, an order was made for the deportation of the applicant to Jordan, where he would face a retrial for offences of which he had been convicted *in absentia*, resulting in sentences of life and 15 years' imprisonment, in which there was a real risk that evidence obtained by the torture of other defendants would be admitted. The use of such evidence would, the Court stated, be a 'flagrant denial of justice'. The Court also referred in that case to other 'forms of unfairness' that it had in earlier cases indicated 'could amount to a flagrant denial of justice'. These were conviction *in absentia* with no possibility of re-opening the proceedings;[18] a trial which is 'summary in nature and conducted with a total disregard for the rights of the defence';[19] 'detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed';[20] and the 'deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country'.

2. FIELD OF APPLICATION

I. IN THE DETERMINATION OF A CRIMINAL CHARGE

The rights guaranteed by Article 6 apply when a 'criminal charge' is being determined. This includes sentencing proceedings following the applicant's conviction.[21] It does not extend to ancillary matters relevant to criminal proceedings that are not determinative of a pending 'charge' against the applicant, such as proceedings concerning legal aid,[22] pre-trial detention,[23] or committal for trial.[24] Nor does it apply to cases in which the applicant brings a private prosecution[25] or the applicant's property is subject to forfeiture because of a criminal charge against a third party.[26] It also does not apply to proceedings that may result in the applicant being placed under police supervision for the prevention of crime[27] or to the giving by the police of a statutory warning.[28] Proceedings concerning the administration

[16] *Othman (Abu Qatada) v UK* 2012-; 55 EHRR 78 para 261. See also *Soering v UK* A 161 (1989); 11 EHRR 439 para 113 PC and *Mamatkulov and Askarov v Turkey* 2005-I; 41 EHRR 494 GC. Where an individual has already been returned, the existence of a 'flagrant denial' is to be assessed in the light of what the sending state knew or ought to have known at the time of the return: *Al-Saadoon and Mufdhi v UK* 2010-; 51 EHRR 212.

[17] 2012-; 55 EHRR 78 para 260.

[18] *Sejdovic v Italy* 2006-II para 84 GC.

[19] *Bader and Kanbor v Sweden* 2005-XI; 46 EHRR 1497.

[20] *Al-Moayad v Germany No 35865/03* hudoc (2007); 44 EHRR SE 276 para 101 DA.

[21] *Phillips v UK* 2001-VII para 39. It also applies to proceedings for costs: *Beer v Austria* hudoc (2001).

[22] *Neumeister v Austria* A 8 (1968); 1 EHRR 91 para 23 and *Gutfreund v France* 2003-VII; 42 EHRR 1076.

[23] *Van Thuil v Netherlands No 20510/02* hudoc (2004) DA.

[24] *Mosbeux v Belgium No 17083/90*, 71 DR 269 (1990).

[25] *Helmers v Sweden* A 212-A (1991); 15 EHRR 285 PC.

[26] *AGOSI v UK* A 108 (1986); 9 EHRR 1 and *Air Canada v UK* A 316-A (1995); 20 EHRR 150.

[27] *Guzzardi v Italy* A 39 (1980); 3 EHRR 333 para 108 PC and *Raimondo v Italy* A 281-A (1994); 18 EHRR 237. But the preventative confiscation of property may concern 'civil rights and obligations': see *Raimondo v Italy, ibid.*

[28] *R v UK No 33506/05* hudoc (2007) DA (young offender warning).

of the prison system are also not included.[29] Where a criminal sanction is imposed by an administrative authority, there must be an appeal to a judicial body complying with Article 6 that has 'full jurisdiction' on the facts and the law; judicial review of a limited administrative law kind is not sufficient.[30] Finally, extradition proceedings to face a criminal charge in another state are not subject to Article 6.[31] Nor are proceedings concerning the transfer of a convicted prisoner abroad[32] or the execution of a European arrest warrant.[33]

a. The meaning of 'criminal'

'Criminal' has an autonomous Convention meaning.[34] Otherwise, if the classification of an offence in the law of the contracting parties were regarded as decisive, a state would be free to avoid the Convention obligation to ensure a fair trial in its discretion. It would also result, in this context, in an unacceptably uneven application of the Convention from one state to another.

In *Engel v Netherlands*,[35] it was established that, when deciding whether an offence is criminal in the sense of Article 6, three criteria apply: the classification of the offence in the law of the respondent state; the nature of the offence; and the possible punishment. The first is crucial in that if the applicable national law classifies the offence as criminal, it is automatically such for the purposes of Article 6 too.[36] This is because the legal and social consequences of having a criminal conviction make it imperative that the accused has a fair trial. In cases in which the offence is not classified as criminal in national law, the other two criteria listed come into play. These two criteria are 'alternative and not necessarily cumulative'; but a cumulative approach may be adopted where neither criterion by itself is conclusive.[37]

As to the 'nature' of the offence, the purpose of the offence must be deterrent and punitive, not compensatory, these being 'the customary distinguishing features of a criminal penalty'.[38] The offence should extend to the population at large,[39] although it may be limited to such general categories of persons as taxpayers and road users. The minor nature of an offence does not detract from its inherently criminal character.[40]

In the context of disciplinary offences, the Court distinguishes between offences focusing on the internal regulation of a group possessing a special status in society, such as the armed forces or prisoners, and offences committed by members of such a group that involve generally anti-social behaviour, with only the latter being subject to Article 6. In this connection, the fact that the conduct proscribed by the disciplinary offence is also a criminal offence under national law (a 'mixed offence') is relevant.[41] Some cases

[29] *Enea v Italy* 2009- GC; 51 EHRR 103 GC (allocation to secure unit) and *Boulois v Luxembourg* 2012-; 55 EHRR 32 GC (prison leave).

[30] *Steininger v Austria* hudoc (2012) para 52.

[31] *Mamatkulov and Askarov v Turkey* 2005-I; 41 EHRR 494 GC.

[32] *Szabó v Sweden No 28578/03* hudoc (2006) DA. For an exception, see *Buijen v Germany* hudoc (2010).

[33] *Monedero Angora v Spain No 41138/05* hudoc (2008) DA.

[34] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC. 'Criminal' has the same meaning in Article 6 and Articles 2–4, 7th Protocol: *Sergey Zolotukhin v Russia* 2009-; 54 EHRR 502 GC.

[35] A 22 (1976); 1 EHRR 647 PC. See also *Ezeh and Connors v UK* 2003-X; 39 EHRR 1 GC.

[36] See *Funke v France* A 256-A (1993); 16 EHRR 297. A state may make any conduct a criminal offence unless it is conduct protected by a Convention right: *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC.

[37] *Ezeh and Connors v UK* 2003-X; 39 EHRR 1 para 86 GC.

[38] *Janosevic v Sweden* 2002-VII; 38 EHRR 473 para 68. And see *Porter v UK No 15814/02* hudoc (2003) DA (local authority surcharge not punitive).

[39] *Lauko v Slovakia* 1998-VI; 33 EHRR 994.

[40] *Ezeh and Connors v UK* 2003-X; 39 EHRR 1 GC and *Lauko v Slovakia* 1998-VI; 33 EHRR 994. A 'breach of the peace' is a criminal offence by its 'nature': *Steel v UK* 1998-VII; 28 EHRR 603. Cf *Sergey Zolotukhin v Russia* 2009-; 54 EHRR 502 GC (minor disorderly acts 'criminal').

[41] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 para 80 PC and *Ezeh and Connors v UK* 2003-X; 39 EHRR 1 GC. See also *Whitfield v UK* hudoc (2005); 41 EHRR 967.

have concerned disciplinary or similar offences aimed at protecting proceedings in a national parliament or a court.[42] Disciplinary offences involving professional misconduct by members of the liberal professions are seen as an internal regulatory matter that does not fall within Article 6, even though a severe punishment—such as a heavy fine, suspension, or striking-off—may be imposed.[43] They may, however, in some cases fall within Article 6 as involving the determination of 'civil rights and obligations'.[44] Disciplinary offences by civil servants and the police are likewise not criminal, even though they may lead to dismissal.[45]

The autonomous concept of a 'criminal' offence in Article 6 has also been extended to regulatory and certain other offences that, although not classified as criminal in national law, have deterrent and punitive objectives. The leading case is *Öztürk v Germany*.[46] There the Court held that an offence of careless driving, which was classified under German law as regulatory, not criminal, was nonetheless 'criminal' for the purpose of Article 6. The offence had characteristics that were the hallmark of a criminal offence: it was of general application, applying to all road users, and carried with it a sanction of a deterrent and punitive kind. It was also relevant that although some West European states had taken steps to decriminalize road traffic offences, the great majority of Convention parties continued to treat minor road traffic offences as criminal.[47] The Court was not concerned by the 'relative lack of seriousness of the penalty at stake' (a modest fine as opposed to imprisonment) because the second element of the *Engel* test was very clearly satisfied.

Other offences that have been regarded as 'criminal' in the sense of Article 6 and that may, more or less convincingly, be placed within the category of regulatory offences, are ones governing trade and commerce,[48] hours of work[49] or public demonstrations,[50] and offences under a customs code.[51] In *Jussila v Finland*,[52] the Court ruled that the imposition of a tax surcharge as a financial penalty for tax evasion involved a 'criminal' charge in the sense of Article 6. Proceedings for committal to prison for non-payment of the UK community charge are also criminal.[53] But an administrative fine for non-compliance with planning laws[54] and a disqualification from being a company director[55] are preventive, not criminal, in character.

[42] *Demicoli v Malta* A 210 (1991); 14 EHRR 47 (parliament) and *Weber v Switzerland* A 177 (1990); 12 EHRR 508 (court).

[43] *Brown v UK No 38644/97* hudoc (1998) DA (solicitor); and *Wickramsinghe v UK No 31503/96* hudoc (1997) DA (doctor).

[44] *Albert and Le Compte v Belgium* A 58 (1983); 5 EHRR 533 PC.

[45] *X v UK No 8496/79*, 21 DR 168 (1980) (police) and *Kremzow v Austria No 16417/90*, 67 DR 307 (1990) (civil servants). As to whether disciplinary offences by the police and civil servants will concern 'civil rights and obligations', see this chapter, section 2.II.a, p 389

[46] A 73 (1984); 6 EHRR 409 PC. For other road traffic cases, see, eg, *Schmautzer v Austria* A 328-A (1995); 21 EHRR 511; *Escoubet v Belgium* 1999-VII; 31 EHRR 1034 GC (temporary withdrawal of driving licence preventive, not criminal).

[47] When deciding on the nature of an offence, the Court regularly takes account of 'common features' of the national law of the contracting parties: see, eg, *Ravnsborg v Sweden* A 283-B (1994); 18 EHRR 38.

[48] *Deweer v Belgium* A 35 (1980); 2 EHRR 439; *Société Stenuit v France* A 232-A (1992); 14 EHRR 509 Com Rep; *Garyfallou AEBE v Greece* 1997-V; 28 EHRR 344; *Grande Stevens v Italy* hudoc (2014) paras 95–99 (administrative penalty for manipulating financial market). But see *OOO Neste St Petersburg et al v Russia No 69042/01* hudoc (2004) DA.

[49] *X v Austria No 8998/80*, 32 DR 150 (1983) (young persons' hours).

[50] *Belilos v Switzerland* A 132 (1988); 10 EHRR 466 PC and *Ziliberberg v Moldova* hudoc (2005).

[51] *Salabiaku v France* A 141-A (1988); 13 EHRR 379.

[52] 2006-XIV; 45 EHRR 892 GC. See also *Bendenoun v France* A 284 (1994); 18 EHRR 54; *Janosevic v Sweden* 2002-VII; 38 EHRR 473; and *Julius Kloiber Schlachthof GmbH and Others v Austria* hudoc (2013). A fine for late payment is not 'criminal': *Boofzheim v France No 52938/99* 2002-X DA.

[53] *Benham v UK* 1996-III; 22 EHRR 293 GC.

[54] *Inocêncio v Portugal No 43862/98* hudoc (2001) DA.

[55] *Wilson v UK No 36791/97* hudoc (1998); 26 EHRR CD 195.

As to the third criterion, the Court looks to the nature and severity of the possible, not the actual, punishment.[56] In *Engel v Netherlands*,[57] the Court held that a punishment of imprisonment belonged to the criminal sphere unless its 'nature, duration or manner of execution, was not such that its effect could be "appreciably detrimental"'. Applying both the second and third criteria, the Court then found that military disciplinary offences involving the publication of a periodical tending to undermine army discipline and the driving of a jeep irresponsibly that could lead to three or four months' imprisonment were 'criminal', but that offences of being absent without leave that carried possible penalties of just two days' strict arrest were not. A possible punishment of a modest fine that may be converted into imprisonment for more than a minimal period for non-payment may fall within Article 6,[58] as may a substantial fine that cannot be converted into imprisonment.[59] Even an offence that carries a modest fine as the only possible punishment and that will not be entered on the accused's criminal record may fall within Article 6 if it is inherently 'criminal' in its 'nature'.[60] Disqualification from holding public office[61] or the deduction of points that may lead cumulatively to the loss of a driving licence for road traffic offences[62] may be criminal punishments, as may the demolition of a building for lack of planning permission;[63] but the withdrawal of a liquor licence, although severe in its consequences, is not.[64] Nor is a penalty for exceeding election expenses limits of disqualification from standing for election plus an order to repay the excess.[65]

b. The meaning of 'charge'

For Article 6 to apply, a person must be subject to a criminal 'charge'. The point at which this begins to be the case has been developed mostly in connection with the 'trial within a reasonable time' guarantee, for which it will always need to be established,[66] although the precise date on which Article 6 begins to apply to that guarantee will not be crucial if the possible dates that may be chosen involve only a small difference.[67]

Like the word 'criminal', 'charge' has an autonomous Convention meaning.[68] It is 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence' or some other act which carries 'the implication of such an allegation and which likewise substantially affects the situation of the suspect'.[69] As stated in *Deweer v Belgium*,[70] 'charge' is to be given a 'substantive', not a 'formal', meaning, so that it is necessary 'to look behind the appearances and investigate the realities of

[56] *Engel v Netherlands* A 22 (1976); 1 EHRR 647 PC.

[57] *ibid* para 82. Cf *Sergey Zolotukhin v Russia* 2009-; 54 EHRR 502 para 56 GC. And see *Blokhin v Russia* hudoc (2016) paras 179–180 GC.

[58] *Weber v Switzerland* A 177 (1990); 12 EHRR 508 (up to three months' imprisonment).

[59] *Janosevic v Sweden* 2002-VII; 38 EHRR 473. But non-payment of any fine will normally lead to enforcement measures resulting in imprisonment: see *Garyfallou AEBE v Greece* 1997-V; 28 EHRR 344.

[60] *Lauko v Slovakia* 1998-VI; 33 EHRR 994. See also *Sergey Zolotukhin v Russia* 2009-; 54 EHRR 502 para 55 GC ('offences aimed at the 'protection of human dignity and public order' inherently criminal). A small tax surcharge was not 'criminal': *Morel v France No 54559/00* hudoc (2003) DA.

[61] *Matyjek v Poland No 38184/03* hudoc (2006) DA (lustration proceedings).

[62] *Malige v France* 1998-VII; 28 EHRR 578.

[63] *Hamer v Belgium* 2007-V. A fine is not: *Inocêncio v Portugal No 43862/98* hudoc (2001) DA.

[64] *Tre Traktörer Aktiebolag v Sweden* A 159 (1989); 13 EHRR 309. But it may determine 'civil rights and obligations': *ibid*.

[65] *Pierre-Bloch v France* 1997-VI; 26 EHRR 202. Cf *Porter v UK No 15814/02* hudoc (2003) DA.

[66] It also has relevance for the right of access to a criminal court: see *Deweer v Belgium* A 35 (1980).

[67] See, eg, *Zaprianov v Bulgaria* hudoc (2004).

[68] *Deweer v Belgium* A 35 (1980); 2 EHRR 439 para 42.

[69] *Corigliano v Italy* A 57 (1982); 5 EHRR 334 para 34.

[70] A 35 (1980); 2 EHRR 439 paras 44, 46.

the procedure in question' to see whether the applicant is 'substantially affected' by the steps taken against them. In practice, a person has been found to be subject to a 'charge' when arrested for a criminal offence;[71] when notified that he is being charged with an offence;[72] when, in a civil law system, a preliminary investigation has been opened and, although not under arrest, the applicant has 'officially learnt of the investigation or begun to be affected by it';[73] when authorities investigating customs offences require a person to produce evidence and freeze his bank account;[74] and when the applicant's shop has been closed pending the outcome of criminal proceedings.[75] In the case of an MP with parliamentary immunity, the relevant date was that on which the prosecuting authorities requested Parliament to lift the immunity.[76] In recent cases, the Court has held that a person is 'substantially affected' from the moment that they are questioned as a suspect.[77] Thus in *Yankov and Others v Bulgaria*,[78] Article 6 began to apply from the moment that an applicant was questioned by the police about stolen goods in their possession and confessed, which occurred more than eight years before they were formally charged.

Most of the case law on the meaning of 'charge' has concerned civil law systems of criminal justice. With regard to common law jurisdictions, applicants have been held to be subject to a 'charge' when they have been arrested[79] or charged by the police.[80] Presumably, the issuing of a summons would be sufficient.

Although the Convention does not guarantee a right of appeal, Article 6 applies to any appeal proceedings against conviction or sentence that are provided.[81] Constitutional court proceedings involving claims alleging a violation of constitutional rights are included insofar as they are decisive for the outcome of a criminal case.[82] Article 6 ceases to apply once the criminal proceedings against the accused are completed, or when they are discontinued.[83]

Article 6 does not apply to proceedings relating to the execution of a sentence against a person once finally convicted of an offence, and hence no longer 'charged' with it.[84] Thus Article 6 does not apply to proceedings for an amnesty for a convicted person[85] or for an

[71] *Wemhoff v Germany* A 7 (1968); 1 EHRR 55.

[72] *Pedersen and Baadsgaard v Denmark* 2004-XI; 42 EHRR 486 GC. In *Boddaert v Belgium* A 235-D (1992); 16 EHRR 242 para 10, the date that the arrest warrant was issued was chosen, not the later date when the applicant surrendered to the authorities.

[73] *Eckle v Germany* A 51 (1982); 5 EHRR 1 para 74. In accordance with the 'substantially affected' test, in *Corigliano v Italy* A 57 (1982); 5 EHRR 334, it was the date of notification of the investigation that was crucial, not the date on which the decision to open the investigation was taken.

[74] *Funke v France* A 256-A (1993). See also *TK and SE v Finland No 38581/97* hudoc (2004) DA (seizure of documents).

[75] *Deweer v Belgium* A 35 (1980).

[76] *Frau v Italy* A 195-E (1991) para 14.

[77] *Svinarenko and Slyadnev v Russia* hudoc (2014) para 142 GC. See also *Grigoryan v Armenia* hudoc (2012) para 128 (formally a witness, but clearly a suspect).

[78] Hudoc (2010). Cf *Aleksandr Zaichenko v Russia* hudoc (2010) (incriminating statements at road check) and *GCP v Romania* hudoc (2011) para 41.

[79] *Heaney and McGuinness v Ireland* 2001-XII; 33 EHRR 264. Cf *Ewing v UK No 11224/84*, 45 DR 269 (1986); 10 EHRR 141.

[80] *X v Ireland No 9429/81*, 32 DR 225 (1983). See also *X v UK No 6728/74*, 14 DR 26 (1978).

[81] *Eckle v Germany* A 51 (1982); 5 EHRR 1 para 76. The 'prevailing approach' is that leave-to-appeal proceedings are also included: *Hansen v Norway* hudoc (2014) para 55. But see *Valchev v Bulgaria No 47450/04 et al* hudoc (2014) paras 68–72 DA.

[82] *Gast and Popp v Germany* 2000-II; 33 EHRR 895.

[83] *Eckle v Germany* A 51 (1982); 5 EHRR 1 para 78; *Orchin v UK No 8435/78*, 26 DR 18 (1982); 6 EHRR 391. An appeal against discontinuance is within Article 6: *Zuckerstätter and Reschenhofer v Austria No 76718/01* hudoc (2004) DA.

[84] Article 6 ceased to apply when the applicant is informed of the verdict: *Pop Blaga v Romania* hudoc (2012) para 120 DA. But see *Michelioudakis v Greece* hudoc (2012) (date of formal decision).

[85] *Montcornet de Caumont v France No 59290/00*, 2003-VII DA.

application for a retrial or a plea of nullity.[86] However, any separate sentencing proceedings are included, the 'charge not being determined until the sentence has been fixed'.[87] Article 6 applies to the execution of judgments of acquittal in criminal cases, the *Hornsby* principle applying to criminal cases.[88]

II. IN THE DETERMINATION OF CIVIL RIGHTS AND OBLIGATIONS

Article 6 applies also when a person's 'civil rights and obligations' are being determined.

a. The meaning of 'civil' rights and obligations

Private law meaning

In their early jurisprudence, the Strasbourg authorities established that the phrase 'civil rights and obligations' incorporated, by the use of the word 'civil', the distinction between private and public law, with 'civil' rights and obligations being rights and obligations in private law.[89] This distinction has long been significant in civil law systems for jurisdictional and other purposes and has more recently become important in UK administrative law.[90] On the basis of it, rights and obligations in the relations of private persons *inter se* clearly fall within Article 6, but some rights and obligations at issue in the relations between the individual and the state (eg, the right to nationality and the obligation to pay taxes) do not, the problem in the latter case being to know where to draw the line. Criminal law is in a special position. Decisions taken in the 'determination of . . . any criminal charge' are included by a separate part of the wording of Article 6(1).[91] Ancillary decisions relating to criminal proceedings are not subject to Article 6 on the criminal side and not otherwise subject to Article 6 as decisions determinative of 'civil rights and obligations'. They are excluded both because of the distinction between private and public law and also, as the Court has sometimes stated, because, if certain decisions in criminal proceedings are specifically covered by Article 6(1), others, by inference, are not.[92]

It therefore follows that the Convention does not guarantee a fair trial in the determination of all of the rights and obligations that a person may arguably have in national law. However, as will be seen, the gaps in the coverage of Article 6 have been significantly, if somewhat confusingly, reduced by interpretation. Indeed, whereas the Court occasionally still relies upon the public law/private law divide when excluding rights or obligations as

[86] *Fischer v Austria No 27569/02* hudoc (2003) DA. See also *Husain v Italy No 18913/03* hudoc (2005) DA (challenge to committal order) and *Aldrian v Austria No 16266/90* 65 DR 337 (1990) (conditional release). Article 6 also does not guarantee a right to a retrial: *Bochan v Ukraine (No 2)* hudoc (2015) para 44. But it may apply to 'reconsideration' proceedings: *Bochan v Ukraine (No 2)*, *ibid* para 45.

[87] *Eckle v Germany* A 51 (1982); 5 EHRR 1 para 77. Tariff fixing (*Easterbrook v UK* hudoc (2003); 37 EHRR 405) and proceeds of crime confiscation (*Phillips v UK* 2001-VII) proceedings are included as a part of sentencing. See also *Callaghan v UK No 14739/89*, 60 DR 296 (1989) (reference to Criminal Cases Review Commission). And see *Sharomov v Russia* hudoc (2009) para 42.

[88] *Assanidze v Georgia* 2004-II; 39 EHRR 653.

[89] *Ringeisen v Austria* A 13 (1971); 1 EHRR 455 para 94 and *König v Germany* A 27 (1978); 2 EHRR 170 para 95 PC.

[90] See Wade and Forsyth, *Administrative Law*, 11th edn, 2014, pp 568ff.

[91] A particular factual situation may concern both a criminal charge and civil rights and obligations, although the case will normally be dealt with under one head only: see *Albert and Le Compte v Belgium* A 58 (1983); 5 EHRR 533 para 30 PC. Criminal proceedings may be determinative of 'civil rights' in some jurisdictions in criminal defamation cases or if a victim is joined as a civil party.

[92] *Neumeister v Austria* A 8 (1968); 1 EHRR 91 (right to bail not a 'civil right' for this reason).

not being 'civil',[93] more recent jurisprudence, by which more and more rights and obligations have been brought within Article 6, is not always easy to explain in terms of any distinction between private and public law that is found in European national law.

An autonomous Convention meaning

'Civil' has an autonomous Convention meaning, so that the respondent state's classification is not decisive.[94] In a particular case, therefore, a right that is regarded as a matter of public law in the legal system of the respondent state may be treated as falling within Article 6[95] and *vice versa*. Although adopting an autonomous Convention meaning of 'civil' rights and obligations, the Court has refrained from formulating any abstract definition of the term, beyond distinguishing between private and public law.[96] It has instead preferred an inductive approach, ruling on the particular facts, or categories, of cases as they have arisen. Even so, there are certain general guidelines that emerge from the cases. First, 'only the character of the right at issue is relevant'.[97] The 'character of legislation (civil, commercial, administrative law, etc) which governs how the matter is to be determined . . . and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence'.[98] This guideline has minimal significance for cases involving disputes between private persons, which will invariably be governed by national private law and usually be within the jurisdiction of the 'ordinary courts'. It is, however, of critical importance in cases that involve the relations between a private person and the state. In national law systems that traditionally have made use of the distinction between private and public law, the classification of such cases generally turns upon whether the state is acting in a sovereign or non-sovereign capacity in its dealings with the private person concerned. For the purpose of Article 6, however, whether the state has 'acted as a private person or in its sovereign capacity is . . . not conclusive';[99] instead, the focus is entirely upon the 'character of the right'.

Second, when determining the 'character of the right', the existence of any 'uniform European notion' that can be found in the law of the contracting parties is influential. This inference can be drawn from the *Feldbrugge* and *Deumeland* cases.[100] There the Court found that there was no 'uniform European notion' (which by implication would have been followed) as to the private or public law character of the social security rights before it and was forced to make a choice in respect of rights it considered to have a mixed private and public law character.[101]

Third, although the classification of a right or obligation in the law of the respondent state is not decisive, that law is nonetheless relevant, in that it necessarily determines the content of the right or obligation to which the Convention concept of 'civil' rights and

[93] See, eg, *Ferrazzini v Italy* 2001-VII; 34 EHRR 1068 para 27 GC.

[94] *König v Germany* A 27 (1978); 2 EHRR 170 para 88 PC.

[95] As in the *Feldbrugge* and *Deumeland* cases, in the next paragraph.

[96] In *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 para 34 PC, the Court declined the Commission's invitation, para 91 Com Rep, to give guidance on the matter.

[97] *König v Germany* A 27 (1978); 2 EHRR 170 para 90 PC. The wording quoted is phrased only in terms of 'rights', omitting 'obligations'. This tends to happen because most of the cases under Article 6 are brought by claimants, not defendants. For 'obligations' cases, see, eg, *Muyldermans v Belgium* A 214-A (1991); 15 EHRR 204 Com Rep (F Sett before Court) and *Schouten and Meldrum v Netherlands* A 304 (1994); 19 EHRR 432.

[98] *Ringeisen v Austria* A 13 (1971); 1 EHRR 455 para 94, quoted in the *König* case, A 27 (1978); 2 EHRR 170 para 90 PC.

[99] *König v Germany* A 27 (1978); 2 EHRR 170 para 90 PC.

[100] *Feldbrugge v Netherlands* A 99 (1986); 8 EHRR 425 para 29 PC and *Deumeland v Germany* A 100 (1986); 8 EHRR 448 para 63 PC. Cf, *König v Germany* A 27 (1978); 2 EHRR 170 para 89 PC.

[101] Cf *Muyldermans v Belgium* A 214-A (1991); 15 EHRR 204 para 56 Com Rep (F Sett before Court).

obligations is applied.[102] For this reason, despite the autonomous nature of 'civil' rights and obligations, it would be possible for the same right or obligation to be subject to Article 6 in it exists in one legal system but not as it is found in another.

Finally, the Court adopts a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6(1). This consideration was relevant in *Vilho Eskelinen v Finland*,[103] when the Court ruled that some disputes concerning employment in the public service fall within Article 6.

Rights and obligations in the relations between private persons

In accordance with the position uniformly found in European national law, the rights and obligations of private persons in their relations *inter se* are 'civil' rights and obligations. Thus, cases concerning, for example, such relations in the law of contract,[104] the law of tort,[105] family law,[106] and employment law[107] have been regarded as falling within Article 6.

State action determining private law rights and obligations

The position is more complicated in cases involving the relations of private persons with the state. In accordance with its approach in the *König* case,[108] in such cases the Court looks solely to the character of the right or obligation that is the subject of the case when deciding whether Article 6 applies. If that right or obligation falls within private law, then any state action that is directly decisive for it must be either taken by a tribunal that complies with Article 6 or, if it is administrative action, challengeable before such a tribunal.[109] What is remarkable is the identity and nature of the rights and obligations of private persons that the Court has recognized as private law rights and obligations in this context. Most significantly, it has recognized certain rights of a very general character, such as rights that have a pecuniary nature or consequences, as being 'civil' rights. When, as is common, state action is determinative of such rights, it is controlled by Article 6.

Pecuniary rights

The key determinant in cases involving state action is often whether the right or obligation in question is pecuniary in nature or, if not, whether the state action that is decisive for the right nonetheless has pecuniary consequences for the applicant.[110] If so, the case will generally fall within Article 6,[111] unless the state is acting within one of the areas that 'still form part of the hard core of public authority prerogatives',[112] such as taxation. Although the Court commonly states that 'merely showing that a dispute is "pecuniary" in nature is not

[102] See, eg, *König v Germany* A 27 (1978); 2 EHRR 170 para 89 PC 9 (a doctor's services were contractual, not a public service, so 'civil'). See also *Perez v France* 2004-I; 40 EHRR 909 GC.

[103] 2007-XX; 45 EHRR 985 GC.

[104] See, eg, *Buchholz v Germany* A 42 (1981); 3 EHRR 597.

[105] See, eg, *Golder v UK* A 18 (1975); 1 EHRR 524 PC (defamation).

[106] See, eg, *Airey v Ireland* A 32 (1979); 2 EHRR 305 (separation) and *Mizzi v Malta* 2006-I; 46 EHRR 529 (paternity).

[107] See, eg, *Buchholz v Germany* A 42 (1981); 3 EHRR 597 (unfair dismissal).

[108] *König v Germany* A 27 (1978); 2 EHRR 170 para 89 PC 9.

[109] As to the review required, see this chapter, section 2.II.e, pp 393–6.

[110] See, eg, *Editions Périscope v France* A 234-B (1992); 14 EHRR 597 and *Stran Greek Refineries and Stratis Andreadis v Greece* A 301-B (1994); 19 EHRR 293.

[111] For instance, the obligation of a French public accountant to repay public monies lost by his negligence fell within Article 6, despite its public law dimensions, because of its pecuniary impact on the accountant: *Martinie v France No 58675/00* hudoc (2004) DA. On surcharges on UK local authority officers, see *Porter v UK No 15814/02* hudoc (2003); 37 EHRR CD 8 DA.

[112] *Ferrazzini v Italy* 2001-VII; 34 EHRR 1068 para 29 GC.

in itself sufficient to attract the applicability of Article 6',[113] this is mainly intended to allow for the 'public authority prerogative' exception. The paragraphs that immediately follow concern rights and obligations that are sometimes classified as 'civil' under other headings by the Court but that all have a pecuniary dimension.

The right to property

The right to property is clearly a right with a pecuniary character. Thus, decisions by the state concerning the expropriation[114] or the regulation of the use[115] of private land have been held to be subject to the right to a fair hearing. With regard to personal property, decisions by the state as to a person's capacity to administer property,[116] or ones that are otherwise decisive for personal property rights,[117] are controlled by Article 6.

The right to engage in a commercial activity or to practise a profession

The right to engage in a commercial activity, which similarly has a pecuniary character, is also a civil right.[118] Hence state action by way of the withdrawal of a commercial licence or other authorization to engage in a commercial activity is controlled by Article 6.[119] The same is true of the right to practise a liberal profession.[120] Article 6 applies to the *grant* of a licence or other authorization to undertake a commercial activity or practise a profession as well as a decision to withdraw it. Reversing its approach in *König v Germany*,[121] in which it had emphasized the legitimate expectation of a licence holder in its continuance, in the *Benthem* and later cases,[122] Article 6 has been applied to applications for new licences, provided that the grant of the licence is not a discretionary decision by the state.[123]

The right to compensation for illegal state action

The Court's jurisprudence also recognizes as 'civil' the right to compensation from the state for injury resulting from illegal state acts, again on the basis of its pecuniary nature. Thus, in *X v France*,[124] the Court held that a claim for damages in an administrative court for contracting AIDS from a blood transfusion because of government negligence fell

[113] *Ferrazzini v Italy*, 2001-VII; 34 EHRR 1068 para 25 GC.

[114] *Sporrong and Lönnroth v Sweden* A 52 (1982); 5 EHRR 35 PC. See also *Raimondo v Italy* A 281-A (1994); 18 EHRR 237 para 43 (confiscation) and *Poiss v Austria* A 117 (1987); 10 EHRR 231 (land consolidation).

[115] For planning or building permission cases, see, eg, *McGonnell v UK* 2000-II; 30 EHRR 289 and *Chapman v UK* 2001-I; 33 EHRR 399 GC. For other land use cases, see, eg, *Posti and Rahko v Finland* 2002-VII; 37 EHRR 158 (fishing).

[116] *Winterwerp v Netherlands* A 33 (1979); 2 EHRR 387 (mentally disabled person).

[117] See, eg, *British-American Tobacco Co Ltd v Netherlands* A 331 (1995); 21 EHRR 409 (patent applications and rights) and *Procola v Luxembourg* A 326 (1995); 22 EHRR 193 (milk levy).

[118] There may be an overlap between this right and the right to property: see, eg, in *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 para 36 PC.

[119] See, eg, *Tre Traktörer Aktiebolag v Sweden* A 159 (1989); 13 EHRR 309 (sale of alcohol); *Kingsley v UK* 2002-IV; 35 EHRR 177 GC (gaming); *Pudas v Sweden* A 125-A (1987); 10 EHRR 380 (transport); *König v Germany* A 27 (1978); 2 EHRR 170 PC (medical clinic); *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 PC (liquid petroleum gas); *Hornsby v Greece* 1997-II; 24 EHRR 250 (private school).

[120] See, eg, *König v Germany* A 27 (1978) 2 EHRR 170 PC (medicine); *GS v Austria* hudoc (1999); 31 EHRR 576 (pharmacy); *H v Belgium* A 127-B (1987); 10 EHRR 339 (law); *Thlimmenos v Greece* 2000-IV; 31 EHRR 411 GC (accountancy); *Guchez v Belgium No 10027/82*, 40 DR 100 (1984) (architecture). And see *Wilson v UK No 36791/97*, 26 EHRR CD 195 (1998) and *X v UK No 28530/95*, 25 EHRR CD 88 (company director).

[121] A 27 (1978); 2 EHRR 170 PC.

[122] *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 PC. Cf *Allan Jacobsson v Sweden* A 163 (1989); 12 EHRR 56; *Nowicky v Austria* hudoc (2005); and *Kraska v Switzerland* A 254-B (1993); 18 EHRR 188.

[123] Article 6 applies only where a person has an arguable legal right.

[124] A 234-C (1992); 14 EHRR 483. Cf *H v France* A 162-A (1989); 12 EHRR 74. See also *Z v UK* 2001-V; 34 EHRR 97 GC.

within Article 6. Although the case concerned the exercise of a general regulatory power by a minister and hence was clearly a matter of public law in France, its outcome was 'decisive for private rights and obligations', namely those concerning pecuniary compensation for physical injury.[125]

The *X* case has been followed by other cases involving claims for compensation for illegal state acts, including claims for compensation for ill-treatment by the police;[126] unlawful detention;[127] unreasonable delay in judicial proceedings;[128] breach of contract;[129] the seizure of property;[130] and a miscellany of other claims.[131]

Statutory rights to compensation against the state for 'wrongful conviction and unjustified detention' in connection with criminal proceedings also fall within Article 6.[132] The cases have involved compensation for detention where the proceedings are discontinued,[133] the accused is acquitted,[134] or the conviction is quashed on appeal.[135] Such cases concern a right to compensation provided by the state under national law where the detention is not necessarily in breach of Article 5 of the Convention, but the detainee is not finally convicted. A claim under a state's criminal injuries compensation scheme may also, because of its pecuniary character, fall within Article 6 if the scheme provides for a legal right to compensation, and not an *ex gratia* payment.[136]

The right to social security and social assistance

One of the most remarkable developments in the Court's jurisprudence has concerned the classification of rights to social security and social assistance which the Court has held fall within Article 6. Initially, in the companion cases of *Feldbrugge v Netherlands*[137] and *Deumeland v Germany*,[138] the Court adopted a balancing approach, and in both cases found that the private law aspects of the social security rights concerned outweighed their public law aspects, so that Article 6 applied. However, the Court has since established that 'the development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view that today the general rule is that

[125] Cf *Editions Périscope v France* A 234-B (1992); 14 EHRR 597 para 40.

[126] *Assenov v Bulgaria* 1998-VIII; 28 EHRR 652 and *Balogh v Hungary* hudoc (2004) (assault); *Baraona v Portugal* A 122 (1987); 13 EHRR 329 (illegal arrest); *Veeber v Estonia (No 1)* hudoc (2002) (illegal search and seizure); *Aït-Mouhoub v France* 1998-VIII; 30 EHRR 382 (police theft, forgery, etc); *Kaukonen v Finland No 24738/94*, 91-A DR 14 (1997) (malicious prosecution).

[127] *Aerts v Belgium* 1998-V; 29 EHRR 50 and *Göç v Turkey* 2002-V; 35 EHRR 134 GC.

[128] *Pelli v Italy No 19537/02* hudoc (2003) DA ('Pinto law').

[129] *Stran Greek Refineries and Stratis Andreadis v Greece* A 301-B (1994); 19 EHRR 293.

[130] *Air Canada v UK* A 316-A (1995); 20 EHRR 150.

[131] See, eg, *Beaumartin v France* A 296-B (1994); 19 EHRR 485 (claim for compensation under a treaty); *Neves e Silva v Portugal* A 153-A (1989); 13 EHRR 535 (official malpractice); and *Sotiris and Nikos Koutras Attee v Greece No 39442/98* hudoc (1999) DA (refusal of state subsidy).

[132] *Humen v Poland* hudoc (1999); 31 EHRR 1168 para 57 GC. The payment of compensation must be as of right, not discretionary: *Masson and Van Zon v Netherlands* A 327-A (1995); 22 EHRR 491.

[133] *Göç v Turkey* 2002-V; 35 EHRR 134 GC and *Werner v Austria* 1997-VII; 26 EHRR 310.

[134] *Lamanna v Austria* hudoc (2001).

[135] *Dimitrios Georgiadis v Greece* hudoc (2000); 33 EHRR 561 and *Humen v Poland* hudoc (1999); 31 EHRR 1168 GC. See also *Hałka and Others v Poland* hudoc (2002).

[136] *Rolf Gustafson v Sweden* 1997-IV; 25 EHRR 623 (a legal right) and *August v UK No 36505/02* hudoc (2003); 36 EHRR CD 115 (*ex gratia* payment). Article 6 does not apply to discretionary state compensation for a natural disaster: *Nordh v Sweden No 14225/88*, 69 DR 223 (1990).

[137] A 99 (1986); 8 EHRR 425 PC (employment sickness benefit).

[138] A 100 (1986); 8 EHRR 448 PC (industrial injuries benefit).

Article 6(1) does apply in the field of social insurance, including even welfare assistance'.[139] In addition, the Court has stressed that such rights are of a pecuniary, or economic, nature.[140] Since the Court adopted this position, disputes concerning social security and social assistance rights have routinely been accepted as falling within Article 6, commonly without argument to the contrary by the respondent state. The right need not be linked to a contract of employment[141] or depend upon contributory payments.[142] There must, however, be entitlement as a matter of legal right for those who qualify: disputes about benefits or assistance given by the state in its discretion are not included.[143] This is not to do with the civil or non-civil character of the benefit or assistance, but because Article 6 extends only to disputes about 'arguable rights'.

Non-pecuniary civil rights and obligations

Although an important touchstone, the pecuniary dimension of a right or obligation is not the only test for a 'civil' right or obligation. Other rights or obligations of private persons may qualify, again by reference to the general perception of them in national law as private law rights or obligations with which the state may not interfere without due process. One such right is the right to respect for family life. Thus, state action that is directly decisive for this right, such as decisions placing children in care,[144] or restricting the contact of prisoners with their families,[145] have been held to be regulated by Article 6. In *Alexandre v Portugal*,[146] the impact on the applicant's employment prospects brought the content of their criminal record within Article 6. Other non-pecuniary rights that have been recognized as 'civil rights' are the rights to life;[147] physical integrity;[148] liberty;[149] respect for private life;[150] a reputation (and a remedy to protect

[139] *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405 para 46 (invalidity pension). See also *McGinley and Egan v UK* 1998-III; 27 EHRR 1 (disability pension); *Pauger v Austria* 1997-III; 25 EHRR 105 (widower's pension); *Grof v Austria No 25046/94*, 25 EHRR CD 39 (1998) (maternity benefit). For cases of welfare assistance, see *Salesi v Italy* A 257-E (1993); 26 EHRR 187 (disability allowance for destitute persons); *Tsfayo v UK*, see this chapter, section 2.II.e, p 395 (housing benefit); *Eternit v France No 20041/10* hudoc (2012) DA (industrial injury benefit). Benefits in kind are included as well as financial benefits: *Fazia Ali v UK* hudoc (2015) para 40 (right to accommodation). And see *Woś v Poland No 22860/02* hudoc (2005) DA (forced labour compensation).

[140] *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405 para 46.

[141] See, eg, *Giancarlo Lombardo v Italy* A 249-B (1992); 21 EHRR 188 (public service pension). The rights in the *Feldbrugge* and *Deumeland* cases were so linked.

[142] *Salesi v Italy* A 257-E (1993); 26 EHRR 187. See also *Stec v UK No 65731/01* hudoc (2005) DA.

[143] *Salesi v Italy, ibid*; and *Mennitto v Italy* 2000-X; 34 EHRR 1122 GC. See also *Gaygusuz v Austria* 1996-IV; 23 EHRR 364. In *Fazia Ali v UK*, the Court accepted that the applicant had a 'right' in English law to be housed. In *Tomlinson and Others v Birmigham City Council* [2010] UKSC 8, the UK Supreme Court had in the same case ruled otherwise because of the degree of discretion left to the authorities as to the particular accommodation.

[144] *Olsson v Sweden (No 1)* A 130 (1988); 11 EHRR 259 PC. See also *Keegan v Ireland* A 290 (1994); 18 EHRR 342 (adoption) and *Eriksson v Sweden* A 156 (1989); 12 EHRR 183 PC (fostering).

[145] *Ganci v Italy* 2003-XI; 41 EHRR 272; *Gülmez v Turkey* hudoc (2008) para 30; and *Enea v Italy* 2009-; 51 EHRR 50 GC. As to prison leave, see *Boulois v Luxembourg* 2012-; 55 EHRR 32 GC.

[146] Hudoc (2012) paras 50–56.

[147] *Athanassoglou v Switzerland* 2000-IV; 31 EHRR 372 GC.

[148] *ibid*; and *Okyay v Turkey* 2005-VII; 43 EHRR 788.

[149] *Laidin v France (No 2)* hudoc (2003) and *Aerts v Belgium* 1998-V; 29 EHRR 50. Restrictions on freedom of movement short of deprivation of liberty and on the use of mobile telephones may also concern civil rights as 'personal rights': *De Tommaso v Italy* hudoc (2017) para 154 GC. But Article 6 does not apply to pre-trial detention cases within Article 5(4): *Reinprecht v Austria* 2005-XII.

[150] *Mustafa v France* hudoc (2003) (choice of surname); *Užukauskas v Lithuania* hudoc (2010) (state file on an individual); *Alaverdyan v Armenia No 4523/04* hudoc (2010) DA (establishment of paternity).

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[151] *Tolstoy Miloslavsky v UK* and *Gradinar v Moldova* hudo

[152] *Ravon and Others v Fra*

[153] *Kenedi v Hungary* hudo DA.

[155] *AB Kurt Kellermann v S* hudoc (2017) para 55 (huntin

[156] *Oršuš v Croatia* hudoc education).

[158] *Ivan Atanasov v Bulgari*

[159] Cf *Truckenbrodt v Germ*

[160] See, eg, *Oršuš and Othe* to primary education was a m be enforced by means of a jud

[161] *Vilho Eskelinen v Finlan*

[162] *Ferrazzini v Italy* 2001-

[163] *ibid* para 27. Footnotes withdrawal of the state, involv

[165] *ibid* para 29.

[166] *ibid*. See Lopardi, 26 EI *62023/00* hudoc (2005) DA (c poll tax). Surcharges imposed

it);[151] respect for one's home;[152] freedom of expression[153] and assembly (unless used for political purposes);[154] freedom of association;[155] education;[156] freedom from discrimination;[157] and a healthy environment.[158] Most of the rights listed in this paragraph are Convention rights.[159]

Public law rights and obligations

Following from the private law reading of the word 'civil', claims concerning a number of rights and obligations are not subject to Article 6 because of their public law character. However, their number is limited and in decline.[160] The Court's approach to the exclusion of rights and obligations on public law grounds is governed by two general considerations. First, in accordance with the object and purpose of the Convention, a 'restrictive interpretation' must be adopted when deciding whether a right or obligation is excluded from the safeguards of Article 6.[161] Second, the Convention is a living instrument that must be interpreted dynamically.[162] The significance of this second consideration was explained by the Court in *Ferrazzini v Italy*,[163] where the Court noted: 'Relations between the individual and the State have clearly developed in many spheres during the 50 years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private law relations.' However, the Court continued, 'rights and obligations existing for an individual are not necessarily civil in nature'.[164] Giving political rights and obligations, rights in some cases concerning public employment, the expulsion of aliens, and the obligation to pay taxes as examples, the Court stated that rights and obligations that relate to matters that 'still form part of the hard core of public authority prerogatives'[165] remain excluded. In the case of such rights or obligations, the fact that there may in some cases be a pecuniary dimension to the right or to the consequences of its infringement is outweighed or overridden by its fundamentally public law character.

The obligation to pay tax

Ferrazzini v Italy concerned the obligation to pay taxes to the state, which was held not to be subject to Article 6: although the obligation has pecuniary elements, 'the public nature of the relationship between the taxpayer and the tax authority remains predominant'.[166]

[151] *Tolstoy Miloslavsky v UK* A 316-B (1995); 20 EHRR 442; *Werner v Poland* hudoc (2001); 36 EHRR 491; and *Gradinar v Moldova* hudoc (2008) paras 90–104.

[152] *Ravon and Others v France* hudoc (2008) (search and seizure).

[153] *Kenedi v Hungary* hudoc (2009) paras 33–34 (access to information). See also *Loiseau v France* 2003-XII DA.

[154] *Reisz v Germany No 3201/96*, 91-A DR 53 (1997).

[155] *AB Kurt Kellermann v Sweden No 41579/98* hudoc (2003); 37 EHRR CD DA 161 and *Lovrić v Croatia* hudoc (2017) para 55 (hunting association). As to political organizations, see n 168.

[156] *Oršuš v Croatia* hudoc (2010) para 104 GC (primary) and *Emine Araç v Turkey* hudoc (2008) (higher education).

[157] *Oršuš v Croatia*, *ibid* para 107 GC.

[158] *Ivan Atanasov v Bulgaria* hudoc (2010).

[159] Cf *Truckenbrodt v Germany No 49849/08* hudoc (2015) ('majority' of Convention rights are 'civil' rights).

[160] See, eg, *Oršuš and Others v Croatia* hudoc (2010) para 104 GC (reversal of Court decision that the right to primary education was a matter of public law). The Court stated that 'where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights': *ibid* para 105.

[161] *Vilho Eskelinen v Finland* 2007-XX; 45 EHRR 985 para 49 GC.

[162] *Ferrazzini v Italy* 2001-VII; 34 EHRR 1068 para 26 GC.

[163] *ibid* para 27. Footnotes omitted. But in some contexts the tendency has more recently been for the withdrawal of the state, involving deregulation and privatization.

[164] *ibid* para 28.

[165] *ibid* para 29.

[166] *ibid*. See Lopardi, 26 ELR Human Rights Survey 58 (2001). See also *Emesa Sugar NV v Netherlands No 62023/00* hudoc (2005) DA (customs duties) and *Smith v UK No 25373/94* hudoc (1995); 21 EHRR CD 74 (UK poll tax). Surcharges imposed for non-payment of tax may involve a 'criminal charge' within Article 6.

In contrast, in *Schouten and Meldrum v Netherlands*,[167] it was held that Article 6 does apply to the applicant's obligation to pay social security contributions: following the approach it had used in the *Feldbrugge* case in respect of social security benefits, the Court decided that the private law features of the obligation outweighed its public law features.

Political rights and obligations

As to political rights and obligations, in *Pierre-Bloch v France*,[168] it was held that the right to stand for election to a national parliament does not fall within Article 6, because 'such a right is a political and not a "civil" one'. There the applicant, who had been elected to the French National Assembly, was found to have exceeded the election expenses limit and as a penalty was disqualified from standing for election for a year, made to forfeit his seat, and required to pay a sum equal to the expenses excess. Despite the pecuniary consequences of the decision, Article 6 was held not to apply. Generally, the right to engage in political activities is not a 'civil' right, so that, for example, disputes concerning the right to vote[169] or the membership or dissolution of a political party[170] do not fall within Article 6. Disputes concerning the election of an officer of a non-governmental organization[171] or of an employees' council representative[172] are excluded on a similar basis.

Entry, conditions of stay, and removal of aliens

Disputes concerning the entry, conditions of stay, and removal of aliens also fall on the public law side of the line. In *Maaouia v France*,[173] the Court held that proceedings concerning the rescinding of an exclusion order against an alien physically present in France did not concern his 'civil' rights. More generally, the Court stated that 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations', and that this is so even though, in the case of an exclusion order, the decision 'incidentally' has 'major repercussions on the applicant's private and family life or on his prospects of employment'.[174] The approach in the *Maaouia* case was applied to the extradition of aliens in *Mamatkulov and Askarov v Turkey*.[175]

In the *Maaouia* case, the Court reached its conclusion that Article 6 did not apply to the 'expulsion of aliens' on the basis that the Seventh Protocol to the European Convention on Human Rights (ECHR) provides procedural safeguards for aliens who are to be expelled, which would not have been necessary if the right to a fair hearing in Article 6 already applied. This reasoning cannot apply to the entry or conditions of stay of an alien, to which

[167] A 304 (1994); 19 EHRR 432. Followed in *Meulendijks v Netherlands* hudoc (2002).

[168] 1997-VI; 26 EHRR 202. See also *Tapie v France No 32258/96*, 88-A DR 176 (1997); *Asensio Serqueda v Spain No 23151/94*, 77-A DR 122 (1994); and *Guliyev v Azerbaijan No 35584/02* hudoc (2004) DA. All kinds of election disputes fall outside Article 6: see, eg, *Priorello v Italy No 11068/84*, 43 DR 195 (1985) (challenge to local election).

[169] *Hirst v UK No 74025/01* hudoc (2003); 37 EHRR CD 176 DA (prisoner's right to vote).

[170] *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v Turkey* hudoc (2002); 36 EHRR 59 and *Refah Partisi (the Welfare Party) and Others v Turkey No 41340/98 et al* hudoc (2000) DA. See also *Reisz v Germany No 32013/96* hudoc (1997) DA and *Papon v France No 344/04* hudoc (2005) DA.

[171] *Fedotov v Russia No 5140/02* hudoc (2005) DA.

[172] *Novotny v Czech Republic No 36542/97* hudoc (1998) DA.

[173] 2000-X; 33 EHRR 1037 GC. Cf *Panjeheighalehei v Denmark No 11230/07* hudoc (2009) DA.

[174] *Maaouia v France*, *ibid* paras 38 and 40. Article 6 does not apply to asylum cases: *P v UK No 13162/87*, 54 DR 211 (1987) and *Taheri Kandomabadi v Netherlands No 6276/03* hudoc (2004) DA. Or to Schengen cases: *Dalea v France No 964/07* hudoc (2010) DA.

[175] 2005-I; 41 EHRR 494 GC. The extradition of nationals is probably excluded also.

the Seventh Protocol does not apply. It is likely that the Court would here rely upon the fact that these matters are a 'part of the hard core of public authority prerogatives'.[176]

Employment in the civil service

To some extent, rights and obligations arising out of employment in the civil service are excluded from Article 6, although the extent of this exception is now more limited than formerly. In *Vilho Eskelinen v Finland*,[177] the Court introduced a new two-part test, which starts from the presumption that Article 6 does apply. For it not to do so, first, 'the state in its national law must have expressly excluded access to a court for the post or category of staff in question'. Second, where this condition is met, Article 6 nonetheless still applies unless the national law exclusion is justified on 'objective grounds in the state's interest'. These 'grounds' must relate not to the nature of the civil servant's employment but to the 'subject matter of the dispute' between the civil servant and the state, with the latter being required to show that the dispute 'is related to the exercise of state power or that it has called into question the special bond of trust and loyalty' between civil servants and the state.[178] Thus, even though there is no right of access to a court in national law in respect of such disputes, Article 6 will apply—and access to a court compliant with it will be required—to 'ordinary labour disputes, such as those relating to salaries, allowance or similar entitlements', regardless of the nature of the employment or status of the civil servant. In the *Vilho Eskilenen* case, which concerned a salary dispute between the applicant policemen, who were civil servants, and the state, the government's defence fell at the first hurdle, as the applicants did have a right of access to a court to decide the dispute in national law. Even if this had not been the case, Article 6 would have applied because the dispute was an 'ordinary labour dispute'. Applying the two parts of the *Vilho Eskelinen* test, the Court has found Article 6 to be applicable to disputes concerning the employment of public prosecutors;[179] disciplinary proceedings against police officers;[180] the dismissal of ministry officials;[181] and disputes concerning employment in the Chamber of Deputies of the Italian Parliament.[182] The test has also been held to apply to ordinary labour disputes concerning the employment of judges, on the basis that '[a]lthough the judiciary is not part of the ordinary civil service, it is considered part of typical public service'.[183] In contrast to the above cases, in *Sukût v Turkey*[184] Article 6 was held not to apply to a dispute concerning the discharge of a soldier for breaches of discipline, the 'special bond of trust and loyalty' between the applicant and the state being central to the dispute. Although the *Vilho Eskelinen* case is a welcome step in the right direction, the Court still needs to go further. An approach by which a dispute concerning employment in the public service in which the applicant has an arguable case under national law should be subject to Article 6 without exception.

Other public law rights and obligations

An obligation which is a part of 'normal civic duties in a democratic society' also falls outside Article 6, including obligations to pay a fine[185] or to give evidence in court

[176] *Ferrazzini v Italy* 2001-VII; 34 EHRR 1068 para 26 GC.

[177] 2007-XX; 45 EHRR 985 para 62 GC. This test replaced the functional test in *Pellegrin v France* 1999-VIII; 31 EHRR 651.

[178] See *Pellegrin v France*, *ibid* para 65.

[179] *Zalli v Albania No 5253/07* hudoc (2011) DA.

[180] *Vanjak v Croatia* hudoc (2010).

[181] *Fazliyski v Bulgaria* hudoc (2013).

[182] *Savino and Others v Italy* hudoc (2009) para 78.

[183] *Baka v Hungary* hudoc (2016) para 104 GC. See, eg, *Olujić v Croatia* hudoc (2009); *Harabin v Slovakia* hudoc (2012); and *Tsanova-Gecheva v Bulgaria* hudoc (2015).

[184] *No 59773/00* hudoc (2007) DA. It did apply in *Kuzmina v Russia* hudoc (2009) (ordinary pay claim by soldier).

[185] *Schouten and Meldrum v Netherlands* A 304 (1994); 19 EHRR 432 para 50.

proceedings.[186] Cases concerning the rights to nationality;[187] liability for military service;[188] certain matters relating to the administration of justice;[189] the interception by the state of mail and telephone calls;[190] medical treatment;[191] public housing;[192] and the award of administrative contracts[193] have also been excluded.

b. The meaning of 'rights and obligations'

By 'rights and obligations' in Article 6 are meant 'rights and obligations' 'which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether . . . [they are] protected under the Convention'.[194] The requirement is only that the applicant have a 'tenable' argument, not that he will necessarily win.[195] If the applicant has no arguable right under national law,[196] Article 6 does not apply.[197] The fact that the state has under national law a discretion in responding to an applicant's claim (eg, when granting a licence) will not prevent Article 6 applying if 'it follows from generally recognised legal and administrative principles that the authorities' do 'not have an unfettered discretion' when taking their decision.[198] Apart from this limitation, a discretionary decision is not subject to Article 6.[199] A person tendering for a contract does not have a 'right' during the evaluation phase.[200]

[186] *BBC v UK No 25798/94* hudoc (1996) DA. See also *Van Vondel v Netherlands No 38258/03* hudoc (2006) DA and *Burdov v Russia* 2002-III; 38 EHRR 639.

[187] *S v Switzerland No 13325/87*, 59 DR 257 (1988). See also *Peltonen v Finland No 19583/92*, 80-A DR 38 (1995) (passport); and *X v UK No 8208/78*, 16 DR 162 (1978) (peerage).

[188] *Nicolussi v Austria No 11734/85*, 52 DR 266 (1987) and *Zelisse v Netherlands No 12915/87*, 61 DR 230 (1989).

[189] *Schreiber and Boetsch v France No 58751/00* hudoc (2003) DA (challenge to a judge); *X v Germany No 3925/69*, 32 CD 56 (1970) (legal aid), but see *Gutfreund v France* 2003-VII; 42 EHRR 1076 paras 39–44; *B v UK No 10615/83*, 38 DR 213 (1984) (lawyers' costs); *Shapovalov v Ukraine* hudoc (2012) and *Mackay and BBC Scotland v UK* hudoc (2010) para 22 (no civil right to report court proceedings); and *Truckenbrodt v Germany* hudoc (2015) para 17 (no civil right to take pictures in relation to court proceedings).

On the disciplining of prisoners (which may involve a 'criminal charge'), see *McFeeley v UK No 8317/78*, 20 DR 44 (1980), now subject to *Ganci v Italy* 2003-XII; 41 EHRR 272.

[190] *Klass v Germany* B 26 (1977) Com Rep and *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria* hudoc (2007) paras 106–107. The question was left open by the Court in *Kennedy v UK* hudoc (2010). But see *Ravon and Others v France* hudoc (2008) (search and seizure of documents at home concerned the right to respect for the home).

[191] *L v Sweden No 10801/84*, 61 DR 62 (1988) Com Rep para 87; CM Res DH (89) 16.

[192] *Woonbron Volkshuisvestingsgroep and Others v Netherlands No 47122/99* hudoc (2002); 35 EHRR CD 161 DA.

[193] *LTC v Malta No 2629/06* hudoc (2007) DA.

[194] *Boulois v Luxembourg* hudoc 2012-; 55 EHRR 32 para 90 GC.

[195] *Neves e Silva v Portugal* A 153-A (1989); 13 EHRR 535 para 37. The right need only be 'arguable' when proceedings are commenced; changes in the law while they are pending are not relevant: *Reid v UK No 33221/96* hudoc (2001) DA.

[196] National law includes EC law for member states: *Papoulakos v Greece No 24960/94* hudoc (1995) DA. Article 6 did not apply in *Károly Nagy v Hungary* hudoc (2017) para 77 GC because the applicant pastor's claim for fees was a matter of ecclesiastical law, not state law.

[197] In *Boulois v Luxembourg* hudoc 2012-; 55 EHRR 32 para 102 GC, the Court noted that the Convention did not contain a right to prison leave, suggesting that Article 6 may apply if there is a Convention right in issue, whether it is recognized in national law or not. Cf *Gutfreund v France* 2003-VII; 42 EHRR 1076 para 39. The failure to enforce the law does not generate a 'right' to commit the prohibited act: *De Bruin v Netherlands No 9765/09* hudoc (2013) (coffee shops selling soft drugs).

[198] *Pudas v Sweden* A 125-A (1987); 10 EHRR 380 para 34. Cf *Allan Jacobsson v Sweden (No 1)* A 163 (1989); 12 EHRR 56. And see *Rolf Gustafson v Sweden* 1997-VI; 25 EHRR 623.

[199] See, eg, *Boulois v Luxembourg* hudoc 2012-; 55 EHRR 32 GC; *Masson and Van Zon v Netherlands* A 327-A (1995); 22 EHRR 491; and *Anne-Marie Andersson v Sweden* 1997-IV; 25 EHRR 722 para 36.

[200] *ITC Ltd v Malta No 2629/06* hudoc (2007) DA.

Article 6 does not control the content of a state's national law; it guarantees only a procedural right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law. For example, in *James v UK*[201] the applicants had been deprived of their ownership of certain properties by the exercise by their tenants of a right to purchase given to them by statute. Although the case concerned their right to property, which was a 'civil' right, Article 6 did not come into play because the applicants had no arguable right in English law that had been infringed. However, a limit to this approach was set in *Fayed v UK*.[202] There the applicants wanted to bring a claim in defamation arising out of a government inspector's report under the Companies Act 1985 that found they had been dishonest. Whereas the law of defamation extended to cover the facts of their claim, it would have been successfully met by a defence of privilege. After referring with approval to its approach in the *James* case, the Court drew a distinction between cases in which there was no 'legal basis' in national law for the claim and others in which there was such a basis, but the claim could be met by a defence. In the 'no legal basis' kind of case, the reasoning in the *James* case applied, but in the *Fayed* kind of case the right of access to a court in Article 6 dictated some degree of Convention 'restraint or control'. On the facts of the case, the Court decided that the restriction upon the right of access presented by the privilege defence to the applicants' defamation claim could be justified as having a legitimate aim and as being in proportion to its attainment.

c. A 'contestation' or dispute concerning civil rights and obligations

For Article 6 to apply there must be a 'dispute' at the national level, between two private persons or between the applicant and the state, the outcome of which is determinative of the applicant's civil rights and obligations. The need for a 'dispute' follows from the use of the word '*contestation*' in the French text of Article 6. Generally, the Court has interpreted the 'dispute' requirement in such a way that it is not a significant hurdle.[203] It has held that '*contestation*' should not be 'construed too technically' and that it should be given a 'substantive rather than a formal meaning'.[204] This approach is adopted as being in accordance with the spirit of the Convention and because the term '*contestation*' has no counterpart in the English text, a fact that has led to hesitation as to its importance.[205]

A dispute may concern a question of law or of fact.[206] It need not concern the actual existence of a right: it may relate instead to its 'scope . . . or the manner in which the beneficiary may avail himself of it'.[207] The dispute must be 'genuine and of a serious nature'.[208] This requirement may exclude a case of a hypothetical kind, such as a case raising the question whether proposed legislation would, if enacted, infringe the applicant's rights,[209]

[201] A 98 (1986); 8 EHRR 123 para 81 PC (owners deprived of property rights by statute: no remedy). Cf *Powell and Rayner v UK* A 172 (1990); 12 EHRR 335 (statute excluded liability in tort for aircraft noise). See also *McMichael v UK* A 307-B (1995); 20 EHRR 205.

[202] A 294-B (1994); 18 EHRR 393 para 65.

[203] See *Oerlemans v Netherlands* A 219 (1991); 15 EHRR 561.

[204] *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 para 45 PC.

[205] In *Moreira de Azevedo v Portugal* A 189 (1990); 13 EHRR 721 para 66, the Court cast some doubt upon the very existence of the requirement ('if indeed it does' exist). Cf the joint dissenting opinion of six judges in *W v UK* A 121 (1987); 10 EHRR 29 PC, and the dissenting opinion of Judge de Meyer in *Kraska v Switzerland* A 254-B (1993); 18 EHRR 188.

[206] *Albert and Le Compte v Belgium* A 58 (1983); 5 EHRR 533 PC.

[207] *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 para 49 PC.

[208] *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 para 32 PC and *Enea v Italy* hudoc (2009) para 99 GC.

[209] But a claim based upon enacted legislation of general application that affects the applicant is subject to Article 6: *Posti and Rahko v Finland* 2002-VII; 37 EHRR 158.

or a case in which the applicant does not pursue their claim seriously, for example by not presenting evidence.[210] For a dispute to be 'genuine and serious', there must also be something 'at stake' for the applicant.[211] It is not necessary that damages be claimed for a dispute to be 'genuine and serious'; a request for a declaratory judgment is sufficient.[212]

A 'dispute' must be justiciable, ie it must be one that inherently lends itself to judicial resolution. This was relevant in *Van Marle v Netherlands*.[213] There the Court held that Article 6 was not applicable to a dispute concerning the applicants' registration as accountants. According to the reasoning in the Court's judgment, this was because the dispute was concerned essentially with the assessment of the applicants' competence as accountants, which was more akin to school or university examining than judging, whereas Article 6 is aimed at regulating only the latter.

d. When are civil rights and obligations being determined?

Supposing that a dispute exists, it is still necessary to show that civil rights and obligations are being 'determined' by the decision to which it is sought to apply Article 6(1). This will be the case when the decision is 'directly decisive' for the civil rights or obligations concerned.[214] This requirement is clearly met where the determination of the applicant's civil rights and obligations is the primary purpose of the decision-making process. Thus Article 6 undoubtedly applies to a personal injuries claim in tort between private individuals before the ordinary courts,[215] and to a claim before an administrative court for negligence by a state hospital.[216]

In addition, it was held in *Ringeisen v Austria*[217] that Article 6 extends to proceedings which do not have the determination of 'civil rights and obligations' as their primary purpose, but which nonetheless are decisive for them. In that case, the applicant had entered into a contract to buy land from third parties. The sale was subject to the approval of an administrative tribunal, which refused permission because the land would be used for non-agricultural purposes. The object of the proceedings before the tribunal—the granting of permission by reference to the public interest—clearly pertained to public law. Nonetheless, the Court held that civil rights—contract rights—were being determined.

In *Ringeisen v Austria*, the Court stated only that for Article 6 to apply the proceedings must be 'decisive' for civil rights and obligations. It was in *Le Compte, Van Leuven and De Meyere v Belgium*[218] that the Court established that they must be '*directly* decisive' and that a 'tenuous connection or remote consequences do not suffice'. In that case, the applicants were Belgian doctors who had been temporarily suspended from medical practice by the competent disciplinary bodies. The Court accepted that the primary purpose of the disciplinary proceedings was to decide whether breaches of the rules of professional conduct had occurred. Nonetheless, the proceedings were 'directly decisive' for the applicants' private law right to practise medicine because the suspension of the applicants' exercise of that right was a direct consequence of the decision that breaches of the rules had occurred.[219]

[210] *Kaukonen v Finland No 24738/94*, 91-A DR 14 (1997). See also *Kiryanov v Russia No 42212/02* hudoc (2005) DA.

[211] *Kienast v Austria* hudoc (2003).

[212] *Helmers v Sweden* A 212 (1991); 15 EHRR 285 PC.

[213] A 101 (1986); 8 EHRR 483 PC. Cf *Le Bihan v France No 63054/00* hudoc (2004) DA; *Nowicky v Austria* hudoc (2005); and *Kervoëlen v France* hudoc (2001).

[214] *Ringeisen v Austria* A 13 (1971); 1 EHRR 455; *Le Compte, Van Leuven and De Meyere v Belgium* A 43 (1981); 4 EHRR 1 PC.

[215] See, eg, *Guincho v Portugal* A 81 (1984); 7 EHRR 223.

[216] See, eg, *H v France* A 162-A (1989); 12 EHRR 74.

[217] A 13 (1971); 1 EHRR 455.

[218] A 43 (1981); 4 EHRR 1, para 47 PC (emphasis added).

[219] Disciplinary proceedings that result in a lesser penalty than suspension (eg, a fine) fall within Article 6 provided that interference with the exercise of the right (by suspension or termination) is 'at stake': *A v Finland No 44998/98* hudoc (2004); 38 EHRR CD 223 DA and *WR v Austria* hudoc (1999); 31 EHRR 985.

In contrast, the applicants 'civil rights' were not 'directly' being determined in *Athanassoglou v Switzerland*.[220] In that case, a decision to renew a licence for a nuclear power station was not subject to Article 6 because, despite the public interest ramifications, it was not directly decisive for the rights to life, physical integrity, and property of applicants living nearby, who were not able to produce evidence showing that the station's operation exposed them to a specific and imminent danger of an infringement of these rights. But civil rights were being determined in proceedings in which an association challenged the building of a dam because of its direct impact on the lifestyle and property of its members as well as on public interest environmental grounds.[221]

Nor does Article 6 apply where a decision being challenged is important for the applicant economically but does not determine their *legal* rights. Thus, an application requesting a court to annul a presidential decree in favour of an airport runway as being unconstitutional did not fall within Article 6. While it was prejudicial to their economic activities relating to adjacent land that they owned, it left their legal rights intact.[222]

Despite the limiting effect of the *Le Compte* case, the impact of the *Ringeisen* case in extending Article 6 to cases in which the 'determination' of civil rights and obligations is a consequence, but not the purpose, of the proceedings has been considerable. In particular, it has provided the basis upon which cases involving decisions by administrative tribunals and, most significantly, by the executive regulating private rights in the public interest are brought within the reach of Article 6.

Civil rights and obligations may be determined in criminal proceedings. This is so, for example, where a criminal prosecution is the remedy provided in national law for the enforcement of a civil right, as, for example, in some legal systems in connection with the right to a reputation.[223] Article 6 also applies when a legal system allows the victim of a crime to be joined as a civil party in criminal proceedings against the offender in order to obtain damages or otherwise protect their civil rights; however, it does not apply in such cases where the victim's purpose in being joined is to punish the offender or to intervene on an *actio popularis* basis, not to obtain a personal civil remedy.[224]

Finally, proceedings before a constitutional court involve the determination of civil rights and obligations where their outcome is capable of being decisive for those rights.[225]

e. The application of Article 6(1) in the context of administrative decisions

Many decisions that are determinative of a person's civil rights and obligations are taken by the executive or some other body that is not a tribunal in the sense of Article 6. What Article 6 requires in such cases is the possibility of judicial review, or in some cases an appeal on the merits, by a body that complies with Article 6. Although this is an approach that conforms with practice in most European states, it has presented serious problems for some such states, where the tradition has been of review or appeal that

[220] 2000-IV; 31 EHRR 372 GC, following *Balmer-Schafroth v Switzerland* 1997-IV; 25 EHRR 598 PC. See also *L'Erablière v Belgium* hudoc (2009-) and *Ivan Atanasov v Bulgaria* hudoc (2010). Contrast *Okyay v Turkey* 2005-VII; 43 EHRR 788.

[221] *Gorraiz Lizarraga and Others v Spain* 2004-III; 45 EHRR 1031.

[222] *SARL du Parc d'activités de Blotzheim v France No 48897/99*, 2003-III DA. Cf *Krafft and Rougeot v France No 11543/85*, 65 DR 51 (1990).

[223] See, eg, *Helmers v Sweden* A 212-A (1991); 15 EHRR 285 PC. But Article 6 does not apply if the defamation prosecution is intended to punish: *Rékási v Hungary No 315061/96*, 87-A DR 164 (1996).

[224] *Perez v France* 2004-I; 40 EHRR 909 GC. See also *Garimpo v Portugal No 66752/01* hudoc (2004) DA.

[225] *Süssmann v Germany* 1996-IV; 25 EHRR 64 GC; *Gorraiz Lizarraga and Others v Spain* 2004-III; 45 EHRR 1031; and *Voggenreiter v Germany* 2004-I; 42 EHRR 456.

was technically within the executive branch of government, and not of recourse to the courts.[226]

The first cases in which the Court expressed a clear opinion on the matter concerned decisions by professional disciplinary bodies rather than public bodies. In *Albert and Le Compte v Belgium*,[227] in which the applicant doctors wished to challenge disciplinary decisions against them on their merits, the decisions themselves were taken by a professional association, with a right of appeal to another such body and finally to the Belgian Court of Cassation. The European Court stated that the Convention required either that such associations meet the requirements of Article 6 or that 'they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)'. Article 6(1) was not complied with in the case because the professional association, which could rule on the facts, did not sit in public as Article 6 requires and because the Court of Cassation, which met all of the procedural demands of Article 6(1), could only consider points of law.

The *Albert and Le Compte* requirement has since been applied to administrative decisions by public bodies. However, in this context the Court has drawn a distinction between 'full jurisdiction' and a lesser requirement of 'sufficient review',[228] which in most cases will not require a full re-hearing of the case. In adopting this approach, the Court has 'had regard to the fact that in administrative law appeals in the Member States of the Council of Europe it is often the case that the scope of judicial review over the facts of a case is limited', with the court or tribunal reviewing 'the previous proceedings rather than taking factual decisions'.[229] When assessing the 'sufficiency' of the jurisdiction of the reviewing body, the Court considers both the extent of the powers that the reviewing body has and 'such factors as (a) the subject matter of the decision appealed against, in particular, whether it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if so, to what extent;[230] (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body [whose decision is being reviewed]; and (c) the content of the dispute, including the desired and actual grounds of appeal'.[231]

This approach has been applied in a number of cases, with the outcome of each turning upon the particular combination of the above considerations present in the case and with the Court accepting that, in cases involving the exercise of administrative discretion, the final decision on the merits should be allowed to rest with the executive, rather than a court, where that discretion is to be exercised in accordance with 'wider policy aims'.[232] *Bryan v UK*[233] was a case involving such aims. There the applicant challenged a planning decision against him that had been taken by a planning inspector who, the Strasbourg Court held,

[226] See, eg, *Benthem v Netherlands* A 97 (1985); 8 EHRR 1 PC and *Ravnsborg v Sweden* A 283-B (1994); 18 EHRR 38.

[227] A 58 (1983); 5 EHRR 533 para 29 PC.

[228] *Fazia Ali v UK* hudoc (2015) para 76.

[229] *ibid* para 77.

[230] Professional knowledge or expertise and administrative discretion can be alternatives: see *Crompton v UK* hudoc (2009); 50 EHRR 905 para 77 (only the latter mentioned).

[231] *Fazia Ali v UK* hudoc (2015) para 78. Cf *Bryan v UK* A 335-A (1995); 21 EHRR 342 para 45.

[232] *Tsfayo v UK* hudoc (2006); 48 EHRR 177 para 46. In *Fazia Ali*, *ibid* para 77, the Court gave decisions on planning, environmental protection, and the regulation of gaming as examples.

[233] A 335-A (1995); 21 EHRR 342 para 47. See also *Chapman v UK* 2001-I; 33 EHRR 399 GC; *Potocka v Poland* 2001-X; *Alatulkkila v Finland* hudoc (2005); 43 EHRR 737; *Jurisic and Collegium Mehrerau v Austria* hudoc (2006); and *Sambata Bihor Greco-Catholic Parish v Romania No 48107/99* hudoc (2010) DA. For earlier cases in which the *Bryan* approach was taken, see *Zumtobel v Austria* A 268-A; 17 EHRR 116 and *ISKCON v UK No 20490/92*, 72-A DR 90 (1994).

did not meet the requirement of objective independence in Article 6.[234] 'The Court held that the judicial review proceedings which the applicant was able to bring in the English High Court to challenge the decision were sufficient to satisfy Article 6 because, although the High Court could not re-hear the case on the facts,[235] it had jurisdiction to rule on errors of law, which was all that the applicant had wished to argue. However, the Court stated that, even supposing the applicant had wanted to question the inspector's findings of fact, there would still have been no breach of Article 6 because when taking his decision the inspector had followed 'a quasi-judicial procedure governed by many of the safeguards required by Article 6(1)':[236] the failure to comply with Article 6(1) was only that, as noted above, the inspector did not meet the requirement of objective independence. Such a procedure was 'frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states'.[237] The Court's judgment in the *Bryan* case suggests that if the initial administrative decision in cases involving the 'classic exercise of administrative discretion' is not followed by a quasi-judicial procedure that sufficiently complies with Article 6—in an extreme case, if it is taken by an official in his office without any hearing of the applicant—then Article 6 must require an appeal on the facts before a tribunal, if and to the extent that the applicant wishes to question the findings of fact. This last comment goes to a separate, important point in the Court's jurisprudence that is confirmed in the *Bryan* case. Article 6 is complied with if the applicant who is challenging an administrative decision has an opportunity to have a ruling by a tribunal that complies with Article 6 on the arguments that they wish to make.[238] If the applicant has this opportunity, as he had in the *Bryan* case, it does not matter that the tribunal lacks jurisdiction to consider other points of law or fact that some other applicant might wish to raise.

The *Fazia Ali* and *Tsfayo* cases provide other factual situations that demonstrate how the Court applies its approach to 'sufficiency of review'. In *Fazia Ali v UK*, a local authority had a legal duty to provide housing for a homeless person such as the applicant. After she had refused two offers of accommodation as unsuitable, the authority's Homelessness Review Officer decided that the duty had been satisfied. The Strasbourg Court held that the decision of the Officer did not by itself meet the requirements of Article 6 as the officer was not 'independent' but ruled that this deficiency was made good by various procedural safeguards built into her role, when they were taken together with the applicant's right of appeal to the County Court. Although the latter did not permit a full re-hearing of the facts, including the hearing of witnesses as the applicant requested, the Strasbourg Court held that, in view of the safeguards in the Officer's procedures (cf *Bryan*), the County Court's powers of judicial review under English law allowed it to carry out a 'sufficient review' of 'both the facts and the procedure by which the factual findings of the Officer were arrived at'.[239] In contrast, in *Tsfayo v UK*,[240] the

[234] Lack of 'independence' has been the most common Article 6 deficiency in public bodies taking administrative decisions.

[235] The High Court could, as the Strasbourg Court noted, quash the decision only if the findings of fact were 'perverse or irrational'.

[236] *Bryan v UK* A 335-A (1995); 21 EHRR 342 para 47. Cf *Sigma Radio Television Ltd v Cyprus* hudoc (2011) para 162. See also *Holding and Barnes plc v UK* 2002-IV DA.

[237] *Bryan v UK, ibid* para 47.

[238] Cf *Oerlemans v Netherlands* A 219 (1991); 15 EHRR 561; *Zumtobel v Austria* A 268-A (1993); 17 EHRR 116; *X v UK No 28530/95* hudoc (1998); 25 EHRR CD 88; and *Sigma Radio Television Ltd v Cyprus* hudoc (2011). The tribunal must also have the power to provide the remedy required: *Kingsley v UK* 2002-IV; 35 EHRR 177 GC (no power to quash decision: violation).

[239] Hudoc (2015) paras 83–84.

[240] Hudoc (2006); 48 EHRR 177. For other, earlier cases requiring full jurisdiction, see *W v UK* A 121 (1987); 10 EHRR 293 PC; *Obermeier v Austria* A 179 (1990); 13 EHRR 290; *Fischer v Austria* A 312 (1995); *Terra Woningen BV v Netherlands* 1996-VI; 24 EHRR 456.

absence of a re-hearing of the evidence was a violation of Article 6. In that case, a Benefit Review Board rejected the applicant's claim for housing and council tax benefit because it did not find her reason for applying late to be 'credible'. The Strasbourg Court ruled that the Board's 'fundamental lack of objective impartiality' and independence (being composed of five Councillors of the local authority that would pay the benefit) was not overcome by the procedures that it followed and the High Court's powers of judicial review, which did not allow the High Court to 'rehear the evidence or substitute its own views as to the applicant's credibility'. The Court in *Tsfayo* also stressed that the case was not one requiring professional knowledge or experience or one concerning policy: the central issue was a 'simple question of fact', as to whether the applicant had applied late for good reason.

The distinction between 'full jurisdiction' and 'sufficient review' is relevant in the context of the review of international organization decisions, as well as of decisions at the national level. *Al Dulimi and Montana Management Inc v Switzerland*[241] concerned UN Security Council Resolution 1483, which required UN member states to freeze and confiscate the property of individuals and entities listed by a Security Council Sanctions Committee because of their connections with Saddam Hussein's former Iraqi Government. The applicants' property was frozen and ordered to be confiscated by the respondent state and, although the Committee's listing procedure was notoriously deficient in 'fair trial' terms, the Swiss courts found themselves unable to rule on the applicants' claims that their listing had violated Article 6 of the Convention because Switzerland was bound to implement Resolution 1483: in their view their competence extended only to confirming that the applicants' names were on the list and that the properties belonged to them. The Grand Chamber held, by 15 votes to 2,[242] that, although the Swiss courts did not have 'full jurisdiction' to examine all questions of fact and law, they should have exercised judicial review to the point of affording the applicants 'a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary'.

The Court's interpretation of the requirements of Article 6 in respect of administrative decisions largely resolves a problem that the Court had created for itself by its early ruling in the *Ringeisen* case. At the same time, inventive though it is, it involves a very forced reading of Article 6, and one that is not always easy to apply. The same text of Article 6 now has different meanings according to the kind of case involved. However, the result is to uphold the rule of law in cases of administrative action, although sometimes in a confusing way.

f. The stages of proceedings covered by Article 6(1)

Article 6 normally begins to apply in 'civil rights and obligations' cases when court proceedings are instituted.[243] But, just as in criminal cases it may apply before the competent court is seized, so too in civil cases Article 6 may begin to run before the writ is issued.[244] For example, this has been held to be so in cases in which the applicant must exhaust a preliminary administrative remedy under national law before having recourse to a court

[241] Hudoc (2016) para 151 GC.

[242] Note, however, that the Court had first decided by only nine votes to eight that Article 103 UN Charter, which provides that member state obligations under the UN Charter, including those resulting from a legally binding Security Council Resolution such as Resolution 1483, prevail over other conflicting treaty obligations, such as those in the Convention. The majority of nine did so on the basis that there was no conflict.

[243] See, eg, *Guincho v Portugal* A 81 (1984); 7 EHRR 223. As in criminal cases, the question is mostly relevant in 'trial within a reasonable time' cases.

[244] *Golder v UK* A 18 (1975); 1 EHRR 524 PC.

or tribunal[245] or cases in which the applicant objects to a draft plan for land consolidation prior to a tribunal hearing.[246]

Article 6 applies not only to the proceedings in which liability is determined, but also to any separate court proceedings in which the amount of damages is assessed[247] or costs are allocated,[248] since these proceedings are a continuation of the substantive litigation. Article 6 also applies beyond the trial stage to appeal and judicial review proceedings concerning civil rights and obligations.[249] The reasonable time guarantee applies until the time for an appeal or application for judicial review by the parties expires and the judgment becomes final.[250]

g. Execution of judgments

Article 6 applies to the execution of judgments in 'civil rights and obligations' cases. In particular, the reasonable time guarantee will apply to any delays for which the state is responsible in their execution. This has proved to be an important ruling, with many cases of violations. The leading case is *Hornsby v Greece*,[251] in which the state authorities had for more than five years not taken the measures necessary to comply with a final judgment in the Greek courts entitling the applicants, who were UK nationals, to establish a private English school in Greece. The Court justified its extension of the 'right to a court' to the execution of judgments, which is not expressly mentioned in Article 6, on the basis that the 'right to a court' would be 'illusory' if a final judgment were allowed to remain inoperative to the detriment of one party and that 'to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention'.

The cases have concerned such matters as the execution by the state of judgments requiring its authorities to pay compensation[252] or to provide public housing.[253] In *Okyay v Turkey*,[254] there was a breach of Article 6 where the administrative authorities failed to comply with court orders upheld by the Supreme Administrative Court for the closure of state power plants, which were causing pollution. A Turkish Council of Ministers' decision that the plants should continue to operate despite the court orders was stated by the Strasbourg Court in a strongly worded judgment to be 'obviously unlawful under

[245] *König v Germany* A 27 (1978); 2 EHRR 170 PC. Cf *Schouten and Meldrum v Netherlands* A 304 (1994); 19 EHRR 432 para 62. See also *Erkner and Hofauer v Austria* A 117 (1987); 9 EHRR 464 para 64.

[246] See *Wiesinger v Austria* A 213 (1991); 16 EHRR 258.

[247] *Silva Pontes v Portugal* A 286-A (1994); 18 EHRR 156 para 33.

[248] *Robins v UK* 1997-V; 26 EHRR 527 and *Ziegler v Switzerland* hudoc (2002). Proceedings for the award of costs where the applicant had withdrawn her claim were held not to fall within Article 6 in *Alsterlund v Sweden No 12446/86* 56 DR 229 (1988).

[249] *König v Germany* A 27 (1978); 2 EHRR 170 para 98 PC. In *Pretto and Others v Italy* A 71 (1983); 6 EHRR 182 para 30 PC the 'reasonable time' guarantee ran until the Court of Cassation judgment was deposited with the court registry, whereupon it became public.

[250] *Pugliese v Italy (No 2)* A 206-A (1991) para 16. See also *Lorenzi, Bernardini and Gritti v Italy* A 231-G (1992).

[251] 1997-II; 24 EHRR 250 para 40. *Hornsby* only applies to final judgments; any appeal possibilities must be exhausted first: *Ouzounis v Greece* hudoc (2002). Article 6 applies to a request for a stay of execution: *Central Mediterranean Development Corp v Malta (No 2)* hudoc (2011) para 21. See also *Roşiianu v Romania* hudoc (2014).

[252] *Burdov v Russia* 2002-III; 38 EHRR 644. See also *Liseytseva and Maslov v Russia* hudoc (2014) (judgment debts).

[253] *Teteriny v Russia* hudoc (2005) and *Tchokontio Happi v France* hudoc (2015). See also *Saccoccia v Austria* hudoc (2008) (*Hornsby* extends to the enforcement of foreign judgments).

[254] 2005-VII; 43 EHRR 788 para 73.

domestic law', resulting in a situation that 'adversely affects the principle of a law-based state, founded on the rule of law and the principle of legal certainty'.

Under *Hornsby*, the state must also ensure the execution of judgments against third parties who are not state actors, so that, for example, it must take action to ensure that private persons comply with judgments against them for the payment of compensation,[255] the payment of divorce maintenance,[256] the transfer of custody of an adopted child,[257] the eviction of tenants,[258] and the demolition of houses built without planning permission.[259] In *Turczanik v Poland*,[260] the state was required to ensure that a bar association allocated a barrister to chambers as required by a court judgment. The state must act itself; it cannot require the litigant to initiate enforcement proceedings.[261] Police assistance must be provided for court bailiffs where this is needed.[262] No particular procedure for execution is required; the Court looks only to see that the procedure followed by the state is adequate and effective.[263] Lack of available state funds[264] or other resources[265] or impractability[266] are not good reasons for the state's failure to execute a judgment against it. But a delay in the execution of a judgment may be justified 'in particular circumstances', provided that the delay does not 'impair the essence of the right protected under Article 6'.[267] The onus is on the state to act and to justify any delay.[268] In *Jasiūnienė v Lithuania*,[269] the government's obstructive attitude led to the Court to characterize the non-execution as an 'aggravated' breach of Article 6(1). Delays in the payment of a monetary award against the state of one year or more have been found to be excessive.[270] In *Burdov (No 2) v Russia*,[271] the Strasbourg Court held that the respondent government's failure to satisfy judgment debts for several years after the Court's first judgment in the case in 2002[272] reflected a 'persistent structural dysfunction'. Noting that there were over 700 similar cases pending before it, the Court, following its pilot judgment procedure, required the respondent state to adopt measures to afford adequate and sufficient redress to victims of non-payment in these cases within one year of its 2009 judgment.

[255] *Satka and Others v Greece* hudoc (2003); 38 EHRR 579.

[256] *Romańczyk v France* hudoc (2010). [257] *Pini and Others v Romania* 2004-V; 40 EHRR 312.

[258] *Immobiliare Saffi v Italy* 1999-V; 30 EHRR 756 GC and *Kyrtatos v Greece* 2003-IV; 40 EHRR 390. See also *Popov v Moldova (No 1)* hudoc (2005) (return of house to pre-Soviet owners).

[259] *Antonetto v Italy* hudoc (2000); 36 EHRR 120. [260] 2005-VI; 52 EHRR 432.

[261] *Beshiri v Albania* hudoc (2006) paras 58–67.

[262] *Immobiliare Saffi v Italy* 1999-V; 30 EHRR 756 GC. Cf *Matheus v France* hudoc (2005).

[263] *Fociac v Romania* hudoc (2005).

[264] *Burdov v Russia* 2002-III; 38 EHRR 639. See also *Jeličić v Bosnia and Herzegovina* hudoc (2006) para 42 (impact on public debt not an excuse). A requirement that a litigant pay the cost of enforcement violated the right of access to a court: *Apostol v Georgia* 2006-XIV.

[265] For instance, public housing: *Shpakovskiy v Russia* hudoc (2005).

[266] The state must look for 'alternative solutions': *Cingilli Holding AŞ and Cingillioğlu v Turkey* hudoc (2015) para 41 (return of property to previous owners not possible).

[267] *Burdov v Russia* 2002-III; 38 EHRR 639 para 35. The conduct of the parties may excuse some delay: *Jasiūnienė v Lithuania* hudoc (2003). Failure to provide the applicant with a flat when its construction had been delayed through no fault of the state was not a violation: *Volnykh v Russia* hudoc (2009).

[268] *Dubenko v Ukraine* hudoc (2005). The state's obligation to execute a judgment expeditiously increases with the applicant's need: *Dubenko v Ukraine* (money to avoid bankruptcy) and *Shmalko v Ukraine* hudoc (2004) (payment for medication).

[269] Hudoc (2003) para 30 (state disputed Strasbourg Court judgment). See also *Hirschhorn v Romania* hudoc (2007) para 58.

[270] *Yuriy Nikolayevich Ivanov v Ukraine* hudoc (2009). Judgments requiring compensation as redress for earlier court delays should be executed within six months: *Cocchiarella v Italy* 2006-V GC.

[271] Hudoc (2009) para 134. Cf *Yuriy Nikolayevich Ivanov v Ukraine* hudoc (2009) (similar pilot judgment).

[272] *Burdov v Russia* 2002-III; 38 EHRR 639.

As well as the execution of final judgments, Article 6 may also apply to some preliminary proceedings. In *Micallef v Malta*,[273] reversing earlier case law, the Court held that Article 6 applies to requests for interim measures, such as injunctions, where the 'measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force'. However, the Court accepted that 'in exceptional cases—where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process—it may not be possible immediately to comply with all of the requirements of Article 6'. In this situation, while the independence and impartiality of the tribunal was 'an indispensable and inalienable safeguard' which must always apply, 'other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue'.[274] The ruling in the *Micallef* case is to be welcomed as being in accordance with a right of effective access to a court and a purposive, human rights reading of the Convention. Earlier Court rulings concerning preliminary proceedings that do not effectively determine a civil right or obligation, such as a challenge to the appointment of an investigating judge,[275] would seem to remain intact. The reasonable time guarantee in Article 6 applies to interim measures proceedings within the *Micallef* case. The question whether the reasonable time guarantee applies to a pre-trial application for legal aid in respect of litigation concerning a 'civil' right or obligation was left open in *H v France*.[276]

3. ARTICLE 6(1): GUARANTEES IN CRIMINAL AND NON-CRIMINAL CASES

1. THE RIGHT OF ACCESS TO A COURT

a. The *Golder* case

One of the most creative steps taken by the European Court in its interpretation of any article of the Convention has been its ruling in *Golder v UK*[277] that Article 6(1) guarantees the right of access to a court. In that case, a convicted prisoner was refused permission by the Home Secretary to write to a solicitor with a view to instituting civil proceedings in libel against a prison officer. The Court held that the refusal raised an issue under Article 6(1) because that provision concerned not only the conduct of proceedings in court once they had been instituted, but also the right to institute them in the first place. Although there was no express mention of the right of access in Article 6, its protection could be inferred from the text.[278] It was also a key feature of the concept of the 'rule of law', which, as the preamble to the Convention stated, was a part of the 'common heritage' of Council of Europe states. Moreover, any other interpretation would contradict a universally recognized principle of law and would allow a state to close its courts without infringing the

[273] 2009-; 50 EHRR 920 GC para 85. Cf *Mercieca and Others v Malta* hudoc (2011) and *RTBF v Belgium* hudoc (2011). See also *Markass Car Hire v Cyprus No 51591/99* hudoc (2001) DA.

[274] *Micallef v Malta* 2009-; 50 EHRR 920 para 86 GC. It would be for the respondent state to show that a safeguard could be dispensed with: *ibid* para 86.

[275] *Schreiber and Boetsch v France No 58751/00*, 2003-XII DA. Applications to re-open a case (*Rudan v Croatia No 45943/99* hudoc (2001) DA) remain excluded. But Article 6 does apply to the re-opened proceedings: *Kaisti v Finland No 70313/01* hudoc (2004) DA.

[276] A 162-A (1989); 12 EHRR 74 para 49. See further *Gutfreund v France* 2003-VII; 42 EHRR 1076 paras 38–44.

[277] A 18 (1975); 1 EHRR 524 PC.

[278] The wording '*à ce que sa cause soit entendue*' in the French text provided the clearest textual indication.

Convention.[279] Despite cogent arguments to the contrary by the dissenting judges,[280] the Court's judgment has long been unquestioned and provides a secure foundation for the full guarantee of the 'right to a court'.[281] The right of access applies to such appeal proceedings as exist, as well as proceedings at first instance.[282]

The right was established and retains most of its significance in connection with the determination of 'civil rights and obligations'. Cases may concern private litigation, as in the *Golder* case, or claims against the state, including claims arising out of administrative decisions.[283] If the law compels the parties to a civil dispute to go to arbitration instead of the courts, the arbitration tribunal must comply with Article 6.[284] But voluntary arbitration is not governed by Article 6, so long as the provision for arbitration has this effect and the resulting waiver is truly voluntary, unequivocal, and subject to appropriate safeguards.[285]

The right of access also applies to criminal cases, where it means that the accused is entitled to be tried on the charge against him in a court.[286] The right of access does not include the right to bring a private criminal prosecution, since Article 6 is concerned only with a criminal charge against an accused.

The right of access means access in fact, as well as in law. It was for this reason that there was a breach of Article 6(1) in the *Golder* case.[287] Whereas the applicant was able in law to institute libel proceedings in the High Court, the refusal to let him contact a solicitor impeded his access to the courts in fact. It did not matter that, strictly speaking, the applicant's complaint was of an interference with his right of access to a solicitor, not the courts;[288] that he might have made contact with his solicitor other than by correspondence; that after doing so he might never have instituted court proceedings at all; or that the applicant would have been able to have written to his solicitor before his claim became statute-barred after his release from prison. A partial or temporary hindrance may thus be a breach of the right of access to a court.

b. A right of effective access

As the ruling in the *Golder* case also indicates, the right is a right of effective access to the courts. This may entail legal assistance, as was established in *Airey v Ireland*.[289] In that case, a wife who was indigent was refused legal aid to bring proceedings in the Irish High Court

[279] See *Khamidov v Russia* 2007-XX; 49 EHRR 284 (Chechen courts closed for 15 months in the emergency).

[280] See the separate opinions of Judges Verdross, Fitzmaurice, and Zekia. The last two of these judges noted, *inter alia*, that in some other instruments in which it had been intended to include the right of access, a separate provision had been inserted in addition to the equivalent of Article 6.

[281] By this term is meant the right of access to a court and the guarantees in Article 6 once proceedings are instituted: *Golder v UK* A 18 (1975); 1 EHRR 524 para 36 PC.

[282] See, eg, *Siałkowska v Poland* hudoc (2007); 51 EHRR 473.

[283] See, eg, *Sporrong and Lönnroth v Sweden* A 52 (1982); 5 EHRR 35 PC (no appeal to a court against expropriation permit).

[284] *Bramelid and Malmström v Sweden Nos 8588/79 and 8589/79*, 38 DR 18 (1983). Cf *Scarth v UK* hudoc (1999); 27 EHRR CD 37. An agreement to go to arbitration does not deprive an opposing third-party minority shareholder of Article 6 rights: *Suda v Czech Republic* hudoc (2010).

[285] *Tabbane v Switzerland No 41069/12* hudoc (2016) DA.

[286] *Deweer v Belgium* A 35 (1980); 2 EHRR 439. See also *Anagnostopoulos v Greece* hudoc (2003).

[287] Similar breaches of the right of access have been found in other UK prisoner cases involving restrictions on contact with solicitors: see, eg, *Silver and Others v UK* A 61 (1983); 5 EHRR 347. See also *Grace v UK No 11523/85*, 62 DR 22 (1988); Com Rep; CM Res DH (89) 21. The 'prior ventilation rule', by which prisoners were required to exhaust prison complaints procedures before resorting to the courts, also infringed it: *Campbell and Fell v UK* A 80 (1984); 7 EHRR 165.

[288] As the Court noted, the applicant could institute court proceedings without recourse to a solicitor.

[289] A 32 (1979); 2 EHRR 305. See Thornberry, 29 ICLQ 250 (1980).

for an order of judicial separation. Given the particular nature of the proceedings,[290] the Court held that, for the applicant's access to court to be effective, she required legal representation, which for an indigent person meant free legal representation.[291] The Court rejected the respondent government's argument that the right of access to a court does not impose positive obligations upon states, particularly ones with considerable economic consequences, such as that to provide free legal aid.[292]

In the *Airey* case, the Court stressed that it was not deciding that the right of access provided a full right to legal aid in civil litigation comparable to that specifically provided by Article 6(3)(c) in criminal cases. Instead, 'Article 6(1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court.'[293] This will certainly be the case where legal representation is required by national law.[294] In other situations, the need for legal assistance must, as stated in *Steel and Morris v UK*,[295] be determined by reference to the facts of each case and 'will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'. Legal aid will not be required where there is no arguable case on the facts.[296] Nor does the right of access require the provision of legal aid where the claim by the applicant involves an abuse of the law[297] or of the legal aid system.[298] Legal aid for legal persons in civil cases would not appear to be required.[299]

In *Steel and Morris*, McDonald's, the fast food chain, successfully brought an action for defamation against the two applicants for criticism of McDonald's on environmental and social grounds in a leaflet that was part of a London Greenpeace campaign, and was awarded a total of £76,000 damages against them personally. The Court upheld the applicants' claim that the UK had infringed Article 6(1) by refusing legal aid to the applicants, who were indigent. First, there was a lot 'at stake' financially for the applicants, who were of very modest means, with McDonald's claiming £100,000 damages. Second, the facts and the law in the case were complicated, with voluminous documentation and over 300 days of court hearings, some 100 of which were on legal argument. Third, although the applicants, who represented themselves, were articulate and resourceful and had some *pro bono* help from lawyers, the 'disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's . . . could not have failed, in this exceptionally demanding case, to have given rise to unfairness'.[300] The *Steel and Morris* case marks a departure

[290] The Court emphasized the complexity of the proceedings, the need to examine expert witnesses, and the emotional involvement of the parties. Cf *P, C and S v UK* 2002-VI; 35 EHRR 1075 (childcare and adoption proceedings; legal aid required). Contrast *Webb v UK No 9353/81*, 33 DR 133 (1983).

[291] Ireland had made a reservation concerning criminal legal aid, which is expressly provided for in Article 6(3)(c). It did not anticipate the *Airey* judgment.

[292] But it was recognized in *P, C and S v UK* 2002-VI; 35 EHRR 1075 para 90, that 'limited public funds' may require 'a procedure of selection'.

[293] *Airey v Ireland* A 32 (1979); 2 EHRR 305 para 26.

[294] *ibid.* Cf *Aerts v Belgium* 1998-V; 29 EHRR 50; *Staroszczyk v Poland* hudoc (2007); 50 EHRR 114; and *Tabor v Poland* hudoc (2006).

[295] 2005-II; 41 EHRR 403 para 61. See also *Bakan v Turkey* hudoc (2007) (courts's reasons for refusal questioned). In *Faulkner v UK* hudoc (1999) (F Sett before the Court), Guernsey agreed to establish for the first time a civil legal aid system after the applicant was denied legal aid to bring proceedings for false imprisonment, etc.

[296] *Gnahoré v France* 2000-IX; 34 EHRR 967. See also *Del Sol v France* 2002-II; 35 EHRR 1281 and *Stewart-Brady v UK Nos 27436/95 and 28406/95*, 90-A DR 45 (1997).

[297] *W v Germany No 11564/85*, 45 DR 291 (1985).

[298] *Sujeeun v UK No 27788/95* hudoc (1996) DA.

[299] *Granos Organicos Nacionales SA v Germany* hudoc (2012).

[300] *Steel and Morris v UK* 2005-II; 41 EHRR 403 para 69.

from a series of earlier defamation cases, mostly brought by plaintiffs, not defendants, in which the Commission or the Court found that legal aid was not required.[301] Key to the decision in the *Steel and Morris* case were the particularly strong and sympathetic facts.

Where the right of access does require legal assistance to ensure a fair hearing, Article 6 leaves states 'a free choice of the means' to be used towards this end: 'a legal aid scheme' is only one possibility.[302] Thus an *ex gratia* offer of legal aid in the particular case may be sufficient,[303] or proceedings may be simplified to avoid the need for legal assistance at all.[304] In *A v UK*,[305] the Court held that the availability of two hours' free legal advice under the 'green form' scheme together with the possibility thereafter of engaging a solicitor on a conditional fee basis was sufficient to provide the applicant with effective access to a court in her defamation claim. Where the applicant qualifies for the assistance of a lawyer under the national system, the state has an obligation to appoint a legal aid lawyer who will actually take up the case. Thus, in *Bertuzzi v France*,[306] the applicant was denied 'effective access' to a court where another legal aid lawyer was not appointed after three lawyers had refused to act because of their personal links with the lawyer whom the applicant was suing.

The need for access to the courts to be effective has also been in issue in a variety of contexts other than legal assistance. Thus, the right of access is infringed not only when the applicant is not allowed to commence proceedings, but also when proceedings are stayed by the state for an unduly long period of time. In such cases, the right of access to a court and the right to trial within a reasonable time may both apply.[307] In *Kutić v Croatia*,[308] a civil claim for damage to property was stayed by statute pending the enactment of legislation governing claims for damage resulting from terrorist acts. It was held that the right of effective access had been infringed because six years had passed without any legislation being enacted.[309] In a case of quite a different kind there was a violation of the right of effective access when the plaintiffs were not permitted to register their claims electronically when the documents presenting the claim amounted to 40 million pages and concerned many thousands of persons.[310] In other cases there was a violation where a court, without giving reasons or explanations, simply refused to receive a litigant's pleadings[311] or declined to hear a case as being improperly submitted.[312] A requirement that a litigant provide a residential address violated the right of access of an applicant who lacked any such address but who could provide an address for correspondence.[313] Lack of access to a court building for a disabled person may be in breach of the right of access.[314] Finally, there was a breach of the right of access when the Albanian Constitutional Court was unable to reach agreement on a decision on the applicant's appeal, thereby depriving him of a final decision in his case.[315]

[301] See *McVicar v UK* 2002-III; 35 EHRR 566; *Munro v UK No 10594/83*, 52 DR 158 (1987); and *Winer v UK No 10871/84*, 48 DR 154 (1986).

[302] *A v UK* 2002-X; 36 EHRR 917 para 98.

[303] *Andronicou and Constantinou v Cyprus* 1997-VI; 25 EHRR 491.

[304] *Airey v Ireland* A 32 (1979); 2 EHRR 305 para 26.

[305] 2002-X; 36 EHRR 917.

[306] 2003-III para 32. See also *AB v Slovakia* hudoc (2003) and *Renda Martins v Portugal No 50085/99* hudoc (2002) DA (refusal for lack of cooperation permissible).

[307] See, eg, *Kristiansen and Tyvik AS v Norway* hudoc (2013) (case decided under right of access).

[308] 2002-II. Cf *Aćimović v Croatia* 2003-XI; 39 EHRR 555.

[309] See also *Ganci v Italy* 2003-XII; 41 EHRR 272 and *Musumeci v Italy* hudoc (2005).

[310] *Lawyer Partners AS v Slovakia* hudoc (2009).

[311] *Dunayev v Russia* hudoc (2007).

[312] *Blumberga v Latvia* hudoc (2008).

[313] *Sergey Smirnov v Russia* hudoc (2009).

[314] *Farcaş v Romania No 32596/04* hudoc (2010) DA (no violation).

[315] *Marini v Albania* 2007-XX. See also *Dubinskaya v Russia* hudoc (2006) (claim registered but no record of any decision).

The right of effective access also supposes that there is a 'coherent system' governing recourse to the courts that is sufficiently certain in its requirements for litigants to have 'a clear, practical and effective opportunity' to go to court.[316] A number of cases in which uncertainty in the law or its application or procedures has led litigants to act in a way that has prejudiced their access to a court have been decided in their favour on this basis.[317] The right of access also requires that the state take reasonable steps to serve documents on the parties to proceedings and to inform them of the dates of hearings and of decisions.[318] Non-compliance with the principle of res *judicata* within a judicial system may also be in breach of the right of access to a court.[319]

c. Restrictions upon the right of access

The right is not an absolute one. Restrictions may be imposed as the right of access 'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals'.[320] As indicated in *Ashingdane v UK*,[321] in imposing restrictions, the state is allowed a certain 'margin of appreciation' but any restriction must not be such that 'the very essence of the right is impaired'. In addition, a restriction must have a 'legitimate aim' and comply with the principle of proportionality, ie there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[322] In the *Ashingdane* case, the applicant instituted civil proceedings challenging the Secretary of State's decision under the Mental Health Act 1959 in effect to continue to detain him in a secure mental hospital. However, there was no liability under the Act for acts done under it in the absence of bad faith or reasonable care. Moreover, a claim in respect of such an act could not be brought unless the High Court gave leave, which it could do only if it were satisfied that there were 'substantial grounds' for believing that these conditions were met. The Court held that these limitations on the right of access to a court were not in breach of the right. The limitation of liability under the Act had the 'legitimate aim' of preventing those caring for mental patients from being unfairly harassed by litigation and the availability of a claim only in a case of bad faith or lack of reasonable care both left intact the essence of the right to institute proceedings and was consistent with the principle of proportionality.

In accordance with the *Ashingdane* approach, restrictions upon access to the courts by *certain categories of persons* have been allowed or countenanced in principle if they

[316] *De Geouffre de la Pradelle v France* A 253-B (1992) para 34 (appeal out of time because of uncertainty as to the applicable procedure). See also *Davran v Turkey* hudoc (2009) and *Stegarescu and Bahrin v Portugal* hudoc (2010).

[317] See, eg, *FE v France* 1998-VIII; 29 EHRR 591 para 40. Cf *Bellet v France* A 333-B (1995). See also *Beneficio Cappella Paolini v San Marino* 2004-VIII (uncertainty as to competent court); *Levages Prestations Services v France* 1996-V; 24 EHRR 351 (uncertainty as to required documents: no breach); *Serghides and Christoforou v Cyprus* hudoc (2002); 37 EHRR 873 (applicant not told of land expropriation, so could not meet time limit). Some time limit and other cases of procedural uncertainty are decided on a 'disproportionate restriction' basis instead.

[318] See *Sukhorubchenko v Russia* hudoc (2005); *Assunção Chaves v Portugal* hudoc 2012; and *Kulikowski v Poland* hudoc (2009). See also *Hennings v Germany* A 251-A (1992); 16 EHRR 83 and *Zavodnik v Slovenia* hudoc (2015) para 81.

[319] See this chapter, section 2.II.m, p 433.

[320] *Golder v UK* A 18 (1975); 1 EHRR 524 para 38 PC.

[321] A 93 (1985); 7 EHRR 528 para 57. Cf *Stanev v Bulgaria* 2012- GC para 230. The 'very essence' requirement overlaps with the 'effective' right requirement: see *De Geouffre de la Pradelle v France* A 253-B (1992), where the Court used both terms.

[322] *Ashingdane v UK*, para 57. Cf *Lithgow v UK* A 102 (1986); 8 EHRR 329 para 194 PC.

are proportionate.[323] Restrictions upon access by mentally incapacitated persons may be imposed, but in *Stanev v Bulgaria*[324] the Grand Chamber noted that there was 'a trend at European level' to allow them direct access in proceedings for the restoration of their legal capacity. However, in *RP and Others v UK*,[325] it was held that representation of the applicant, who had learning disabilities, by the Official Solicitor in childcare proceedings complied with Article 6, given that the applicant could challenge the decision to appoint the Official Solicitor.

The limitation of the right to bring proceedings to *particular interested parties*, to the exclusion of others, may be a breach of the right of access. Thus a law that barred certain Greek monasteries from bringing legal proceedings in respect of their property, giving the right to the Greek Church instead, was a breach of the monasteries' right of access, depriving them of the 'very essence' of the right.[326] *A fortiori*, a judicial decision by which a church was deprived of its legal personality, which prevented it from bringing any civil proceedings, was a breach.[327] In a different context, restrictions imposed on a managing director or shareholders who sought to question the liquidation or winding up of a company were held to be disproportionate.[328] Likewise, a residential or other requirement imposed on a foreign company wishing to go to court may be such as to deprive it of the essence of the right.[329]

Restrictions on the bringing of claims by *all litigants*[330] are acceptable if proportionate. Thus requirements that an appeal be lodged by a lawyer[331] or that a litigant pay a fee to bring a case[332] or as security for costs,[333] provided that the amount is reasonably proportionate, are permissible, as is a fine for an abusive appeal,[334] a requirement to settle a civil claim against the state being taking it to court,[335] and a limitation of a constitutional right of appeal to important cases.[336] Restrictions on the level of damages available in civil claims are also permissible.[337]

[323] See *Golder v UK* A 18 (1975); 1 EHRR 524 (prisoners, minors) PC; *Luordo v Italy* 2003-IX; 41 EHRR 547 (bankrupts); *H v UK No 11559/85*, 45 DR 281 (1985) (vexatious litigants); *Carnduff v UK No 18905/02* hudoc (2004) DA (police informers).

[324] 2012-; 55 EHRR 696 para 243 GC. Cf *Shtukaturov v Russia* 2008-; 54 EHRR 962; *DD v Lithuania* hudoc (2012); and *Nataliya Mikhaylenko v Ukraine* hudoc (2013). See also *X and Y v Croatia* hudoc (2011) and *AN v Lithuania* hudoc (2016).

[325] Hudoc (2012).

[326] *Holy Monasteries v Greece* A 301-A (1994); 20 EHRR 1 para 83. See also *Sâmbata Bihor Greek Catholic Parish v Romania* hudoc (2010); *Philis v Greece* A 209 (1991); 13 EHRR 741; and *Związek Nauczycielstwa Polskiego v Poland* 2004-IX; 38 EHRR 122.

[327] *Canea Catholic Church v Greece* 1997-VIII; 27 EHRR 521.

[328] *Arma v France* hudoc (2007) and *Kohlhofer and Minarik v Czech Republic* hudoc (2009).

[329] *Ligue du monde islamique et al v France* hudoc (2009).

[330] *Stedman v UK No 29107/95*, 89-A DR 104 (1997); 23 EHRR CD 168 (two years' employment for unfair dismissal claims). See also *Clunis v UK No 45149/98* hudoc (2001) DA (*ex turpi causa* limitation).

[331] *Gillow v UK* A 109 (1986); 11 EHRR 335. A requirement that a litigant pay damages awarded at first instance before appealing may be acceptable depending on whether their means allow this: *Annoni di Gussola v France* 2000-XI and *Gray v France No 27338/11* hudoc (2013) DA.

[332] *Kreuz v Poland (No 1)* 2001-VI; *Urbanek v Austria* hudoc (2010); and *Podbielski and PPU Polpure v Poland* hudoc (2005). See also *Weissman v Romania* 2006-VII (stamp duty).

[333] *Tolstoy Miloslavsky v UK* A 316-B (1995); 20 EHRR 442; *Aït-Mouhoub v France* 1998-VI; 1999 EHRLR 215; and *Grepne v UK* No 17070/90, 66 DR 268 (1990).

[334] *Les Travaux du Midi v France No 12275/86*, 70 DR 47 (1991) and *Toyaksi and Others v Turkey Nos 43569/08 et al* hudoc (2010) DA. See also *Sace Elektrik Ticaret Ve Sanayi AŞ v Turkey* hudoc (2013).

[335] *Momčilović v Croatia* hudoc (2015).

[336] *Arribas Anton v Spain* hudoc (2015). See also *Papaioannou v Greece* hudoc (2016). And see *Valchev v Bulgaria Nos 47450/04 et al* hudoc (2014) paras 87–91 DA.

[337] *Manners v UK No 37650/97* hudoc (1998); 26 EHRR CD 200 (Warsaw Convention limit).

In other lack-of-access cases, there was a breach of the right of access when the refusal of the applicant's request to have his fixed penalty speeding fine referred to a court was based upon an error of law[338] and where a foreign litigant without a lawyer was not given information as to his right of appeal.[339] In an unusual case, the applicant was held to have been deprived of the 'very essence' of his right of access when a court declined, without giving any plausible reasons, to hear his claim on the ground that it should be heard in the courts of another country.[340]

The right of access also requires that ambiguous procedural requirements governing recourse to the courts should not be given a 'particularly strict' interpretation[341] or unnecessarily strict application[342] so as to prevent litigants making use of an available remedy. Most cases have concerned time limits for the bringing of first-instance or appeal proceedings;[343] others have concerned factual or clerical errors by a litigant.[344] A time limit which the applicant could not reasonably have been expected to meet will be a breach of the right of access,[345] but clear and avoidable errors by a litigant will not.[346] Time limits in themselves are permissible[347] if they meet the requirement of proportionality, with a margin of appreciation being justified because of the variation in practice in European states. In *Stubbings v UK*,[348] a time limit for civil claims of childhood sexual abuse of six years from attaining the age of 18 was proportionate. Time limits for proceedings to determine paternity are permissible, but they must not place an 'excessive burden' on the applicant.[349] Reasonable requirements as to the statement of grounds for an appeal are not contrary to the right of access.[350]

Positive state action in the form of legislation with retroactive application that is designed to defeat a litigant's claim in the courts is also in breach of the right of access, unless it can be justified as a proportionate limitation on 'compelling' public interest grounds.[351] Most such cases have, however, been treated as involving a

[338] *Peltier v France* hudoc (2002); 37 EHRR 197. See also *Mortier v France* hudoc (2001); 35 EHRR 163; *Liakopoulou v Greece* hudoc (2006); and *Celice v France* hudoc (2012) (speeding fine: error by official).

[339] *Assunção Chaves v Portugal* hudoc (2012) para 87.

[340] *Zylkov v Russia* hudoc (2011). See also *Arlewin v Sweden* hudoc (2016) (no liability for defamation in TV programme broadcast from abroad).

[341] *Běleš and Others v Czech Republic* 2002-IX para 51.

[342] *Pérez de Rada Cavanilles v Spain* 1998-VIII; 29 EHRR 109 para 49. See also *Yagtzilar and Others v Greece* hudoc 2001-XII and *Zvolsky and Zvolska v Czech Republic* hudoc (2012) para 54.

[343] See, eg, *Miragall Escolano and Others v Spain* 2000-I; 34 EHRR 658; *Tricard v France* hudoc (2001); 37 EHRR 388; *Zemanová v Czech Republic* hudoc (2005); and *Mikulová v Slovakia* hudoc (2005).

[344] See, eg, *Kadlec and Others v Czech Republic* hudoc (2004); *'Sotiris et Nikos Koutras ATTEE' v Greece* 2000-XII; 36 EHRR 410; and *Saez Maeso v Spain* hudoc (2004). Administrative errors by the state must also not disadvantage the applicant: *Platakou v Greece* 2001-I.

[345] *Neshev v Bulgaria* hudoc (2004) and *Tsironis v Greece* hudoc (2001); 37 EHRR 183. See also *Cañete de Goñi v Spain* 2002-VIII and *AEPI SA v Greece* hudoc (2002). And see *Howald Moor v Switzerland* hudoc (2014) (time limit for asbestos claim did not take account of delay in diagnosis) and *Sefer Yilmaz and Meryem Yilmaz v Turkey* hudoc (2015).

[346] *Edificaciones March Gallego SA v Spain* 1998-I; 33 EHRR 1105. But see *Marc Brauer v Germany* hudoc (2016) para 43 (exception made for mentally ill applicant).

[347] They may even be *required* by the principle of legal certainty: see *Oleksandr Volkov v Ukraine* hudoc (2013) para 145.

[348] 1996-IV; 23 EHRR 213.

[349] *Mizzi v Malta* 2006-I; 46 EHRR 429 para 89 (six months from birth a 'practical impossibility' for applicant). See also *X v Sweden No 9707/82* 31 DR 223 (1982) DA (three-year limit reasonable).

[350] *Trevisanato v Italy* hudoc (2016) (final summing up paragraph required).

[351] *National and Provincial Building Society et al v UK* 1997-VII; 25 EHRR 127 para 112 (retroactive legislation to fill a tax loophole justified in the public interest). Procedural changes do not infringe the right of access as there is a 'generally recognized principle' that they apply to pending cases: *Brualla Gómez de la Torre v Spain* 1997-VIII; 33 EHRR 1341.

breach of the 'principle of the rule of law and the notion of a fair trial enshrined in Article 6', rather than as a breach of the right of access. The overturning of a court judgment that is *res judicata* has sometimes been considered as infringing the right of access,[352] but has generally been regarded as being contrary to the right to a 'fair hearing' instead.

A procedural bar that takes the form of a defence that may be pleaded by the defendant is another kind of restriction upon the right of access to a court—one that has given rise to some important rulings. Whether the defence is consistent with the right of access turns upon whether it meets the *Ashingdane* requirements indicated earlier in this section. This approach was first adopted by the Court in *Fayed v UK*, as noted earlier,[353] concerning an immunity defence in defamation proceedings.[354]

The same approach has been used to justify parliamentary, head of state, and state immunity and the immunity of international organizations from legal proceedings. As to *parliamentary immunity*, in *A v UK*,[355] it was held that absolute immunity for Westminster Members of Parliament from a claim in defamation for their statements in proceedings in Parliament was not a breach of Article 6. It had the legitimate aims of securing the freedom of speech of MPs on matters of public interest—which is a matter of great importance in a democracy—and of maintaining the separation of powers of the legislature and the judiciary. Although absolute and extending to both civil and criminal proceedings, the immunity did not exceed the margin of appreciation: it could be justified as a proportionate restriction on the right of access to a court in order to achieve these aims, particularly as it extended only to statements *in* Parliament. Also relevant was the fact that the immunity was 'consistent with and reflects generally recognised rules within signatory states, the Council of Europe and Members of the European Parliament'.[356] An immunity that extends to statements made by parliamentarians *outside* of Parliament is given closer scrutiny.[357] Similarly, the grant of parliamentary immunity in a dispute over child custody was a violation, as it had no relation to parliamentary activity.[358]

As to *head-of-state immunity*, it is permissible to allow a head of state functional immunity from civil liability during their term of office to protect their freedom of speech provided that the immunity is 'regulated and interpreted in a clear and restrictive manner'; as in the case of parliamentary immunity there must be a 'fair balance between the competing interests'.[359]

As to *state immunity*, the immunity of states from civil proceedings in the courts of other states that is granted in accordance with international law has been held to be a proportionate restriction on the right of access to a court, with the legitimate aim of promoting comity and good relations among states. Thus immunity from civil process in a tort claim for personal

[352] See, eg, *Ryabykh v Russia* 2003-XI; 40 EHRR 615.

[353] This chapter, section 2.II.b, p 391.

[354] See also *Taylor v UK No 49589/99* hudoc (2003); 38 EHRR CD 25 DA; *Mahon and Kent v UK No 70434/01* hudoc (2003) DA; and *Mond v UK No 49606/99* hudoc (2003) DA.

[355] 2002-X; 36 EHRR 917. See also *Young v Ireland* hudoc (1996); 84 DR 122 (1996). Cf *Esposito v Italy* 1997-IV.

[356] *A v UK*, *ibid* para 83. The Court also noted that there was an alternative contempt of parliament remedy, but this was not crucial to its decision: see *Zollmann v UK No 62902/00* hudoc (2003) DA.

[357] *Cordova v Italy (No 2)* 2003-I (senator's statement at election meeting). See also *Cordova v Italy (No 1)* 2003-I; *De Jorio v Italy* hudoc (2004); 40 EHRR 961; *CGIL and Cofferati v Italy* hudoc (2009).

[358] *Syngelidis v Greece* hudoc (2010).

[359] *Urechean and Pavlicenco v Moldova* hudoc (2014) para 44 (President's immunity 'perpetual and absolute': violation).

injury against a foreign state and one of its soldiers,[360] a claim against the German Government for payment for forced labour during World War II,[361] and a claim, in *Fogarty v UK*,[362] concerning the recruitment of a local national for employment as a secretary in a foreign diplomatic mission were not in breach of the right of access.[363] For a state immunity defence in civil cases to be accepted as consistent with Article 6, the national court must examine it by reference to the relevant international law rules and give relevant and sufficient reasons for it.[364]

The controversial case of *Al-Adsani v UK*[365] concerned state immunity from civil proceedings in tort for acts amounting to torture. In that case the applicant brought a claim in tort against the state of Kuwait in the English courts in respect of torture allegedly committed in Kuwait by state agents. However, the respondent state successfully pleaded state immunity, this being a defence available to states in English law, as required by long-established customary international law. The Grand Chamber, by just nine votes to eight, held that this restriction on the right of access was permissible. It held that a rule of state immunity in national civil proceedings had the legitimate aim of 'complying with international law to promote comity and good relations between states through the respect of another state's sovereignty'.[366] As to proportionality, measures taken by a state to comply with its obligations under the international law of state immunity could not 'in principle' be regarded as disproportionate.[367] As to these obligations, the Court noted that the prohibition of torture in customary international law had become a peremptory norm (*ius cogens*) and that there were judicial precedents suggesting that customary international law had been modified to the point where a claim of state immunity could not bar *criminal* proceedings against an individual for acts of torture. However, the Court could find no evidence of a similar development in the context of *civil* proceedings, so that a state retained its absolute immunity from civil suit in the courts of another state, at least, as on the facts of the case, for acts of torture committed outside of the forum state. The dissenting judges mostly rejected the majority's distinction between criminal and civil proceedings, arguing that the consequences of the prohibition of torture as *ius cogens* was that it was hierarchically superior in customary international law to the law of state immunity and should prevail over the latter generally, so as to remove all of its legal effects, in both civil and criminal cases.[368] The argument of the dissenting judges is persuasive. As suggested by Judge Ferraro Bravo, the Court 'had a golden opportunity to issue a clear and forceful condemnation of all acts of torture'.[369] In *Jones and Others v UK*,[370] the *Al Adsani*

[360] *McElhinney v Ireland* 2001-XI; 34 EHRR 322 GC (Irish policeman injured by British soldier in border incident). Judges Rozakis, Caflisch, Cabral Barreto, Vajić, and Loucaides dissented on the ground that international law no longer imposed a duty on states to grant immunity in tort cases. See also *Kalogeropoulou and Others v Greece and Germany* 2002-X DA. State immunity—again based on international law—extends to the *execution* of judgments against state property: *Manoilescu and Dobrescu v Romania and Russia* 2005-VI DA.

[361] *Grosz v France No 14717/06* hudoc (2009) DA.

[362] 2001-XI; 34 EHRR 302 GC. Distinguished in *Cudak v Lithuania* 2010-; 51 EHRR 418 GC (concerned dismissal, not recruitment). Cf *Sabeh El Leil v France* hudoc (2011); 54 EHRR 449 GC.

[363] See also *Wallishauser v Austria* hudoc (2012) (state immunity rule on the service of documents).

[364] *Oleynikov v Russia* hudoc (2013).

[365] 2001-XI; 34 EHRR 273 GC. See Bates, 3 HRLR (2003) and Voyakis, 52 ICLQ 279 (2003).

[366] *Al-Adsani v UK*, *ibid* para 54. [367] *ibid.*

[368] See the dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić. For further arguments, see the dissenting opinions of Judges Ferraro Bravo and Loucaides.

[369] But for a well-argued presentation of the problems, eg, of execution of judgments, that would have arisen were the dissenting judges to have prevailed, see the dissenting opinion of Judge Pellonpää, joined by Judge Bratza.

[370] Hudoc (2014). As to the immunity of the state itself, the Court was influenced by the ICJ ruling in the *Jurisdictional Immunities of the State* case (*Germany v Italy*), ICJ Rep 2012, p 99, to the same effect as *Al-Adsani*.

immunity was extended to state officials acting in their official capacity. In the *Jones* case, civil claims by the applicants against two prison officers, a deputy prison governor, and the Minister of the Interior in respect of acts of torture allegedly committed against them while in custody in Saudi Arabia were rejected by the English courts on grounds of state immunity. Applying *Al Adsani*, the Court Chamber held that there was no violation of the right of access in Article 6 in respect of the claims against the state itself. It also upheld the ruling of the English courts in respect of the claims against the individual state officials. The Court stated that, although there was 'some emerging support' for an exception, with state practice 'in a state of flux',[371] there remained both a general rule of international law granting immunity from civil suit *ratione materiae* for state officials and, as yet, no exception in cases of torture. In another torture case, in *Nait-Liman v Switzerland*[372] the respondent state's courts declined jurisdiction to hear a claim in tort by a Tunisian national against the state of Tunisia and a government minister for damages for acts of torture allegedly committed in Tunisia on the minister's orders. The Court Chamber held, by four votes to three, that there was no obligation under the Convention against Torture or customary international law requiring the respondent state to recognize universal jurisdiction in torture claims, despite the *ius cogens* character of the prohibition of torture in international law. Accordingly, the applicant had not been deprived of the essence of his right of access.

Immunity from civil proceedings for *international organizations*, in accordance with international law rules concerning their immunity, may also be permissible. In *Waite and Kennedy v Germany*,[373] the existence of an 'alternative means of legal process', or remedy, provided by the European Space Agency Convention was a 'material factor' in the decision that immunity from civil claims brought against the Agency under the respondent state's labour law was proportionate to the legitimate aim of ensuring the proper functioning of an international organization free from interference by individual governments. However, the absence of an alternative remedy was not decisive in *Stichting Mothers of Srebrenica and Others v Netherlands*,[374] although here too immunity for an international organization was allowed. In this case, immunity was granted to the UN by the respondent state's courts in respect of civil claims brought for the failure to prevent genocide and other serious offences in the Srebrenica massacre. The Court distinguished the *Waite and Kennedy* line of cases on the basis that whereas they involved disputes between the organizations and their members of staff, the *Stichting Mothers* case concerned a dispute arising out of a UN operation authorised by the Security Council under Chapter 7 of the UN Charter. 'To bring such operations within the scope of domestic jurisdiction would be to allow individual states, through their courts, to interfere with the fulfilment' of the key mission of the UN to secure international peace and security.

A different kind of immunity, in the form of an executive certificate that was conclusive of an issue before the courts, was the subject of *Tinnelly and McElduff v UK*.[375] In that case, a right of action for damages for discrimination in Northern Ireland did not extend to acts done to protect national security. Whereas this by itself did not present a problem, the Court held that the rule by which an executive certificate to the effect that the act was done for that purpose was conclusive was a disproportionate limitation upon the right of

[371] *Jones and Others v UK*, *ibid* para 213.

[372] Hudoc (2016) para 120. The Grand Chamber confirmed the chamber's judgment by 15 votes to 2: hudoc (2018).

[373] 1999-I; 30 EHRR 261 GC para 72. See also *Beer and Regan v Germany* hudoc (1999); 33 EHRR 54 GC (ESA case); *Chapman v Belgium No 39619/06* hudoc (2013) DA para 56 (NATO); and *Klausecker v Germany* hudoc (2015) paras 105–106 DA (European Patent Office): alternative remedies a factor in each case.

[374] *No 65542/12* hudoc (2013) para 154 DA.

[375] 1998-IV; 27 EHRR 249. Cf *Devlin v UK* hudoc (2001); 34 EHRR 1029 and *Devenney v UK* hudoc (2002); 35 EHRR 643.

access; it would have been possible, as the UK had done in other contexts, to have made special arrangements to provide for an independent judicial, rather than an executive, determination of the facts.

The distinction between the situation where there is no 'legal basis' under national law and that where there is a procedural limitation by way of a defence that may be invoked is sometimes difficult to draw.[376] In *Z v UK*,[377] the applicant children, who brought a civil claim for damages against a local authority for failing to prevent their being abused by their parents, were denied the chance to plead their case on the merits when their claim was struck out by the courts. This followed proceedings in which it was held, deciding a new point of law, that the local authority owed no duty of care in negligence and had no liability for breach of statutory duty in respect of their statutory childcare duties. The Court held that the inability to sue the local authority was not an immunity under the applicable law, in which case questions of a legitimate aim and proportionality would have been relevant, but a case of the absence of a right within the bounds of the substantive law, so that Article 6 did not apply at all. In its judgment in the *Z* case, the Court took the opportunity to signal a reversal of its reasoning in *Osman v UK*.[378] Whereas in *Osman* the Court had ruled that the absolute immunity in English law of police officers from civil liability in negligence was a disproportionate limitation upon the right of access to a court, in *Z v UK*, the Court stated that, in the light of clarification later made by the English judiciary,[379] it now understood this exclusion as deriving from the extent of the duty of care in the substantive law of negligence, not as going to an immunity. As a result, it can be taken that the Court's ruling in *Osman* that the police immunity from liability was in breach of the right of access as being disproportionate because of its absolute nature is no longer good law; instead, Article 6 simply did not apply.

As well as in defence cases, the Court has applied the *Ashingdane* approach where the national courts' jurisdiction has been ousted by treaty. In *Prince Hans Adam II of Liechtenstein v Germany*,[380] the applicant brought a claim in Germany concerning the expropriation by the Czechoslovak authorities of a painting to which he claimed title that was kept in Czechoslovakia, but which was temporarily in Germany for exhibition. The German courts held that, under the Settlement Convention, which was binding upon Germany and the Western Allies, they had no jurisdiction to hear a claim concerning 'German external assets'. Applying *Ashingdane*, the European Court, unanimously, found against the applicant on the basis that the restriction on the German courts' jurisdiction had a legitimate aim—the realization of German sovereignty and unity—and was not disproportionate to that end, given that the natural and most likely forum for such a claim was where the painting was kept, and that a claim had earlier been brought unsuccessfully in the Czechoslovak courts.

The right of access may be restricted in criminal, as well as non-criminal cases. Thus a decision may be taken not to prosecute, or proceedings may be discontinued without infringing Article 6.[381] A practice whereby there is no hearing as to guilt or innocence (only

[376] See, eg, *Markovic v Italy* 2006-XX; 44 EHRR 1045 GC ('act of government' doctrine) and *Roche v UK* 2005-X; 42 EHRR 599 GC. The Court has sometimes declined to make it in cases in which the restriction is disproportionate, so that the outcome does not depend upon it. See, eg, the *Ashingdane* and *Fayed* cases. And see *Lupeni Greek Catholic Parish and Others v Romania* hudoc (2016) para 100 GC.

[377] 2001-V; 34 EHRR 97 GC. Cf *TP and KM v UK* 2001-V; 34 EHRR 42 GC and *DP and JC v UK* hudoc (2002) 36 EHRR 183.

[378] 1998-VIII; 29 EHRR 245 GC.

[379] See *Barrett v Enfield LBC* [1999] 3 WLR 79, in which members of the House of Lords expressed their surprise at the *Osman* judgment.

[380] 2001-VIII GC.

[381] *Deweer v Belgium* A 35 (1980); 2 EHRR 439 para 49. See also *X v UK No 8233/78*, 3 EHRR 271 (1979). Where the discontinuance of proceedings may imply guilt, there may be a breach of Article 6(2).

as to the sentence) if an accused pleads guilty at the beginning of his trial is consistent with Article 6(1) provided that adequate safeguards exist to prevent abuse.[382] It is also permissible to issue a penal order by which a person is convicted and sentenced in respect of a minor criminal offence without any court hearing, provided that the person has sufficient opportunity to request a hearing.[383] The immunity of an investigating judge from criminal prosecution has also been held to be justified.[384] However, a requirement that a convicted person who appeals on a point of law must surrender to custody pending a decision on the appeal is a disproportionate restriction that takes away the very essence of the right of access to a court on appeal.[385] A violation also occurs where a civil party whose claim is joined to criminal proceedings is unable to pursue the claim when the proceedings become time barred because of the prosecution's delay.[386]

d. Waiver of the right of access

A person may waive his right of access in civil and criminal cases.[387] In *Deweer v Belgium*,[388] the Court stated that a claim of waiver should be subjected to 'particularly careful review'. In that case, a butcher chose to pay an out-of-court fine for an 'over-pricing' offence rather than wait for trial. A waiver was found not to have occurred because his decision to waive his right to a trial was subject to constraint. In particular, the accused was faced with the provisional closure of his shop pending prosecution, with consequential economic loss, if he elected to go for trial. In *Kart v Turkey*,[389] it was held that the National Assembly's refusal to lift the applicant Member of Parliament's immunity from criminal prosecution was a justifiable limitation on the applicant's freedom to waive his right of access in order to protect the Assembly's integrity.

e. Relationship with Article 13

Finally, the right of access to a court overlaps with the right to an effective national remedy in respect of a breach of a Convention right that is guaranteed by Article 13.[390] The overlap exists insofar as the Convention right is also a 'civil right' in the sense of Article 6(1). The right of access provides a stricter guarantee than Article 13 in that it requires a remedy before a court.[391]

II. THE RIGHT TO A FAIR HEARING

In contrast with the other guarantees in Article 6(1), the right to a 'fair hearing' has an open-ended, residual quality. It provides an opportunity for adding other specific rights not listed in Article 6 that are considered essential to a 'fair hearing', and also for deciding whether a 'fair hearing' has occurred when the proceedings in a particular case are looked

[382] *X v UK No 5076/71*, 40 CD 64 at 67 (1972).

[383] *Hennings v Germany* A 251-A (1992); 16 EHRR 83. Cf *X v Germany No 4260/69*, 35 CD 155 (1970).

[384] *Ernst and Others v Belgium* hudoc (2003); 39 EHRR 724.

[385] *Omar v France* 1998-V; 29 EHRR 210 GC and *Papon v France* 2002-VII; 39 EHRR 217. See also *Eliazer v Netherlands* 2001-X; 37 EHRR 892 (no breach).

[386] *Atanasova v Bulgaria* hudoc (2008).

[387] *Deweer v Belgium* A 36 (1980); 2 EHRR 439 para 49; and *Nordström-Janzon and Nordström-Lehtinen v Netherlands No 28101/95*, 87-A DR 112 (1996) (arbitration agreed, not court hearing).

[388] *Deweer v Belgium, ibid.* See also *Marpa Zeeland v Netherlands* 2004-X; 40 EHRR 817.

[389] 2009-I; 51 EHRR 941 GC.

[390] See *Golder v UK* A 18 (1975); 1 EHRR 524 para 33 PC and *Kudła v Poland* 2000-XI; 35 EHRR 198 GC. See also *Powell and Rayner v UK* A 172 (1990); 12 EHRR 355 and the joint separate opinion of Judges Pinheiro Farinha and De Meyer in *W v UK* A 121 (1987); 10 EHRR 29.

[391] See *De Geouffre de la Pradelle v France* A 253-B (1992) para 37.

at as a whole, whether or not a particular right has been infringed. A breach of one of the specific rights that have been added may itself amount to a breach of the right to a 'fair hearing' without any need to consider other aspects of the proceedings.

In criminal cases, the 'fair hearing' guarantee has to be read together with the specific guarantees in Article 6(2) and (3). Whereas the latter are subsumed within the former, the general guarantee of a 'fair hearing' in Article 6(1) has elements that supplement those specified in Article 6(2) and (3).[392] Where a case falls within one (or more) of the specific guarantees in Article 6(2) or (3), it may be considered by the Court under that guarantee alone,[393] or in conjunction with Article 6(1),[394] or just under Article 6(1). When the last of these options is chosen, it is on the basis that the complaint is essentially that the proceedings in their entirety, including any appeal proceedings, were unfair.[395]

Whereas the right to a 'fair hearing' applies to civil as well as criminal proceedings, 'the contracting states have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases'.[396] Thus although certain of the guarantees listed in Article 6(3) (eg, the right to cross-examine witnesses) are inherent in a 'fair hearing' in civil as well as criminal cases, they may not apply with the same rigour or in precisely the same way under Article 6(1) in civil proceedings as they do in criminal ones.[397] The same is true of some of the rights that flow exclusively from Article 6(1), such as the right to be present at the hearing.[398]

As noted, in cases not involving a breach of a specific right, the Court may nonetheless find a breach of the right to a 'fair hearing' on a 'hearing-as-a-whole' basis. Thus, in *Barberà, Messegué and Jabardo v Spain*,[399] involving the prosecution of alleged members of a Catalan organization for terrorist offences, the Court identified a number of features of the hearing that cumulatively led it to conclude that there had not been a 'fair hearing'. The Court referred to the fact that the accused had been driven over 300 miles to the court the night before the trial, the unexpected changes in the court's membership, the brevity of the trial, and, above all, the failure to adduce and discuss important evidence orally in the accused's presence as considerations that, 'taken as a whole', rendered the proceedings unfair contrary to Article 6(1).

a. A hearing in one's presence

Although not expressly provided for in Article 6, the right to a hearing in one's presence is a part of the right to a 'fair hearing' in Article 6(1) in criminal cases. As stated in *Colozza v Italy*,[400] 'it is difficult to see how an accused could exercise their rights in Article 6(3)(c), (d), and (e) without being present at the hearing'. The right to be present is also implicit in the accused's rights in Article 6(1) to 'participate effectively' in the hearing[401] and to an adversarial trial.[402] In addition, the accused's presence reflects their interest in witnessing and monitoring proceedings that are of great importance to them. There is also a public

[392] *Artico v Italy* A 37 (1980); 3 EHRR 1 para 32. Article 6(3) guarantees 'minimum' rights.
[393] See, eg, *Luedicke, Belkacem and Koç v Germany* A 29 (1978); 2 EHRR 149.
[394] See, eg, *Benham v UK* 1996-III; 22 EHRR 293 GC.
[395] *Edwards v UK* A 247-B (1992); 15 EHRR 417 paras 33–34.
[396] *Dombo Beheer BV v Netherlands* A 274 (1993); 18 EHRR 213 para 32. [397] *ibid.*
[398] In some cases there are no such differences: see *Nideröst-Huber v Switzerland* 1997-I; 25 EHRR 709 para 28 (right to an adversarial trial).
[399] A 146 (1988); 11 EHRR 360 para 89 PC. Cf *Papageorgiou v Greece* hudoc (2003) para 39. See also *Laska and Lika v Albania* hudoc (2010) para 71.
[400] A 89 (1985); 7 EHRR 516 para 27. Cf *Hermi v Italy* 2006-XII; 46 EHRR 1115 para 58 GC.
[401] This chapter, section 3.II.b, p 414. [402] *Ziliberberg v Moldova* hudoc (2005).

interest in an accused attending the trial to give evidence so that their evidence may be checked in person against that of others.[403] However, in the criminal case of *Sakhnovskiy v Russia*[404] the Grand Chamber stated that a video link 'is not, as such, incompatible with the requirements of a fair and public hearing, but it must be ensured that the detainee is able to follow the proceedings, to see the persons present and hear what is being said, but also be seen and heard by the other parties, the judge and witnesses, without technical impediments'.

As to civil proceedings, generally Article 6 'does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side'.[405] However, the Court has identified certain kinds of civil cases in which a litigant may be entitled under Article 6 to be present at the hearing.[406] These are cases where the 'personal character and manner of life' of the person concerned is 'directly relevant' to the decision or where the decision involves an assessment of the person's 'conduct' or of allegations of ill-treatment by the police.[407] The Court has also held that a national court that is deciding on the legal capacity of a mentally incapacitated person should in principle have 'personal contact' with that person.[408] Also the Commission had indicated that cases involving child custody and access were included.[409] In contrast, in *Kozlov v Russia*[410] there was no violation of Article 6(1) when the applicant was unable to attend hearings in civil proceedings concerning a housing dispute because he was in provisional detention on the basis that on the facts his presence and participation were not necessary to ensure equality of arms. However, where a prisoner's participation is 'virtually the only way to ensure adversarial proceedings' in his civil case, the state must ensure his presence in court.[411]

A party to a criminal or non-criminal case may waive his right to be present at the hearing, provided that the established requirements for waiver are met.[412] Waiver will depend upon the applicant having knowledge of the hearing. In *Sejdovic v Italy*,[413] the Court indicated that, while appropriate official notice is normally required, it 'could not rule out the possibility that certain established facts might sufficiently provide an unequivocal indication that the accused is aware' of the criminal proceedings against him and does not intend to appear at them. However, the mere fact that, as in the *Sejdovic* case, the accused has left his place of residence and is untraceable is not sufficient to show that he knows of the hearing.

Waiver need not be expressly indicated. It may be inferred from conduct, for example by an accused not attending the hearing, having knowledge of it.[414] However, notice must make clear what the hearing concerns,[415] be given in good time to allow the accused to

[403] *Sejdovic v Italy* 2006-II para 81 GC. For this reason, the legislature may discourage 'unjustified absences': *ibid* para 92. [404] Hudoc (2010) para 98 GC. Cf *Yevdokimov and Others v Russia* hudoc (2016) para 43.

[405] *Khuzhin and Others v Russia* hudoc (2008) para 104.

[406] If there is no oral hearing, on the right to which see later in this chapter, section 3.b, p 436 the question of a litigant's presence does not arise.

[407] *X v Sweden No 434/58*, 2 YB 354 at 370 (1959); *Muyldermans v Belgium* A 214-A (1991); 15 EHRR 204 para 64 Com Rep; and *Kovalev v Russia* hudoc (2007) paras 35, 37 ('personal experience').

[408] *X and Y v Croatia* hudoc (2011).

[409] *X v Sweden No 434/58*, 2 YB 354 at 370 (1959) and *X v Austria No 8893/80*, 31 DR 66 (1983).

[410] Hudoc (2009) paras 34–48.

[411] *Kovalev v Russia* hudoc (2007) para 37. See also *Khuzhin and Others v Russia* hudoc (2008).

[412] *Sejdovic v Italy* 2006-II para 86 GC (criminal case). For civil cases, see *Kovalev v Russia* hudoc (2007) para 32 and *Groschev v Russia* hudoc (2005) para 28. For the requirements, see this chapter, section I, p 375.

[413] *Sejdovic v Italy, ibid. See also Groschev v Russia, ibid.* On notification to the mentally incapacitated, see *Vaudelle v France* 2001-I; 37 EHRR 397.

[414] *Hermi v Italy* 2006-XII; 46 EHRR 1115 para 102 GC. [415] *Sibgatullin v Russia* hudoc (2009).

attend,[416] and in a language that he understands[417] before waiver may be inferred. Non-attendance by itself is not a waiver; a court must not proceed to a trial *in absentia* without making appropriate enquiries to establish waiver.[418] 'Particular diligence' is required where notice of the hearing is given via the applicant's lawyer.[419] Refusal to participate in a hearing other than in the accused's own language is not a waiver.[420] A waiver is also not 'unequivocally' established where an accused could not reasonably have foreseen the consequences of his failure to attend. Thus, there was no waiver in *Jones v UK*,[421] when the applicant's trial commenced in his absence when the applicant, having been given bail, did not surrender on the date set for the trial. There was held not to be a waiver because at the time it was not clear in English law that a trial could proceed to a conclusion in the accused's absence and without his being legally represented, and the seemingly invariable practice was to adjourn the proceedings until the accused could be brought to court.

As well as in cases of waiver, trial *in absentia* is permitted without infringing Article 6 in two other situations. The first is where the state has acted diligently, but unsuccessfully, to give an accused notice of the hearing. In *Colozza v Italy*,[422] the Court stated that this is because the 'impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to the dispersal of evidence, expiry of the time-limit for prosecution or a miscarriage of justice'. On the facts of the *Colozza* case, the Court found a breach of Article 6(1) because the applicant had changed his address and the authorities had not been diligent in the steps they had taken to locate the applicant's new address and that trial *in absentia* was a disproportionate penalty for failure to report a change of address. The onus was upon the state to show diligence, not upon the accused to show that he was 'not seeking to evade justice or that his absence was due to *force majeure*'.[423]

The second situation is where the accused, having knowledge of the trial, intentionally absents himself from it with a view to escaping trial.[424] In view of the 'prominent place of the right to a fair trial in a democratic society' the state must have good reason to conduct a trial *in absentia* on this basis.[425] Such cases differ from waiver in that there is no express or implied acceptance that the trial may proceed in the accused's absence. As with waiver, knowledge of the trial normally means official knowledge, except that it may be inferred from conduct, such as evading an attempted arrest.[426]

In a case in which a trial is permitted *in absentia* under the *Colozza* rule, the accused must be able to obtain 'a fresh determination of the merits of the charge, in respect of both law and fact',[427] should they later learn of the proceedings. A re-hearing adequately overcomes the 'fair' trial problems that may result from the accused's absence at the original trial and failure to provide one would be a denial of justice.[428] The requirement of a

[416] See *Yakovlev v Russia* hudoc (2005) para 21 and *Groschev v Russia* hudoc (2005) para 28. See also *Ziliberberg v Moldova* hudoc (2005).
[417] *Brozicek v Italy* A 167 (1989); 12 EHRR 371 PC.
[418] *FCB v Italy* A 208-B (1991); 14 EHRR 909 (applicant in prison abroad). The Court must check whether the applicant had the opportunity to apprise himself of the date of the hearing and the steps to be taken in order to attend: *Hermi v Italy* 2006-XII; 46 EHRR 1115 para 76 GC.
[419] *Yavuz v Austria* hudoc (2004).
[420] *Zana v Turkey* 1997-VII; 27 EHRR 667.
[421] *No 30900/02* hudoc (2003) DA.
[422] A 89 (1985); 7 EHRR 517 para 29.
[423] *ibid* para 30.
[424] *Sejdovic v Italy* 2006-II para 82 GC. See also *Medenica v Switzerland No 20491/92* 2001-VI DA and *Jones v UK No 30900/02* hudoc (2003) DA.
[425] *FCB v Italy* A 208-B (1991); 14 EHRR 909 para 35.
[426] *Sejdovic v Italy* 2006-II para 99 GC.
[427] *ibid* para 82. A re-hearing that allows only new facts or evidence is insufficient: *Sanader v Croatia* hudoc (2015) para 93.
[428] *Sejdovic v Italy, ibid* para 82. The destruction of the case file is not a good reason for not having a re-hearing: *Stoichkov v Bulgaria* hudoc (2005); 44 EHRR 276.

re-hearing may be satisfied by a trial court hearing, or by an appeal that provides for a sufficient consideration of the merits of the case.[429] The requirement of a re-hearing applies to civil as well as criminal cases.[430]

There is, however, no right to a retrial in a case in which under the Convention a trial is permitted *in absentia*, where it is established that the right to be present at the trial was waived, or in which the applicant intended to escape justice, by absconding or otherwise.[431] In addition to the cases mentioned in which a trial may commence and be fully conducted in the absence of the accused, a trial that has already commenced may continue in the absence of the accused in the interests of the administration of justice in some cases of illness[432] or obstructive behaviour.[433] Obviously, an accused who seeks to delay proceedings by claiming unsubstantiated illness may be tried in his absence.[434] Similarly, an accused or other litigant who behaves in the courtroom in such as way as to seriously obstruct proceedings may be excluded from the court, at least temporarily.[435]

Although Article 6 applies to such appeal proceedings as a state chooses to provide, there are limits to the right of the accused to be present at an oral hearing on appeal. In some cases, written proceedings will suffice, so that the question of the right to be present does not arise. The cases in which an oral hearing has been required by the Court have mostly been ones in which the justification for the hearing has been the need for the appellate court to hear the appellant as a witness, in which situations his right to be present is implied. These cases are considered in this chapter, section 3.III.b, p 436 on the right to an oral hearing.

b. The right to participate effectively in the trial

The right to participate effectively in proceedings, which overlaps with the right to be present at the hearing,[436] applies to civil and, especially, criminal cases. It means in the first place that the state, acting diligently, must take the 'necessary steps' to inform the accused or the civil parties of the existence of the proceedings.[437] Other cases have concerned participation in the courtroom. In *Stanford v UK*,[438] the Court held that Article 6 guarantees not only the right of an accused to be present at the hearing, but also the right to hear and follow the proceedings and generally to participate effectively in them. In the

[429] A reasonable period of time to appeal is required: *Sejdovic v Italy* 2006-II GC.

[430] *Dilipak and Karakaya v Turkey* hudoc (2014) para 80.

[431] *Sejdovic v Italy* 2006-II para 82 GC; *Einhorn v France No 71555/01* 2001-XI; *Demebukov v Bulgaria* hudoc (2008); 50 EHRR 1040; and *Medenica v Switzerland* 2001-VI. Cf the European standard suggested in the Council of Europe Criteria Governing Proceedings held in the Absence of the Accused, CM Res (75) 11. It is for the state to have effective procedures in place to establish a waiver or an intention not to appear. Thus, there was a breach of Article 6 where the procedure for considering the applicant's claim that his signature acknowledging receipt of the hearing notice had been forged was inadequate: *Somogyi v Italy* 2004-IV; 46 EHRR 47.

[432] *Ninn-Hansen v Denmark No 28972/95* 1999-V; 28 EHRR CD 96 DA.

[433] *Ensslin, Baader and Raspe v Germany Nos 7572/76, 7586/76 and 7587/76*, 14 DR 64 (1978) and *Marguš v Croatia* hudoc (2014) para 90 GC.

[434] *X v UK No 4798/71*, 40 CD 31 (1972). See also *Krakolinig v Austria No 33992/07* hudoc (2007) DA para 21 (no right to terminate criminal proceedings because of illness).

[435] See *Colozza v Italy*, Report of the Commission, para 117 (1983).

[436] The right to participate concerns more than presence.

[437] *Dilipak and Karakaya v Turkey* hudoc (2014) para 80 (no serious efforts to find civil defendant's address). Cf *Schmidt v Latvia* hudoc (2017) paras 86–90. See also *Colozza v Italy*, this chapter, section 3.II.a, p 413 (criminal case) and *Gankin and Others v Russia* hudoc (2016) para 39 (civil case).

[438] A 282-A (1994) para 26. Cf *Timergaliyev v Russia* hudoc (2008).

Stanford case, the applicant claimed that he was unable to hear the proceedings because of a combination of his hearing difficulties and the acoustics in the courtroom. While the right to participate effectively meant, *inter alia*, that the state must provide a courtroom in which the accused is able to hear and follow the proceedings, the Court found no breach of Article 6 on the facts. It may be a breach of Article 6(1) for an accused to be placed in a 'glass cabin' for security reasons if this prevents them from communicating freely and confidentially with their lawyer and otherwise participating effectively in the proceedings.[439] In a different kind of case, in *Pullicino v Malta*,[440] the confiscation of the accused's notes during the trial hearing raised an issue of effective participation, but did not amount to a breach on the facts.

The right to participate effectively was infringed in *V v UK*.[441] In that case, the applicant was one of two boys tried at the age of 11 years[442] for the murder of a 2-year-old boy in a case that had attracted huge publicity in the national media. The trial took place in public over three weeks in a packed Crown Court. Although some special measures were taken in view of the accused's young age,[443] nevertheless 'the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of 11'; and there was evidence that the raising of the dock in which the accused was placed, in order for him to see the proceedings, increased his discomfort by exposing him to the press and the public. There was also psychiatric evidence to suggest that the accused had been terrified and unable to pay attention to the proceedings. The Court held that in these circumstances, the applicant's right to participate effectively in the hearing had not been respected; although his lawyers sat close by him, he would have been in no state to consult with them or generally to follow what was going on.

c. Equality of arms

The right to a fair hearing supposes compliance with the principle of equality of arms.[444] This principle, which applies to both civil and criminal proceedings,[445] 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[446] When deciding whether it has been complied with, 'appearances' are relevant, as is the seriousness of what is at stake for the applicant.[447] In criminal cases, the principle of equality of arms in Article 6(1) overlaps with the specific guarantees in Article 6(3).[448] It has, however, a wider scope than these guarantees, applying to all aspects of the proceedings.[449] Non-compliance with the

[439] *Yaroslav Belousov v Russia* hudoc (2016) para 152. See also *Ashot Harutyunyan v Armenia* hudoc (2010); 55 EHRR 320 para 138. And see *Campbell v UK No 12323/86*, 57 DR 148 (1988) (handcuffing).

[440] *No 45441/99* hudoc (2000) DA. Pre-trial limitations on access to the case file and the applicant's notes may also raise issues of effective participation: *Moiseyev v Russia* hudoc (2008); 53 EHRR 306. Cf *Matyjek v Poland* hudoc (2007); 53 EHRR 370.

[441] 1999-IX; 30 EHRR 121 GC. Cf *SC v UK* 2004-IV; 40 EHRR 226 and *Güveç v Turkey* hudoc (2009) paras 123–124. See also *DD v Lithuania* hudoc (2012) paras 118–119 (mentally disabled litigant).

[442] For the case of the other accused, see *T v UK* hudoc (1999); 30 EHRR 121 GC.

[443] The trial procedure was explained to him, he was shown the courtroom before the trial, and the hearings were shortened.

[444] *Neumeister v Austria* A 8 (1968); 1 EHRR 91.

[445] *Dombo Beheer BV v Netherlands* A 274 (1993); 18 EHRR 213 para 33.

[446] *Kress v France* 2001-VI para 72 GC. Total equality between the parties is not required so that publicly funded legal aid does not have to match that provided privately by the other party: *Steel and Morris v UK* 2005-II; 41 EHRR 403 GC.

[447] *AB v Slovakia* hudoc (2003).

[448] There may also be an overlap with the right to an adversarial trial in Article 6(1): see, eg, *Užukauskas v Lithuania* hudoc (2010).

[449] *Ofner and Hopfinger v Austria* 6 YB 676 (1962) Com Rep para 46; CM Res DH (63) 1.

principle does not depend upon proof of unfairness on the facts: the procedural deficiency in itself is a breach of the right to a fair trial.[450]

The principle has been applied most strikingly in cases from civil law jurisdictions in which the role of the *avocat général* or similar officer in final appellate court proceedings has been called into question. The key case was *Borgers v Belgium*.[451] There the Court held that the lack of equal standing in criminal proceedings before the Court of Cassation between the *avocat général* within the Belgian *procureur général's* department and the appellant was in breach of equality of arms. In particular, the *avocat général* was entitled to state his opinion at the hearing as to whether the appellant's appeal should be allowed[452] and then retire with the Court and take part (without a vote) in its discussion of the appeal. The appellant did not have prior notice of the *avocat général's* opinion and could neither reply to it nor retire with the judges. The decision reversed the European Court's earlier ruling to the contrary in the much-criticized case of *Delcourt v Belgium*,[453] and invalidated a century-old Belgian practice. In its reasoning, the Court accepted that the *avocat général* was not a part of the prosecution and that his function was to give independent and impartial advice to the Court of Cassation on the legal issues raised in the case and on the consistency of its case law. However, the European Court emphasized the importance of 'appearances' and 'the increased sensitivity of the public to the fair administration of justice'.[454] The emphasis upon 'appearances', which echoes the English law doctrine that 'justice must be seen to be done', follows the use of the same idea in the Court's jurisprudence on the requirement of an 'independent and impartial' tribunal.

In a series of similar cases since *Borgers*, concerning both Belgium and other civil law jurisdictions and in both civil and criminal cases, the Strasbourg Court has also found breaches of Article 6(1), by reference to equality of arms, the right to an adversarial trial, or the right to a fair hearing generally. In *Kress v France*,[455] the fact that the *commissaire du gouvernement* retired with the *Conseil d'Etat*, having made submissions adverse to a civil litigant's case, was held by the Grand Chamber, by ten votes to seven, to be a breach of Article 6(1) generally, not of equality of arms, although the Court did refer to a legitimate 'feeling of inequality' that the litigant might have.

In criminal cases a number of other particular rulings have been made requiring a 'fair balance' between the parties. Thus the failure to lay down rules of criminal procedure by legislation may be a breach of equality of arms, since their purpose is 'to protect the defendant against any abuse of authority and it is therefore the defence which is most likely to suffer from omissions and lack of clarity in such rules'.[456] In *Moiseyev v Russia*,[457] there was a lack of equality of arms because the prosecution (i) had control over the detained applicant's access to his lawyer, each visit requiring prosecution permission; and (ii) saw all documents passing between them. In *Bönisch v Austria*,[458] it was held that an expert

[450] *Bulut v Austria* 1996-II; 24 EHRR 84.

[451] A 214-B (1991); 15 EHRR 92 PC. See Wauters, 69 RDIC 125 (1992). In *Mort v UK No 44564/98* hudoc (2001) DA, it was held that the role of the magistrates' court's clerk was not contrary to equality of arms.

[452] Cf *Zhuk v Ukraine* hudoc (2010) (prosecutor, but not appellant, participated in appeal hearing).

[453] A 11 (1970); 1 EHRR 355.

[454] *Borgers v Belgium* A 214-B (1991); 15 EHRR 92 para 24 PC. Cf the reasoning in *Brandstetter v Austria* A 211 (1991); 15 EHRR 378.

[455] 2001-VI paras 81–82 GC. See also *Martinie v France* 2006-VI; 45 EHRR 433 GC; *Tedesco v France* hudoc (2007) paras 63–65; *Vermeulen v Belgium* 1996-I; 32 EHRR 313; and *Lobo Machado v Portugal* 1996-I; 23 EHRR 79.

[456] *Coëme v Belgium* 2000-VII para 102.

[457] Hudoc (2008); 53 EHRR 306.

[458] A 92 (1985); 9 EHRR 191. A court-appointed expert in criminal proceedings must be neutral (if not, the applicant must be allowed to appoint their own expert): *Brandstetter v Austria* A 211 (1991); 15 EHRR 378 paras 42–46. See also *Matytsina v Russia* hudoc (2014) (defence disadvantaged regarding expert evidence).

witness appointed by the accused must be accorded equal treatment with one appointed by the trial court who has links with the prosecution. Requiring the lawyer for the accused, but not the prosecution, to wait many hours before being heard by the court may also be a breach of equality of arms.[459] Other breaches have involved the failure by the prosecution to disclose all 'material evidence' to the defence,[460] limitations upon an accused's access to his case file or other documents on public interest grounds,[461] and the refusal to allow witnesses to be called on equal terms with the prosecution[462] or to admit written defence testimony.[463] In *Diriöz v Turkey*,[464] the prosecutor's privileged location in the courtroom was not a breach of equality of arms as it did not adversely affect the accused's defence.

With regard to 'civil rights and obligations' cases, there is a breach of equality of arms if one party may attend the hearing when the other may not.[465] The parties to a case must also be treated equally when calling witnesses.[466] The Court has also indicated that equality of arms requires that a party to civil proceedings be permitted to have material evidence in support of his case admitted in court;[467] be allowed equal access to evidence;[468] and be informed of, and hence be able to challenge, the reasons for an administrative decision.[469] As in criminal cases, a court-appointed expert in civil proceedings must be neutral,[470] and litigants must be allowed access to facilities on equal terms.[471] Unequal time limits for the bringing of proceedings may also be a breach of equality of arms,[472] as may rules as to costs that unduly favour the state or other party.[473]

Finally, the Court has relied upon the principle of equality of arms in some cases in which a state has enacted legislation with retroactive effect that is intended to influence the outcome of pending civil litigation.[474] In other such cases, the Court has treated the legislation as falling foul of a separate Article 6(1) 'fair hearing' requirement, distinct from equality of arms.

d. The right to an adversarial trial

The right to an adversarial trial 'means in principle the opportunity for the parties to a civil or criminal trial to have knowledge of and comment on all evidence adduced

[459] *Makhfi v France* hudoc (2004); 41 EHRR 745. For other criminal cases on 'equality of arms', see *Blastland v UK No 12045/86*, 52 DR 273 (1987); *U v Luxembourg No 10140/82*, 42 DR 86 (1985); *Kremzow v Austria* A 268-B (1993); 17 EHRR 322; *Monnell and Morris v UK* A 115 (1987); 10 EHRR 205; and *Grande Stevens v Italy* hudoc (2014) paras 117–118, 123.

[460] Non-disclosure is considered in this chapter, section 3.II.d, below, on the right to an adversarial trial. See also *Bendenoun v France* A 284 (1994); 18 EHRR 54; and *Kuopila v Finland* hudoc (2000); 33 EHRR 615. On the handing over of evidence for scientific testing, see *Korellis v Cyprus* hudoc (2003).

[461] *Matyjek v Poland* 2007-XX; 53 EHRR 370 (lustration proceedings).

[462] *Perić v Croatia* hudoc (2008) [463] *Mirilashvili v Russia* hudoc (2008). [464] Hudoc (2012).

[465] *Komanický v Slovakia* hudoc (2002).

[466] *Dombo Beheer BV v Netherlands* A 274 (1993); 18 EHRR 213. See also *Ruiz-Mateos v Spain* A 262 (1993); 16 EHRR 505 PC; and *Ankerl v Switzerland* 1996-V; 32 EHRR 1. But the Court will respect a national court's refusal to hear a witness, unless it is 'tainted by arbitrariness': *Wierzbicki v Poland* hudoc (2002); 38 EHRR 805 para 45. [467] *De Haes and Gijsels v Belgium* 1997-I; 25 EHRR 1.

[468] *Užukauskas v Lithuania* hudoc (2010). But see *Valchev v Bulgaria No 47450/04 et al* hudoc (2014).

[469] *Hentrich v France* A 296-A (1994); 18 EHRR 440 para 56.

[470] *Sara Lind Eggertsdóttir v Iceland* 2007-XX; 48 EHRR 753 para 47.

[471] See *Schuler-Zgraggen v Switzerland* A 263 (1993); 16 EHRR 405. For other civil cases, see *H v France* A 162-A (1989); 12 EHRR 74; *Yvon v France* 2003-V; 40 EHRR 938.

[472] *Varnima Corp International SA v Greece* hudoc (2009) and *Dacia SRL v Moldova* hudoc (2008).

[473] *Stankiewicz v Poland* 2006-VI; 44 EHRR 938.

[474] See, eg, *Stran Greek Refineries v Greece* A 301-B (1994); 19 EHRR 293 and *Aras v Italy* hudoc (2012).

or observations filed with a view to influencing the Court's decision'.[475] It is for the court to take the initiative to inform an accused or a party to civil proceedings of the existence of such evidence or observations; it is not sufficient that the material is on file at the court for the party to consult.[476] In criminal cases, the right requires that the 'prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused',[477] whether or not they use it in the proceedings. In criminal cases, the right to an adversarial trial overlaps with the specific guarantees in Article 6(3), particularly those in Article 6(3)(b) and (d) to adequate facilities and to call and cross-examine witnesses, respectively.[478] Generally, the approach of the Court is to decide the case under Article 6(1), after considering whether the trial as a whole has been 'fair'. It is not necessary to show actual prejudice: the essence of the right is that the parties should be in a position to decide whether they wish to respond to the material.[479]

While the facts of a case may give rise to issues under both the right to an adversarial trial and the right to equality of arms, the two rights differ in that whereas the latter is satisfied if the parties are treated equally, the former requires access to all relevant material, whether the other party has access to it or not.[480] The Court applied both the rights to an adversarial trial and to equality of arms in a group of UK criminal cases[481] in which material in the possession of the prosecution was not made available to the defence on public interest immunity grounds. In these cases, the Court established that whereas, as indicated earlier, the prosecution must disclose 'all material evidence' to the defence, this is not an absolute requirement. It is permissible to withhold evidence if this is 'strictly necessary' 'to preserve the fundamental rights of another individual or to safeguard an important public interest': for example, non-disclosure might be justified to protect informers, police undercover activities, or national security.[482] Where public interest immunity is claimed, the Strasbourg Court's role is not to assess the necessity for withholding the evidence, which is the function of the national courts, but to ensure that the procedure followed when the non-disclosure decision is taken incorporates adequate safeguards to protect the interests

[475] *Vermeulen v Belgium* 1996-I; 32 EHRR 313 para 33 GC. Cf *Barberà, Messegué and Jabardo v Spain* A 146 (1988); 11 EHRR 360 para 78 PC. In the *Barberà* case, the Court found a breach of the fair hearing guarantee partly because various witness statements and documents on the investigation file were simply read into the record. See also *Feldbrugge v Netherlands* A 99 (1986); 8 EHRR 425 PC (access to case file); *Georgios Papageogiou v Greece* 2003-VI (forged cheques not adduced); and *Sofri v Italy No 37235/97* hudoc (2003) DA (evidence destroyed).

[476] *Göç v Turkey* 2002-V; 35 EHRR 134 GC. See also *HAL v Finland* hudoc (2004). However, a party must use all available procedures for obtaining disclosure: *McGinley and Egan v UK* 1998-III; 27 EHRR 1.

[477] *Edwards and Lewis v UK* 2004-X; 40 EHRR 593 para 46 GC. This is sometimes formulated as a separate fair hearing requirement.

[478] These guarantees apply to civil proceedings under the rights to an adversarial trial and equality of arms: see *Wierzbicki v Poland* hudoc (2002); 38 EHRR 805.

[479] *Walston (No 1) v Norway* hudoc (2003) para 58.

[480] See *Nideröst-Huber v Switzerland* 1997-I; 25 EHRR 709.

[481] *Rowe and Davis v UK* 2000-II; 30 EHRR 1 GC; *Jasper v UK* hudoc (2000); 30 EHRR 441 GC; *Fitt v UK* 2000-II; 30 EHRR 480 GC; *Dowsett v UK* 2003-VII; 38 EHRR 845; *Edwards and Lewis v UK* 2004-X; 40 EHRR 593 GC; and *Mansell v UK No 60590/00* hudoc (2003) DA. See also *Edwards v UK* A 247-B (1992); 15 EHRR 417, in which the police failed to inform the defence of material evidence (fingerprints, failure to identify the accused) where there was no public interest immunity claim: no breach as any possible unfairness was rectified on appeal. Cf *Botmeh and Alami v UK* hudoc (2007). In *Donohoe v Ireland* hudoc (2013), the Court applied the *Al-Khawaja* test, this chapter, section 5.V, p 485, to the 'withholding' situation, not *Rowe and Davis*; see the criticism of this approach by Judge Lemmens in his concurring opinion.

[482] *Edwards and Lewis v UK* 2004-X; 40 EHRR 593 para 46 GC.

of the accused. In *Jasper v UK*,[483] the Grand Chamber held that the public interest immunity procedure in English law complied with Article 6(1) as it applied on the facts of the case. Under that procedure, the decision about non-disclosure on public interest immunity grounds was taken by the trial judge after examining the non-disclosed evidence. The defence was not shown the evidence or even told of the kind of evidence it was but was permitted to outline its case to the judge, who was competent to order disclosure of evidence relevant to it. In ruling, by a bare majority of nine votes to eight, that the judge's decision authorizing non-disclosure was not a breach of the rights to an adversarial trial or equality of arms, the Court was strongly influenced by the fact that the non-disclosed evidence formed no part of the prosecution case and was not put to the jury. In contrast, in *Edwards and Lewis v UK*,[484] the Grand Chamber unanimously held that the same English law procedure did not comply with the same rights on the facts of the case. In particular, the facts differed from those in *Jasper* in that the non-disclosed material in *Edwards and Lewis* was directly relevant to the trial, for the reason that it related to the applicants' possible entrapment by the police into committing the alleged offence which, if established, would have led to the discontinuance of the prosecution. In these circumstances, a procedure that did not permit the defence to have access to the material, and an opportunity then to argue its case for entrapment with full information, was a breach of Article 6(1).[485]

A breach of the right to an adversarial trial has been found in various other contexts.[486] For example, in *Kamasinski v Austria*,[487] there was a breach of Article 6(1) when the Supreme Court obtained, and relied upon, information obtained over the telephone from the presiding judge at the trial; this was without the accused being informed or having an opportunity to comment on the judge's response.[488] In *McMichael v UK*,[489] there was a breach where social reports on children in care, relevant to a dispute between their parents and the local authority, were not revealed to the parents. In *Mantovanelli v France*,[490] there was a breach when the applicants were not permitted to participate in the procedure for obtaining a medical expert's report.

c. Rules of evidence

The right to a fair hearing in Article 6(1) does not require that any particular rules of evidence are followed in national courts in either criminal or non-criminal cases; it is in principle for each state to lay down its own rules.[491] Such an approach is inevitable,

[483] Hudoc (2000); 30 EHRR 441 GC. Cf *Fitt v UK* 2000-II; 30 EHRR 480 GC. The procedure was introduced after a breach of Article 6 was found in *Rowe and Davis v UK* 2000-II; 30 EHRR 1 GC, in which the prosecution withheld evidence that a key witness was a paid informer without informing the trial judge. In contrast with *Edwards and Lewis v UK* 2004-X; 40 EHRR 593 para 46 GC, the unfairness in *Rowe and Davis* could not be rectified on appeal.

[484] 2004-X; 40 EHRR 593 GC.

[485] On the possible use of special counsel to represent the interests of the accused in the light of *Edwards and Lewis*, see *R v H and C* [2004] 2 WLR 335; [2004] UKHL 3.

[486] For cases on the role of the *avocat général* or *commissiare du gouvernement* in appeals in civil law jurisdictions raising adversarial trial and related issues, see this chapter, section 3.II.c, p 416.

[487] A 168 (1989); 13 EHRR 36 para 102. Cf *Brandstetter v Austria* A 211 (1991); 15 EHRR 398. See also *Ferreira Alves v Portugal* hudoc (2007).

[488] Cf the facts of *J v Switzerland No 13467/87* hudoc (1989) DA (F Sett) in which a conviction was based on reports obtained after the hearing unknown to the accused.

[489] A 307-B (1995); 20 EHRR 205. Cf *Feldbrugge v Netherlands* A 99 (1986); 8 EHRR 425 PC.

[490] 1997-II; 24 EHRR 370. Cf *Cottin v Belgium* hudoc (2005). And see *Augusto v France* 2007-XX (non-communication of expert's report) and *Dağtekin and Others v Turkey* hudoc (2007) (security report withheld).

[491] For instance, rules as to the burden of proof in civil proceedings are in principle a matter for national law: *Hämäläinen v Finland No 351/02* hudoc (2004) DA.

given the wide variations in the rules of evidence in different European legal systems, with, for example, common law systems controlling the admissibility of evidence much more tightly than civil law ones. However, the Strasbourg Court has set certain parameters within which a state must operate.

Admissibility of evidence

In *Schenk v Switzerland*,[492] the Court stated that Article 6 'does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law'. Accordingly, it 'is not the role of the Court to determine, as a matter of principle, whether particular types of evidence . . . may be admissible . . . The question for the Court instead is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.'[493]

So, evidence may be admitted even if illegally obtained if this does not render the proceedings as a whole unfair. In the *Schenk* case, there was no breach of Article 6(1) when a tape recording of a conversation between the applicant and another person, P, that was obtained in breach of Swiss law and that incriminated the applicant, was admitted in evidence. This was because the proceedings as a whole were not unfair, for the following reasons. First, the rights of the defence had not been disregarded. In particular, the defence had the opportunity to challenge both the authenticity of the recording and its admission as evidence and to examine both P and the police officer who had instigated the recording. Second, the recording was not the only evidence on which the conviction was based.

The *Schenk* case was applied in *Khan v UK*,[494] in which again no breach of Article 6 was found. There, a conversation between the applicant and X on the latter's premises had been recorded by an electronic listening device secretly installed on the premises by the police. The recording was admitted in evidence at the applicant's trial for a drug trafficking offence. In contrast to the *Schenk* case, the installation and use of the device were not contrary to national criminal law, although it was obtained in breach of Article 8 of the Convention.[495] The recording was the only evidence on which the applicant's conviction was based, but this consideration was discounted by the Court because the recording was both 'very strong evidence' and undoubtedly reliable and in *Schenk* the recording had in fact also been important, possibly decisive evidence. Moreover, the applicant had, as in the *Schenk* case, been able to challenge the authenticity and admissibility of the recording and the national courts at three levels of jurisdiction had rejected claims that it should be excluded as rendering the proceedings unfair.

As emerges from these cases, whether the use of evidence obtained in breach of Article 8 renders a trial unfair in breach of Article 6 depends upon the circumstances, including whether the rights of the defence have been respected and the strength of the evidence. In contrast, the admission of evidence obtained by torture contrary to Article 3 automatically makes the trial as a whole unfair contrary to Article 6: 'incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value'.[496] The same is

[492] A 140 (1988); 13 EHRR 242 para 46 PC. Cf *García Ruiz v Spain* 1999–1; 31 EHRR 589 para 28 GC. And see *X v Belgium No 8876/80*, 20 DR 233 (1980).

[493] *Khan v UK* 2000-V; 31 EHRR 1016 para 34. Cf *Jalloh v Germany* 2006-IX;44 EHRR 667 para 94 GC and *Erkapić v Croatia* hudoc (2013).

[494] *Khan v UK, ibid* para 37. Cf *PG and JH v UK* 2001-IX; 46 EHRR 1272 and *Lee Davies v Belgium* hudoc (2009). See also *Parris v Cyprus No 56354/00* hudoc (2002) DA (illegal post-mortem: no breach).

[495] See Ch 11, section 4.VI, p 555.

[496] *Jalloh v Germany* 2006-IX; 44 EHRR 667 para 105 GC. 'Real evidence' is tangible evidence.

true of confessions obtained by inhuman or degrading treatment contrary to Article 3.[497] However, in *Gäfgen v Germany*, the Grand Chamber held, by 11 votes to 6, that the admission of 'real evidence' obtained by inhuman or degrading treatment contrary to Article 3 is only in breach of the right to a fair trial in Article 6 'if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence'. This was not so in the *Gäfgen* case. In that case, having been threatened by the police with force involving 'intolerable pain'—which threat amounted to inhuman treatment but not torture—if he did not reveal the whereabouts of an abducted child, the applicant revealed the location, as a result of which the child's body and other real evidence (including tyre tracks and clothes) were found and admitted in court. However, the Grand Chamber noted that the evidence that was 'decisive' for the applicant's conviction was the confession made by him at his trial, together with other 'untainted' corroborative evidence. The 'real evidence' obtained by inhuman treatment in violation of Article 3 was relied on at the trial only to test the veracity of the confession, not to prove guilt. In their joint opinion, the six dissenting judges argued that the admission of all evidence, both statements and real evidence, obtained in violation of Article 3 should always be regarded as in breach of Article 6. In their view, which is persuasive, the majority had failed to treat the proceedings as an 'organic whole', so that they had not taken into account the fact that the applicant's confession was influenced by the admission of the real evidence obtained in breach of Article 3, which he would have realized had substantially reduced his chances of mounting a successful defence. The dissenting judges also criticized the Court for introducing a distinction in the consequences of different types of conduct prohibited by Article 3 which was not envisaged in the Convention text. A 'strict application' of the exclusionary rule would also deprive state agents of any incentive to engage in inhuman treatment, which, like torture, was the subject of an absolute guarantee. Other important considerations mentioned by the dissenting judges were the need to maintain the rule of law and the integrity of the judicial process. Another factor is that the borderline between torture and the lesser forms of ill-treatment proscribed by Article 3 is not always easy to determine.

The admission of evidence obtained in breach of Article 3 has been taken further in the context of extradition cases. In *Othman (Abu Qatada) v UK*,[498] in which the applicant was to be deported by the respondent state to Jordan to face a retrial on serious criminal charges, the Court held, first, that in the application of the above rules the standard of proof was whether there was a 'real risk' that the disputed evidence that might be admitted at trial had been obtained in breach of Article 3, not, as claimed by the respondent state, the higher standard of 'beyond reasonable doubt'. Second, the Court held that the above rules applied to the admissibility of evidence obtained from third parties, as well as from the accused.[499] These *Abu Qatada* rulings were applied in *El Haski v Belgium* in the reverse situation of the admissibility in a criminal trial in the respondent state of statements allegedly obtained in a third state in breach of Article 3. In the *El Haski* situation, if there is a 'real risk' that the statements were obtained in breach of Article 3, they must not be admitted in evidence if the third state 'does not offer meaningful guarantees' that the allegations have been subjected to 'an independent, impartial and serious examination'.[500]

In other cases involving allegations that evidence has been obtained by coercion or oppression by the authorities in the respondent state in which there has been no finding of a

[497] *Gäfgen v Germany* 2010- paras 166, 173. See *also Turbylev v Russia* hudoc (2015).
[498] Hudoc (2012) para 273 (allegations of torture). [499] *ibid* paras 263, 267.
[500] Hudoc (2012) paras 85, 88 (statements obtained in interviews in Morocco; required guarantees absent).

breach of Article 3, the Strasbourg Court has made it clear that it will not intervene where appropriate safeguards are in place in that state.[501] These include the presence of the accused's lawyer during police questioning or, in the absence of this, satisfactory procedures followed by the court that ensure that a statement has been freely made.[502]

Certain other national rules as to admissibility of evidence that do not concern coercion or oppression or breaches of Article 3 have been found to be acceptable. The admission of evidence by an accomplice or other accused who has been promised immunity is not in itself contrary to Article 6.[503] Consistently with the practice in a number of European criminal justice systems, it has also been held that it is not in breach of Article 6 for the court to be informed of the accused's criminal record during the trial,[504] or for a conviction to be founded solely on circumstantial evidence.[505]

Assessment of evidence

Just as the Strasbourg Court regards the rules as to the admissibility of evidence as primarily a matter for national decision, so it will not generally review the assessment of evidence by a national court.[506] It will only do so where the national court has drawn 'arbitrary or grossly unfair conclusions from the facts submitted to it'.[507] The same general 'hands off' approach extends to the means used to ascertain the relevant facts, so that the Strasbourg Court will not generally question a national court decision as to the calling of a witness or an expert.[508] However, where the reliability of evidence is in dispute, the existence of a fair procedure for the accused to question its admissibility is important.[509]

Disclosure of evidence

The obligation to disclose all material evidence to the other party has been considered above under the right to an adversarial trial.[510]

f. Presumption of innocence in criminal cases

The presumption of innocence in criminal cases is guaranteed by Article 6(2) and is considered under that provision.[511] However, the presumption of innocence is also a part of the 'general notion of a fair hearing' in Article 6(1). This is crucial where the applicant is subject to a criminal 'charge' but where Article 6(2) does not apply. This was the case in *Phillips v UK*,[512] in which the applicant had been convicted of a drug trafficking offence and sentenced to nine years' imprisonment. In separate proceedings, the Crown Court later made an order confiscating property believed to have been gained from drug trafficking. In those proceedings the court applied a rebuttable statutory assumption that

[501] The Court's reluctance to intervene in such cases was apparent in *Ferrantelli and Santangelo v Italy* 1996-III; 23 EHRR 288.

[502] See *Latimer v UK No 12141/04* hudoc (2005) DA and *G v UK No 9370/81*, 35 DR 75 (1983).

[503] *Cornelis v Netherlands No 994/03*, 2004-V.

[504] *X v Austria No 2676/65*, 23 CD 31 (1967).

[505] *Alberti v Italy No 12013/86*, 59 DR 100 (1989). But the admission of photocopied evidence must be subjected to strict scrutiny: *Buzescu v Romania* hudoc (2005).

[506] *Barberà, Messegué and Jabardo v Spain* A 146 (1988); 11 EHRR 360 para 68 PC. Cf *Wierzbicki v Poland* hudoc (2002); 38 EHRR 805.

[507] *Waldberg v Turkey No 22909/93* hudoc (1995) DA. Cf *Camilleri v Malta No 51760/99* hudoc (2000) DA.

[508] See *Sommerfeld v Germany* 2003-VIII; 36 EHRR 565 GC (Article 8 case). Cf *Accardi v Italy No 30598/02* 2005-II. For exceptions, see *Elsholz v Germany* 2000-VIII; 34 EHRR 1412; *Schlumpf v Switzerland* hudoc (2009); and *Balsytė-Lideikienė v Lithuania* hudoc (2008).

[509] *Bykov v Russia* hudoc (2009) para 95 GC. See also *Sakit Zahidov v Azerbaijan* hudoc (2016) para 48.

[510] See this chapter, section 3.II.d, p 418.

[511] See this chapter, section 4, p 460.

[512] 2001-VII para 39. Cf *Grayson and Barnham v UK* hudoc (2008); 48 EHRR 722.

property held by the applicant following his conviction or during a six-year period before it was obtained by drug trafficking. In response to the applicant's claim that the assumption infringed the presumption of innocence, the Strasbourg Court held that Article 6(2) did not govern the confiscation proceedings as it ceased to apply after conviction, but that the presumption of innocence in Article 6(1) did apply as Article 6(1) generally 'applies throughout the entirety of proceedings'. However, no breach of the presumption of innocence was found, as the application of the statutory assumption on the facts of the case was 'reasonable'.

g. The principle of immediacy

An 'important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case'.[513] This is important because 'the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused'. Accordingly, 'normally a change in the composition of the trial court after the hearing of an important witness should lead to the re-hearing of that witness', although exceptions may be allowed where the facts as a whole suggest that the outcome of the case was not affected.[514] Thus there was a violation of the principle when the judges who finally convicted the applicant were not those who had earlier at the trial heard his evidence or that of other witnesses.[515] The principle of immediacy applies also to civil proceedings, although less strictly.[516]

h. Freedom from self-incrimination

The right to a fair hearing includes freedom from self-incrimination in criminal cases. In one sense, this is an unexpected reading of Article 6(1), in that when Council of Europe member states added to the rights of the accused in the Seventh Protocol to the Convention, they considered including freedom from self-incrimination but decided not to do so. Nonetheless, the Court's subsequent jurisprudence under Article 6 fills an obvious gap. As the Court stated in *Saunders v UK*,[517] 'the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6'.

Freedom from self-incrimination follows from the autonomy of the individual, the need to avoid miscarriages of justice, and the principle that the prosecution should prove its case without the assistance of the accused.[518] As stated in the *Saunders* case, Article 6 it is 'primarily concerned' with the aspect of freedom from self-incrimination that concerns 'respecting the will of an accused to remain silent'; accordingly it 'does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.[519]

[513] *PK v Finland No 37442/97* hudoc (2002) DA.
[514] *ibid.* See also *Mellors v UK* No 57836/00 hudoc (2003) DA.
[515] *Cutean v Romania* hduoc (2014). See also *Cerovšek and Božičnik v Slovenia* hudoc (2017).
[516] *Pitkänen v Finland* hudoc (2004) para 62.
[517] 1996-VI; 23 EHRR 313 para 68 GC.
[518] *ibid.* It is also closely linked to the presumption of innocence: *ibid.*
[519] *ibid* para 69. The right to silence is a part of the larger concept of freedom from self-incrimination, which includes incrimination through the use of the 'compulsory powers' which fall within Article 8 of the Convention. Although Article 6 is mostly only about the right to silence, the general term is used in this chapter as well as the right to silence.

With regard to statements, freedom from self-incrimination includes not only incriminating statements but also statements which appear 'on . . . [their] face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact' since these 'may later be deployed in criminal proceedings in support of the prosecution case'.[520] Article 6 is not confined totally to the refusal to answer questions or make an oral statement. It also applies to situations in which there is 'coercion to hand over real evidence to the authorities'.[521] Thus in *Funke v France*,[522] in which the applicant was required himself to produce documents, as opposed to being subjected to the execution by others of a search warrant for them, the evidence was not obtained independently of his will, so that his right to freedom from self-incrimination was in issue. In *Jalloh v Germany*,[523] the *Funke* case was extended to cover a situation in which the applicant was subjected to the forced administration of an emetic causing him to regurgitate real evidence (drugs) from his body. Finding a breach of freedom from self-incrimination, the Grand Chamber distinguished the examples of material given in *Saunders* that fall outside the guarantee of freedom from self-incrimination on the following grounds. It noted that the material obtained in *Jalloh* was 'real evidence', as opposed to material that was wanted for forensic examination; that the degree of force used to obtain it was much greater than that used in the conduct of blood tests, etc; and that the procedure used to recover the drugs involved a breach of Article 3.

Freedom from self-incrimination is not absolute; what is prohibited is 'improper compulsion' to answer questions, etc.[524] 'Compulsion' may take various forms. Clearly, the use of physical force against a person aimed at obtaining a confession or other evidence from him is compulsion,[525] as is requiring an accused to give evidence at his trial by law.[526] The threat[527] or imposition[528] of a criminal sanction for failure to provide information is compulsion and may infringe freedom from self-incrimination whether or not the person concerned is later prosecuted for,[529] or convicted of,[530] an offence. In *Brusco v France*,[531] it was held that requiring an accused to take an oath to tell the truth when answering police questions, on pain of being charged with perjury if he did not do so, is compulsion. The Court also held in the *Brusco* case that there was a breach of Article 6(1) because the accused was not informed by the police before they began questioning of his right to remain silent.[532] A rule permitting the drawing of adverse inferences from the exercise of the right to silence is also a form of compulsion, by bringing pressure to bear to answer questions.[533] Similarly, the use of an undercover agent to solicit information may involve compulsion. This was the case in *Allan v UK*,[534] where

[520] *Aleksandr Zaichenko v Russia* hudoc (2010) para 54. See also *H and J v Netherlands* hudoc (2014) (statements made during application for asylum later used in prosecution for torture: no violation).

[521] *Jalloh v Germany* 2006-IX; 44 EHRR 667 para 111 GC.

[522] A 256-A (1993); 16 EHRR 297. See also *JB v Switzerland* 2001-III.

[523] 2006-IX; 44 EHRR 667 GC. Cf *Gäfgen v Germany* 2010- para 178 GC (no breach of freedom from self-incrimination).

[524] *Murray (John) v UK* 1996-I; 22 EHRR 29 para 46 GC.

[525] See *Jalloh v Germany* 2006-IX; 44 EHRR 667 GC. See also *Austria v Italy* 6 YB 740 at 784 (1963) Com Rep; CM Res DH (63) 3.

[526] See *Murray (John) v UK* 1996-I; 22 EHRR 29 para 47 GC. See also *Serves v France* 1997-VI; 28 EHRR 265 (applicant obliged to give evidence in the preliminary investigation of a fellow suspect for the same murder).

[527] *Saunders v UK* 1996-VI; 23 EHRR 313 GC.

[528] *Funke v France* A 256-A (1993); 16 EHRR 297.

[529] *ibid.*

[530] *Heaney and McGuiness v Ireland* 2000-XII; 33 EHRR 264.

[531] Hudoc (2010).

[532] *ibid* para 54. See also *Simeonovi v Bulgaria* hudoc (2017) para 119 GC. Cf *Stojkovic c France and Belgium* hudoc (2011) para 54 and *Navone and Others v Monaco* hudoc (2013) para 74.

[533] *Condron v UK* 2000-V; 31 EHRR 1.

[534] 2002-IX; 36 EHRR 143. The Court stressed that the informer could be seen as a state agent whose questioning was the equivalent of interrogation. Contrast *A v Germany No 12127/86* hudoc (1986) DA.

the applicant confessed to a murder to an undercover police informer who was placed in his remand cell for the purpose of eliciting information from him, their conversations being recorded. Having resisted police questioning, the psychological pressures upon the applicant, who was induced to confess by persistent questioning by someone with whom he shared his cell, meant that the confession was obtained 'in defiance of the will' of the applicant. In contrast, there was no violation of the accused's freedom from self-incrimination in *Bykov v Russia*.[535] In that case, V, an employee of the applicant, told the police that he had been ordered by the applicant to kill the applicant's business associate. The police had V visit the applicant's house pretending that he had committed the murder, whereupon incriminating statements by the applicant were obtained by recorded conversations at the house. The Grand Chamber distinguished *Allan* on the grounds that the applicant was at his own house and not otherwise under pressure to talk to V; moreover, the evidence obtained by the covert operation was not the main evidence at the trial.

Compulsion is 'improper' if the 'very essence of the right' not to incriminate oneself is destroyed. In *Murray (John) v UK*,[536] the Court held that the possibility of drawing adverse inferences from the failure of a suspect or an accused to answer questions, either before or at their trial for a criminal offence, does not amount to 'improper compulsion', destroying the 'very essence of the right', provided that proper safeguards are in place. In that case, the applicant was arrested in a house in which a police informer was being questioned by the IRA. He was convicted of aiding and abetting the informer's false imprisonment. Under the legislation applicable to terrorist offences in Northern Ireland, the applicant was tried by an experienced judge without a jury who drew 'strong inferences' from the applicant's failure, exercising his right to silence, to explain his presence in the house when he was arrested and interrogated by the police and from his refusal to give evidence at his trial. The Court held, by fourteen votes to five, that there was no 'improper compulsion' upon the applicant to break his silence, because of the safeguards that applied. These were that adverse inferences could only be drawn if (i) the accused had been cautioned that this could follow from his exercise of the right to silence; (ii) there was a *prima facie* case against the accused that could lead to his conviction if unanswered; and (iii) the judge both had a discretion as to whether it was appropriate to draw inferences from silence and had to give reasons should he do so. Given these safeguards and the 'formidable' case against the applicant, the Court concluded that the drawing of adverse inferences on the facts was 'a matter of common sense' and could not be regarded as 'unfair or unreasonable'. Whereas it was contrary to the right to freedom of self-incrimination to base a conviction 'solely or mainly' on the accused's silence, this should not prevent that silence being taken into account in situations 'which clearly call for an explanation', provided that satisfactory safeguards apply. As the Court noted, the UK legislation providing for the drawing of inferences simply placed upon a 'formalized' basis the practice of criminal courts in 'a considerable number of countries' in Europe.

In the *Murray (John)* case, the Court distinguished *Funke v France*, mentioned earlier in the section. In *Funke*, the applicant was convicted and fined for an offence of refusing to produce bank statements, which it was believed existed, at the request of the customs authorities who suspected him of having committed offences concerning financial dealings

[535] Hudoc (2009) GC. Cf *Heglas v Czech Republic* hudoc (2007); 48 EHRR 1018.
[536] 1996-I; 22 EHRR 29 PC.

abroad.[537] The 'degree of compulsion' to which the applicant was subjected in *Funke* destroyed the 'very essence' of his freedom from self-incrimination.[538]

Adverse inferences were also at issue in *Condron v UK*.[539] There it was held that where adverse inferences may be drawn not by a judge, as happened in the *Murray* case, but by a jury, a necessary additional safeguard that is required to prevent an infringement of the right to freedom from self-incrimination is that the jury is directed that 'if it was satisfied that the applicants' silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference'. In the *Condron* case, the applicants, who were heroin addicts, were suspected of drug dealing. They exercised their right to silence during police questioning on the advice of their solicitor, who was present during the interview and was concerned that they would not be able to follow the questions because of the influence of drugs. In contrast with the *Murray* case, they did give evidence later at the trial. Applying legislation that contained the safeguards present in the *Murray* case, the judge directed the jury that they might draw adverse inferences from the accused's silence, but, in breach of Article 6, did not draw their attention to the possibility that there might have been a good reason for their remaining silent (viz. following their solicitor's advice) other than that they had no satisfactory answers to give.

The 'very essence' of the right was also destroyed in *Heaney and McGuiness v Ireland*.[540] In that case, the applicants were arrested in a house on suspicion of membership of the IRA, and of involvement in a suspected terrorist bombing that had occurred nearby hours earlier. When they refused to answer questions about the bombing or their presence in the house, the applicants were requested to provide an account of their movements during the relevant period under a statute that made failure to give such an account a criminal offence, but they refused to do so. They were later acquitted of an offence involving membership of the IRA but convicted of the offence of failing to provide the requested account of their movements. The latter convictions, resulting in sentences of six months' imprisonment, were held to be a violation of freedom from self-incrimination. Article 6 applied, as the applicants were 'substantially affected' by being arrested on the basis of their suspected criminal activities, and there was 'improper compulsion' in breach of that Article, because the 'degree of compulsion' applied through the imposition of a criminal sanction for failure to supply the requested information destroyed the 'very essence' of the right to freedom from self-incrimination.

In the *Murray (John)* and *Heaney and McGuiness* cases, the Court adopted a 'degree of compulsion' criterion to be applied when deciding whether the compulsion was 'improper' so that the 'very essence' of the right to freedom from self-incrimination had been

[537] Although not arrested, the applicant in *Funke* was considered to be 'charged' as being 'substantially affected' by the allegation made against him: see *Weh v Austria* hudoc (2004); 40 EHRR 890 para 52. The applicant's death forestalled his prosecution for the substantive offence. For criticism of the *Funke* case, see Naismith, 3 EHRLR 229 (1997) and Stressens, ELR Human Rights Survey 45 (1996).

[538] *Murray (John) v UK* 1996-I; 22 EHRR 29 para 49 GC. The Court had not used 'very essence' language in *Funke*. The severity of the sanction is a relevant factor in deciding whether the 'very essence' of the right is destroyed: *Allen v UK No 76574/01* hudoc (2002) DA (a small fine: no breach). In *Heaney and McGuiness v Ireland* 2000-XII; 33 EHRR 264, no distinction was drawn between accumulated fines (*Funke*) and a six-month prison sentence (*Heaney and McGuiness*).

[539] 2000-V; 31 EHRR 1 para 61. *Condron* has been applied in, eg, *Beckles v UK* hudoc (2002); 36 EHRR 162; *Smith v UK No 64714/01* hudoc (2002) DA; and *Adetoro v UK* hudoc (2010).

[540] 2000-XII; 33 EHRR 264 para 48. See Ashworth, 2001 Crim LR 482. See also *Shannon v UK* hudoc (2005); 42 EHRR 660.

destroyed. In *Jalloh v Germany*,[541] the Court revised and added to this criterion. The Court stated that it would have regard to the following three criteria: 'the nature and degree of the compulsion, the existence of any relevant procedural safeguards, and the use to which any material so obtained is put'. Applying these three criteria to the facts, the Court noted that the 'nature and degree' of the compulsion in *Jalloh* had interfered with the applicant's physical and mental integrity to the point where it was 'inhuman and degrading treatment'; that while there were generally sufficient procedures to prevent the arbitrary or improper use of compulsion, the applicant's ability to withstand the force used had not been fully established because of his poor German; and that the evidence obtained was the decisive evidence in the case. The Court also introduced a fourth criterion in *Jalloh*, namely the weight of public interest in the investigation, but concluded that this could not on the facts justify such a grave interference with the applicant's physical and mental integrity. The use of this fourth criterion was not apparent in the earlier case of *Heaney and McGuiness v Ireland*.[542] There the Court rejected the defendant government's argument that it could require the applicants to give an account of their movements or face a criminal sanction of up to six months' imprisonment as a 'proportionate response' to a terrorist and security threat: such public interest considerations could not justify the imposition of a criminal sanction for remaining silent that destroyed the 'very essence' of the right.

In *O'Halloran and Francis v UK*,[543] the Grand Chamber confirmed and applied the criteria in *Jalloh*. In that case, each of the two applicants had been required, on pain of criminal sanction, to identify to the police the driver of his car in connection with a speeding offence. The first applicant revealed that he was the driver and was convicted of the speeding offence. The second did not reveal who the driver was and was convicted of a different criminal offence of failing to identify the driver and fined for not doing so. The Grand Chamber held, by fifteen votes to two, that neither the threat nor the imposition of the criminal sanction for not identifying the driver destroyed the 'essence' of the right to freedom from self-incrimination. It did so on the basis of the 'special nature of the regulatory regime at issue and the limited nature of the information sought', both of which considerations the Court addressed under the first of the *Jalloh* criteria. As to the former, the Court stressed that the regulatory regime for motor vehicles was motivated by their 'potential for grave injury'.[544] As to the latter, the Court noted that only the name of the driver was required, which in itself was not incriminating. The Court also noted, in terms of the third *Jalloh* criterion, that many other elements beyond the identification of the driver were needed to prove guilt.[545] Although the Court did not expressly refer to the fourth, public interest *Jalloh* criterion, it can be seen to underlie the Court's reference to the motivation for the regulatory regime, as can its comment that 'those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations',[546] including informing the authorities of the drivers of their vehicles.

Public interest considerations were also relevant in *Allen v UK*.[547] In that case, after being pressured, the applicant eventually made the required declaration of his assets for tax purposes but was convicted of making false statements in it. This was held not to be a breach of freedom from self-incrimination because the applicant did not allege that he was being forced to reveal prior acts or omissions that might contribute to his conviction for

[541] 2006-IX; 44 EHRR 667 para 101 GC. For the facts, see earlier in this section. See also *Schmid-Laffer v Switzerland No 41269/08* hudoc (2015) para 39 DA.

[542] 2000-XII; 33 EHRR 264 paras 55–58. [543] 2007-III; 46 EHRR 397 para 62 GC.

[544] *ibid* para 57. [545] As to the second criterion, there were sufficient procedural safeguards.

[546] *O'Halloran and Francis v UK* 2007-III; 46 EHRR 397 para 62 GC.

[547] *No 76574/01* hudoc DA. Contrast *JB v Switzerland* 2001-III, in n 522.

some other offence:[548] instead, the offence of which he was convicted was committed only by the false statements in his declaration. In any event, an obligation to declare income and capital for the assessment of tax was 'a common feature of the taxation systems of contracting states and it would be difficult to envisage them functioning effectively without it'.[549] Hence, it would seem that even an accurate return of income or capital (that is required for tax purposes on pain of criminal sanction) that reveals prior tax evasion would not be a breach of freedom from self-incrimination.

In *Weh v Austria*[550] it was pointed out that there are two different kinds of cases in which breaches of the right to freedom of self-incrimination have been found by the European Court. First, there are cases in which compulsion is used 'for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or—in other words—in respect of an offence with which that person has been "charged" within the autonomous meaning of Article 6(1)'.[551] Second, there are cases of 'incriminating information compulsorily obtained outside of the context of criminal proceedings' that is later used in criminal proceedings against the person concerned.[552] Most cases that raise freedom from self-incrimination issues are of the first kind. *Saunders v UK*[553] is a case of the second kind. In that case, the applicant, on pain of criminal sanction was required by law to answer (and did answer) questions put to him by Department of Trade and Industry inspectors in the course of their administrative investigation under company law into the conduct of a company takeover. Although this requirement did not *per se* raise an issue of freedom of self-incrimination, the use to which the information was put might do. In the *Saunders* case, the answers that the applicant gave, although not directly self-incriminating, were introduced by the prosecution to great effect in his later successful prosecution for offences involving fraud. There was held to be 'improper compulsion' in violation of Article 6.

Although acknowledging that an accused may waive his right to freedom from self-incrimination, in *Aleksandr Zaichenko v Russia*[554] the Court rejected the government's claim because 'being in a rather stressful situation and given the relatively quick sequence of the events [at a road check], it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed the basis for his prosecution'.

i. Entrapment

Entrapment is conduct inciting the commission of a criminal offence by a person who would otherwise not have committed it. The use in a criminal trial of evidence obtained by incitement may render the trial unfair in breach of Article 6.[555] In *Ramanauskas v Lithuania*,[556] the Grand Chamber stated: 'Police incitement occurs when the officers involved—whether members of the security forces or forces or persons acting on their instructions—do not confine themselves to investigating criminal activity in an essentially

[548] Contrast the *Saunders* case in the next paragraph.

[549] For other possible examples, see *Vasileva v Denmark* hudoc (2003); 40 EHRR 681 (giving one's name in some circumstances) and *Shannon v UK* hudoc (2005); 42 EHRR 660 para 38 (requirement to attend an interview).

[550] Hudoc (2004); 40 EHRR 890.

[551] *ibid* para 42.

[552] *ibid* para 43.

[553] 1996-IV; 23 EHRR 313 GC.

[554] Hudoc (2010) para 55.

[555] See, eg, *Veselov and Others v Russia* hudoc (2012) para 89. Cf *Sepil v Turkey* hudoc (2013) paras 32–33. The evidence of undercover agents who monitor or participate in an offence without inciting it may be admitted, even though they are excused from appearing as witnesses, subject to safeguards to protect the rights of the accused: *Lüdi v Switzerland* A 238 (1992); 15 EHRR 173. See further this chapter, section 5.V, p 484.

[556] 2008-I; 51 EHRR 303 para 55 GC.

passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.'[557] The test as to whether the offence would otherwise have been committed is whether there are 'objective suspicions that the applicant had been involved in criminal activity' or was 'predisposed to commit offences'.[558] The Grand Chamber added that the burden is on 'the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable'.[559] In other cases the Court has stressed the 'need for a clear and foreseeable procedure for authorising investigative measures, as well as their proper supervision' by judicial review or other independent supervision.[560] In addition to these requirements, the Court has added that the applicant must be 'effectively able to raise the issue of incitement during his trial', either by way of a defence or as grounds for the exclusion of evidence.[561] This must be possible in court proceedings that are 'adversarial, thorough, comprehensive and conclusive on the issue of entrapment', and in which the court's powers of judicial review extend to 'the reasons why the covert operation was mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected'.[562]

In the *Ramanauskas* case, the applicant was a prosecutor who, after repeated requests from members of the police anti-corruption unit, eventually accepted a bribe to secure the acquittal of a third person. The Grand Chamber held that the applicant's subsequent conviction for a corruption offence, in which the key evidence was his taking of the bribe, was unfair in breach of Article 6(1). In reaching this decision, the Grand Chamber noted that there was no evidence that the applicant had committed any corruption or other offences beforehand and that all meetings between the police and the applicant had been initiated by the police.[563] The Grand Chamber in the *Ramanauskas* case followed the approach taken by a Court Chamber in *Teixeira de Castro v Portugal*,[564] in which the applicant was requested by undercover police officers to supply heroin. The trial leading to his conviction was held to have been unfair because there were no indications that the applicant was predisposed to commit drug-dealing offences: he had no criminal record and all the evidence suggested that he was essentially a drug user who was prepared to help others in need, rather than a person minded and equipped to deal in drugs. The Court also noted that, as in the *Ramanauskas* case, the evidence of the police officers had been the main evidence against him.[565] In contrast, in *Volkov and Adamskiy v Russia*,[566] there was no entrapment when, on the basis of information received, the police, acting as lawful customers, asked to buy computer software and the applicants supplied unlicensed software on their own intiative.

[557] The 'influence' may simply be prompting the crime by, eg, a test purchase of drugs (the *Teixeira* case, below), or something more, such as pressure, threats, or bribes: see *Bannikova v Russia* hudoc (2010) para 47 and *Pareniuc v Moldova* hudoc (2014) para 39.

[558] *Ramanauskas v Lithuania* 2008-I; 51 EHRR 303 para 55 GC.

[559] *ibid* para 70 GC.

[560] *Khudobin v Russia* 2006-XII; 48 EHRR 53 para 135. See also *Vanyan v Russia* hudoc (2005) paras 46–47 and *Bannikova v Russia* hudoc (2010) para 49.

[561] *Ramanauskas v Lithuania* 2008-I; 51 EHRR 303 para 69 GC; *Bannikova v Russia* hudoc (2010) para 54; and *Matanović v Croatia* hudoc (2017) paras 125–129. See also *Sandu v Moldova* hudoc (2014) paras 32–38.

[562] *Veselov and Others v Russia* hudoc (2012) para 94. See also *Lagutin and Others v Russia* hudoc (2014) paras 119–121.

[563] Cf *Malininas v Lithuania* hudoc (2008) and *Sandu v Moldova* hudoc (2014) paras 32–38.

[564] 1998-IV; 28 EHRR 101 para 38.

[565] Contrast *Calabrò v Italy and Germany No 59895/00* hudoc (2002) DA.

In *Shannon v UK*,[567] the question arose whether the use of entrapment evidence obtained not by the police or others acting for them, but by private persons acting on their own initiative, might give rise to unfairness in breach of Article 6. In that case, the applicant, a well-known TV actor, agreed to provide a *News of the World* journalist, disguised as a sheikh, with cocaine. The applicant was convicted of supplying drugs illegally, the journalist's recordings being a key part of the evidence. While noting that the *Teixeira de Castro* case was different in that it involved a direct 'misuse of state power', the Court nonetheless stated that the use by the prosecution as evidence in court of information handed over to the state by a third party may 'in certain circumstances' render the proceedings unfair. However, on the facts of the case the Court found no breach of Article 6, essentially because the applicant was, in contrast with the applicant of the *Teixeira de Castro* case, predisposed to supply drugs, responding readily in the manner of an experienced supplier.

j. Prejudicial media publicity

The Court has acknowledged that the state has a positive obligation to control the conduct of the media so to ensure a fair trial. Whereas Commission decisions to this effect were expressed in terms of the residual 'fair hearing' guarantee in Article 6(1), in its jurisprudence the Court has considered this matter mostly under the guarantee of the 'presumption of innocence' in Article 6(2).[568]

k. Retroactive legislation designed to defeat a litigant's claim

Retroactive legislation designed to defeat a litigant's claim against the state in the courts in pending proceedings is in breach of the 'principle of the rule of law and the notion of a right to a fair trial enshrined in Article 6'.[569] In *Stran Greek Refineries and Stratis Andreadis v Greece*,[570] the state challenged in the courts an arbitration award against it arising out of a contract with the applicants. While the state's appeal to the Court of Cassation against lower court judgments was pending, the Greek Parliament, in breach of Article 6, enacted legislation that made it 'inevitable' that the arbitration award in the applicants' case was judicially declared void. The rule concerning retroactive legislation extends to cases in which the state is not a party, in which legislative interference prevents a 'fair trial' between the parties.[571] Exceptionally, retroactive legislation that interferes with the administration of justice in pending cases is not in breach of Article 6 if it can be justified on 'compelling' public interest grounds.[572] In this connection, the state's financial needs are not in themselves sufficient.[573] Legislation enacted after a court judgment has become final that affects its outcome is permissible.[574]

[566] Hudoc (2015) paras 35–46. Cf *Miliniené v Lithuania* hudoc (2008); *Sequeira v Portugal No 73557/01* hudoc (2003) DA; *Eurofinacom v France No 58753/00*, 2004-VII DA.

[567] *No 67537/01* hudoc (2004) DA.

[568] See this chapter, section 4, p 460. The Court has also referred to the impartiality of the tribunal.

[569] *Zielinski and Pradal & Gonzalez and Others v France* 1999-VII; 31 EHRR 532 para 57 GC. It is sufficient for a breach that the legislation is only a subsidiary reason for the judgment: *Anagnostopoulos and Others v Greece* 2000-XI 311 para 21.

[570] A 301-B (1994); 19 EHRR 293 paras 46, 49. The Court also relied upon 'equality of arms'. See also *Scordino v Italy (No 1)* 2006-V; 45 EHRR 207 GC.

[571] *Vezon v France* hudoc (2006) and *Arras and Others v Italy* hudoc (2012).

[572] *Forrer-Niedenthal v Germany* hudoc (2003) (furthering German reunification); *Gorraiz Lizarraga and Others v Spain* 2004-III (need for regional planning). See also *National and Provincial Building Society et al v UK* (public interest in clarifying tax law and securing tax payments) 1997-VII; 25 EHRR 127 and *OGIS-Institut Stanislas et al v France* hudoc (2004).

[573] *Maggio and Others v Italy* hudoc (2011). See also *Stefanetti v Italy* hudoc (2014).

[574] *Preda and Dardari v Italy Nos 28160/95 and 28382/95* 1999-II.