



The right of access to court

Particular aspects of the Right to a Fair Trial – Part I

Dr Piero Leanza



Article 6 (1) ECHR

- “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 (...)**”.



Article 6 (1) ECHR

“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”

Article 6 and civil proceedings

- The specific wording of Article 6 suggests that the guarantees under paragraph (1) apply to both criminal and civil proceedings, whilst the rights listed in paragraphs (2) and (3) – which start with the words ‘*Everyone charged with a criminal offence*’ - are specifically intended for criminal proceedings.

* See – among others – *Dombo Beheer B. V. v. the Netherlands*, Judgment of 27 October 1993, paras 32-33; *Albert and Le Compte v. Belgium*, Judgment of 10 February 1983, paras 39; *Feldbrugge v. the Netherlands*, Judgment of 26 May 1986, para 44.



Article 6 and civil proceedings

- However, extension of some of the guarantees provided for in paragraphs (2) and (3) to civil proceedings, where its principles are applicable by analogy*.

* See – among others – *Dombo Beheer B. V. v. the Netherlands*, Judgment of 27 October 1993, paras 32-33; *Albert and Le Compte v. Belgium*, Judgment of 10 February 1983, paras 39; *Feldbrugge v. the Netherlands*, Judgment of 26 May 1986, para 44.



The right to a court

“...Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the **‘right to a court’**, of which the **right of access**, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the **organisation and composition of the court**, and the **conduct of the proceedings**. In sum, the whole makes up the **right to a fair hearing....**”

(Golder v. the United Kingdom, Judgment of 21 February 1975, paragraph 36)



The right to a court

According to the prevailing interpretation, based on the principles affirmed in *Golder v. The UK*, the right to a fair trial has two components:

- the right of access to court, and
- the right to a fair process, which is secured by a certain number of procedural safeguards.



Right of access to court

- Although Article 6 does not explicitly provide for the right of ‘access to a court,’ it is widely accepted that such a right stems directly from paragraph (1), which grants everyone a *‘fair and public hearing ... before an impartial tribunal established by law.’*



Right of access to court

Article 6(1) embodies the ‘right to a court’, of which the right of access (that is, the right to institute proceedings before a court in civil matters) constitutes one aspect.

(Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, Judgment of 10 July 1998, paragraph 72)



Limitations

- Any limitation to the right of access to a court imposed by domestic legislation must not impair the ‘essence’ of the right to a court.



Limitations

Limitations may include, inter alia:

- statutory limitation periods
- determination of a certain value of the claim as condition for the filing of an appeal
- obligations to pay in advance a certain sum as ‘security’ before filing an appeal
- immunity from liability
- limitation of presence of minors and other categories of people before a court



Limitations

- The right of access to the courts is not absolute but may be subject to limitations (regulated by the State; cf. the mentioned *Golder* judgment, para 38).
- In laying down such rules, the Contracting States enjoy a certain margin of appreciation.
- Nonetheless, the limitations applied must not restrict or reduce the access to court in such a way or to such an extent that the very essence of the right is impaired.



Limitations

A limitation will not be compatible with Article 6 paragraph 1 (Article 6-1) if it does not pursue a **legitimate aim** and if there is not a **reasonable relationship of proportionality** between the means employed and the aim sought to be achieved.

(Ashingdane v. the United Kingdom, Judgment of 28 May 1985; Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, Judgment of 10 July 1998)



Examples

Stubbings and Others v. the United Kingdom, Judgment of 22 October 2006, paras 51-52

- The ECtHR held that the English relevant legislation providing for a statutory limitation period did not infringe the right of access to court under Article 6(1).
- Limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States, for the purposes of ensuring legal certainty, protecting potential defendants from stale claims, etc.
- In the case under examination, the English law of limitation allowed the applicants six years from their eighteenth birthdays in which to initiate civil proceedings.



Examples

Tolstoy Miloslavsky v. the United Kingdom, Judgment of 13 July 1995, para 67

- The applicant alleged that the requirement that he pay, as security, the sum of GBP 124,900 within fourteen days (failing which the appeal would be dismissed) had amounted to a total bar on his access to the Court of Appeal, since it had impaired the essence of his right of access to that court and was disproportionate.
- The ECtHR, however, did not find a violation of the applicant's right to to pursue his appeal.



Examples

Lupas and Others v. Romania, Judgment of 14 December 2006, paras 75-76), concerning a civil action involving the recovery of property held in undivided shares.

- The ECtHR found that the right of access to a court was violated when some of the co-owners of the property in question were prevented from initiating a lawsuit in the absence of the consent of all the co-owners (the so-called ‘unanimity rule’).



Examples

Garcia Manibardo v. Spain, Judgment of 15 February 2000, paras 44-45

- An appeal was declared inadmissible by the domestic court (*Audiencia Provincial*) due to the failure of the appellant to make a deposit or a ‘compensation award,’ a precondition to file an appeal under Spanish law.

The ECtHR found a violation of Article 6(I).



Legal aid

In *Airey v. Ireland*, Judgment of 9 October 1979, para 26, the ECtHR held that Article 6(1) was violated because the applicant was not able to bring an action for separation against her husband due to the fact that she did not have sufficient financial means to pay for a lawyer.

(The proceedings were quite complex and Irish law foresees the mandatory assistance by a lawyer)



Legal aid

- In the above decision, the ECtHR provided a limitation, in that the State need not ‘provide free legal aid for every dispute relating to a ‘civil right’, but stressed that Article 6(1) may oblige the Signatory State to provide for the assistance of a lawyer, where professional representation is necessary in law or due to the complexity of the procedure.



Legal aid

In *McVicar v. the United Kingdom*, Judgment of 7 May 2002, para 48 (...), the ECtHR decided that:

‘the question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer’.



Legal aid

The ECtHR case law also suggests that it is not sufficient for the State simply to grant legal aid to individuals (either in civil or criminal proceedings), but that State must also ensure that the assistance is of practical effect.



Legal aid

Bertuzzi v. France, Judgment of 13 February 2003, para 31

- The applicant obtained legal aid but was not able to make use of it since the opposing party (the defendant) was a lawyer and because all three lawyers assigned to the applicant had personal connections to the defendant and obtained permission to withdraw.
- The applicant was not able to have another lawyer assigned to his case; therefore, he was unable to start the proceedings.
- ECtHR: the principle of equality of arms was violated.



Excessive financial burden

- The right of access to a court is violated also when litigation related filing fees under domestic law impose an excessive financial burden on the applicant.
- In *Kreuz v. Poland* (Judgment of 19 June 2001) the applicant alleged that the court fee of PLZ 100,000,000 was equivalent to his annual salary at that time and therefore constituted a de facto bar to his access to court.



Immunities

- Immunity granted by international conventions or domestic law to special categories of persons such as states, embassies, international organizations, agents, employees, etc. may represent a bar to the power of domestic courts to adjudicate civil claims.
- This is relevant not only for litigation relating to employment, but also for claims for compensation and actions for damages in general.



Immunities

- In *Al-Adsani v. the United Kingdom* (Grand Chamber, Judgment of 21 November 2001) the United Kingdom courts had ruled that the State of Kuwait was immune to a claim for damages for personal injuries suffered by an individual as a consequence of torture.
- (On the basis of the State Immunity Act 1978, Section 1(1))



Immunities

- The ECtHR held that the immunity granted to Kuwait by the 1978 Act pursued the legitimate aim of compliance with the principles of international law and was also proportionate to the aim pursued, in light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969



Immunity for Certain Categories of State Servants

- Where there is a public interest justification for doing so, a State can also grant immunity to certain categories of its own employees; for example, police officers or members of the judiciary.



Immunity for Certain Categories of State Servants

- In *Enrst v. Belgium* (Judgment of 15 July 2003) the Court found that the immunity granted to a magistrate with regard to civil claims for damages did not violate the right of access to justice, but only because the domestic jurisdiction provided the injured party with other means of protection of his interests.



Immunity for Parliamentary Members

- In *Syngelidis v. Greece* (Judgment of 11 February 2010) the applicant had claimed for compensation for non-pecuniary damages as a consequence of his ex-wife's breach of a judicial decision on the custody of their child.
- The applicant alleged that the parliamentary immunity of his ex-wife violated his right of access to a court.



Immunity for Parliamentary Members

In that case, the ECtHR held that the dispute between the couple was unrelated to the parliamentary activity.

The refusal by the Greek Parliament to waive the M.P.'s immunity was therefore unjustified and constituted a breach of the right of access to court embodied in Article 6(1)



Immunity for Parliamentary Members

- Similar reasoning had already been expressed by the ECtHR in *Cordova v. Italy* (Judgment of 30 January 2003) where blanket immunity protected a member of the Italian Parliament (and former President of the Italian Republic) from the claim for damages brought by an Italian public prosecutor.



Immunity for Parliamentary Members

- The Court held that the decision of the domestic court to apply the immunity provided for by Article 68(I) of the Italian Constitution, and the subsequent refusal of the same court to raise a conflict of State powers before the Constitutional Court (as requested by the applicant) amounted to an infringement of the right of access to a court.



Immunity for Parliamentary Members

- The prosecution of Mr Cossiga was abandoned, with the consequence that the applicant was deprived of the possibility of securing any form of reparation for his alleged damage.

“In these circumstances, the Court considers that there has been an interference with the applicant’s right of access to a court.” (Cordova v. Italy, paras 52-53)



Immunity for Parliamentary Members

- Furthermore, the ECtHR noted that the behaviour of the member of Parliament related to a personal dispute and was unrelated to the exercise of his parliamentary functions. Accordingly, it could not have been covered by parliamentary immunity



Presence of parties in the proceedings

- Although this principle is generally accepted as being of universal application in criminal proceedings, the presence of a party at the proceedings in civil cases is considered to be necessary only in exceptional cases (in other words, it is sufficient that a party is represented by a lawyer)



Presence of parties in the proceedings

Article 6 of the Convention does not guarantee the right to attend a civil court in person, but rather a more general right to present one's case effectively before a court and to enjoy equality of arms with the opposing side.

(Pashayev v. Azerbaijan, Judgment of 28 February 2012, para 64).



Right to have an effective final decision

- Corollary of the right of access to court is the right of the parties to obtain a final decision and to have that decision executed.



Right to have an effective final decision

- This right stem directly from the general principle of *res judicata*.
- When a decision is final, it cannot be undermined by any state authority, unless exceptional circumstances exist.



Right to have an effective final decision

- In *Brumarescu v. Romania* (Judgment of 28 October 1999) the Court held that allowing the Procurator-General of Romania to apply for a final judgment – *res judicata* and even after the judgment had been executed - to be quashed violated the principle of legal certainty.