

## THE RIGHT TO A FAIR TRIAL IN CIVIL CASES

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### I. INTRODUCTION

The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights and it represents one of the most fundamental guarantees for the respect of democracy and the rule of law on the European continent. Indeed, the concept of fair trial is a basic component of the wider notion of the separation of powers: it attributes to the judiciary - one of the three powers of the State - its distinct character from the other two, by determining which qualities - independence and impartiality - and which procedures make it an element of protection and security for those who are under the omnipotent jurisdiction of the State. The obligations, therefore, for the State under this Article go far beyond the protection afforded by some other articles of the Convention, as they are positive obligations by their nature, and hence require from the State and its authorities not only a mere abstention from acts which may be detrimental to an individual, but also, and above all, the taking of initiatives to ensure good administration of justice within the State. In sum, Article 6, while it encompasses the protection of individuals before the courts, at the same time identifies the basic features of the judiciary which distinguish it from the other two State powers.

The right to a fair trial refers both to criminal and civil cases and the corresponding proceedings. The first paragraph of Article 6 applies equally to the two categories of cases, while the two remaining paragraphs 2 and 3 are designed to apply, by and large, to criminal proceedings. We say “by and large” because, although the intention of the legislator was to limit the applicability of these two paragraphs to penal cases, the Strasbourg organs have widely construed the obligations appearing on paragraphs 2 and 3, which has led to their application by analogy in civil cases, whenever feasible.<sup>1</sup>

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<sup>1</sup> This observation concerns more para. 3, than para. 2 of Article 6.

It should also be pointed out, from the outset, that the Strasbourg case-law has led to the creation of new guarantees which are not specifically mentioned in the letter of the article as such, but which have emerged as a consequence of the development of this case-law. These judge-made guarantees have been considered as natural corollaries of the written guarantees of Article 6 or, better, as guarantees which emanate from its very spirit of protection: the right of access to a court, the right to legal aid, or the equality of arms are three guarantees, now well-embedded in the judicial conscience, that all come from an extensive interpretation of Article 6. At the same time, and as a result of this extensive interpretation of Article 6, notions which were designed, by the European legislator, to have a more limited purview, have grown, through the case-law, to dimensions expanding the limits of protection of Article 6 in areas far wider than anticipated by its founding fathers. A classic example of this expansionist trend of the case-law is the creation of the autonomous notion of “civil rights and obligations” and of “criminal charge” which now covers categories of cases and proceedings which cannot be considered necessarily to have been anticipated by the drafters of the Convention.

The task of this brief presentation is not, of course, to carry out a comprehensive analysis covering all the possible aspects of the first paragraph of Article 6, when it applies to civil cases. As we have already said, Article 6, in its first paragraph, does not make any distinction, as far as the guarantees contained therein are concerned, between the civil or the criminal nature of judicial proceedings. And the case-law of Strasbourg has never isolated any of the guarantees as exclusively belonging to civil or criminal procedures. In these circumstances, we shall attempt to draw a distinction, somewhat artificially, by dealing in this introduction with guarantees that are not necessarily destined for civil cases, but which have been implemented by the Court, so far, mainly in civil proceedings, or have been implemented in a manner which treats in a different way civil and criminal proceedings. Our proposal is, therefore, to deal in this introduction with two aspects of para. I, the question of the access to court, which has mainly matured as a legal concept in civil cases, and the question of the fairness of the proceedings, seen from

the angle of civil proceedings.

## II. ACCESS TO A COURT

We start with the notion of access to a court. If we make the distinction between the institutional aspects of Article 6 and the procedural ones, institutional being e.g. the independence and impartiality of a tribunal, procedural being the fairness of a hearing, then the access question is, of course, one fundamental institutional aspect. As we have already mentioned, it is a judge-made concept appearing for the first time in the judgment of *Golder v. U.K.*<sup>2</sup> In that 1975 case a prisoner was refused permission by the Home Secretary to write to a solicitor asking him to institute civil proceedings against a prison officer for libel. The Court held that Article 6 had been violated in the circumstances because its para. 1 concerned not only the conduct of the proceedings once they have been instituted, but also the right to institute them in the first place. Any other interpretation of Article 6, according to the Court, would contradict a universally recognised principle of law and would allow a State to close its courts without infringing the Convention. With the lapse of time, the notion of a right of access to a court, or the equivalent wider notion of a right to a tribunal, has developed into one of the fundamental guarantees of Article 6, both in civil - par excellence - and, sometimes, in criminal cases. The constitutive elements of this novel concept, namely its specific components which have been set out in the case-law are the following.

First, the right of access concerns both the factual circumstances of a case and its legal substratum. In other words, a person within the jurisdiction of a State-party to the Convention must have effective access to a court to settle his grievances on arguable civil claims. The Court does not make a distinction between impediments to this right deriving from factual difficulties and those stemming from legal regulations. Furthermore, as far as effectiveness is concerned, a person must have the facilities to vindicate his right before the courts and be able to enforce a decision determining that

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<sup>2</sup> (1979) 1 E.H.R.R. 524, [1975] E.C.H.R. 4451/70. See, mainly paras. 28 *et seq* of the judgment.

right. The case of *Airey v. Ireland*<sup>3</sup> where an indigent woman was refused legal aid in very complex proceedings, where there was a need to examine expert witnesses, and where the Court found that refusal of legal aid equated to refusal of access is a good example of this second requirement.<sup>4</sup> The Court, however, made a distinction in that case between criminal and civil proceedings by stating that legal aid is required in civil cases, under the notion of access, only in situations where a person cannot plead his case effectively.

Second, the right of access concerns also the right to a proper preparation of a civil case in that the authorities must keep people duly informed of measures taken concerning their civil rights, allowing them time to institute civil proceedings against these measures if they interfere with their rights. The *locus classicus* in this respect was the *de la Pradelle v. France*<sup>5</sup> case where the administration had not properly informed interested persons, affected by the repercussions that a law decree had upon their real property.

Third, the right of access is not an absolute right. The Court accepts that limitations may apply, as this right “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”.<sup>6</sup> However, although a State-party enjoys a certain “margin of appreciation” a limitation must not be such that “the very essence of the right is impaired”.<sup>7</sup> As with most of the limitations which are permissible under the Convention, a restriction to the right of access must, in addition, have a legitimate aim, and comply with the proportionality test, in that there must exist “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.<sup>8</sup>

The case-law of the Strasbourg organs has given an answer as to what can be considered acceptable limitations of a right to access. Specific categories of litigants may legitimately be prevented from instituting proceedings or participating in them: minors, prisoners, vexatious litigants. Equally, reasonable time-limits for instituting

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<sup>3</sup> (1979) 2 E.H.R.R. 305.

<sup>4</sup> (1979) 2 E.H.R.R. 305, vol. 32.

<sup>5</sup> [1992] E.C.H.R. 12964/87.

<sup>6</sup> (1979) 1 E.H.R.R. 524, [1975] E.C.H.R. 4451/70, at para. 38.

<sup>7</sup> *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528, [1985] E.C.H.R. 8225/78, at para. 57.

<sup>8</sup> *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528, [1985] E.C.H.R. 8225/78, at para. 57.

proceedings may be imposed; formal requirements must be respected, and reasonable fees to be paid by litigants may also be acceptable. An interesting aspect of these restrictions is to be found in a series of cases whose State of origin is the United Kingdom and concerning jurisdictional bar on access based on an immunity or defence that may be invoked by a defendant in order to avoid adjudication of a case against him. The case of *Fayed v. United Kingdom*<sup>10</sup> is the first important case in this family, where the Court held that a defence of privilege available in an action for defamation brought by the owners of a company concerning allegations of fraud in a government inspector's report on the company was a permissible restriction on access. Its legitimate aim was to facilitate the investigation of public companies in the public interest and there was proportionality in the light of the State's margin of appreciation. That case was followed by *Osman v. United Kingdom*<sup>11</sup> where the Court found that there was violation of the right of access because the applicants were prevented from suing the police on the basis of an absolute, blanket immunity protecting policemen from being sued in civil proceedings for negligence in the course of their duties. The blanket immunity was considered by the Court to be an unacceptable restriction because of its absolute and unqualified character, going beyond the permissible limits afforded to a State by its margin of appreciation. Strangely enough, the Court has recently overturned the *Osman* case-law, in a very similar case, concerning blanket immunity of local authorities in children's care matters, on the basis of reasoning which unjustifiably, to my mind, attempts to distinguish that case from *Osman*.<sup>12</sup>

Finally, it should be underlined that a right of access may be subject to a legitimate waiver, provided that the waiver may be established on the basis of unequivocal conduct on the part of the person concerned.<sup>13</sup>

### III. THE RIGHT TO A FAIR HEARING

The right to a "fair hearing" is the other generic notion which

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<sup>10</sup> (1994) 18 E.H.R.R. 393, [1994] E.C.H.R. 17101/90.

<sup>11</sup> (2000) 29 E.H.R.R. 245, [1998] E.C.H.R. 23452/94.

<sup>12</sup> *Z. and others v. The U.K.*, [2001] E.C.H.R. (Grand Chamber) 10 B.H.R.C. 384, 10 May 2001.

<sup>13</sup> See Harris, D.J., Boyle, M.O., Warbrick, C., *Law of the European Convention on Human Rights* (Butterworth, London, 1995), pp.201 *et seq.*

applies to civil cases in a way which marginally differs from its application to criminal cases. As the Court has said “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” (*Dombo Beheer B.V v. The Netherlands*).<sup>14</sup> As it has been pertinently stated by the doctrine:

... although certain of the guarantees listed in Article 6 (3) (e.g. the right to legal assistance or to examine or cross examine witnesses) may in principle be inherent in a “fair hearing” in civil as well as in criminal cases, they may not apply with quite the same rigour or in precisely the same way in civil proceedings as they do in criminal ones. The same is true of such rights as the right to be present at the trial and to “equality of arms” that flow exclusively from Article 6 (I) in both criminal and civil cases.<sup>15</sup>

We therefore propose to have a close look at certain instances of the Strasbourg case-law in order to delineate the limits of protection afforded by the organ(s) of the Convention in civil cases on the issue of “fair hearing”.

- a. With regard to the presence of a party to a hearing, the case-law demonstrates that, unlike in criminal cases, in civil cases, the presence of a party is not absolutely necessary, and that it may be limited to specific circumstances, for instance in cases where assessment of the party's personality is required. In most cases the presence of a lawyer suffices to satisfy the requirement of fairness. It goes without saying that an unequivocal waiver of the right to be present is also accepted by the case-law.
- b. With regard to the notion of “equality of arms” *i.e.* the premise that “everyone who is a party to ... proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at substantial disadvantage *vis-à-vis* his opponent” (*Kaufman v. Belgium*)<sup>16</sup> the Court has

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<sup>14</sup> [1993] E.C.H.R. 49 14448/88

<sup>15</sup> Harris, D.J., Boyle, M.O., and Warbrick, C., *Law of the European Convention on Human Rights* (Butterworth, London, 1995), p. 202

<sup>16</sup> Commission decision of 9<sup>th</sup> December 1986, D.R. 50, p. 98, at p. 115. 10938/84

developed a rich case-law in civil matters. In the *Ruiz Mateos v. Spain*<sup>17</sup> case, the Court found a violation of the principle because the applicants were not allowed to reply to written submissions made by the Counsel for the State before the domestic appeal court. In the *Stran Greek Refineries and Stran Andreadis v. Greece* case, the Court stated that the “principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute”.<sup>18</sup> The legislative interference may be seen, of course, as an issue of equality of arms, but also as a problem of infringement of a right to a tribunal, even as a problem of independence of the courts.<sup>19</sup>

- c. With regard to the evidence in civil cases, the constant position of the Court is that domestic courts are not required to follow particular rules on evidence. It is within the margin of appreciation of the States-parties to the Convention and their courts to determine such rules provided, of course, that they do not infringe the fundamental procedural guarantees provided for by Article 6.

A similar problem to that of evidence is the invocation by applicants of errors on the facts or the law allegedly committed by national courts in their assessment of the facts and in their interpretation of the law. The traditional approach of the European Court on this matter is that Article 6, incorporating procedural guarantees, is not designed to be the legal basis for a review of the facts and of the substantive law upon which the national judge decided the case. The European Court is not a “fourth instance” court, called upon to re-examine, under Article 6, the merits of a case or the interpretation of the applicable domestic law. The Court only reviews errors which are relevant to the procedure followed errors *in procedendo*, not errors *in iudicando*.

In the recent case-law of the Court this principle has been reinstated. Yet, in some instances the Court has reached a threshold of the “fourth instance”. This happened for instance in the case of

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<sup>17</sup> (1993) 16 E.H.R.R. 505, [1993] E.C.H.R. 12952/87.

<sup>18</sup> [1994] E.C.H.R. 48, 13427/87 paras. 46 and 49

<sup>19</sup> See also recent case-law on the participation of the Commissaire du Gouvernement in administrative proceedings in *Kress v. France* [2001] E.C.H.R. 39594/98.

*Dulaurans v. France*.<sup>20</sup> In this case, the applicant complained that the Court of Cassation declared inadmissible the only complaint she made before it because it considered that that complaint had been raised for the first time at the stage of cassation; while, in reality, the complaint had already been raised in the submissions at the appeal stage. The European Court reminded that the right to a fair hearing required that the observations of the parties must really be heard and duly examined by the domestic tribunals. According to that principle, a court has the obligation to proceed to an effective examination of the complaints, argument and evidence offered by the parties in order to assess their pertinence. In examining the judgment of the Appeal Court, in the circumstances of the case, the European Court reached the conclusion that the approach taken by the Court of Appeal in its operative part was an answer to an allegation of the applicant raised at the appeal stage and, hence, the Court of Cassation was not right to say that this complaint was a new one raised at the cassation stage. Here we are confronted with a situation where the European Court enters into the merits of a case and scrutinises a judicial decision to find whether a procedural error was committed by a court.

An interesting aspect of errors committed by national courts concerns the non-respect of formalities provided for by national legislation. In the case of *Leoni v. Italy*<sup>21</sup> the applicant's appeal to the Court of Cassation was rejected by that court because the appeal deposited at the Registry of the Appeal Court was not transferred to the Registry of the Court of Cassation in time. The European Court found that that error was an error of the authorities and that an applicant cannot be penalised for the non-respect of formalities by the Appeal Court. In the same vein, in a Greek case, *Platakou*,<sup>22</sup> the European Court found a violation by the Greek State because of a delay in transmitting an appeal to a court which was attributable to the “*huissier de justice*”, and which led to a loss of opportunity for the applicant to lodge her appeal. As in the previous case, the European Court attributed responsibility to the State whose organ was responsible for the delay.

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<sup>20</sup> [2000] E.C.H.R. 108, 34553/97

<sup>21</sup> Judgment of 26 October 2000, 43269/98.

<sup>22</sup> [2001] E.C.H.R. 14, 38460/97



#### IV. SOME CONCLUDING REMARKS

As we have already said, it is impossible in the limited space of this presentation to deal exhaustively with all the issues which have been raised by the case-law of the Court and concern civil proceedings. Let us then stop here, and allow ourselves some lines to deal succinctly with the core problem of this discussion which we have left till last, although in reality it is the first consideration, namely what is considered by the Court to be a “civil case” worthy of protection by Article 6.

It is well-known, of course, that neither the Convention when referring in Article 6 to “civil rights and obligations” nor the Court's case-law have provided a general definition of the term. Although it seems that the drafters, when preparing the Convention, were in favour of a rather restrictive approach to the notion, the Strasbourg organs have expanded the purview of the term - as they have done with regard to the term “criminal charge” - to cover proceedings which do not necessarily belong to the purely civil sphere. The Court has held on several occasions that Article 6 applies to proceedings whose outcome has a direct bearing on the determination and/or substantive content of a private right or obligation. Applying the criterion “decisive for private rights or obligations”, referring to the applicability of Article 6, “the Strasbourg organs declared that the Article applies to several categories of what would often be considered as public law disputes ...”.<sup>23</sup> Many of the cases concern administrative proceedings affecting contracts for the sale or expropriation of land, nationalisation of property, environmental protection, practice of professions, regulation of licence to conduct certain economic activities. There have also been cases concerning social benefits, including sometimes cases of unjust dismissal.

In all these categories of cases, the prevailing element which has led the Court to identify them as civil cases, was an element of an economic interest for an individual, or a private interest at stake (such as reputation, well-being, quality of life), considered to be of such importance as to override the public-law character of a case. In any event the Court seems to have adopted in these instances an

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<sup>23</sup> Harris, D.J., Boyle, M.O., and Warbrick, C., *Law of the European Convention on Human Rights* (Butterworth, London, 1995), pp. 189 *et seq.*

approach which implicitly accepts that a public law character of a case is not necessarily affected, in regard to the core issue of the discretion of a State, by the mere fact that, if proceedings exist to control it, these proceedings must comply with the procedural guarantees offered by Article 6.

In these circumstances, the only categories of cases, bearing a public-law element, which resist the control of the Court -because the Court so decides -are mainly immigration and asylum proceedings as well as tax proceedings. The exclusion of the latter was challenged in a recent case, the case of *Ferrazzini v. Italy*.<sup>24</sup> The majority (rather numerically reduced if compared to previous cases on the same issue) of the Court decided to uphold its constant case-law on the basis of the argument that taxation still belongs to the “hard core of public authority prerogatives, with the public nature of the relationship between the tax- payers and the tax authority remaining predominant”. The position of the dissenters is expressed in an opinion written by Judge Lorenzen:

... the finding that Article 6 § 1 ... is applicable to tax cases does not in any way restrict the States' power to place whatever fiscal obligations on the individuals and companies they may wish. Nor does such a finding restrict the States' freedom to enforce such laws as they deem necessary in order to secure the payment of taxes ... Article 6 ... is a procedural guarantee that grants primarily the right of access to a court and the right to have court proceedings determined fairly within a reasonable time.<sup>25</sup>

This *dictum* may, of course, equally apply to all other categories of cases which still remain outside the purview of Article's 6 control.

The last words of the quotation from the dissenting opinion brings us to the issue of the length of proceedings as a ground for violation of Article 6. Length of proceedings in civil cases represents today, statistically, the most frequently invoked violation of Article 6. For many European States it is the most typical violation

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<sup>24</sup> [2001] E.C.H.R. 44759/98.

<sup>25</sup> [2001] E.C.H.R. 44759/98, at para. 8. of the dissenting judgment.

stemming from their domestic proceedings. This is extremely serious, on the one hand, because length of proceedings may have adverse consequences for the good administration of justice. But it may also be seen, on the other hand, as a positive element in the long adventure towards compliance of European States with the guarantees of the Convention: if in today's Europe the great bulk of cases are length of proceedings cases, this phenomenon demonstrates a tendency of compliance of States with the Convention's precepts on other, more hard core guarantees. Let this optimistic statement be the last words of this small contribution.