



**NATIONAL INSTITUTE OF JUSTICE**

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# The right to a fair and public hearing within a reasonable time

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# Introduction

- Bearing in mind:
  - Article 6 generally: “a pithy epitome of what constitutes a fair administration of justice”.
  - Elements:
    - “Civil rights and obligations”
      - Autonomous meaning of “civil rights and obligations”
    - “Fair and public hearing”
    - “Within a reasonable time”
    - “Independent and impartial tribunal established by law”
    - Public judgment
      - Qualified

# Article 6 & the Strasbourg Court

- Provision of the ECHR most frequently invoked by applicants.
- Statistics:
  - Breaches of Article 6 comprised approx. 1/3 of all violation decisions in 2013.
  - 916 violation decisions in total: 30.05% re Article 6 = 275+- violation decisions.
- But bear in mind limited role of Strasbourg Court:
  - No jurisdiction to
    - reopen national proceedings
    - re-examine facts
    - reconsider application of national law.
- Rather, will consider whether proceedings, as a whole, were compliant with Article 6?
  - And note: finding of breach will not automatically result in reverse of national court judgment.

# Civil rights and obligations

- Autonomous meaning
- Requires a national law civil “right / obligation”
- Includes civil litigation between private bodies
- But more difficult where state involved:
  - Dispute may be “administrative law” matter?
  - Dispute may involved “public law”.
- National classification not determinative, or would allow states to contract around ECHR.
- Court takes case-by-case approach.

# Scope

- Strasbourg Court increasingly liberal.
- “civil rights and obligations” has included:
  - Applications for approval of land transfers – *Ringeisen v Austria* (1971)
  - Professional authorisations - *Konig v Germany* (1978) (medical licences)
  - Taxi licenses - *Pudas v Sweden* (1987)
  - State care of children, expropriation, planning decisions, alcohol serving licences, professional disciplinary disputes, social security disputes (inc. re non-contributory benefits) – *Salesi v Italy* (1993) – re. disability allowance, public sector employment disputes...
    - Suggests: requires – 1. national, legal rights and 2. “civil life” impact – e.g. impact on income.
- Though:
  - Tax disputes – outside scope
- Depends on character of right / effect on individual

## What is a “dispute” / “contestation”?

- Non-technical construction.
- May be re. existence or exercise of a right.
- Must be genuine / serious
- “Civil rights” must be an object of proceedings
- So – as to the requirements of a “fair” hearing...

# Fairness

- Covers proceedings as a whole
- Not possible to state entirety of considerations in abstract: will depend on circumstances.
- But some specific “ingredients”...

# Procedural Equality

- Equality of arms
  - In civil context: need not be absolute. (*Steel & Morris v UK*, 2005) (legal aid availability to McLibel defendants)
    - E.g. no need to provide “perfect” legal aid.
    - But weaker party should not be placed at “substantial disadvantage”
  - Rather – requires a reasonable opportunity to present case, including evidence, without being at substantial disadvantage to opponent.
    - *Dombo Beheer BV v Netherlands* (1993) (re. civil dispute over overdraft facility).



# Adversarial process / disclosure of evidence

- Adversarial requirement
  - Requires disclosure of evidence
  - i.e. “the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.”
    - *Ruiz-Mateos v Spain* (1993) (re. counsel for state at advantage to private bodies re dispute)
  - But not absolute entitlement. – e.g. permitted to limit to protect other individuals’ rights – e.g. vulnerable individuals / children.
    - But qualifications on disclosure must be strictly necessary.
    - Strasbourg Court will not review factual justifications for limits on disclosure, but rather will look to decision-making procedure, e.g. re safeguards

# Other procedural aspects of Art. 6

- Reasoned decision
  - Implicit in requirement for fair hearing.
    - E.g. *Van de Hurk v Netherlands (1994)* (CAP-related dispute)
  - No breach solely because judgment fails to address points applicant considers material, provided some reasons are given.
  - But equally, national court cannot ignore “fundamental”, “cogent / relevant” issues – which would have had bearing on outcome of dispute.
    - *Luka v Romania (2009)* (re. raising of issues in corporate dispute)
  - Esp. important at first instance to enable effective functioning of appeal system.
  - Though again, will in all cases depend on circumstances:
    - E.g. reasons given must relate to dispute in question.
      - *Gorou v Greece (No. 2) (2009)* (defamation dispute – public prosecutor declined to appeal for applicant – terse response)

## And a few more...

- Appearance in person
  - Esp. important in criminal context re. accused.
  - But also important in civil context, esp. where individual's character / state of health is relevant to dispute – e.g. child custody, disability claims.
    - *X v Sweden* (1959), *Salomonsson v Sweden* (2002)
- As well as effective participation..
  - i.e. present and able to participate!
    - “reasonable” adjustments required?
    - What about witnesses? E.g. children...

# Public hearing

- Turning to explicit requirements of Article 6...
- The public character of court hearings.
  - Strong guarantee of fairness:
    - Protects against arbitrariness
    - Ensures justice is seen to be done – confidence building measure
  - But key only where there is a “determination”
    - As opposed to appeal courts’ “supervising” of lower courts on points of law and remitting decisions.
      - i.e. in camera appeals may be permissible: *Axen v Germany* (1983) – re personal injury claim.
- May be limited on grounds of:
  - Public policy, national security, privacy or interests of justice – but strictly construed.
    - Importantly – re. civil context, proceedings re children’s residence - = “prime example” of circumstances where exclusion of press / public may be justifiable owing to personal sensitivity / need for candour.

# Public judgments

- Public pronouncement required by Article 6(1) (“doit être rendu publiquement”)
- Meaning?
  - Not necessarily “read out in open court” – rather, states have discretion to manner of publicity:
    - *Pretto & others v Italy* (1983) Court of Cassation’s appeal decision not “pronounced”, but readily available. No breach.
  - i.e. will depend on circumstances...
- No qualifications.
  - But re. e.g. child residence hearings – would cut across privacy of proceedings if decisions freely available: held no breach if court leave required to access first-instance decisions, provided decisions in cases of “special interest” and appeals were routinely published.
    - *P and B v UK* (2001) (applicants complained had been barred from divulging information about proceedings on custody rights over their children).

# Length of proceedings: the right to a trial within a reasonable time

- Purposes:
  - to protect civil litigants and criminal defendants against excessive delays in legal proceedings,
  - to underline the importance of “rendering justice without delays which might jeopardise its effectiveness and credibility (*H. v France* (1989)) (re. damages in psychiatric hospital).
- “Reasonableness” assessed according to circumstances of each case with respect to:
  - complexity of the case;
  - conduct of the applicant;
  - conduct of the state authorities;
  - what was at stake for applicant in proceedings.
    - *Frydlender v France* (2000) – Grand Chamber (employment) / *Davies v UK* (2002) (directors’ disqualification proceedings)
- Issues examined separately and only then cumulatively.

# Excessive length of proceedings

- Most common basis of complaint to Strasbourg Court.
- Civil context:
  - “start” of proceedings – issuing summons / writ.
  - “end” – final determination, inc. appeal, cassation, assessing costs / damages, enforcement.
- State not responsible for delays caused by private parties to litigation.
  - n.b. judicial over-burdening no excuse.

# Length of proceedings

- Examples:
  - *A and others v Denmark* (1996)
    - “Special diligence” required where issue was award of compensation from state for negligent HIV infection.
  - *H v UK* (1987)
    - Delays not acceptable where permanent damage may result in consequence (e.g. re parental access to child).
  - *Bottazzi v Italy* (1999)
    - Violations re unreasonable length of proceedings in Italy:
      - Continuing situation;
      - Systemic breach incompatible with ECHR...



# Length of Proceedings: Pilot Cases

- Two variations in problems:
  - Prolonged non-enforcement of court decisions and lack of domestic remedy (violation of Articles 6 and 13)
  - Excessive length of proceedings and lack of domestic remedy (violation of Articles 6 and 13)
- Approaches:
  - *Scordino v Italy* (2006) (re. expropriation) – preferred solutions (in order):
    - Prevent unreasonably lengthy proceedings.
    - Remedy to expedite lingering proceedings.
    - Provide compensation for over-long proceedings.
- Slovenia:
  - *Lukenda v Slovenia* (2005): inadequate legislation / inefficiency – state required to provide remedies for violations of rights.
    - Addressed with 2006 legislation.

# Bulgaria

- *Dimitrov and Hamanov v. Bulgaria* (application nos. 48059/06 and 2708/09) 2011
- *Finger v. Bulgaria* (no. 37346/05) 2011
  - 12 month deadline for introducing compensatory remedy. At that point: around 700 further cases against Bulgaria on this issue.
  - Legislation introduced
    - Judiciary Powers Act / 1988 State and Municipalities Responsibility for Damages Act amendments October 2012?
- *Subsequent inadmissibility decisions:*
  - *Valcheva and Abrashev v. Bulgaria* (applications nos. 6194/11 and 34887/11) and
  - *Balakchiev and Others v. Bulgaria* (application no. 65187/10)
- *Update since Committee of Ministers (26 September 2013)?*