

INTERIM MEASURES AND THE APPLICABILITY OF ARTICLE 6

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INTRODUCTION

In our daily work, we are confronted with a full scale of situations of conflicts. Apart from the merits of a case, the core guaranty to ensure justice is the right to a fair trial. This principle shall determine all handling in each case by legal practitioners. To reach a fair decision complying with all the procedural stipulations of a fair trial is already difficult enough. If an immediate decision has to be reached this is even harder. Since these situations occur routinely, we decided to approach the dilemma of time and justice in this paper, concentrating only on disputes concerning ‘civil rights and obligations’.

The first part of the paper describes this dilemma of time and justice. Predicting that a fair trial, on which basis a judge is able to deliver a just result, depends on the adequate investment of time, our goal is to show that an immediate decision is always in conflict with the guarantees of

Art. 6 (1) of the European Convention on Human Rights (ECHR)¹. This problem is even more apparent in the legal instrument of interim measures², which was developed to attenuate the consequences of the dilemma at hand.

Part two, without claiming to be exhaustive, attempts to give a general overview of the applicability of Art. 6 (1), its scope and the specific guarantees of a ‘fair trial’ to provide an ideal basis for the subsequent content.

In the third part, we handle the case-law of the European Court of Human Rights³, describing the former decision practice as well as the development of the ‘new approach’ in the Micallef case and its practice in the latest decisions and judgements.

In the final chapter we took the opportunity to elucidate our position on this topic in further detail.

I. THE DILEMMA OF TIME AND JUSTICE

As previously indicated a significant conflict between a prompt and a just decision exists. By describing this problem of time and justice one aspect of economic theories shall be elaborated here. The method we use to find a/the just solution to legal disputes is the correct application of the substantive law to the true facts. Since the object of determining the truth about disputed facts cannot be achieved by waving a magic wand, it necessitates the gathering of evidence, its investigation and preparation for trial. The attainment of a correct solution is therefore – at least in part – an outcome of the resources we are prepared to invest in the civil process. Up to a certain point, the more we put into the investigation of an issue of fact the more likely we are to get closer to the truth. Furthermore, the more professional and judicial effort is devoted into the fact-finding, the more likely a correct answer can be achieved.

This is also true with the factor ‘time’⁴. The more time we spend to investigate the facts and determine the law, the more likely we are to obtain a just result. Predicting that every individual or entity has the right to a fair trial – as Art. 6 envisions – it is every legal practitioner’s, especially

¹Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms states: ‘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. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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.’; Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4/11/1950 (3/9/1953), UNTS Vol. 213, p. 221; All Articles not specially marked are those of the ECHR.

² Interim Measures are ordered by courts in cases where there is plausibly asserted to be a risk of irreparable damage to the rights of one of the parties to preserve the subject matter of a dispute and, thus, maintain the status quo until a court reaches a final determination of the civil right or obligation in dispute; see Mamatkulov and Askarov, 4.2.2005, 46827/99 and 46951/99, §§ 108, 113.

³The European Court of Human Rights hereafter will be referred to as ‘the Court’.

⁴ Sinaniotis describes the dilemma between justice and time as follows: ‘Time is a notion with a strong effect to the effectiveness of judicial protection. Time has a positive as well as a negative side. Therefore in relation to justice, time may prove to be a factor of correct as well as wrong results.’ (Sinaniotis, Dimitrios; The interim protection of individuals before the European and national Courts, Alphen aan den Rijn [u.a.], Kluwer Law International 2006, p. 2).

a judge's, duty to administrate litigation considering all available evidentiary material in detail. It is an easy conclusion that a careful, accurate and effective result needs time.

In addition one should keep in mind that a judge is not the only one who controls the outcome of legal proceedings. A just procedure is one which gives opportunity to each party to litigation to use all available evidence, remedies and rights the legal system confers to them. Naturally, such opportunity takes time and an exhaustive investigation from both sides of the bench – judge's and litigant's. As a result a 'fair' trial, on which basis a judge is able to deliver a just result, depends on the adequate investment of time⁵.

Nonetheless academic theory has proven that this prediction may get obsolete⁶. Conveying the 'law of the diminishing return' from the economic theory, a certain point may be reached in litigation beyond which any additional investment in the process would produce increasingly insignificant improvement. Furthermore – which brings us closer to the problem at stake – there may be a point beyond which time would undermine the practical utility of the judgement. Due to this concept it's possible that a decision in a dispute between two litigants applies the law to the true facts correctly and yet still comes too late to be of practical use to the winning party.

This can be illustrated using a simple example: After the break-up of a marriage the two children from this marriage remain in the custody of their father, who files a divorce petition against his wife. Because of the father's refusal to give her an opportunity to see her children, the mother files for parental custody during the divorce proceedings. These proceedings last two years in which the mother has no opportunity to get in contact with her children⁷. Regardless of the result of litigation, it is obvious in this case, that after two years even a judgement in favour of the mother will cause harm which no later compensation could remedy.

Therefore the reasonable time-requirement of Art. 6 (1) is one of the core preconditions of a fair trial⁸. Following this principle and the Court's case-law there clearly exists an obligation of all Contracting States to organise their judicial systems in such a way that their courts can hear cases within reasonable time, meaning without unjustified delays. But even if these delays could be avoided it's still obvious that litigation based on the investigation of evidence will always need a special amount of time.

A good example of this may be found in the segment of media, which is probably the segment most dependent on the factor time: A national broadcasting corporation – especially

⁵ The majority of the detailed rules of procedural law, especially those referring to the rules of evidence, underline the importance legal systems grant this fundamental 'fair trial'- principle.

⁶ See inter alia: Zuckermann, A.A.S; Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgements for Timely Judgements; Oxford Journal of Legal Studies, Vol. 14 (1994) No. 3, pp. 353-387 (p. 354).

⁷ This example is based on the Case of Boca v. Belgium, which will be discussed later in Part III, see Boca, 15.2.2003, 50615/99.

⁸ Especially in cases relating to civil status the Court has pointed out in its well-established case-law that special diligence is required in regard to the possible consequences which excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (inter alia ECHR Laino, 18.2.1999, 335158/96).

known for its news and investigation programmes – gets information about heavy complaints made by a patient of doctor A, a neurosurgeon and well-established member of the medical society in this state. The patient accuses doctor A of having performed surgery inebriated. Doctor A is informed about the planned programme by the broadcasting corporation one day before sending it. Even if he brings an action against the broadcasting corporation immediately the next morning, his life and career may be unrecoverably harmed or in worst case destroyed in one day and no fair trial will end in time to avert this⁹.

This dilemma of time and justice can not satisfactorily be solved by legal systems. Therefore they developed the system of interim protection to attenuate its consequences¹⁰. While its purpose is to achieve the fundamental objective of every legal system, the effectiveness of judicial protection¹¹, this aim shall be reached by preserving the status quo under the principle of urgency until the court has been able to pronounce the judgement on the dispute¹².

The concept of interim protection is not only implemented by national legal systems but also by all international or transnational courts such as the International Court of Justice (Art. 41 of the Statute of the Court of Justice) the European Court of Justice (Art.279 of the Treaty on the Functioning of the European Union¹³) or the ECHR (Art. 39 ECHR)¹⁴ itself.

Furthermore some academic writers have concluded from the reasonable time-requirement of Art. 6 (1) in connection with the principle of effective court protection, that Art. 6 (1) obliges states to grant its individuals and entities interim protection in litigation¹⁵. Nevertheless the Court has not yet found a violation of Art. 6 in a case where a legal system did not grant the opportunity for interim protection.

⁹ This case is based on the Case of RTBF v. Belgium (RTBF, 29.3.2011, 50084/06), but was aggravated to show the major effects modern media has in relation to time and justice. This problem is further deepened by fast, worldwide communication.

¹⁰ The concept of interim protection of rights has been declared to one of those general principles of law common to all legal systems, and is therefore a general principle of law recognized by civilized nations in the meaning of Art. 38 (1) lit. c of the Statute of the International Court of Justice; see: International Court of Justice, Aegean Sea Continental Shelf Case, Greece vs. Turkey, ICJ Reports 1976, 3, at 15;

¹¹ Lawrence Collins wrote in 1992: 'In the modern law the primary function of provisional and protective measures is to preserve the integrity of the final judgement, but there are historical grounds for seeing their origin in the desire of those administering the law to prevent violent self-help [...].' Collins, Lawrence; Provisional and protective measures in international litigation, *Recueil des cours / Académie de Droit International de La Haye*, Vol. 234 (1992) No 3, pp. 9 – 238 (p. 23).

¹² Zuckermann criticises, that the preservation of material status quo is not a feasible objective. The principle to preserve the status quo is found to be misleading especially in cases in which a legal status is at dispute. He therefore proposes to formulate that the aim of an interim protection act is to maintain whatever the case is, until trial, when the reasons for doing so may be no better than the reason for not doing so (Zuckermann, l.c. [p. 368]).

¹³ Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol 53, C 83, 30.3.2010.

¹⁴ See therefore Harby, Catharina; The Changing Nature of Interim Measures before the European Court of Human Rights, *European Human Rights Law Review*, (2010), No. 1 pp. 73-84

¹⁵ see inter alia de la Sierra, Susana, Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures deriving from the right to Effective Court Protection. A Comparative Approach, *European Law Journal*, Vol. 10 (2004), No. 1, pp 42-60 (p.48); Hoehl, Stefan; Vorläufiger Rechtsschutz im verwaltungsgerichtlichen Verfahren unter besonderer Berücksichtigung des Europarechts, 1999, p. 87.

However the mechanism of interim measures leads us right into further dilemmas¹⁶. Apart from the fact, that the status quo may be the result of pure chance that the plaintiff rather than the defendant happens to be in possession of the subject of litigation or the possibility to use the right at stake, a fair trial also requires equal treatment of the parties to litigation which implies non-interference with party's rights before judgement. In this context it shall be noted that an interim measure doesn't always prohibit an act of activity of the opponent (passive side) but may even dictate an action (active side).

Moreover a request for an interim procedure is usually an ex-parte proceeding. This means the principle of urgency contravenes the opponent's right to issue a statement in his favour. Granting an interim measure therefore establishes a situation which infringes the legal position of one party before having proven the facts of the case or even before gathering evidence. Furthermore in such cases the judge usually will only have the plaintiff's statement and a few tools submitted by the plaintiff at his disposal to find a solution. If then the court remains impartially passive until the parties have proven their entitlement, time passing in litigation may render the later judgement useless, as the examples above have shown. It should be borne in mind, however, that any course of pre-judgement interference is problematic.

As a further consequence of this ex-parte proceeding such an interference generally results in negligence of the principle of equality of arms since giving the opponent a chance to provide argument and evidence in his favour will usually contradict the aim of an interim protection. On the other hand - as shown above - the opponent may have a legitimate interest but only gets limited procedural protection by appealing to court.

This problem is further deepened by the fact that an interim measure is a pre-judgement interference into human rights in almost every case. For example, it frequently interferes with the right of possession (Art. 1 of the 1st Additional Protocol to the ECHR). But as the example above has shown also other basic human rights, that are of great importance to democratic societies, may be concerned which can not – or at least only in an improper way – be compensated afterwards. The right of freedom of expression (Art. 10) and all rights related to family life (Art. 8) are comprehensible examples.

As a conclusion, interim protection of party's rights in litigation is an attempt to attenuate the consequences of the dilemma of justice and time and tries to achieve the fundamental objective of the effectiveness of judicial protection. By granting this legal instrument to only one side of litigation legal systems accept a disadvantage on the defendant side who has only limited procedural protection even if human rights are concerned. But this effect lies in the nature of this legal instrument.

¹⁶ Zuckerman, A.A.S; Interlocutory Remedies in Quest of Procedural Fairness, *The Modern Law Review*, Vol. 56 (1993) No. 3, pp. 325-341 (p. 326).

III. THE GUARANTEES OF A FAIR TRIAL

Since the above mentioned reasonable time requirement and the principle of equality of arms are only two fair trial guarantees provided by Art 6 (1) the following chapter gives insight into the specific guarantees offered by this Article in order to gain a better understanding of the provisions of Art. 6 (1) and to provide an ideal basis for the subsequent content.

A. THE SCOPE OF ART. 6 (1)

Art. 6 (1) of the Convention deals with the rights of people, who are charged with criminal offences or are subjected to proceedings, in which the determination of their 'civil rights and obligations' is at issue. It concerns the manner in which these actions are carried out, the fairness of the procedures and whether they comply with the specific safeguards stipulated by the convention. Furthermore it applies both to civil and criminal proceedings in the Contracting States and constitutes the provision of the Convention most frequently invoked by applicants to Strasbourg¹⁷.

Since the meaning of the words 'civil rights and obligations' leaves a broad scope for interpretation the Court has made it clear that while the domestic law position is not totally without importance 'the concept of civil rights and obligations cannot be interpreted solely by reference to the domestic law of the respondent State'. Instead the words have autonomous meaning¹⁸ and the interpretation has to be carried out in due consideration of the spirit and purpose of the Constitution¹⁹.

Even though the established case-law is missing an abstract definition of 'civil rights and obligations', it is clear that while the Court requires the determination to concern a right (or an obligation)²⁰ it's not decisive for the applicability of the Art. 6 (1) that the Court is convinced that the legal claim is well founded as long as it 'présentait un degré suffisant de sérieux'²¹. Additionally it is not a determining factor if a certain claim is not actionable under domestic law²².

¹⁷ Ovey, Clare; / White, Robin C. A. / Jacobs, Francis Geoffrey; The European Convention on Human Rights 4th. Ed.; Oxford 2006 Oxford Univ. Press (Jacobs and White), p. 158; More than half of the judgements in the Years 1959-2009 in which the Court found a violation included a violation of Art. 6 (see 50 years of activity: European Court of Human Rights - Some Facts and Figures, p 6, <http://www.echr.coe.int/echr/en/header/reports+and+statistics/reports/annual+reports/>, last update 29.05.2011).

¹⁸ Ringeisen, 16.7.1971, 2614/65, § 94; König, 28.6.1978, 6232/73, §§ 88, 89.

¹⁹ Peukert in Frowein, Jochen Abr., Peukert, Wolfgang; Europäische MenschenRechtsKonvention, EMRK-Kommentar 3rd. Ed.; Kehl am Rhein 2009, Engelm, p. 146.

²⁰ 'which can be said, at least on arguable grounds, to be recognized under domestic law', see James & Others, 21.2.1986, 8793/79, p 26, § 81; van Dijk, P. /van Hoof, F. / van Rijn, A / Zwaak, L; Theory and Practice of the European Convention on Human Rights, 4th Ed., Antwerpen – Oxford 2006, Intersentia, p. 517.

²¹ Editions Periscope, 26.3.1992, 11760/85, § 38, english translation: 'sufficiently tenable'.

²² See in detail Van Dijk/Van Hoof/Van Rijn/Zwaak, 2006, p. 517.

Provided the constraints already mentioned are fulfilled the next step must be to determine whether a certain right or obligation is 'civil'²³. Starting in the Ringeisen Case²⁴ the Court adopted an increasingly liberal interpretation of the concept of civil rights and obligations²⁵. To give a few examples Art. 6 (1) is applicable whether a public authority is involved in a dispute with an individual²⁶, whether the proceedings take place before a civil court or another body vested with jurisdiction²⁷ or – at least partially - whether the individuals are employed as civil servants²⁸ or seek access to public office²⁹.

Finally Art. 6 (1) requires besides an 'existence of a veritable contestation (dispute), in the sense of two conflicting claims or applications' that 'the contestation (dispute) is related to a civil right and obligation'³⁰. Additionally the legal proceeding in question must lead to a (final) determination of civil rights or obligations. It's not necessary that the 'determination' of the right/obligation forms the main point or the purpose of the proceedings but instead it's sufficient that the outcome of the (claimed) judicial proceedings may be 'decisive for', or may 'affect' or 'may relate to' the determination and/or the fulfilment of the right/obligation³¹.

B. THE RIGHT OF ACCESS TO COURT

Since the fair trial guarantees provided by Art. 6 (1) would be useless if it were impossible to institute legal procedures³² the Court stated in an important early case, *Golder v. United Kingdom*³³, that Art. 6 (1) secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. As already mentioned one aspect of this 'right to court' is the right to institute proceedings before courts in civil matters. As stated by the Court this right must not be theoretical, but practical and effective which sometimes compels States to provide for legal aid³⁴, to ensure that the decision-making body –apart from a few exceptions - has full jurisdiction³⁵, or that civil judgements are executed within a reasonable amount of time³⁶. Moreover this guaranty ensures that a departure from the principle of the

²³ This is evident as long as the right or obligation forms part of private law.

²⁴ *Ringeisen*, I.c.

²⁵ *Jacobs and White*, I.c., 165; for an overview of the case-law see: *Van Dijk/Van Hoof/Van Rijn/Zwaak*, I.c., p. 525-528

²⁶ *Inter alia Bentham*, 23. October 1985, p 8, § 34.

²⁷ *Ringeisen*, I.c.

²⁸ *Eskelinen*, 19.4.2007, 63235/00, § 62; *Janis/Kay/Bradley*, *European Human Rights Law*, 2008, p 755 – 763.

²⁹ *Kübler*, 13.1.2011, 32715/06, § 45.

³⁰ *Le Compte, Van Leuven and De Meyere*, 23.6.1981, 6878/75 and 7238/75, §§ 45-46, in which was pointed out that the concept of 'dispute' should not be construed too technically and that it should be given a substantive rather than a formal meaning.

³¹ *Van Dijk/Van Hoof/Van Rijn/Zwaak*, I.c., p 521-522.

³² *Jacobs and White*, I.c., p. 170.

³³ *Golder*, 21.2.1975, 4451/70, § 36.

³⁴ *Airey*, 9.10.1979, 6289/73, §§ 25-26, where it was also stated that Art. 6 (1) does not guarantee any right to free legal aid as such.

³⁵ *Le Compte & Others*, I.c., p 15, § 51; see *Van Dijk/Van Hoof/Van Rijn/Zwaak*, I.c., p 561.

³⁶ *Jacobs and White*, I.c., p. 174 – 175 with examples of judgements finding violation of Art 6 on this grounds.

finality of judgements (*res judicata*) is justified only when made necessary by circumstances of a substantial and compelling character³⁷.

Even though Art. 6 (1) does not oblige the Contracting States to set up courts of appeal or cassation its procedural safeguards still require States, which institute such courts, to ensure that persons amenable to the law shall enjoy the fundamental guarantees contained in Art. 6 (1) before these courts³⁸.

According to the established case-law the right of access to the courts can be subject to limitations leaving a certain margin of appreciation to the Contracting states³⁹. Nonetheless the Court made it very clear that these limitations had to secure ‘the very essence of this right’ and had to pursue a legitimate aim. Furthermore it stated that a reasonable relationship of proportionality between the means employed and the aim sought to be achieved⁴⁰.

In consideration of demands of flexibility and efficiency the Court held in its judgement in the *Le Compte, Van Leuven and De Meyere Case* that there is no right of access to court in each stage of the legal procedure and that a prior intervention of administrative or professional bodies may be justified⁴¹.

C. THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

Art. 6 (1) guarantees the right to a fair trial before ‘an independent and impartial tribunal established by law’⁴². The Court interprets the word ‘tribunal’ autonomous and stated in previous cases that it is characterized by its judicial function⁴³ which allows not only ordinary courts but also other national decision making bodies to meet its requirements⁴⁴. To fall within the concept of the meaning of ‘tribunal’ it is essential that ‘its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner’⁴⁵, that it has full jurisdiction⁴⁶ and the power to make binding decisions in the area in question⁴⁷. Moreover its decisions may not be deprived of its effect by a non-judicial authority to the disadvantage of the individual party⁴⁸.

³⁷ Ryabykh, 24.7.2003, 52854/99, §§ 51-52.

³⁸ *Delcourt*, 17.1.1970, 2689/65, § 25;.

³⁹ See *Peukert I.c.*, p. 176 – 182 and *Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c.*, p 569 – 578 to gain a good overview of individual cases regarding the legitimacy of limitations.

⁴⁰ *Ashingdane*, 28.5.1985, 8225/78, § 57.

⁴¹ *Le Compte & Others, I.c.*, p 15, § 51; *Grabenwarther/Pabel in Grote/Marauhn, EMRK/GG*, 2006, p 682, margin no. 85.

⁴² The term ‘established by law’ ensures ‘that the judicial organisation in a democratic society does not depend on the discretion of the Executive, but that it is regulated by law’, see *Coème and Others*, 22.6.2000, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98.

⁴³ *Coème and Others, I.c.*, § 99.

⁴⁴ *Grabenwarther/Pabel I.c.*, p 660 -661, margin no. 36-38.

⁴⁵ *Sramek*, 22.10.1984, 8790/79, § 36.

⁴⁶ *Pfarrmeier*, 23.10.1995, 16841/90, § 38.

⁴⁷ *Campbell and Fell*, 28.6.1984, 7819/77; 7878/77, § 76.

⁴⁸ *inter alia Brumarescu*, 28.10.1999, 28342/95, § 61; *Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c.*, p 612.

To meet the criteria of an 'independent' tribunal, the court must function independently of the executive, legislature and of the parties⁴⁹. To reach this goal safeguards must be established to enable the court to function independently⁵⁰. While the manner of the appointment of members of a tribunal and the duration of their term of office is an essential criteria when assessing the independence of a tribunal, their life-long appointment is not necessary, as long as they cannot be discharged at will or on improper grounds by the authority⁵¹. Moreover according to the maxim 'justice must not only be done it must also be seen to be done' even a semblance of independence must be avoided⁵².

Furthermore there is a functional relationship between independence and impartiality of a court since the first is a prerequisite of the latter⁵³. The existence of impartiality for the purposes of Art. 6 (1) is determined according to a subjective test which refers to the personal impartiality of a particular judge in a given case⁵⁴ and also according to an objective test that is ascertaining whether the judge offers guarantees sufficient to exclude any legitimate doubt in this respect⁵⁵. In this context particular attention has to be devoted on whether the way in which the tribunal is composed or organized, or a certain coincidence or succession of function in one of the tribunal's members may raise doubts as to the impartiality of the tribunal or its member⁵⁶. Therefore - if a member of the tribunal has had a previous part in an earlier stage of the legal proceedings - the Court usually reviews the precise actions of this judge in the previous proceedings to determine whether or not such involvement could justify fears as to his impartiality⁵⁷. Since the Court repeatedly stated that only the 'scope and nature' of the measures and decisions taken prior to the trial matter in such cases⁵⁸ the mere fact that the judge has taken part in an earlier decisions is in itself not incompatible with the requirements of Art. 6 (1).

D. THE REASONABLE TIME REQUIREMENT

Art. 6 (1) stipulates that the hearing of the case by the court must take place 'within reasonable time' to protect the individual concerned from living too long under the stress of uncertainty and to ensure that justice is administered 'without delays which might jeopardise its

⁴⁹ Ringeisen, I.c., § 95; Benthem, I.c., §§ 41-43.

⁵⁰ Safeguards can be e.g. that the members of the tribunal are appointed to sit in an individual capacity and the law prohibits their being given instructions by the executive; see Sramek, I.c., § 38. Campbell and Fell, I.c.

⁵¹ The Court regarded a three-year term as sufficient, see Grabenwarther/Pabel I.c., p 665, margin no. 47.

⁵² Delcourt, I.c., § 31; Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c., p 614.

⁵³ Peukert I.c., p. 224, margin no. 213.

⁵⁴ Personal prejudice and bias is assumed if the judge allowed himself to be influenced by popular feeling, his personal emotions or information outside the court room. Nevertheless is his impartiality presumed as long as the contrary has not been proven, see inter alia Piersack, 1.10.1982, 8692/79, § 30.

⁵⁵ Fey, 24.2.1993, 14396/88, § 28; The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings e.g. family ties in Micallef, 15.10.2009, 17056/06, § 102.

⁵⁶ Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c., p 616.

⁵⁷ Janis/Kay/Bradley, I.c., p 769 -770.

⁵⁸ Nortier, 24.8.1993, 13924/88, § 33.

effectiveness and credibility⁵⁹. Furthermore this guarantee also entails that this time may not be unreasonably short to ensure a proper preparation of the case for the parties⁶⁰.

In civil proceedings the period taken into consideration usually starts the moment the proceedings were initiated before a tribunal⁶¹ and lasts until the final determination of the case⁶².

The Court has held⁶³ that the reasonableness of the length of proceedings has to be assessed in the light of the circumstances of the case. It usually takes into account the complexity of the case⁶⁴, the conduct of the applicant⁶⁵ and of the relevant authorities⁶⁶ and the importance of what was at stake for the applicant in the litigation⁶⁷. While proceedings that take 10 or more years usually violate the right to prompt adjudication, a period of 1 ½ to 2 years for proceedings before each level of jurisdiction is normally considered reasonable⁶⁸.

E. THE RIGHT TO A PUBLIC TRIAL AND PUBLIC PRONOUNCEMENT OF THE JUDGMENT

Publicity of proceedings before courts protects parties against the administration of justice in secret and builds confidence in courts by allowing the public to see justice being administered⁶⁹. The principle of publicity is not only granted to the litigants of a case but to everyone⁷⁰.

Since the text of Art. 6 (1) is lacking a qualification of this guarantee as far as the phase of the proceedings is concerned it is necessary to consider a trial as a whole to answer the question whether there has been a public hearing within the meaning of Art. 6 (1). Generally speaking the right to a public and oral hearing – unless having been waived by the party - cannot be refused in first instance. By contrast if a public hearing has been held at first instance, appeal proceedings and proceedings involving only questions of law may comply with the requirements of Art. 6 (1) even without a further public hearing.⁷¹

⁵⁹ Bottazzi, 28.7.1999, 34884/97, § 22; Jacobs and White, I.c., p. 187 – 188.

⁶⁰ Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c., p 610.

⁶¹ If prior to the judicial proceedings another action must have been brought, the beginning is shifted to the moment of that action, see Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c., p 603.

⁶² Which includes appeal or cassation proceedings, proceeding to calculate the damage or sentence and enforcement proceedings; for examples in established case-law see Janis/Kay/Bradley, I.c., p 817 FN 320.

⁶³ e.g Crowther, 1.2.2005, 53741/00, § 27.

⁶⁴ Factors such as the number of accused persons or witnesses, investigations conducted abroad, the necessity for an expert opinion, see Peukert I.c., p. 240, margin no. 252.

⁶⁵ A party to civil proceedings may be required to co-operate actively in expediting the proceedings, see Muti, 23.3.1994, 14146/88, § 16.

⁶⁶ Only delays attributable to the State (such as delays that are caused by the backlog of cases traceable to structural problems) may justify a finding of failure to comply with the 'reasonable time' requirement; see inter alia Humen, 15.10.1999, 26614/95, § 66.

⁶⁷ Special diligence can be required in cases concerning employment or pension disputes or - as already mentioned - in cases regarding the rights provided by Art 8; in this context see Peukert, I.c., p. 240 - 246 and Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c., p 606 - 612 for examples of individual cases regarding the reasonable time requirement.

⁶⁸ Peukert, I.c., p. 239, margin no. 249.

⁶⁹ Pretto & Others, 8.12.1983, 7984/77, § 21.

⁷⁰ While media coverage is implied, Art. 6 doesn't contain a right to produce sound and image recordings, see Grabenwarther/Pabel I.c., p 695 - 696, margin no. 109 – 110; Peukert, I.c., p. 215, margin no. 188.

⁷¹ Furthermore Art. 6 contains a list of limitations to the right to a public trial on grounds of public policy, national security, privacy or where strictly necessary in the interest of justice. While the national authorities have a certain 'margin of appreciation' in the assessment of whether there is any reason for the application of one of the restrictions, the Court has

Another right granted by Art. 6 (1) is the right to a public pronouncement of the judgement. The Court didn't adopt a literal interpretation of the words 'judgement shall be pronounced publicly' but considered in the leading case of *Pretto*⁷² 'that in each case the form of publicity to be given to the judgement under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Art. 6 (1)'. A publication of the full text of the judgement available to everyone will generally be sufficient to meet the requirements of Art. 6 (1).

F. THE OVERALL REQUIREMENTS OF A FAIR HEARING

Apart from other requirements Art. 6 (1) demands that the determination of civil rights and obligation has to be made in a 'fair hearing'. Since there are no expressly outlined aspects of a 'fair hearing' in civil cases and since the Court has avoided to give an enumeration of criteria of a fair trial in abstract, a number of specific guarantees of a fair trial emerged from the case law:

1. PROCEDURAL EQUALITY, THE RIGHT TO AN ADVERSARIAL PROCESS AND DISCLOSURE OF EVIDENCE

Considering the maxim of non-discrimination the principle of equality of arms requires a fair balance between parties to litigation. Therefore each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent⁷³. However, this presupposes that both parties had the right to an adversarial trial which means they have had the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party⁷⁴ insofar as the material may influence the formation of the court's opinion⁷⁵. Art 6 (1) furthermore guarantees a right of disclosure of evidence that can be restricted with regards to competing factors such as national security or the need to protect witnesses.⁷⁶

Procedural equality further entails that the parties are afforded the same opportunity to summon witnesses or experts and examine them and all witnesses/experts summoned by the opponent or by the court⁷⁷. Furthermore it may be concluded from established case-law that the fair-trial requirement includes a right to immediacy since the Court has not taken court decisions

itself shown to be prepared to examine the reasons for the restriction independently since the limitations nevertheless are to be tightly construed; see inter alia *Le Compte, Van Leuven and De Meyere, I.c.*, §§ 59-61 ; *Jacobs and White, I.c.*, p. 185.

⁷² *Pretto & Others, I.c.*, § 26.

⁷³ *Dombo Beheer B.V.*, 27.10.1993, 14448/88, § 33.

⁷⁴ *Ruiz-Mateos*, 23.6.1993, 12952/87, § 63.

⁷⁵ *Ernst & Others*, 15.7.2003, 33400/96, § 61. This applies also to an independent member of the national legal service, see inter alia *Vermeulen*, 20.2.1996, § 33.

⁷⁶ See *Jacobs and White, I.c.*, p. 177 who affirm this also in regard to civil cases.

⁷⁷ *Peukert, I.c.*, p. 203, margin no. 153; *Van Dijk/Van Hoof/Van Rijn/Zwaak, I.c.*, p 583.

which were exclusively based upon indirect evidence in accordance with the guarantee granted by Art. 6 (1)⁷⁸.

3. THE RIGHT TO BE PRESENT AT TRIAL AND THE RIGHT TO AN ORAL HEARING

The right of the parties to be present in person at the trial is closely connected to the right to an oral hearing and the right to be able to follow the proceedings⁷⁹. According to the Court's established case-law, the right to a 'public hearing' in proceedings before a court of first and only instance implies an entitlement to an 'oral hearing' unless there are exceptional circumstances that justify dispensing with such a hearing⁸⁰. Naturally this entails the party to be present at the hearing.

Contrary to criminal proceedings this rule seems less strict in civil proceedings⁸¹ where it is generally sufficient in regard to this guarantee that a lawyer safeguards the party's interest.

4. THE RIGHT TO A REASONED DECISION

The last important guarantee provided by Art 6 (1) is the right to a reasoned decision. In the case of *Hadjianastassiou v. Greece*⁸² the Court stated that the national courts had to indicate with sufficient clarity the grounds on which they based their decision to make it possible for a party to exercise usefully his right of appeal. Even though Art. 6 (1) obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument as long as the court heard all parties and considered all the arguments.⁸³ In this context it has to be taken into consideration that the Court isn't competent 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 Convention⁸⁴.

IV. PRINCIPALS AND DECISIONS OF THE COURT CONSIDERING INTERIM MEASURES

Following the brief overview of specific guarantees offered by Art. 6 (1) this chapter will return to the topic of interim measures and will elaborate on decisions concerning this legal instrument.

A. THE APPLICABILITY OF ART 6 IN FORMER DECISIONS

In previous decisions, the Court generally denied the applicability of Art. 6 (1) in legal proceedings concerning interim measures such as injunctions, arguing that the right of access to

⁷⁸ *Van Dijk/Van Hoof/Van Rijn/Zwaak, l.c.*, p 586-587.

⁷⁹ *Van Dijk/Van Hoof/Van Rijn/Zwaak, l.c.*, p 586-587.

⁸⁰ *Hakansson and Stureson*, 21.2.1990, 11855/85, § 64.

⁸¹ Special circumstances can require that a party has to be heard, see inter alia *Göc*, 11.7.2002, 36590/97, § 51.

⁸² *Hadjianastassiou*, 16.12.1992, 12945/87, § 33.

⁸³ *Garcia Ruiz*, 21.1.1999, 30544/96, § 26.

⁸⁴ *Garcia Ruiz, l.c.*, § 28.

court did not extend to interim procedures because those procedures neither finally nor even provisionally determined civil rights or obligations but only regulated a party's temporary position pending the outcome of the main proceedings without making a decision on the merits of the case.⁸⁵

Evaluating if a decision was made within reasonable time, the Court only took into account the time that passed after the initiation of the case on the merits and neglected the period of preliminary request for such measures⁸⁶. Only in some exceptional cases, the Court applied Art. 6 (1) on proceedings concerning interim measure(s), recognising that e.g. an interim measure regulating the custody of children was decisive for the civil rights⁸⁷. Additionally, the Court exceptionally applied Art. 6 (1) if an interim measure was dramatic, disposed of the main action to a considerable degree and affected the legal rights of the parties for a substantial period⁸⁸.

B. THE NEW APPROACH

In 2008, the Grand Chamber used a new approach concerning the application of Art. 6 (1) in interim proceedings in the Micallef case⁸⁹ changing its former law-case-practice:

Facts of the Micallef case

In 2006 the ECHR was appealed by Josef Micallef, a Maltese national, who was the brother of the late Mrs. M. In 1985, Mrs. M's neighbour sued her in the Maltese civil courts and requested an interim injunction against her to restrain her from hanging up clothes over the courtyard of his apartment to dry. The competent judge in Malta granted the neighbour the interim injunction in the absence of Mrs M., who had not been informed of the date of the hearing. Due to this failure, Mrs M. brought proceedings in the Civil Court, claiming that the interim injunction had been granted without giving her the opportunity of being heard. In October 1990 the Civil Court found that the injunction had been passed in violation of Mrs. M's rights and declared it null and void. Mrs. M.'s neighbour then appealed against this decision of the Civil Court. In October 1992, the Court of Appeal, consisting of the Chief of Justice and two other judges, reversed the judgement of the Civil Court and decided in favour of the neighbour. Mrs M. then instituted proceedings before the Civil Court in its constitutional jurisdiction. She pointed out that the Court of Appeal had not been impartial. Mrs. M alleged that the Chief Justice was an uncle and brother of the two lawyers representing her neighbour. This constitutional appeal, which was taken over by the applicant after his sister's death, was dismissed in January 2004. In October 2005 a further appeal of Mrs. M.'s brother was again dismissed.

⁸⁵ inter alia, Wiot (Decision), 15.3.2001, 43722/98; APIS (decision), 13.1.2002, 39794/98; Verlagsgruppe News (Decision), 16.1.2003, 62763/00; Libert (Decision), 8.6.2004, 44734/98; X. (Commission), 11.5.1981, 7990/77.

⁸⁶ see Jaffredou, 15.12.1998, 39843/98, § 28; Kress, 7.6.2001, no. 39594/98, § 90.

⁸⁷ Boca, l.c.; Aerts, l.c., § 59.

⁸⁸ see, inter alia, Wiot l.c.; Verlagsgruppe News GMBH, l.c.; Libert, l.c..

⁸⁹ Micallef (Grand Chamber), 15.10.2009, 17056/06.

In the meantime, in May 1992, the court trying the merits of the civil action, had issued a permanent injunction against Mrs M. No appeal had been lodged against this decision and the case became final on the merits.

Concerning the interim proceedings, Mrs. M.'s brother finally appealed the ECHR complaining that, due to the close family ties of the presiding judge of the Court of Appeal and the lawyers of the other party, there was a lack of impartiality, causing a violation of Art. 6 (1). He also considered that Mrs M.'s right to a fair trial was violated because her constitutional claim had not been heard within reasonable time.

The ECHR admitted (partly) the applicant's complaint in regard to the impartiality of the Court of Appeal⁹⁰.

The objections concerning the application of Art. 6 (1) and the Court's decision

The Maltese government submitted that the interim injunction did not determine the right or obligation claimed. Therefore, the proceedings before the Court of Appeal were not decisive of any civil right or obligation and Art. 6 (1) was not applicable.

The applicant submitted that, unlike normal preliminary proceedings, there were judgements at first instance and on appeal, which were in fact decisive of civil rights and obligations. Therefore, Art. 6 (1) should be applicable.

The Court clarified that in this case, the relevant question was not whether Art. 6 (1) was applicable to the preliminary proceedings but to the post-injunction proceedings. The Court noted that the applicant had invoked Art. 6 (1) before the Civil Court in its constitutional jurisdiction and that the inapplicability of Art. 6 (1) had never been argued by the Maltese government within the domestic proceedings⁹¹. The domestic court of first instance had followed Mrs M.'s arguments interpreting the domestic law covering her objections. The Court of Appeal, that had rejected the complaint without arguing that Art. 6 (1) was not applicable, had determined the dispute concerning Mrs. M.'s right to be heard. Due to all these facts, the Court reasoned that the applicability of Art. 6 (1) to post-injunction proceedings was obviously established in the Maltese legal system. The Court reminded his concept that, independently of the Court's autonomous application of Art. 6 (1), its applicability would be recognised if the domestic system recognised it in order to guarantee the same level of protection in Strasburg as in the domestic country⁹². Additionally, the Court argued that a restrictive interpretation of Art. 6 (1) would not correspond to the aim and the purpose of the Convention due to the importance of Art. 6 (1)⁹³. For all these reasons, the Court finally decided that Art. 6 (1) was applicable.

⁹⁰Micallef (Decision), 5.9.2006, 17056/06.

⁹¹ see San Leonard Band Club, 29.7.2004, § 46.

⁹² Vilho Eskelinen, I.c., § 61.

⁹³ see, mutatis mutandis, Delcourt, I.c., § 25.

After clarifying the applicability of Art. 6 (1) and the victim status of the applicant, the Court analysed the domestic rules concerning the impartiality. Under Maltese law, a judge is only barred from hearing a case if one of the parties is represented by the former's son, daughter, spouse or ascendant, but not, if the representative is a brother or an uncle. The Court considered that the Maltese law did not give adequate guarantees of impartiality and that the close family connection justified the applicant's fears that the presiding judge lacked impartiality. Therefore, the Court decided that there was a violation of Art. 6 (1)⁹⁴.

The Maltese government requested to refer the case to the Grand Chamber in accordance to Art. 43.

The decision of the Grand Chamber and the submissions

The Government submitted that they had invoked the inapplicability of Art. 6 during the domestic proceedings and that the domestic court had not dealt with this argument because it had accepted their preliminary objection based on the argument that the case was frivolous and vexatious. It was therefore false to argue that the applicability of Art. 6 to post-injunction proceedings was obviously established in the Maltese legal system. Moreover, it was irrelevant that due to domestic procedural law, the post-injunction proceedings had to be instituted by means of a separate action, being equivalent to an appeal against the injunction. Additionally, the interim measures were preliminary without any determination of the merits of any right or obligation claimed. No decision concerning these interim measures could have more effects. Therefore, Art. 6 (1) was neither applicable on preliminary proceedings nor on post-injunction proceedings. Moreover, the arguments on the right to be heard in injunction proceedings could have easily been submitted when defending the substantive action concerning the same civil right. The original claim had been conclusively decided in 1992. No appeal against this decision had been lodged. Therefore, there was no lack of possibilities to be heard.

The applicant submitted that interim measures had effects until the final outcome of the proceedings and influenced the civil rights of the parties for that period of time. Furthermore, the proceedings complained of were different from normal interim injunction proceedings. There were formal ad hoc proceedings, followed by an appeal petition and concluded by a judgement at first instance and a judgement on the appeal. The nature of the case was not different from that of any other case before the ordinary domestic courts and therefore Art. 6 was applicable.

The government of the Czech Republic submitted in the interest of the proper administration of justice, following Art. 36 (2), a written comment to the case. The government argued that interim measures could not be seen as independent proceedings but only within the context of the main proceedings. It reasoned that Art. 6 was applicable to interim measures on the condition that

⁹⁴ Micallef (Chamber), 15.1.2008, 17056/06.

they concerned the determination, existence, scope or conditions of civil rights and obligations. Violation would only occur in cases where a failure in the interim measure proceedings made all consecutive proceedings unfair. Moreover the government of the Czech Republic argued that the applicability of Art. 6 in domestic proceedings was an irrelevant factor that should not be considered by the Court. There was nothing preventing national courts from going beyond the standards established by the Convention.

The Grand Chamber analysed that there were four tiers of proceedings, i) the proceedings granting the injunction; ii) the set of proceedings in which the fairness of the injunction was contested (the appeal against which is the subject of the complaint before this Court); iii) the main proceedings regarding Mr F.'s claim; and iv) and the set of constitutional proceedings. In contrast to the Chamber, the Grand Chamber argued that a global approach was more reasonable when considering the applicability of Art. 6 on the proceedings. It noted that it was irrelevant that due to domestic procedural law, the post-injunction proceedings had to be instituted by means of a separate action. This proceeding was equal to an appeal against the injunction, granted in another jurisdiction, and therefore the proceedings could not be seen as distinct from each other.

The Court took a look at national systems, figuring out that there was a widespread consensus on the applicability of Art. 6 to interim measures, including injunction proceedings. Analysing Art. 47 of the Charter of Fundamental Rights of the European Union and the related case-law, the Grand Chamber noted that the European Court of Justice considered that provisional measures fall within the protection of guarantees of a fair trial⁹⁵. The Grand Chamber noted that justice systems of many Contracting States were overburdened which leads to long proceedings. It reasoned that nowadays interim measures were frequently effective for long periods. Failures in such proceedings could often not be remedied in proceedings on the merits because prejudices suffered in the meantime may have become irreversible. Damages could only be redressed by pecuniary compensation. Interim and main proceedings also often decided the same 'civil rights or obligations' and had the same long lasting or even permanent effects.

Therefore, the Grand Chamber decided to use a new approach and determined that the following criteria have to be fulfilled for the applicability of Art. 6 on interim proceedings:

1. the right at stake in the main and the injunction proceedings has to be 'civil' within the autonomous meaning of that notion under Art. 6
2. the interim measure has to effectively determine the civil right or obligation at stake; this criteria has to be checked by taking a look at the nature of the interim measure, its object, its purpose and its effects on the right in question, without taking into account the length of time it is in force;

⁹⁵ Denilauler v. SNC Couchet (ECJ), 21 May 1980, 125/79.

Furthermore, the Grand Chamber clarified that not all procedural safeguards have to be fulfilled in every interim proceeding. If e.g. the effectiveness of the measure were to depend on a rapid decision-making process, it would not be possible to comply with all of the requirements. Rights like the independence and impartiality of the tribunal or the judge are indispensable, but other procedural safeguards may be applied only if they are compatible with the nature and purpose of the interim proceedings at issue. The Grand Chamber made also clear that, in further proceedings, the governments would have to argue due to which reasons one or more specific procedural safeguards could not be applied in a specific case without prejudicing the objectives of the interim measure.

In the present case, the Grand Chamber analysed that the substance of the right at stake in the main proceedings concerned the use of property rights of the neighbours and therefore a right of a civil character according to domestic law as well as the Court's case-law. The purpose of the injunction was to determine the same right as the one in the main proceedings and was immediately enforceable. Therefore, the injunction proceedings in the present case fulfilled the application criteria. The Government did not say why it would have been necessary to limit the scope of the application of Art. 6 (1) in that case.

The Grand Chamber also clarified that the fact that the merits of the main claim had already been determined when the complaint failure occurred in the interim proceeding, was irrelevant. It stated that when the interim proceedings were instituted, the merits of the claim had not yet been determined and as a result there was no reason why Art. 6 (1) should not have continued to apply to the proceedings at a later stage. For all these reasons, the Grand Chamber declared Art. 6 (1) applicable to the proceedings complained of.

Finally, the Grand Chamber, like the Court, recognised that there was a violation of Art. 6 (1) of the Convention, arguing that the composition of the court of Appeal in Malta had not guaranteed its impartiality, thus failing to meet the Convention's standards.

Practice of the new approach

In the Kübler case⁹⁶ the applicant complained that his right of access to a court had been breached as a result of the non-enforcement of an interim injunction issued by the Federal Constitutional Court, ordering the regional Ministry of Justice to keep one post of advocate notary vacant pending the examination of the applicant's constitutional complaint. A complaint he had made for not being given a post of advocate notary. The Court clarified that the right claimed by the applicant had to be regarded as 'civil' within the meaning of Art. 6 (1)⁹⁷ and took a close look at the interim measure, figuring that its aim was to prevent the Ministry of Justice from filling all

⁹⁶ Kübler, I.c..

⁹⁷ With reference to Vilho Eskelinen, I.c.

notary posts before the termination of the main proceedings. Due to the facts that only a certain number of notary posts were available and that it was impossible to revoke the appointment of an advocate notary even if another candidate's claim was successful, the Court estimated that the interim measure had a direct effect on the civil right at stake. Therefore, it declared Art. 6 applicable to the interim proceedings.

Another case concerned an interim injunction ordered by a judge against the Belgian French-language broadcasting corporation RTBF, preventing the broadcasting of a programme until the final decision in a dispute between a doctor named in the programme and the RTBF had been made. The Court noted that the interim injunction had the same aim as the proceedings on the merits – to prevent the broadcasting of the offending programme – and that the interim injunction was immediately enforceable. Additionally, the Court pointed out that the proceedings on the merits were still pending when the RTBF lodged its application with the ECHR. For all these reasons, the Court declared Art. 6 applicable⁹⁸.

In 2010 the Court applied Art. 6 (1) in a case of a Sinti applicant who had brought an action to the civil courts, complaining that the evacuation of the Sinti community, ordered by the Rome City Council, was discriminatory. Therefore, the applicant had demanded the annulment of the decision and compensation of damages. The court argued that – even if the decision of evacuation was provisional – it determined civil rights. By this, the Court could refuse an objection of the government, arguing that Art. 6 was not applicable due to the interim character of the evacuation⁹⁹.

Concerning the admission of complaints concerning interim measures, the Court clarified in the Kuczera case¹⁰⁰ that the Court had to be appealed within six months after the final domestic decision concerning the interim measure and not on the merits of the claim.

V. CONCLUSION

An overview about the change in the case law of the ECHR regarding interim measures must come to the result, that the modification through the Grand Chamber is not as significant as it seems.

As it has already been shown in this paper, in previous decisions the Court denied the general applicability Art. 6 (1) on proceedings concerning interim measures. Anyhow, in exceptional cases, which were found to have dramatic effects, the Court argued that certain rights, which base on Art. 6 (1), have to be observed. This fragmental case law was not well established and lacked in clarity but showed the direction of the Court's intention.

⁹⁸ RTBF, l.c.

⁹⁹ Udorovic, 18.5. 2010, 38532/02.

¹⁰⁰ Kuczera, 14.10.2010, 275/02.

Following the judgements in the Micallef case, Art. 6 (1) is now applicable to proceedings concerning interim measures. Nevertheless – taking the nature and the purpose of the interim proceedings into consideration – the Grand Chamber formulated an exceptional clause. As it is not clearly stated which cases fall into the scope of this clause, it is not foreseeable, apart from the rights mentioned by the Court as indispensable, in which cases an infringement into the rights of Art. 6 (1) will be tolerated by the Court in future. Therefore it may be argued that legal certainty has not grown¹⁰¹.

Discussing the latest case-law of the Court – especially the Micallef Case –two interesting arguments can be pointed out:

The first one - more an academic one - can be found in the argumentation of the Grand Chamber. Not consenting with the Chamber's substantiation in its judgement, the Grand Chamber argued that the exclusion of interim measures from the scope of Art 6 (1) could no longer be maintained, because of the considerable backlogs in the overburdened justice systems leading to excessively long proceedings. As an argument for the extension of the applicability of Art 6 (1), the Grand Chamber – using a general argument - took cases, which the Court found to be deeply-rooted in its case-law and in which infringements of Art 6 (1) (“reasonable time requirement”) had been determined, but were in no way related to the present case. Then it amplified that a judge's decision on an injunction can often be tantamount to a decision on the merits of the claim for a substantial period of time, in exceptional cases even for ever. By taking these exceptional cases as a basis for its argumentation, the Court omitted the fact that an interim measure by nature is not a final determination of rights or obligations and failed to remedy the inconsistency with its earlier case law. This sort of argument is at least questionable¹⁰².

The second point is a more practical one and was found in the merits of the result of the Grand Chamber's judgement. As mentioned above all injunction proceedings determining civil rights within the autonomous meaning of that notion that also have a certain degree scrutinised by its object, purpose and its effects on the rights in question, fall under Art. 6 (1). As a result those proceedings would have to fulfil all the requirements which were described in Chapter III if the Court itself had not provided for an exception. Taking into consideration the nature and the purpose of the interim proceedings the Grand Chamber formulated an exceptional clause. Such an exception would be constituted if the effectiveness of the requested measure depended upon a

¹⁰¹ Moreover, as the Court will decide on a case by case basis, the general applicability of Art. 6 (1) will become the rule. Contracting States will have to prove ex-post that the infringement into the rights of Art. 6 (1) by the interim measure was necessary through the nature and the purpose of the interim measure. Keeping in mind the tendency of the Court to expand the scope of the ECHR, it's predictable, that this proof will be hard to produce.

¹⁰² As a second line of argumentation the Court stated that the majority of Contracting States support the idea that Art. 6 (1) is applicable to proceedings concerning interim measures. Nevertheless this argument was not substantiated. Comparing this judgement with other judgements of the Grand Chamber, at least it can be said that the Micallef Judgement was not well prepared. [Kodek, Georg E.; *Einstweilige Verfügungen im Familienrecht und Art. 6 EMRK*, Zeitschrift für Ehe- und Familienrecht, EF-Z 2010/35, pp. 59-64, p. 61]

rapid decision-making process. But as shown in Chapter II the core aim of an interim measure is to reach a solution under the principle of urgency until the court has been able to pronounce on the dispute. Consequently every interim measure should be a result of a rapid decision-making process. This circular reasoning was covered by the argument of the Grand Chamber that the Contracting States will have to argue for this exception in every given case.

The Court further clarified that some guarantees of Art. 6 (1) are indispensable even in proceedings dealing with interim measures, namely the independence and impartiality of the tribunal/judge as well as inalienable safeguards. Accordingly the Grand Chamber distinguished between the proceedings on the merits of a case, where all requirements of Art 6 (1) have to be fulfilled, and the proceedings in regard to interim measures in which at least some core requirements of Art 6 (1) have to be observed. In the latter case some guarantees provided by Art 6 (1) could be omitted if those were contradicting the nature or the scope of the measure. From a theoretically point of view, through this reasoning the Court established a two-type-system of proceedings under the scope of Art. 6 (1) in its civil part. If this was the true intention of the Court remains to be seen in following case-law.

Keeping the argumentation of Chapter II in mind an outlook shall be made which rights of Art 6 (1) could fall under the exception clause of the Grand Chamber. Undoubtedly most of the 'fair-hearing' guarantees will be affected. As already demonstrated the principle of equality of arms usually has to be neglected because of the nature and the scope of an interim measure. If the opponent in such a proceeding was given the opportunity to present his case - including all evidence - in an adversarial trial he'll have the chance to overburden the proceedings which would run counter to the purpose of the interim measure. Furthermore the right of the opponent to be present at the trial as well as the right to an oral hearing will probably be captured by the exclusion clause of the Court.

The reasonable time requirement will probably be the most important guaranty provided by Art. 6 (1) in times to come. But this principle, lying deep in the nature of the legal instrument of interim measures, is now enhanced to a right of the parties to litigation. Therefore the protection of the legal subjects against unreasonable delays is undisputable strengthened.

The Court will have the privilege of an ex-post review whereas practicing judges like us, when confronted with an application for an interim measure, will still have to decide prompt if certain guarantees provided by Art. 6 (1) may be neglected in this case. The Courts new approach will lead to an increased effort a judge has to put into verifying which procedural guarantees have to be observed in the particular case. To ensure traceability the appreciation of interests shall find its way into the decision and its reasoning.

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