Selected Aspects of the Right to a Fair Trial

Introduction

The specific wording of Article 6 suggests that the guarantees under paragraph (1) apply to both criminal and civil proceedings, whilst the rights listed in paragraphs (2) and (3) are specifically intended for criminal proceedings. However, the ECtHR case law indicates the extension of some of the guarantees provided for in paragraphs (2) and (3) to civil proceedings, where its principles are applicable by analogy.

Therefore, whenever an individual is charged with a criminal offence or is involved in proceedings concerning his civil rights and obligations, he is entitled to access to court, to have a fair and public hearing before an independent and impartial tribunal established by law, and to have judgment pronounced publicly and within a reasonable time.

1. The Right of Access to Court

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

The Court noted that the right of access is only one aspect of the broader ‘right to a court,’ embodied in Article 6(1):

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

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

The right of access to a court outlined in the first paragraph of Article 6 applies to both civil and criminal proceedings, as clearly affirmed in Deweer v. Belgium: ‘the ‘right to a court’, which is a

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2 Indeed, while paragraph (1) of Article 6 begins with the sentence, ‘In the determination of his civil rights and obligations or of any criminal charge against him …’, paragraphs (2) and (3) both begin with the words ‘Everyone charged with a criminal offence …’.

3 See – among others – Dombo Beheer B. V. v. the Netherlands, Judgment of 27 October 1993, paragraphs 32–33; Albert and Le Compte v. Belgium, Judgment of 10 February 1983, paragraph 39; Feldbrugge v. the Netherlands, Judgment of 26 May 1986, paragraph 44. In the literature see, among others, D.J. Harris, M.O. Boyle & C. Warbrick, Law of the European Convention on Human Rights (London: Butterworths, 1995), 202, wherein the Authors note that, however, such guarantees may apply with a different strength in civil and criminal proceedings.
constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters.\textsuperscript{4}

[A] \textit{Golder} and Subsequent Rulings

From a historical perspective, the right of access to a court was firstly analysed by the ECtHR in \textit{Golder v. the United Kingdom},\textsuperscript{5} where the Court, inter alia, noted that:

Again, Article 6 para. 1 (art. 6 -1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.


The Court, after a thorough analysis of the specific rights provided for by Article 6(1), concluded as follows:

Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to ‘supplementary means of interpretation’ as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English ‘determination’, French ‘décidera’).

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

In particular, the \textit{Golder} court observed that Article 6(1) is not limited to proceedings that have already been initiated before a court, stating that it would be ‘inconceivable’ that the guarantees under Article 6(1) were only ‘afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to court.’ Under this untenable interpretation, the Court reasoned that any Contracting State could simply exclude from its jurisdiction certain classes of civil rights, taking away certain actions from courts and tribunals (leaving them, for example, under the authority of government organs).\textsuperscript{6}

The ECtHR has repeatedly invoked the \textit{Golder} Court’s interpretation of Article 6(1) recognizing the access to court under a number of factual contexts, such as the right to legal aid, the presence of the parties in the proceedings, the interference between the right of access to court and immunities, limited jurisdiction, etc.

[B] \textit{Ashingdane} and Limitations on the Right to Access a Court

Despite this wide application of the principles laid down in the \textit{Golder} judgment, the ECtHR has offered a \textit{caveat} limiting the right of access to a court.


\textsuperscript{5} \textit{Golder v. the United Kingdom}, Judgment of 21 February 1975. In this case the applicant was a prisoner who complained that his right to access to court had been violated because he was refused permission by the Home Secretary to consult a solicitor in order to prepare a civil lawsuit against a prison officer.

\textsuperscript{6} The Court observed, \textit{inter alia}, that: ‘The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings’ (\textit{Golder v. the United Kingdom}, cited above, paragraph 35).
In *Ashingdane v. United Kingdom*, for example, the Court stated that the right of access to court might be subject to limitations set out in the laws and regulations of the Contracting States. The Court stated, however, that these limitations should not be interpreted to alter the essence of the right itself, in that any attempts to limit the right to a court under Article 6(1) must be tailored so as to relate to a legitimate aim, and must bear a ‘reasonable relationship of proportionality’ with the aim sought to be achieved.

Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals’ (see the above-mentioned *Golder* judgment, p. 19, paragraph 38, quoting the ‘Belgian Linguistic’ judgment of 23 July 1968, Series A no. 6, p. 32, paragraph 5). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention’s requirements rests with the Court, it is no part of the Court’s function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (see, mutatis mutandis, the *Klass and Others* judgment of 6 September 1978, Series A no. 28, p. 23, paragraph 49).

Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the above-mentioned *Golder* and ‘Belgian Linguistic’ judgments, ibid., and also the above-mentioned *Winterwerp* judgment, Series A no. 33, pp. 24 and 29, paras. 60 and 75). Furthermore, a limitation will not be compatible with Article 6 paragraph. 1 (Article 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.


The same principles articulated in *Ashingdane* were further affirmed in *Tinelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, where the Court remarked:

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, the *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, § 50).

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

From the precedent outlined above, it is therefore a well-established principle that any limitation to the right of access to a court imposed by domestic legislation (such as, inter alia, statutory limitation periods, determination of a certain value of the claim as condition for the filing of an

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9 *Tinelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, cited above.
10 In *Stubbings and Others v. the United Kingdom*, Judgment of 22 October 2006, paragraphs 51–52, the Court held that the English relevant legislation providing for a statutory limitation period did not infringe the right of access to court under Article 6(1), reasoning as follows:

It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time. (...) In the instant case, the English law of limitation allowed the applicants six years from their eighteenth birthdays in which to initiate civil proceedings. In
appeal, obligations to pay in advance a certain sum as ‘security’ before filing an appeal, immunity from liability, limitation of presence of minors and other categories of people before a court, etc.) must not impair the ‘essence’ of the right to a court.

[C] Domestic Procedural Requirements and Article 6(1)

With regard to time limits to file an appeal, the ECtHR has not clearly articulated whether Article 6(1) creates a right for a litigant to be apprised of the existence of time limits to file an appeal. In one case, the Court found that, when two different time limits are provided by the law (one for filing the appeal, and another to file a submission to substantiate the appeal), such a right might be recognized.

For example, in Vecher v. France, the Court ruled that, since there was no fixed time to file a pleading to substantiate the already filed appeal, and since the French Court of Cassation, taking ‘less time than usual to hear the appeal,’ had decided the case (dismissing the appeal as untimely) eight days before the appellant actually submitted his written pleading, there was a violation of Article 6(1):

In conclusion, since there was no fixed date for filing a pleading and the Court of Cassation took less than usual to hear the appeal, without Mr Vecher being either warned of the fact by the registry or able to foresee it, he was deprived of the possibility of putting his case in the Court of Cassation in a concrete and effective manner.

*(Vecher v. France, Judgment of 29 November 1996, paragraph 30).*

In Ganci v. Italy, the Court stated that the right to obtain a judicial decision can be inferred from the right to court. The applicant was a prisoner who had filed a number of appeals against decisions of the Ministry of Justice to impose on him a ‘special regime.’ In domestic law, the prisoner had ten days to appeal against the decree of the Ministry of Justice, and the competent court had ten days to issue a decision. The Court observed, *inter alia*, that the failure of the competent courts to issue a decision on the merits of his case in respect of four appeals filed by the prisoner, constituted a violation of Article 6(1).

The Court notes at the outset that there is an essential feature in the instant case distinguishing it from Messina (no. 2), cited above. In the present case the courts never ruled on the merits of the applicant’s four appeals, whereas in the case of Mr Messina they did so out of time.

addition, subject to the need for sufficient evidence, a criminal prosecution could be brought at any time and, if successful, a compensation order could be made (see paragraphs 38–42 above). Thus, the very essence of the applicants’ right of access to a court was not impaired.

11 See, for example, Brualla Gómez de la Torre v. Spain, Judgment of 19 December 1997, paragraphs 28–39, where the Court found that no violation of Article 6(1) had occurred, reasoning – *inter alia* – that ‘The manner in which Article 6 § 1 applies to courts of appeal or of cassation depends on the special features of the proceedings conducted in the domestic legal order and the court of cassation’s role in them; the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal’ (paragraph 37).

12 See, for example, Tolstoy Miloslavsky v. the United Kingdom, where the applicant alleged that the requirement that he pay, as security, the sum of GBP 124,900 within fourteen days (failing which the appeal would be dismissed) had amounted to a total bar on his access to the Court of Appeal, since it had impaired the essence of his right of access to that court and was disproportionate. The Court, however, after carefully examining the applicable law in that context and the specific circumstances of the case, did not ‘find that the national authorities overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal’ and therefore concluded that ‘it cannot be said that those conditions impaired the essence of the applicant’s right of access to court or were disproportionate for the purposes of Article 6 para. 1’ *(Tolstoy Miloslavsky v. the United Kingdom,* cited above, paragraph 67).

13 See, among others, T.P. and K.M. v. the United Kingdom, Judgment of 10 May 2001, concerning a case of negligence liability of local authorities.

14 See, *ex multis*, Ashingdane v. the United Kingdom, cited above.


The Court can only conclude that the lack of any decision on the merits of the appeals nullified the effect of the courts’ review of the decrees issued by the Minister of Justice.

In the Court’s opinion, the applicable legislation lays down a time-limit of only ten days for adjudication partly because of the seriousness of the special regime’s effects on prisoners’ rights and partly because the impugned decision remains valid for only a limited time.

In these circumstances, the Court considers that the lack of a decision by the court responsible for the execution of sentences on the appeals lodged against the decrees issued by the Minister of Justice breached the applicant’s right to have his case heard by a court.

Accordingly, there has been a violation of Article 6 of the Convention.

(Inanci v. Italy, Judgment of 30 October 2003, paragraph 31).

In another case, the judgment was not handed down on the merits because a domestic tribunal had lost the case file. The ECtHR held that this amounted to a violation of the right of access to court, stressing that such right would be illusory if it contemplated only the right to file a claim, without envisaging the right to a decision on such claim by the domestic judicial authorities:

The Court recalls that the institution of proceedings does not, in itself, satisfy all the requirements of Article 6 § 1. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. The right of access to a court includes not only the right to institute proceedings but also the right to obtain a ‘determination’ of the dispute by a court. It would be illusory if a Contracting State’s domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined (see Multiplex v. Croatia, no. 58112/00, § 45, 10 July 2003; Katic v. Croatia, no. 48778/99, § 25, ECHR 2002-II). A litigant’s right of access to a court would be illusory if he or she were to be kept in the dark about the developments in the proceedings and the court’s decisions on the claim, especially when such decisions are of the nature to bar further examination (see Sukhorubchenko, cited above, § 53).

(Dubinskaya v. Russia, Judgment of 13 July 2006, paragraph 41).

In Lupas and Others v. Romania, a civil action involving the recovery of property held in undivided shares, the ECtHR ruled that the right of access to a court was violated when some of the co-owners of the property in question were prevented from initiating a lawsuit in the absence of the consent of all the co-owners (the so-called ‘unanimity rule’). In Lupas, the Court admitted that, in theory, the rule provided by the domestic civil code could be considered as conforming to Article 6(1) of the Convention; but it held that, in practice, the domestic civil code imposed an improper burden on the claimants, in effect hindering them from access to the court and ultimately obtaining a decision on their claim:

Accordingly, reiterating that all the provisions of the Convention and its Protocols must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory, the Court cannot accept the Government’s argument that the dismissal of the applicants’ actions placed only a temporary restriction on their right of access to a court. In this connection, it also notes that apart from a judgment given by the High Court of Cassation and Justice on 3 February 2005, the Government have not indicated any legal means whereby the applicants might be able to assert their inheritance rights. Lastly, the Court notes with interest that a bill to amend the Civil Code, expressly abandoning the unanimity rule, was recently tabled in Parliament.

In the light of the foregoing considerations, the Court finds that the strict application of the unanimity rule imposed a disproportionate burden on the applicants, depriving them of any clear and practical opportunity to have the courts determine their applications for recovery of the land in issue and thereby impairing the very essence of their right of access to a court.

(Lupas and Others v. Romania, Judgment of 14 December 2006, paragraphs 75-76).

Regarding appeals proceedings, the ECtHR has consistently held that the right to a court implied by Article 6(1) does not compel the Contracting States to set up courts of appeal or of cassation. However, it has stated that where such courts do exist, the guarantees of Article 6(1), including the right of access to court, must be upheld.17

In light of this holding, in *Dunayev v. Russia* the Court held that the refusal by the domestic courts to accept an appeal constituted a violation of the right of access to court guaranteed by Article 6(1). In other cases, the Court decided that where the right to an appeal is hindered by the fact that the appellant did not fully observe the appealed judgment, this will amount to a violation of the right of access to a court.

For example, in *Garcia Manibardo v. Spain*, an appeal was declared inadmissible by the domestic court (*Audiencia Provincial*) due to the failure of the appellant to make a deposit or a ‘compensation award,’ a precondition to file an appeal under Spanish law. The Court determined that the Spanish Court’s denial of filing an appeal based on the claimant’s failure to follow the compensation award requirements amounted to a violation of Article 6(1):

In the instant case, the applicant’s appeal was declared inadmissible owing to the statutory duty on persons other than those who are in receipt of legal aid to deposit with the *Audiencia Provincial* a specific amount (namely, the compensation award) as a condition precedent to their being permitted formally to lodge an appeal.

The Court finds that by obliging her to pay the amount ordered, the *Audiencia Provincial* prevented the applicant from using an existing and available remedy, such that a disproportionate hindrance was put in the way of her right of access to a court. Consequently, there has been a violation of Article 6 § 1. (*Garcia Manibardo v. Spain*, Judgment of 15 February 2000, paragraphs 44-45).

Similarly, the ECtHR has found a violation of Article 6(1) in cases where under domestic law the admissibility of the appeal is subject to the surrender of the appellant to custody. For example, in *Papon v. France* and in *Omar v. France*, the Court – after stressing the crucial role of cassation proceedings, ‘whose consequences may prove decisive for the accused’ – observed that the requirement that the appellant surrender himself into custody in order to file an ‘admissible’ appeal constituted a disproportionate burden on the appellant and impaired the essence of the right of appeal:

Noting that the applicant forfeited his right to appeal on points of law because he had failed to surrender to custody as required by Article 583 of the Code of Criminal Procedure as applicable at the time, it considers that, regard being had to all the circumstances of the case, he suffered disproportionate interference with his right of access to a court and, therefore, with his right to a fair trial (…). (*Papon v. France*, Judgment of 25 July 2002, paragraph 100).

The Court can only note that, where an appeal on points of law is declared inadmissible solely because, as in the present case, the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired.

This impairs the very essence of the right of appeal, by imposing a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and exercise of the rights of the defence on the other. (*Omar v. France*, [Grand Chamber], Judgment of 29 July 1998, paragraph 40).

[D] Legal Aid

[1] Legal Aid Schemes and Article 6(1)

The court has also held that where an individual proceeds in a case without legal counsel, and is unable to properly defend himself or protect his rights, either in criminal or civil proceedings, Article 6(1) is invoked.

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18 *Dunayev v. Russia*, cited above, paragraphs 37–38.
For example, in *Airey v. Ireland*, the ECtHR held that Article 6(1) had been violated because the applicant was not able to bring an action for separation against her husband due to the fact that she did not have sufficient financial means to pay for a lawyer. The Court considered that due to their complexity, proceedings for separation in Ireland could not be brought in person by the applicant without assistance by a lawyer. Considering the generally high fees required for representation, the Court determined that in the absence of a legal aid scheme, or of a simplification of the procedure, the right of access to court was violated:

(...)

In addition, whilst Article 6 para. 1 (art. 6-1) guarantees to litigants an effective right of access to the courts for the determination of their ‘civil rights and obligations’, it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme – which Ireland now envisages in family law matters (see paragraph 11 above) – constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court’s function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1 (art. 6-1)(…).

(*Airey v. Ireland*, Judgment of 9 October 1979, paragraph 26).

In its decision, the Court provided a limitation, in that the State need not ‘provide free legal aid for every dispute relating to a ‘civil right’’ (indeed, a specific provision on legal aid [Article 6(3)] exists only with regard to criminal proceedings), but stressed that Article 6(1) may oblige the signatory state to provide for the assistance of a lawyer, where professional representation is necessary in law or due to the complexity of the procedure:

To hold that so far-reaching an obligation exists would, the Court agrees, still with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

(*Airey v. Ireland*, Judgment of 9 October 1979, paragraph 26).

Where a legal-aid scheme does not exist under domestic law, the ECtHR has held that the State is obliged to provide alternative measures to ensure a litigant’s right of access to court. This principle was articulated – among others – in *Andronicou and Constantinou v. Cyprus*. In *Andronicou*, the applicants alleged that the absence of a legal-aid system for civil litigants, coupled with the litigants’ lack of adequate financial resources, in effect deprived them of the right of access to a court in that they were precluded from filing a lawsuit for damages based on their financial inability. However, the litigants were offered *ex gratia* legal aid from the Attorney General, but refused it. The Court held that based on the presence of an available legal-aid scheme, there was no violation of Article 6(1):

The Court notes that whilst Article 6 § 1 of the Convention guarantees to litigants an effective right of access to the courts for the determination of their ‘civil rights and obligations’, it leaves to the State a free choice of the means to be used towards this end. The institution of a legal-aid scheme constitutes one of those means but there are others. It is not the Court’s function to indicate, let alone stipulate, which measures should be taken. All that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 § 1 (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26).

The Court, like the Commission, considers that the Attorney-General’s *ex gratia* offer of 7 July 1995 provided a solution to help overcome the applicants’ lack of resources. It is surprising that the applicants did not take up the offer immediately, given their need of financial assistance to institute proceedings and their determination to sue the authorities. It is significant in this respect that they had no hesitation in accepting the Government’s earlier offer to cover the costs and expenses incurred through their participation in the proceedings of the commission of inquiry.

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In the circumstances therefore, the applicants cannot maintain that they did not have an effective access to a court within the meaning of Article 6 § 1 of the Convention, it being recalled that this provision does not guarantee a litigant a favourable outcome. There has accordingly been no violation of Article 6 § 1.


[E] Limitations to the Duty of Providing Legal Aid

Significantly, the ECtHR has ruled that domestic laws which allow the State to refuse to grant legal aid in limited, specific circumstances are compliant with Article 6(1).

For example, in cases where the applicant has substantial knowledge of the law and the subject matter of the case is not complex, limited access to legal aid does not violate Article 6(1). In McVicar v. the United Kingdom,23 for instance, the Court, after reaffirming the principle set out in Airey v. Ireland, according to which ‘Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to a court,’ remarked that:

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

(Mcvicar v. the United Kingdom, Judgment of 7 May 2002, paragraph 48).

However, in the similar case of Steel and Morris v. UK,24 the ECtHR applied the following analysis when considering the complexity of the law(s) at issue, the nature of the case, and the legal education of the defendants. In Steel, the litigants were deemed unable to meet the criteria of providing adequate themselves pro se representation; therefore, the applicants were not able to represent themselves adequately. As such, Article 6(1) was violated. The facts before the Steel Court involved what was deemed complex litigation (the case file included around 40,000 pages of documentary evidence, and 130 witnesses were heard; the first instance trial lasted 313 court days and the appeal 28; the combined judgments of the trial court and the Court of Appeal extended to 1,100 pages), and the case had significant financial consequences for the appellants, who were low income. The Court reasoned that the appellants, given the complexity of the litigation and the gravity of the case, were not able to enjoy ‘equality of arms’ with the opposing side in the absence of legal aid.25

In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald’s. There has, therefore, been a violation of Article 6 § 1 of the Convention.

(Steel and Morris v. United Kingdom, Judgment of 15 February 2005, paragraph 72).

[F] Effectiveness of Legal Aid

The ECtHR has also considered the effectiveness of legal aid as it relates to the right to access a court. The jurisprudence of the Court of Strasbourg suggests that it is not sufficient for the State simply to grant legal aid to individuals (either in civil or criminal proceedings), but that State must also ensure that the assistance is of practical effect.

For example, in Bertuzzi v. France,26 the applicant obtained legal aid but was not able to make use of it since the opposing party (the defendant) was a lawyer and because all three lawyers assigned to the applicant had personal connections to the defendant and obtained permission to withdraw. The applicant was not able to have another lawyer assigned to his case; therefore, he was unable to

23 McVicar v. the United Kingdom, Judgment of 7 May 2002.
24 Steel and Morris v. United Kingdom, Judgment of 15 February 2005.
start the proceedings. The Court observed that the principle of equality of arms articulated in Steel was violated:

It considers that permitting the applicant to represent himself in proceedings against a legal practitioner did not afford him access to a court under conditions that would secure him the effective enjoyment of equality of arms that is inherent in the concept of a fair trial (…).

(Bertuzzi v. France, Judgment of 13 February 2003, paragraph 31).

**[G] Financial Burden**

A number of rulings indicate that the right of access to a court is violated when litigation related filing fees under domestic law impose an excessive financial burden on the applicant.

In Kreuz v. Poland, the applicant alleged that the court fee of PLZ 100,000,000 was equivalent to his annual salary at that time and therefore constituted a *de facto* bar to his access to court. In light of these facts, the ECtHR held that there had been a breach of Article 6(1):

Assessing the facts of the case as a whole and having regard to the prominent place held by the right to a court in a democratic society, the Court considers that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts.

The fee required from the applicant for proceeding with his action was excessive. It resulted in his desisting from his claim and in his case never being heard by a court. That, in the Court’s opinion, impaired the very essence of his right of access.

For the above reasons, the Court concludes that the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court. It accordingly finds that there has been a breach of Article 6 § 1 of the Convention.


**[H] Limited Jurisdiction**

Where a party is granted a civil ‘right’ under domestic law, the ECtHR has consistently protected the right of access to court. However, the Court has refused to widen the scope of this protection to cases where a civil ‘right’ is not at issue.

In Boulois v. Luxembourg, the Grand Chamber did not recognize the existence of the right of access to court for a prisoner who was denied several requests for prison leave by the competent domestic authorities (the Attorney General and the Prison Board) and had consequently filed a complaint before the domestic Administrative Court and the Higher Administrative Court.

In Boulois, the domestic administrative courts had declined their jurisdiction. The applicant then applied to the ECtHR for relief, claiming that the domestic courts had violated Article 6(1). The Grand Chamber ruled that Article 6(1) was not applicable, since the issue did not concern a civil ‘right’ under (Luxembourg) domestic law.

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27 See also *P., C. and S. v. The United Kingdom*, Judgment of 16 July 2002, where the applicants were initially granted legal aid, but after the withdrawal of their lawyer they were not give the possibility to find another lawyer (paragraphs 92–100).


30 *Boulois v. Luxembourg*, (Grand Chamber), Judgment of 3 April 2012.

31 In the judgment under examination, however, the Court reaffirmed the principles expressed in its settled case-law, according to which prisoners continue to enjoy all the fundamental rights and freedoms guaranteed by the Convention, except the right to liberty, where the detention is lawfully imposed (see paragraph 84 and, among many others, *Dickson v. the United Kingdom*, [Grand Chamber], Appl. no. 44362/04, paragraph 67; and *Stummer v. Austria*, [Grand Chamber], Appl. no. 37452/02, paragraph 99, both quoted in the judgment).
In its judgment, the Grand Chamber considered that Article 6(1) ‘is not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to a determination of a “criminal charge”.’32 The Court further stated:

The Court must therefore consider whether the applicant had a ‘civil right’, in order to assess whether the procedural safeguards afforded by Article 6 § 1 of the Convention were applicable to the proceedings concerning his requests for prison leave.

(Boulois v. Luxembourg, [Grand Chamber], Judgment of 3 April 2012, paragraph 86).

Additionally, the Court noted that the ‘dispute’ present in the case centred around ‘the actual existence of the right to prison leave claimed by the applicant.’33 In deciding whether this amounted to a ‘right’ of the applicant, the Grand Chamber considered that permission to leave prison, within domestic law, existed as a ‘privilege,’ which ‘may be granted’ to prisoners in certain circumstances, but not as a civil ‘right’ granted to the prisoners (paragraphs 47, 49, and 96). The Court held that according to the relevant domestic law, ‘the Prison Board enjoys a certain degree of discretion in deciding whether the prisoner concerned merits the privilege in question’.34 The Court then concluded that:

In view of all the foregoing considerations, the Court cannot consider that the applicant’s claims related to a ‘right’ recognised in Luxembourg law or in the Convention. Accordingly, it concludes, like the Government, that Article 6 of the Convention is not applicable.

(Boulois v. Luxembourg, [Grand Chamber], Judgment of 3 April 2012, paragraph 104).

In its decision, the Grand Chamber almost completely reversed the judgment of the Chamber (Second section) of 14 December 2010. In that case, it held that although Article 6 ECHR was not applicable to the specific case under its criminal head, it was applicable under its civil head.35 The decision in Boulois can also be contrasted with the judgment in Enea v. Italy,36 where the Grand Chamber found the existence of a civil right of a prisoner in relation to family visits and correspondence. Although the court distinguished Boulois v. Luxembourg from the earlier case law, all the cases above concerned the nature of a civil right for the purposes of Article 6(1); they were not solely focused on the right of ‘access’ to court in its strictest sense.

The issue of limited jurisdiction came to the attention of the ECtHR in Vasilescu v. Romania.37 This case concerned a claim for restitution of goods that had been confiscated by the public authorities during the Communist regime. The applicant complained that in 1966, police officers from the Argeş miliţia had searched her house without a warrant, in connection with a police investigation carried on against her husband for unlawful possession of valuables, and had seized 327 gold coins. These coins were then deposited at the Argeş branch of the National Bank of Romania. After the criminal charges were dropped and the investigation discontinued, the applicant filed a lawsuit for the restitution of part of the gold coins and obtained favourable decisions at first instance and in appeals proceedings.

In 1994, however, the Procurator-General applied to the Supreme Court of Justice under Article 330 of the Code of Civil Procedure. The Supreme Court of Justice quashed all the earlier

32 Boulois v. Luxembourg, cited above, paragraph 85.
33 Ibid., paragraph 95.
34 Ibid., paragraph 99. The Court, in same judgment, recalled its established case law, according to which ‘the examination of requests for temporary release or of issues relating to the manner of execution of a custodial sentence do not fall within the scope of Article 6 § 1’ (paragraph 87). In the same sense, see also Neumeister v. Austria, Lorsé and Others v. the Netherlands and Montcornet de Caumont v. France, all cited by the Boulois Court.
35 According to the Court (Boulois v. Luxembourg, Second section, Judgment of 14 December 2010), the applicant was entitled to be granted a certain period of prison leave since he met all the requirements laid down in the domestic legislation. In particular, the Chamber considered that the pecuniary implications of the reasons of his requests for prison leave were related to his resettling in the society and to his private life, and were therefore related to civil rights.
36 Enea v. Italy, (Grand Chamber), Judgment of 17 September 2009.
judgments in the applicant’s favour. The Supreme Court of Justice held that under Article 275 of the Code of Civil Procedure, only the State Counsel for the county of Argeş had jurisdiction over the application of Mrs. Vasilescu. In her application to the Court of Strasbourg, Mrs. Vasilescu complained that her right of access to a court had been violated.

The Court observed that the Procurator-General’s department ‘consists of officials who carry out all their duties under the authority of the Procurator-General,’ under the supervision of the Minister of Justice. It concluded that even if the State Counsel exercised powers of a judicial nature, he exercised those powers as a member of the Procurator-General’s department. The court therefore upheld the applicant’s complaint that there was a violation of the right of access to court as guaranteed by Article 6(1):³⁹

The Court reiterates that only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the description ‘tribunal’ within the meaning of Article 6 § 1 (see, among other authorities, the Beaumartin v. France judgment of 24 November 1994, Series A no. 296-B, p. 63, § 38). Neither State Counsel for the county of Argeş nor the Procurator-General meets those requirements.

There has therefore been a violation of Article 6 § 1.

(Vasilescu v. Romania, Judgment of 22 may 1998, paragraph 41).

[I] Immunity

Immunity granted by international conventions or domestic law to special categories of persons such as states, embassies, international organizations, agents, employees, etc. may represent a bar to the power of domestic courts to adjudicate civil claims. This is relevant not only for litigation relating to employment, but also for claims for compensation and actions for damages in general. Where such immunity exists, the Court is required to determine not only whether a violation of the right of access to a court has occurred, but also whether Article 6(1) is applicable at all.

[1] Immunity for States and International Organizations

In Al-Adsani v. the United Kingdom,⁴⁰ the United Kingdom courts had ruled that the State of Kuwait was immune to a claim for damages for personal injuries suffered by an individual as a consequence of torture.⁴¹ The applicant maintained that the English courts had failed to secure the enjoyment of his right not to be tortured and had denied him access to a court, contrary to Articles 3, 6(1) and 13 ECHR.

The ECtHR, noting that according to English law a civil action against a State is possible provided that the respondent State waives immunity, held that – in principle – Article 6(1) was applicable:

The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government’s submission that the applicant’s claim had no legal

³⁸ Ibid., paragraph 40.
³⁹ In the sense that only an institution that has full jurisdiction and satisfies a number of requirements can be defined a ‘tribunal’, in the meaning of Article 6, see also, ex plurimis, Ringeisen v. Austria, Judgment of 16 July 1971, paragraph 95; Le Compte, Van Leuven and De Meyere v. Belgium, Judgment of 23 June 1981, paragraph 55; Belilos v. Switzerland, Judgment of 29 April 1988, paragraph 64; and Beaumartin v. France, Judgment of 24 November 1994, paragraph 38.
⁴⁰ Al-Adsani v. the United Kingdom, (Grand Chamber), Judgment of 21 November 2001.
⁴¹ In particular, when the Court of Appeal examined the case, it found that the State of Kuwait was immune to the action filed by the claimant, on the basis of the State Immunity Act 1978, Section 1(1), which provides: ‘A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.’; and Section 5, which reads: ‘A State is not immune as respects proceedings in respect of (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom’. In that case, the Court observed, it was clear and uncontested that the torture occurred in Kuwait did not fall within the exception provided by Section 5.
basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred in limine: if the defendant State waives immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right.

The Court is accordingly satisfied that there existed a serious and genuine dispute over civil rights. It follows that Article 6 § 1 was applicable to the proceedings in question.

(Al-Adsani v. the United Kingdom, [Grand Chamber], Judgment of 21 November 2001, paragraphs 48-49)

However, following the principles set out in Waite and Kennedy v. Germany, the Court remarked that the right of access to a court is not absolute, but may be subject to limitation, provided that any limitations do not impair the essence of the right of access to court, and that they pursue a legitimate aim with ‘a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.’42 The ECtHR held that the immunity granted to Kuwait by the 1978 Act pursued the legitimate aim of compliance with the principles of international law and was also proportionate to the aim pursued, in light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969:

It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

(Al-Adsani v. the United Kingdom, [Grand Chamber], Judgment of 21 November 2001, paragraph 56)

Finally, the Court concluded that although prohibition of torture is a peremptory norm in international law, the case under examination did not concern criminal liability for alleged acts of torture, but the immunity of a State sued for damages deriving from torture, which was legitimately covered by the State Immunity Act of 1978:

In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait’s claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant’s access to a court.

(Al-Adsani v. the United Kingdom, [Grand Chamber], Judgment of 21 November 2001, paragraph 67)

The ECtHR has reached similar conclusions in employment-related claims against a foreign State that enjoys immunity under international law. In Fogarty v. the United Kingdom,43 the applicant was an employee of the United States Embassy in London, and the UK Courts afforded immunity to the employer under the 1978 act.

The Court, in deciding whether the restriction on the right to court pursued a legitimate aim, observed that ‘sovereign immunity is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State’ and that ‘the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.’44

The Court accepted the employer’s argument that issues relating to the recruitment of staff for missions and embassies may involve sensitive and confidential aspects of the diplomatic and organizational policy of a foreign State. The Court noted that the International Law Commission did not exclude State immunity where the subject of the proceedings was related to the recruitment of staff, and concluded that the restriction was therefore proportionate to the pursued aim:

42 Waite and Kennedy v. Germany, (Grand Chamber), Judgment of 18 February 1999, paragraph 59.
44 Ibid., paragraph 34.
In these circumstances, the Court considers that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual’s access to court.

(Fogarty v. the United Kingdom, Judgment of 21 November 2001, paragraph 39)

However, in Sabeh El Leil v. France, the applicant alleged that he had been deprived of his right of access to a court in a lawsuit concerning the termination of his employment by the Kuwaiti Embassy in Paris as a result of the immunity from jurisdiction granted by the domestic courts to the State of Kuwait. The applicant had obtained judgment from the Employment Tribunal granting him compensation for the unjustified termination of his employment. However, the Court of Appeal had set aside the judgment, finding the claim inadmissible ‘by virtue of the principle of jurisdictional immunity of foreign States.’

The ECtHR considered the established principles set out in Cudak v. Lithuania, Loizidou v. Turkey, and the above-mentioned Fogarty v. the United Kingdom, and remarked that ‘in cases where the application of the rule of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court must ascertain whether the circumstances of the case justified such restriction.’ The Court concluded that in the case at hand the French courts had failed to preserve a reasonable relationship of proportionality and had thus impaired the very essence of the applicant’s right of access to a court:

In conclusion, by upholding in the present case an objection based on State immunity and dismissing the applicant’s claim without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the French courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant’s right of access to a court.

(Sabeh El Leil v. France, [Grand Chamber], Judgment of 29 June 2011, paragraph 67)

In its judgment, the ECtHR applied the principles of international customary law as laid down in the International Law Commission’s 1991 Draft Articles (now enshrined in the 2004 Convention). The Court noted that in the case at hand the applicant was neither a diplomatic or consular agent of Kuwait, nor a national of that State, and that his duties were not related to the sovereign interests of the State of Kuwait. The Court concluded that the French Court of Appeal and Court of Cassation had therefore not provided a proper legal justification for limitation of his right of access to a court.

The ECtHR has adopted similar reasoning in respect of the immunity enjoyed by international organizations. In Waite and Kennedy v. Germany, for example, the Court examined the aspect of the immunity granted to the European Space Agency (ESA).

The applicants had brought an action against the ESA before the Darmstadt Labour Court (Arbeitsgericht), maintaining that according to the German Provision of Labour (Temporary Staff) Act (Arbeitnehmerüberlassungsgesetz), they had acquired the status of employees of ESA. The ESA argued that it was immune from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I. The Darmstadt Labour Court accepted the ESA’s argument and declared the applicants’ actions inadmissible.

The ECtHR applied the test set out in the case law, examining the facts of the case with particular reference to the legitimacy of the aim pursued by the immunity granted to the ESA and to the proportion between the means adopted and the aim sought. The Court took into account the existence of an alternative means for protecting the applicants’ interests and reached the conclusion that there had not been any violation of the right of access to court:

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46 Ibid., paragraph 15.
47 Cudak v. Lithuania, (Grand Chamber), Judgment of 23 March 2010.
48 Loizidou v. Turkey, Judgment of 18 December 1996.
49 Waite and Kennedy v. Germany, cited above.
In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their ‘right to a court’ or was disproportionate for the purposes of Article 6 § 1 of the Convention.

(Waite and Kennedy v. Germany, [Grand Chamber], Judgment of 18 February 1999, paragraph 73)

[2] Immunity for Certain Categories of State Servants

Where there is a public interest justification for doing so, a State can also grant immunity to certain categories of its own employees; for example, police officers or members of the judiciary. The leading case in this area is Osman v. the United Kingdom.50 The first applicant argued that in failing to adequately protect the second applicant and his father from a known danger, the police had failed to comply with their positive obligation under Article 2 ECHR; namely, ‘Everyone’s right to life shall be protected by law.’ They also argued that the dismissal by the Court of Appeal of the negligence action on the grounds of state immunity constituted a restriction of their right of access to a court in violation of Article 6(1) ECHR.

The ECtHR held that, although Article 2 had not been violated, there was a breach of Article 6(1). The Court observed that although a rule protecting the police from actions in negligence might be justified on the basis that the constant risk of exposure to liability for their actions would hinder the police’s ability to fight crime, ‘a blanket immunity’ would breach Article 6(1). To ensure compliance with Article 6(1), the Court stated that domestic courts should have regard to other public interest considerations in a particular case – ‘considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police.’51 Even where the immunity enjoyed by police agents was legitimate and in the wider public interest, the State must nevertheless grant individuals an alternative means of satisfaction if they suffer damages as a consequence of the negligent action of the police.

The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police in deserving cases.

(Osman v. the United Kingdom, [Grand Chamber], Judgment of 28 October 1998, paragraph 151)

The decision in Osman was undoubtedly controversial, and in similar cases (Z. and Others v. the United Kingdom,52 and T.P. and K.M. v. the United Kingdom53) the ECtHR has found no violation of Article 6(1), notably upholding the application of an exclusionary rule by English law, which granted local authorities substantial immunity from the negligence actions filed against them for damage suffered by parents and their children. In Z. and Others v. the United Kingdom, the Court was cautious to state that the inability of the applicants to sue the local authorities was due to the lack of substantive right in the domestic law, and not because the local authorities were immune from suit, opting instead for the application of Article 13, instead of Article 6(1).54

50 Osman v. the United Kingdom, (Grand Chamber), Judgment of 28 October 1998.
51 Ibid., paragraph 152.
52 Z. and Others v. the United Kingdom, (Grand Chamber), Judgment of 10 May 2001.
54 Z. and Others v. the United Kingdom, cited above, paragraph 102, reads:

It is nonetheless the case that the interpretation of domestic law by the House of Lords resulted in the applicants’ case being struck out. The tort of negligence was held not to impose a duty of care on the local authority in the exercise of its statutory powers. Their experiences were described as ‘horrific’ by a psychiatrist (see paragraph 40 above) and the Court has found that they were victims of a violation of Article 3 (see paragraph 74 above). Yet the outcome of the domestic proceedings they brought is that they, and any children with complaints such as theirs, cannot sue the local authority in negligence for compensation, however foreseeable – and severe – the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. The applicants are correct in their assertions that the gap they have identified in domestic law is one that gives rise to an issue under the Convention, but in the Court’s view it is an issue under Article 13, not Article 6 § 1.
In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law.

(Z. and Others v. the United Kingdom, [Grand Chamber], Judgment of 10 May 2001, paragraph 100)

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

[3] Immunity for Parliamentary Members

Similar immunities are enjoyed by members of legislative assemblies. In Syngelidis v. Greece, the case concerned a claim for compensation for non-pecuniary harm suffered by the applicant as a consequence of his ex-wife’s alleged breach of a judicial decision on the custody of their child. The applicant alleged that the parliamentary immunity of his ex-wife violated his right of access to a court. The Court observed that when a State grants immunity to its members of parliament, the protection of individuals’ civil rights may be hindered. However, following the principles set out in its earlier case law, according to which immunity must not impose a disproportionate restriction on the right of access to justice, the Court remarked that:

[1] In determining whether or not a particular measure was proportionate, the Court examines whether the impugned acts were connected with the exercise of parliamentary functions in their strict sense.

(Syngelidis v. Greece, Judgment of 11 February 2010, paragraph 44)

In that case, the Court held that the dispute between the couple was unrelated to the parliamentary activity. The refusal by the Greek Parliament to waive the M.P.’s immunity was unjustified and constituted a breach of the right of access to court embodied in Article 6(1):

In this connection the Court notes that, if properly interpreted in the light of Article 6 § 1, Article 62 of the Greek Constitution entitles the Greek Parliament to refuse to grant leave for a prosecution only where the acts on which the prosecution is based are clearly connected with parliamentary activity. In the context of the present case, there was no conceivable link between M.A.’s behaviour which formed the basis of the proposed criminal proceedings and her parliamentary functions. Her alleged failure to comply with the contact arrangements ordered by the domestic court was entirely unrelated to the performance of her functions as a member of parliament and to the functioning and reputation of Parliament in general. Such behaviour is more consistent with a personal quarrel between an ex-couple with regard to the regulation of their contact with their child.

(Syngelidis v. Greece, Judgment of 11 February 2010, paragraph 46)

Similar reasoning had already been expressed by the ECtHR in Cordova v. Italy, where the blanket immunity that protected a member of the Italian Parliament (and former President of the Italian Republic) from the claim for damages brought by an Italian public prosecutor was held to violate the right of access to justice guaranteed by Article 6(1).

56 Ibid., paragraph 56, reads (official French version): ‘Dans ces conditions, la Cour estime que, se limitant à reconnaître les spécificités liées au privilège de juridiction, les restrictions apportées au droit d’accès n’ont pas porté atteinte à la substance même de leur droit à un tribunal ou qu’elles aient été disproportionnées sous l’angle de l’article 6 § 1 de la Convention’.
58 In the case under examination, the applicant had filed a criminal indictment in combination with a request for monetary compensation, pursuant to the Greek applicable law.
59 See also, on this point, Kart v. Turkey, (Grand Chamber), Judgment of 3 December 2009, paragraph 80; Waite and Kennedy v. Germany, cited above, paragraph 59; T.P. and K.M. v. the United Kingdom, cited above, paragraph 98.
61 The case is related to the claim for compensation for damage to his honour and reputation filed by a public prosecutor against a member of the Italian parliament. In the course of some investigations against a certain Mr C., the public prosecutor had found out, inter alia, that this Mr C. had had contact with the Senator and former Italian President Mr Francesco Cossiga. The latter, sent the prosecutor a fax, two letters and, later on, a small wooden horse and a tricycle, together with a detective game called ‘Super Cluedo’, attaching to the parcel the following message: ‘Have fun, dear Prosecutor! Best wishes, F. Cossiga’ (‘Si prenda un po’ di svago, gentile Procuratore! Cordialmente F. Cossiga’). (See
The Court held that the decision of the domestic court to apply the immunity provided for by Article 68(1) of the Italian Constitution, and the subsequent refusal of the same court to raise a conflict of State powers before the Constitutional Court (as requested by the applicant) amounted to an infringement of the right of access to a court.

[…] In the present case, following the resolution of 2 July 1997 coupled with the Messina District Court’s refusal to raise a conflict of State powers before the Constitutional Court, the prosecution of Mr Cossiga was abandoned and the applicant was deprived of the possibility of securing any form of reparation for his alleged damage.

In these circumstances, the Court considers that there has been an interference with the applicant’s right of access to a court.

(Cordova v. Italy, (No. 1), Judgment of 30 January 2003, paragraphs 52-53)

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

However the Court notes that, in the particular circumstances of this case, Mr Cossiga’s behaviour was not connected with the exercise of parliamentary functions in their strict sense. Although it emerges from the decision of the Messina public prosecutor of 13 December 1997 (see paragraph 20 above) that Mr Cossiga had criticised the applicant’s investigations in an earlier parliamentary question, the Court considers that ironic or derisive letters accompanied by toys personally addressed to a prosecutor cannot, by their very nature, be construed as falling within the scope of parliamentary functions. Such behaviour is more consistent with a personal quarrel. In such circumstances, it would not be right to deny someone access to a court purely on the basis that the quarrel might be political in nature or connected with political activities.

(Cordova v. Italy, (No. 1), Judgment of 30 January 2003, paragraph 62)

The Court also observed that the resolution of the Italian Senate granting full immunity to the Parliament member left the applicant with no alternative means for the effective protection of his rights. The Court therefore considered that the immunity ran counter to the well-established principles laid down in its vast jurisprudence on the subject matter.

62 See, ex multis, Waite and Kennedy v. Germany, cited above.

63 A. v. the United Kingdom, Judgment of 17 December 2002.

64 Article 9 of the Bill of Rights 1689 (‘... the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in a court or place out of Parliament.’) does not refer to a substantive bar to civil claims, but rather to a procedural bar to the determination by a court of any claim which derives from words spoken in Parliament (see A. v. the United Kingdom, cited above, paragraphs 22 and 64).
The Court concludes that the parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.

(A. v. the United Kingdom, Judgment of 17 December 2002, paragraph 77)

In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 (see, mutatis mutandis, Al-Adsani, cited above, § 56). Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by signatory States as part of the doctrine of parliamentary immunity (ibid.).

(A. v. the United Kingdom, Judgment of 17 December 2002, paragraph 83)

It follows that, in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual’s right of access to a court.

(A. v. the United Kingdom, Judgment of 17 December 2002, paragraph 87)

[J] Presence of the Parties at the Proceedings

The parties generally have the right to be present during civil proceedings. Similarly, the accused has the right to be present in criminal proceedings. This is implied in the guarantees provided for by Article 6(1) and (3)(c)(d), and (e).65

Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing. Moreover, subparagraphs (c), (d) and (e) of paragraph 3 guarantee to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person’, ‘to examine or have examined witnesses’ and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’, and it is difficult to see how he could exercise these rights without being present (…).

(Hermi v. Italy, [Grand Chamber], Judgment of 18 October 2006, paragraph 59)

However, although this principle is generally accepted as being of universal application in criminal proceedings,66 the presence of a party at the proceedings in civil cases is considered to be necessary only in certain circumstances. In other words, in criminal trials the absence of a party may be justified in exceptional cases and under certain circumstances, whereas in civil proceedings the presence of the parties is necessary only in exceptional cases; for example, when an assessment and evaluation of a party is needed for the adjudication of the case.

The Strasbourg case law suggests that unless the Court finds it necessary to assess the party’s personality, in the vast majority of civil cases the presence of a legal representative in court is sufficient. The Court has consistently affirmed that any right to be present during proceedings is not guaranteed per se by Article 6, but is derived indirectly from the right of equality of arms in adversarial proceedings.67

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

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

This interpretation of Article 6(1) is consistent with decisions made by the ECHR in several cases where an imprisoned applicant had not been given the possibility to appear in person to make oral submissions before a civil court in order to defend his claim. The corollary of this principle is that

65 See Colozza v. Italy, Judgment of 22 January 1985, paragraph 27.
67 See, other than the judgment quoted in the text, McMichael v. the United Kingdom, Judgment of 24 February 1995, paragraphs 17–27.
in civil litigation, unless a party falls within the exception outlined above, they can always waive their right to be present at civil proceedings, either implicitly or explicitly, without any restriction by the court.  

Conversely, the presence of the accused in a criminal trial is always necessary unless there are exceptional circumstances that make it impossible, notwithstanding all possible diligent efforts, to notify the accused of the day of the hearing, or unless there is an unequivocal waiver by the accused. The above interpretation can be drawn, inter alia, from the reasoning adopted in the well-known Colozza v. Italy.  

In Colozza, the Court observed that there had been no waiver by the accused of his right to be present at the hearing, and that he did not have legal knowledge of the institution of criminal proceedings against him. Therefore, the Court held that Article 6 had been violated:

In fact, the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption (see paragraphs 12 and 20 above), inferred from the status of ‘latitante’ which they attributed to Mr. Colozza that there had been such a waiver.  

(Colozza v. Italy, Judgment of 22 January 1985, paragraph 28).

Similarly, in F.C.B. v. Italy, the Court decided that a retrial in the absence of the accused, who was detained abroad, had violated his right to attend the trial alongside his defence counsel. In F.C.B., the applicant alleged that he did not know when his trial before the Milan Assize Court of Appeal would take place, as he was in detention (under ‘solitary confinement’) in the Netherlands. He also maintained that the two attempts to notify him of the date of the trial were invalid.

The ECtHR held that the Italian Assize Court, which was aware that the applicant was detained abroad but did not adopt all the necessary measures in order to ensure his legal knowledge of the date of the trial and thus his attendance at the hearing, had violated Article 6(1) and (3), since the applicant had not waived his right to attend the hearing:

The Court points out firstly that Mr F.C.B., who was not present at the hearing before the Milan Assize Court of Appeal despite the fact that he was charged with very serious crimes (see paragraph 10 above), had not expressed the wish to waive attendance. Moreover, that court had learnt from concurring sources (Mr F.C.B.’s counsel and two co-defendants) that apparently he was in custody in the Netherlands. Yet it did not adjourn the trial, nor did it investigate further to see whether the applicant had indeed consented to not being present; it merely stated that it had not been provided with proof that he was unable to attend.  


However, the Court noted that proceedings that are held in absence of the defendant are not, per se, contrary to Convention if the accused subsequently obtains a determination on the merits of the case from a court that has heard him.

The Court has previously stated that it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses. The legislature must accordingly be able to discourage unjustified absences (see Poitrinol v. France, judgment of 23 November 1993, Series A no. 277-A, p. 15, § 35, and Krombach v. France, no. 29731/96, § 84, ECHR 2001-II). Proceedings that take place in the accused’s absence will not of themselves be incompatible with the Convention if the accused may subsequently obtain, from a court which has heard him, a fresh determination of the merits of the charge (see Colozza v. Italy, judgment of 12 February 1985, Series A no. 89, p. 15, § 29, and Poitrinol, cited above, pp. 13-14, § 31).


69 Colozza v. Italy, cited above.
Furthermore, the ECtHR has adopted a less absolute approach to the presence of the accused when it comes to appeal proceedings. The Court has noted that while the presence of the accused is crucial in the trial hearing, it may not be vital in appeals proceedings, especially when the appeal court is called to deal only with points of law.

In *Kremzow v. Austria*, the accused was not present at a hearing where the Court of Appeal had to decide on points of law. The Court found no violation of Article 6, stressing that in this case the presence of the lawyer had been sufficient.

In other cases, the Court has also suggested that complete non-participation in appeal or cassation proceedings may comply with the requirements of Article 6, provided that a public hearing was held at first instance. Where a higher court is called to decide on the facts of the case, the presence of the accused is also not always considered necessary. The Court has observed that whether the presence of the accused is required will depend on the specific characteristics of the proceedings and the manner in which the applicant’s interests were protected before the appellate court, as well as the nature of the issues in question and their importance to the appellant.

However, when the appellate court has to examine both fact and law in order to make a full assessment on the guilt or innocence of the accused, and an assessment of the evidence given in person by the accused is required, the Court has stated that the presence of the accused is an essential part of a fair trial.

[K] Amnesties

One of the few cases where the issue of amnesties has been considered involved is an admissibility decision in *Dujardin and others v. France*.

In this case the families of four unarmed gendarmes killed in a politically-motivated attack by insurgents in New Caledonia, a French colony, alleged the violation of Article 2 and 6 ECHR when the French government granted a general amnesty, which covered also the offence of murder. They complained, in particular, on the fact that the amnesty law put an end to the criminal investigation and trial.

In declaring that the application was inadmissible the Commission stated, with reference to the alleged violation of Article 2:

The Commission observes in that connection that French legislation undoubtedly secures protection of life in so far as the crime of murder is a punishable offence in French criminal law. Admittedly, as with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.


And, with reference to the alleged violation of Article 6(1):

As for the complaints raised under Article 6 of the Convention, the Commission notes that the application is not very precise in that the applicants seem to be complaining that they did not have access to a court in order to contest the

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71 See, for instance, *Monnell and Morris v. the United Kingdom*, Judgment of 2 March 1987, wherein the Court observes that ‘The manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 (art. 6-1, art. 6-3-c) is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved.’


77 With a law adopted by the National Assembly on 20 December 1989.
legislation in question However, the right of access to a court set forth in Article 6 para 1 of the Convention does not include the right to instigate criminal prosecutions (…).


The Dujardin decision emerged several years before the Court had developed a full jurisprudence on Article 2. Subsequent cases involving state actors have revealed a considerable sense of reticence concerning amnesty for state actors, whose public interpretation could undermine public confidence in the rule of law.

This sentiment was confirmed, for example, in Abdülsamet Yaman v. Turkey, whose facts involved allegations of Article 3 violations arising from the torture inflicted on the applicant by the Turkish police.

The Court affirmed, inter alia, that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred, and the granting of an amnesty or pardon should not be permissible, and concluded that in the case at hand there was a violation of Article 13 ECHR:

The Court further points out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.

(‘Abdülsamet Yaman v. Turkey, Judgment of 2 November 2004, paragraph 55)

[L] Interference by Executive Authorities in the Execution of Judicial Decisions and the Principle of Legal Certainty

The logical corollary of the right of access to court is the right of the parties to obtain a final decision and to have that decision executed. Clearly, if after obtaining a decision by the competent judicial authority that decision is not given effect, the individual’s substantive right will be meaningless. The right of access to a court, therefore, encompasses both the right to legal certainty and the right to effective court decisions.

This issue has been examined by the ECtHR in many judgments, with reference to both civil and criminal cases. In Ryabykh v. Russia, the applicant alleged that Article 6(1) had been violated because the Presidium of the Belgorod Regional Court had set aside a final judgment issued in her favour by the Novooskolskoi District Court.

The Court reaffirmed that ‘legal certainty presupposes respect for the principle of res judicata (…), that is the principle of the finality of judgments,’ with the consequence that ‘no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.’ The Court noted that ‘the right of a litigant to a court would be equally illusory if a Contracting State’s legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official,’ concluding that:

By using the supervisory review procedure to set aside the judgment of 8 June 1998, the Presidium of the Belgorod Regional Court infringed the principle of legal certainty and the applicant’s ‘right to a court’ under Article 6 § 1 of the Convention.

(Ryabykh v. Russia, Judgment of 24 July 2003, paragraph 57).

As noted in the above judgment, these ‘rights’ stem directly from the general principle of res judicata, common to all the Member States of the Council of Europe. When a decision or a
judgment is final, it cannot be undermined by any state authority, apart from in specific and exceptional cases, and the mechanism for doing so should be strictly limited by domestic procedural rules.

However, in many States there are procedural rules that allow public authorities (such as, for example, the prosecutor) to file an ‘extraordinary’ appeal at any time against a decision, even when it has become ‘final.’ In a number of cases, the ECtHR has held that such extraordinary appeals infringe the principle of *res judicata* in both civil and criminal proceedings and amount to a violation of Article 6(1).

For example, in the well-known case of *Brumărescu v. Romania*, the Court held that allowing the Procurator-General of Romania to apply for a final judgment to be quashed violated the principle of legal certainty. In that case, the applicant alleged that in a judgment of 9 December 1993, the Court of First Instance had held that the nationalization of his parents’ house had been unlawfully carried out, as his parents fell into a category of persons whose property was exempted from nationalization. No appeal was brought against the judgment, which thus became final and irreversible. However, after the judgment had been executed and the applicant had begun paying the land tax on the house, the Procurator-General of Romania filed an application (*recurs în anulare*) with the Supreme Court of Justice, requesting to quash the judgment of 9 December 1993 on the grounds that the Court of First Instance had exceeded its jurisdiction. The Supreme Court of Justice accepted the application and quashed the judgment. The Court of Strasbourg, following the principles set out above, concluded that Article 6(1) had been violated:

In the present case the Court notes that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to challenge indefinitely.

The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice’s words – a judicial decision that was ‘irreversible’ and thus *res judicata* – and which had, moreover, been executed.

In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant’s right to a fair hearing under Article 6 § 1 of the Convention.

There has thus been a violation of that Article.


Similarly, *Jasiūnienė v. Lithuania* concerned the restitution of and compensation for nationalized property. The ECtHR held that ‘by failing to take the necessary measures to comply with the judgment of 3 April 1996, the Lithuanian authorities deprived the provisions of Article 6 § 1 of the Convention of all useful effect.’ However, in *Užkurėliénė and Others v. Lithuania*, where the execution of a judgment of the domestic court required a complex set of actions to be carried out by the national authorities under the domestic legislation on restitution of property rights, the Court found that a two-year delay in making the first offer for compensation in execution of the judgment, though ‘regrettable,’ did not violate Article 6(1):

The Court notes that the first offer of compensation in execution of the judgment of 22 May 2000 was made to the applicants almost two years later, on 20 March 2002. Thereafter slightly more than two years passed until the last offer of compensation was made on 19 July 2004 (see §§ 20-26 above). While the Court finds such a lapse of time regrettable, it cannot be compared with the circumstances in the *Jasiūnienė* case cited above, where even at the time of the adoption of the Court’s judgment in 2004 no appropriate executive decision had been taken regarding the court decision on restitution adopted as far back as 1996 (*loc. cit.*, §§ 27-32). In view of the above considerations, and in

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83 Ibid., paragraphs 15–16.
85 Ibid., paragraph 31.
particular on account of the lack of activity established on the part of the applicants themselves, the Court considers that the delays in the execution of the judgment of 22 May 2000 were not such as to infringe upon the essence of the applicants’ right to a court guaranteed by Article 6 of the Convention (…).

(Užkuriėnių and Others v. Lithuania, Judgment of 7 April 2005, paragraph 36).

As far as criminal proceedings are concerned, the ECtHR found in Bujniţa v. Moldova that the annulment of an acquittal, on request of the public prosecutor, violated the right of the applicant to a fair trial, pointing out that no new evidence had been submitted by the prosecutor. The Court, following the principles already laid down in its case law, stressed that any higher court’s power of review should be limited to the correction of judicial errors and should not extend to carrying out a fresh examination. The Court held that ‘a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.’ In its judgment, the Court stated:

However, although a mere possibility to re-open a criminal case is prima facie compatible with the Convention, including the guarantees of Article 6, certain special circumstances may reveal that the actual manner in which such a review was used impaired the very essence of the right to a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct the request for annulment proceedings were exercised by the authorities so as to strike, as far as possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice (…).

(Bujniţa v. Moldova, Judgment of 16 January 2007, paragraph 22),

The Court concluded that these basic principles had not been respected, noting that the re-opening of the proceedings was requested not because new evidence had emerged or due to the discovery of serious procedural errors, but simply because the prosecutor’s office disagreed with the court’s assessment:

The Court notes that the grounds for the re-opening of the proceedings were based neither on new facts nor on serious procedural defects, but rather on the disagreement of the Deputy Prosecutor General with the assessment of the facts and the classification of the applicant’s actions by the lower instances. The Court observes that the latter had examined all the parties’ statements and evidence and their original conclusions do not appear to have been manifestly unreasonable. In the Court’s view, the grounds for the request for annulment given by the Deputy Prosecutor General in the present case were insufficient to justify challenging the finality of the judgment and using this extraordinary remedy to that end. The Court, therefore considers, as it has found in similar circumstances (see, for instance, Savinskiy v. Ukraine, no. 6965/02, § 25-27, 28 February 2006), that the State authorities failed to strike a fair balance between the interests of the applicant and the need to ensure the effectiveness of the criminal justice system.


In Assanidze v. Georgia, the ECtHR found that the failure of the State to release the defendant from detention following his acquittal breached Article 6(1). (The defendant was eventually released more than three years after his acquittal.) The Court, recalling the principles set out in Hornsby v. Greece, stated that:

Applying those principles to the instant case, the Court emphasises that it was impossible for the applicant to secure execution of the judgment of a court that had determined criminal charges against him, within the meaning of Article 6 § 1 of the Convention. It does not consider it necessary to establish which domestic authority or administration was responsible for the failure to execute the judgment, which was delivered more than three years ago. It merely observes that the administrative authorities taken as a whole form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice (see Hornsby, cited above, p. 511, § 41). If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees the defendant previously enjoyed during the judicial phase of the proceedings would become partly illusory.
Consequently, the fact that the judgment of 29 January 2001, which is a final and enforceable judicial decision, has still not been complied with more than three years later has deprived the provisions of Article 6 § 1 of the Convention of all useful effect.

(Assanidze v. Georgia, Judgment of 8 April 2004, paragraphs 183-184)

The Court has ruled that the principles outlined above also apply to proceedings before administrative courts. In Hornsby v. Greece, the Court remarked that the right to a fair trial would be illusory if a contracting State allowed a final and binding judicial decision to remain ‘inoperative’ and that proper execution of judgments must be regarded as an integral part of the right to a fair trial for the purposes of Article 6 of the Convention.

 Ibid., paragraph 40. In the same sense see, *ex multis*, Immobiliare Saffi v. Italy, Judgment of 28 July 1999, paragraph 63 and 66, wherein the Court examined the issue also under the aspect of undue delay of execution proceedings (around thirteen years in that case).