

# **The right to a court: Article 6 of the Human Rights Convention**

## **James Wood Lecture, University of Glasgow**

### **Lord Sumption**

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Article 6 of the European Convention on Human Rights provides that “in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Article 6 is an important part of the Convention. For quite a number of years, it has been the most fertile source of petitions to the European Court of Human Rights, and has accounted for the largest number of violations. Last year, just over a quarter of all violations found by the Court were violations of Article 6. The principal offenders were Turkey and the countries of the old communist block, notably Russia and Romania. The United Kingdom is well down the list of offenders and did not feature at all in that year. But it has had its own collisions with Article 6. Since 1975 there have been according to my computation 79 cases in which the Strasbourg Court has found violations of Article 6 by the United Kingdom, more than any other article. In addition, since the Human Rights Act came into force in 2000, the United Kingdom courts have on five occasions made declarations of incompatibility based on Article 6. During the same period, the House of Lords or the Supreme Court have on three occasions declared aspects of Scottish criminal procedure to be incompatible with Article 6.

Numbers of course do not tell the whole story. In addition to cases in which the United Kingdom has been found to have violated Article 6, there has been a fair number of cases since 2000 in which a violation of the article has only been avoided by reading down legislation under

section 3 of the Human Rights Act, or by quashing subordinate legislation or other executive acts. More generally, Article 6 has had a significant influence on criminal procedure and on new legislation, notably in the fields of criminal sentencing and penal policy and in the creation of fresh avenues of review of administrative decisions. So I think that we may take it that although our violations of Article 6 are neither as frequent nor as serious as those of Russia, Romania or Turkey, the article raises significant issues for all three jurisdictions of the United Kingdom.

I want to focus this evening on one particular aspect of Article 6, namely what has been called the “right to a court”. This is the right, which has been held to be implicit in Article 6, not just to have legal proceedings fairly conducted but to bring legal proceedings at all, without having to confront some legal, administrative or practical obstacle. The “right to a court” admittedly accounts for only a small proportion of the cases in which the Strasbourg Court has found violations of Article 6. In the case of the United Kingdom it accounts for just five of the UK’s 79 violations. But the principle has a broader significance which I think warrants the attention that I propose to give it. This is because it provides an interesting, and I think revealing case-study of the way in which the jurisprudence European Court of Human Rights tends to expand the scope of the Convention.

The origin of the “right to a court” is the decision of the Strasbourg court in *Golder v United Kingdom* (1979-80) 1 EHRR 524. The facts were simple enough. Mr Golder was a prisoner serving a fifteen-year sentence for robbery with violence at Parkhurst Prison in the Isle of Wight. A prison officer had written an entry in his prison record alleging that he had participated in a serious riot. As a result, he had suffered two weeks in solitary confinement and was at risk of being refused parole at the end of his sentence. He denied that he had had anything to do with the riot, and proposed to instruct a solicitor to sue the prison officer for libel. But under Rule 33 of the Prison Regulations as they then stood, a prisoner was not allowed to communicate with

any outsider in connection with any legal business without the permission of the Home Secretary, which in this instance was refused. So in 1970, Mr Golder petitioned the Strasbourg court.

Mr Golder's petition worked its way through the Strasbourg process at a critical stage in its history. The Strasbourg Court had very little business in the early 1970s. People were not as conscious of the Convention as they later became. The Court's jurisdiction to hear individual petitions was limited to states that had opted to allow them. The United Kingdom had only recently exercised that option, and many states had still not done so. The decision to allow individual petitions from the United Kingdom had been made by the Labour Government in 1966. They made it partly because they believed that it would make little difference. They assumed that the Strasbourg institutions could be expected to respect the limits of what the convention states had actually agreed. By the early 1970s, however, with a Conservative government in power, the picture had begun to look very different. Under the procedure which then obtained, petitions were dealt with in the first instance by the European Commission on Human Rights. They did not reach the Court unless the Commission or a Convention state referred them. In the view of the UK Government, the Commission had shown a distressing tendency to expand the scope of the Convention by implying additional rights into it which had not been agreed by the Convention states. An important milestone was passed in October 1970, when the Commission ruled that 243 applications by East African Asians who had been refused a right of entry into the UK were admissible on the ground that Article 3, which prohibits inhuman or degrading treatment, was capable of applying to acts of racial discrimination. Lord Lester of Herne Hill, who as Anthony Lester QC who was counsel for the applicants, is on record as saying that he doubted whether the Court would have been so bold.

In March 1971, six months after the admissibility decision in the East African Asians case, the Commission declared Mr Golder's complaint to be admissible, and in their report on the merits in June 1973, they upheld it. They held that the right to a fair trial implied a right to a trial. It was therefore violated by any administrative measure which restricted a person's right to instruct a solicitor. The British government referred the case to the Court. They were not particularly concerned about the particular position of Mr Golder. The Parole Board had not in fact been told about the prison officer's accusation, and he had been released without difficulty more than a year before the Commission reported. The government was much more concerned about the Commission's propensity to add implied rights to the Convention. They wanted to treat Mr Golder's case as a test case on the general approach to the construction of the Convention. Thus it was that Mr Golder found himself in Strasbourg up against the combined learning of two former legal advisers to the Foreign Office, Professor Sir Francis Vallat KCMG, QC, and Sir William Dale KCMG, and Mr Gordon Slynn QC, the future Lord Slynn of Hadley.

The argument of these great luminaries was that the Convention was not designed to protect all human rights. It was intended to protect only those particular rights upon which the parties to the original Convention had been able to agree when it was drafted in 1950. There was therefore, in their submission, no justification for extending the scope of the Convention any further than its language warranted. The Foreign Office obviously shared Mr Lester's view that they would get a more cautious approach from the court than from the Commission. As it turned out, they were both wrong. The Court adopted the Commission's line, and *Golder* became one of the leading cases on the teleological approach to the application of the Convention.

The Court held that there was a right to put a civil dispute before a court, and not just a right to have it tried fairly when it got there. Their reasoning was based on the rule of law. They began by drawing attention to Article 31 of the Vienna Convention on the Interpretation of Treaties,

which authorises resort to general principles of law recognised by civilised countries as an aid to interpretation. The rule of law was such a principle. Starting from this position, they reasoned as follows: Article 6, by requiring civil disputes to be determined at a fair and public hearing before a independent and impartial tribunal, was designed to give effect to the rule of law - the rule of law also required a right of access to the courts – therefore Article 6 must also be taken to require a right of access to a court. They reinforced this conclusion by a *reductio ad absurdum*. If there was no right to a court, the right to a fair and public hearing before an impartial and independent tribunal was not worth much. A state would always be able to “do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government.”

There were three dissenting judgments. The longest and most acrimonious of them came from the British judge, Sir Gerald Fitzmaurice, a notable international lawyer and himself a former Legal Adviser to the Foreign Office, who had worked on the drafting of the Convention while it was being negotiated. His dissent is worth studying, because it goes to the heart of the difference between the supporters and the opponents of the Strasbourg’s court’s expansive approach to the Convention. The difference between the Commission and the UK Government, he observed, was not really about the meaning of the Convention at all. The rival arguments represented different juridical frames of mind. The UK Government submitted that Article 1 bound the state parties to give effect to the rights “defined” in the following articles, and no right to a court was defined in Article 6. The argument of the Commission, on the other hand,

“amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms.”

This approach, he said, might be legitimate from a legislator, but not from a court of interpretation. There was, he said,

“a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains.”

The Court's approach, according to FitzMaurice, was

“typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane, has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact... The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them.”

Whether or not one agrees with Sir Gerald FitzMaurice's interpretation of Article 6, it seems to me that he put his finger on the real difference between the two sides of the argument. He also correctly identified the wider significance of the majority's judgment. The decision in *Golder* marked, at an early stage of the Court's history, its adoption of an approach to the interpretation of Convention which was radically different from the approach of international tribunals to the interpretation of treaties generally. Instead of seeking to ascertain the intentions of the

contracting parties from the language, the *travaux* and other recognised aids to interpretation, the articles of the Convention were in effect to be treated as a body of legal principle capable of autonomous legal development in accordance with the values which its provisions might be said to represent. This is essentially a process of extrapolation rather than interpretation. It is more like the way that the common law develops autonomously into new areas. The expression “living instrument” was not coined until three years later. But the concept was adopted in *Golder* well before the phrase was devised in *Tyrer v United Kingdom* (1979-80) 2 EHRR 1.

The potential for expanding the scope of the Convention into new areas was at least one reason for the exponential growth of the Strasbourg Court’s business, which began in the late 1970s. *Golder* was the first judgment of the Court to which Sir Gerald Fitzmaurice was party. He became a persistent critic of the Court, and dissented in most of the eleven cases on which he sat in his time as one of its judges.

Personally, I have no difficulty with the actual result in *Golder*. I think that it *is* implicit in a rule that civil rights and obligations will be determined at a fair and public hearing before an independent and impartial tribunal, that a litigant will be allowed access to that tribunal in order to determine his claim. The proposition seems to me to be no more radical than the corresponding common law rule which the courts have repeatedly recognised over the past half-century. As early as the 1760s, Blackstone wrote in his *Commentaries* in the 1760s (4<sup>th</sup> ed., 1876, 111):

“A... right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man’s life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein.”

Indeed, the French text of Article 6 comes very close to saying this in terms.

The problem about *Golder* lies not in the result, which is unexceptionable, but in the reasoning. In basing its judgment mainly on the rule of law, the Court the Strasbourg court raised a major question which it left unanswered, namely what does the rule of law require in this context.

*Golder* was a very simple case. If the officer's report about Mr Golder was untrue, as Mr Golder alleged, then he had a good cause of action for libel. It was common ground that the English courts would have received and determined his action whether or not his instructions to his solicitor had been communicated in breach of the Prison Regulations. So the real effect of the Prison Regulations was to confer a discretionary administrative power on the Home Secretary to obstruct the exercise of a legal right, by preventing Mr Golder from invoking the courts' jurisdiction. Moreover, in this instance, the power had been exercised so as to prevent Mr Golder from suing an employee of the Prison Service itself. I do not have the slightest difficulty in regarding that as an interference with Mr Golder's right to a fair hearing. Equally, once one accepts that there may be a right not to be obstructed from accessing the court, it is a short step to holding that in some cases the state may be obliged to provide positive assistance, for example by way of legal aid, in a case where without it a litigant will be unable to exercise his rights. This was the step which the Strasbourg court took in 1979 in *Airey v Ireland* (1979-80) 2 EHRR 305.

The principle accepted in *Golder* and again in *Airey* has, however, been treated as decisive of many cases in which the petitioner's problem did not arise from any difficulty in accessing the court, but from the rules of law which fell to be applied when he got there. This can happen in a number of ways. The courts may lack jurisdiction under their own law. Or there may be a procedural bar, such as the expiry of a limitation period or the certification of the Claimant as a mental patient or a vexatious litigant. Or the Claimant may simply have no legal right to assert under the domestic law. These are all examples of legal rules which, without preventing access to



a court, may prevent a civil claim from succeeding. Such rules are law, and on the face of it the rule of law would appear to require that effect should be given to them. On that footing, there is only one basis on which Article 6 could be relevant. That is that the article is not just concerned with removing obstacles in the way of a litigant seeking to enforce his legal rights. It also determines what limits may properly be placed upon the scope of those right. It therefore has potential implications for the substantive law of a Convention state.

One answer to these questions might have been that Article 6 is not about content of the domestic law of Convention states governing liability. It is only about procedure. When the Duke of Westminster complained, in *James v United Kingdom* (1986) 8 EHRR 123, that that the Leasehold Reform Act 1967 allowed his qualifying leaseholders to compulsorily purchase his freeholds without providing any grounds on which he could object before a court, he was met with the answer (para. 81) that Article 6 “does not in itself guarantee any particular content for (civil) rights and obligations in the substantive law of the Contracting States.” In *Fayed v United Kingdom* (1994) 18 EHRR 393, the Court expanded this statement. “The Court,” it said, “may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned.” These formulae have been repeated time and again in the subsequent case-law of the Strasbourg Court. But, as so often in Strasbourg, these forthright statements do not quite mean what they seem to say. Article 6 has been the vehicle for some quite striking incursions into the content of domestic law.

The two landmark cases were *Ashingdane v United Kingdom* (1985) 7 EHRR 528 and *Fayed v United Kingdom* (1994) 18 EHRR 393 In both of these cases, petitions based on Article 6 failed, but the reasoning considerably extended the scope of the article to cover the content of the domestic rules of law.

*Ashingdane* arose out of Mental Health Act 1959, which conferred extensive powers to commit mental patients to hospitals. Section 141 of the Act provided that no one should be civilly liable for anything done pursuant to the Act unless it was done in bad faith or negligently. Mr Ashingdane had been detained under the Act in Broadmoor Hospital on the ground that he was a dangerous schizophrenic. After a certain amount of time, it was decided that he could safely be transferred to a less secure establishment. But he remained in Broadmoor because no other psychiatric hospital could be found to accept him. He sued the Department of Health for breach of statutory duty in failing to transfer him, but found his action barred by section 141. On its face, here was a statutory rule that determined the content of Mr Ashingdane's civil rights against the health authorities. In the absence of bad faith or negligence he had no claim against them under English law. The Court of Appeal struck out the claim. They held that the alleged breach of statutory duty was not based on either bad faith or absence of reasonable care, and that was the end of the matter. The Strasbourg Court accepted that Mr Ashingdane had been able to go before the courts, even if the outcome was that his action failed. But that, they said, was not the end of the matter. "It must still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's 'right to a court', having regard to the rule of law in a democratic society" (para. 57). That required the court to decide whether section 141 pursued a legitimate objective and to apply a proportionality test. In particular the court had to be satisfied that the statute did not impair the essence of Mr Ashingdane's rights. As it happened, section 141 was held to be both legitimate in principle and proportionate as applied to Mr Ashingdane. By inference the Strasbourg court must also have thought that it did not impair the essence of his right. But the startling result of the Court's reasoning was that Mr Ashingdane's right to a court was said to have been interfered with simply because under the law of England he had no cause of action. Moreover, because the proportionality of applying section 141 had to be decided in the light of the particular impact that that would have on Mr Ashingdane, the Strasbourg Court appeared to be saying that rules of substantive law which applied to particular categories of person had to be applied on a discretionary basis.

Nearly a decade later, the Strasbourg Court had to deal with the case of *Fayed v United Kingdom* (1994) 18 EHRR 393. Mr Mohammed Fayed is a notable friend of the legal profession who needs no introduction to this audience. Inspectors appointed under the Companies Acts had published a report in which they made serious criticisms of his honesty. His complaint was that he could not sue them successfully for libel because they were entitled to qualified privilege. Of course, Mr Fayed had not been deprived of access to the court, any more than Mr Ashingdane had. His problem was that since the facts did not warrant a plea of malice, his claim was bound to fail. Now qualified privilege is a rule of substantive law. Where it applies, it is a defence to liability. But the Strasbourg Court declined to decide what sort of rule it was. They held that whether it was a procedural bar or a rule of substantive law, Article 6 required it to be reviewed for legitimacy and proportionality. They must therefore have thought that by allowing a defence of privilege to a libel Claimant, English law was restricting Mr Fayed's right to a court in a manner which needed to be justified. Their reason for taking this view seems to have been that they regarded a defence such as qualified privilege, which is available only to certain categories of Defendant, as a personal immunity. Thus they took the *reductio as absurdam* of the Court in *Golder*, and expanded it (para. 65) to say that it would be inconsistent with the rule of law if the state were to "confer immunities from civil liability on large groups or categories of persons."

This seems most surprising. Before one can regard a rule of law as conferring an immunity on some one, one has to be satisfied that it relieves him of a liability that he would otherwise have been under. What liabilities he would otherwise have been under must depend not just on the elements of legal liability but on the availability of any legal defences. The approach of the Strasbourg Court in *Fayed* seems to have been that a defence such as qualified privilege, which was available only to some categories of persons, must for that reason alone be regarded as an immunity. But as a general statement, that simply cannot be right. Whether a defence amounts to

an immunity must depend, surely, on the reason why the defence exists. Very few legal liabilities are unqualified. Most qualifications reflect some reservation about the kind of activities which ought to give rise to liability. The defence of qualified privilege is broadly speaking available in cases where the law regards the activity in which the Defendant was engaged as giving rise to a duty in whose performance there is a public interest, and which may require them to say unkind things about other people, provided that they do so without malice. There is a world of difference between a defence of this kind and an immunity based on status. If Article 6 can nullify a defence in this way, it is in effect turning a qualified liability into an unqualified one. This is in reality to create through the interpretation of Article 6 a substantive right which has no basis in the law of the State concerned, precisely the exercise which the Court in *Fayed* acknowledged to be illegitimate.

The muddle which the Strasbourg Court got into on this question was cruelly exposed by its decision in *Osman v United Kingdom* (2000) 29 EHRR 245. Mr Osman had been killed by a man who was subsequently convicted of manslaughter by reason of diminished responsibility. His widow and son sued the police for negligence in failing to act on evidence of the killer's aberrant behaviour in the period before he struck. English, like Scottish law recognises a duty of care as existing only if certain conditions are satisfied. One of them is that it should satisfy the public policy test, i.e. that it is fair, just and reasonable that such a duty should be owed. In *Hill v Chief Constable of West Yorkshire* [1989] AC 53, the House of Lords had held that, absent a specific assumption of responsibility, it was not fair, just and reasonable that a duty of care should be owed by the police to the public in relation to the investigation or prevention of crime. That rule has recently been reaffirmed by the Supreme Court. As a result, the Osmans' action was struck out as unarguable in the High Court. This was held by the Strasbourg Court to be a violation of Article 6. There is no doubt that the Strasbourg court misunderstood some aspects of the English law of tort. In particular it did not appreciate that the decision in *Hill* had been about the

sorts of activity which could give rise to a duty of care as a matter of law. They assumed that the question whether it was fair, just and reasonable to impose liability had to be decided on a case-by-case basis in the light of the particular facts, and that the English court had been prevented from carrying out that exercise by the order striking out the claim. However, the main reason why the Court found a violation of Article 6 was, I think, a different one. They made the same mistake as the court had made in *Fayed*. They treated the non-liability of the police as a kind of institutional immunity based on status, and concluded that it was too broad to be proportionate. Actually, the law was that the police owed no duty to the Osmans, because the activities in which they were engaged were not such as ought to give rise to a duty of care. There was no immunity because there was nothing for the police to be immune from.

These errors were shortly afterwards pointed out by Lord Browne-Wilkinson, delivering the leading judgment in the House of Lords in *Barrett v Enfield London Borough Council* [2001] 2 AC 550. This case was not about the liability of the police. It was about the corresponding rule that no duty of care was owed by local authorities engaged in child protection. The House felt bound by the decision in *Osman* to allow the action to go to trial, although they regarded it as legally misconceived. But they expressed the hope that the decision in *Osman* would be revisited. Lord Browne-Wilkinson observed (page 558) that the Strasbourg Court's decision in *Osman* was "extremely difficult to understand".

"Although the word 'immunity' is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence."

The result of *Osman* was that for some years actions against the police and other public authorities could not be struck out. Instead, they were required to go through the ritual of a full trial only to fail later and at much greater cost for want of a relevant duty.

*Osman* was effectively overruled by the Grand Chamber in *Z and others v United Kingdom* (2002) 34 EHRR 3. *Z* was another claim against a local authority for the negligent performance of its duty to protect children. It had been struck out as unarguable in the High Court, a decision ultimately affirmed by the House of Lords. By the time the case reached Strasbourg the explanation of Lord Browne-Wilkinson in *Barrett* was available. The subsequent course of events exposed the divisions within the Strasbourg court. The Commission was entirely unrepentant. They invited the court to stick to its analysis in *Osman*, on the ground that the claim must be regarded as arguable in English law, notwithstanding the decision of the House of Lords that it was not. This was, apparently, because the Claimants had been granted legal aid and had won in the Court of Appeal. Essentially, the Commission regarded the policy concerns that underlay the English law of tort as misguided. The majority of the Grand Chamber disagreed with the Commission. They accepted Lord Browne-Wilkinson's explanation of English law and held that it undermined the decision in *Osman*. They therefore rejected the complaint. However, in two joint judgments, four judges of the Grand Chamber dissented. Both judgments were essentially based on a dislike of the principles of the English law of negligence. Their authors held the view, which they took no trouble to conceal, that in a matter as important as the protection of children, there ought to have been a duty. One dissent appeared to deprecate as an "immunity" any domestic law qualification of a general rule of liability if the qualification applied only to a specific category of persons or activities. It suggested that it had been inconsistent with Article 6 to strike out the claim on general policy grounds, even when the policy in question went to the very existence of a legal duty. The other dissent went further. It openly criticised what its authors called the refusal

of the House of Lords to “extend tortious liability for civil wrongs arising out of a duty of care by local authorities for child care.”

The decision of the Strasbourg Court in *Z* marked a schismatic moment in the development of Strasbourg’s outlook. The outcome, however, was a notable vindication of the policy of constructive dialogue between the Court of Human Rights and the national courts. Yet in *Matthews v Minister of Defence* [2003] 1 AC 1163 (para. 140) Lord Walker observed that notwithstanding *Z* the “uncertain shadow of *Osman* still lies over this area of law.” This was because only six months after the decision in *Z*, the observations of the Strasbourg Court in *Fayed*, which had launched the Court on its campaign against so-called “immunities”, were repeated word for word in *Fogarty v United Kingdom* (2002) 34 EHRR 12 as if nothing had happened. This suggested that the repentance of the Court was limited to the question of duties of care, and that their basic analysis of immunities remained intact. I shall return to *Fogarty* in a moment.

The result of the *Osman* debacle was a certain amount of regrouping in two cases decided in 2005 and 2006. One was *Roche v United Kingdom* (2006) 42 EHRR 30. The other was *Markovic v Italy* (2007) 44 EHRR 52. *Roche* was about personal injuries suffered as a result of service in the armed forces. Under section 10 of the Crown Proceedings Act 1947 the Secretary of State was required to certify that the injuries had arisen from the Claimant’s service in the armed forces. The effect of the certificate was that the injured serviceman had no right to sue the Crown for negligence but enjoyed instead a right to a service disability pension without proof of fault. The Grand Chamber adopted a new approach. According to this approach, the application of Article 6 to immunities should depend on a distinction between the substantive and the procedural rules of domestic law. This of course was the very distinction that the Court had declined to draw in *Fayed*. But that case was disregarded as being, in this respect, a one-off decision on its facts. The

court held that an immunity from liability should be regarded as substantive and not subject to review under Article 6; whereas an immunity from suit should be regarded as procedural and open to review in accordance with the triple test of legitimacy, proportionality and consistency with the “essence of the right”. In this case, the Court accepted the analysis of the House of Lords that a section 10 certificate was substantive, and concluded that therefore Article 6 had no application.

In *Markovic*, the applicants were a group of Yugoslav citizens seeking redress in the Italian courts for the death of their relatives in the NATO air-raid on Belgrade in 1999, which had been launched from bases in Italy. These were said to be acts of war in violation of international law. The Corte de Cassazione had held that the Italian courts had no jurisdiction over acts of war or indeed over any acts of the Italian state which were impugned on the sole ground that they violated international law. The Strasbourg Court adopted the same distinction between substance and procedure as they had in *Roche*. They held that the limitation on the jurisdiction of the Italian court was substantive. The decision of the Corte de Cassazione, they said (para. 114), “does not amount to recognition of an immunity but is merely indicative of the extent of the courts’ powers of review of acts of foreign policy such as acts of war.”

The distinction between substance and procedure is certainly an improvement on the indiscriminate approach previously adopted. But it is hardly satisfactory. It can be, as has often been remarked, a very fine distinction indeed. Even when the distinction is clear, it is frequently arbitrary. And there are some rules of law which do not readily lend themselves to a simple classification as procedural or substantive.

Time bars are a good example. Limitation or prescription is an almost universal feature of developed systems of law. In England, limitation is a procedural defence. Except in the case of



title to land, it bars the remedy but not the right. It follows that under current Strasbourg conceptions, its application to any particular case is subject to review for legitimacy and proportionality. This is what the Strasbourg Court held in *Stubbings v United Kingdom* (1997) 23 EHRR 213. In Scotland, limitation is also procedural, but prescription is substantive. It extinguishes the right. So it seems clear that if identical claims were barred by limitation in England and prescription in Scotland, Article 6 would be engaged in England but not in Scotland. Indeed, this is what the Scottish courts have held: see *S v Miller (No 1)* 2001 SC 977.

State immunity is a more controversial example. The Strasbourg Court first grappled with state immunity in *Waite and Kennedy v Germany* (2000) 30 EHRR 261, a decision in 1999 about the statutory immunity conferred by German law on the German operations of an intergovernmental organisation, the European Space Agency. The case was decided after *Osman* but before *Z*. The Court cited *Osman* as authority for the proposition that a rule of law which limits the application of some principle of liability to particular categories of persons, must be treated as an immunity and subject to review for legitimacy and proportionality. But it went on to hold that the application of state immunity to a wrongful dismissal claim was justified. It reached the same conclusion in *Fogarty v United Kingdom* in 2002, a sex discrimination case brought against the United States by an employee of its London embassy. By the time that *Fogarty* was decided, the Court had retreated from *Osman*. But in its judgment, it repeated verbatim its earlier statement, simply deleting the reference to *Osman* and substituting a reference to the passage from *Waite and Kennedy* which had been based on *Osman*.

Once the Strasbourg court began to adopt its distinction between substantive and procedural immunities, it had to put state immunity in one box or the other. In *Al-Adsani v United Kingdom* (2002) 34 EHRR 11, the court decided that state immunity was procedural. It followed that a court giving effect to the immunity would have to justify it as legitimate and proportionate. This

decision has been received with some perplexity by the English courts. What I think that the Strasbourg court meant by describing state immunity as procedural is that it does not go to the merits of the claim. It does not define the existence or extent of any legal duty. But it is certainly not procedural in the sense that the organisation and practises of the court system are procedural. State immunity is a rule of substantive law, the effect of is that the court has no jurisdiction. As Lord Bingham observed in *Jones v Saudi Arabia* [2007] 1 AC 270 at para [14], Article 6 cannot confer on a court a jurisdiction which it does not have, and a state cannot be said to deny access to its court if it has no access to give. When *Jones v Saudi Arabia* reached Strasbourg, the court was invited to reconsider *Al-Adsani*. But it simply reaffirmed the decision in *Al-Adsani* without so much as addressing the difficulties involved.

None of this mattered very much as long as the court continued to hold that state immunity was justified. But there are signs that the court has begun to carry its traditional hostility to special defences and jurisdictional voids rather further. In *Cudak v Lithuania* (2010) 51 EHRR 15 in 2010, the Grand Chamber held that Article 6 had been violated when the Lithuanian courts upheld a claim for state immunity in a case of unfair dismissal brought by a switchboard operator at the Polish embassy in Vilnius. The Strasbourg Court had nothing against the fairness or impartiality of the Lithuanian proceedings. They simply thought that the Lithuanian courts had got the answer wrong. They should not have regarded the employment of the applicant as an act of sovereign power, *jure imperii*. Precisely the same approach was adopted, with the same result, in *Sabeh El Leil v France* (2012) 54 EHRR 14 in 2011, another unfair dismissal case, this time brought by the head of the accounts department in the Kuwaiti embassy in Paris. It was held that the Paris Court of Appeals had been wrong to find as a fact that the applicant's job had included participating in sovereign acts done in the course of the embassy's diplomatic business, and that it had thereby arrived at the wrong conclusion as a matter of French law. Now, the Strasbourg Court may or may not have been right in the view that it took of the merits of these two cases.

But it seems a surprising result of Article 6 that the European Court of Human Rights should act as a Court of Appeal from perfectly fair proceedings in national courts simply because it disagreed with the way in which they had applied their own law. It also opens up the prospect that the hitherto absolute immunity of states in respect of sovereign acts may have to be treated as a qualified immunity whose application must be assessed on a case by case basis depending on whether its application to particular facts can be regarded as proportionate.

Before the decision in *Roche*, the Strasbourg Court had subjected special defences to review under Article 6, whether they were procedural or substantial. It currently reviews them if they are procedural but not if they are substantive. But it is worth asking why they should be reviewable in either case. The effect of a bar on proceedings is exactly the same, namely that the claim will fail. A rule of law may be procedural and yet reflect fundamental legal policies of the forum governing the incidence of liability. If a national court entertains the claim but decides in perfectly fair and impartial proceedings that the bar applies, it is not easy to see how the litigant can be said to have been deprived of a court.

My object in making these remarks is not to rubbish Article 6. Its express provisions are among the core principles of any civilised society. It has undoubtedly brought benefits both to the United Kingdom and to other member states of the Council of Europe. To give just two examples in a UK context, it has forced the United Kingdom to reduce the anomalous role which the executive once had in criminal sentencing; and it has restricted attempts to allow the deployment of closed material in court proceedings without, I think unduly impairing the interests of national security. Its potential impact on the somewhat brutal forensic practices of some former communist countries of eastern Europe seems likely to be even more beneficial. But these are questions which lie within the scope of the core values of Article 6. The problem really lies with the appetite that the Strasbourg Court has demonstrated over the past half-

century or so to transform the Convention into what in *Loizidou v Turkey* (1998) 26 EHRR CD5 it called an “instrument of the European public order”. This has resulted in the application of Article 6 in areas well beyond its core values, which appear to have little to do with the fairness of proceedings or even access to a court.

In his dissent in *Golder*, Sir Gerald Fitzmaurice warned that the implication of into the Convention of rights which were not expressed there would lead to the development of a class of human rights with no exact definition and no principled limits. That prophecy has been borne out by events. Opinions will differ about whether these additional rights are desirable. Like, I suspect most lawyers, I think that the picture is mixed. Some are while others are not. What seems clear, however, is that the result has been to expose the European Court of Human Rights to accusations of altering principles of civil liability in ways that are practically incapable of amendment or repeal by national legislatures. It is open to doubt whether Article 6 was ever intended to serve such a purpose.