



Casebook on European fair trial standards in administrative justice

Arman Zrvandyan



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Foreword

The interest in administrative justice, in particular with the establishment of new administrative courts dealing with the judicial review of administrative acts, has been growing in many countries recently. At the core of an accountable and transparent administration is the right to effectively challenge acts and decisions that affect civil rights and obligations, and so also the daily life of individuals. Effective means of redress against administrative decisions require a functioning system of administrative justice that provides fair trial guarantees.

The Folke Bernadotte Academy (FBA) has been engaged in developing practical tools in the field of rule of law in public administration and administrative justice for several years. With this casebook, we encourage practitioners in the field of administrative justice to adhere to fair trial standards and by doing so further strengthen the rule of law and the accountability and transparency of public administration and administrative justice.

Under international law, the practical implications of a fair trial entail several principles. An administrative process should be public, held within a reasonable time, undertaken by an independent and impartial tribunal established by law, and result in an enforceable judgment that shall be pronounced publicly. This meaning has been interpreted by the European Court of Human Rights (“the Court”), whose case law on administrative proceedings is analysed in this casebook. In addition to interpreting the rights, the Court has pointed out that it must be borne in mind that the European Convention on Human Rights (“the Convention”) is intended to guarantee rights that are practical and effective.

The FBA and the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) have previously published a *Handbook for Monitoring Administrative Justice*, a unique diagnostic tool for monitoring administrative justice. The handbook provides an overview of core fair trial standards and practical guidance on running a trial monitoring operation in the field of administrative justice. In connection to specific rule of law principles, the handbook provides numerous references to international and regional case law on fair trial standards applicable to administrative proceedings. This *Casebook on European fair trial standards in administrative justice* is the first collection of the most significant cases decided by the European Court of Human Rights. It complements the handbook with an in-depth understanding of fair trial standards and seeks to better facilitate both academic discussions and reform efforts in the area of administrative justice.

The FBA and the Council of Europe would like to express their sincere appreciation to Arman Zrvandyan for suggesting the project and for bringing it to a successful conclusion.

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The opinions expressed in this work are, however, the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.

Introduction

WHY IS ADMINISTRATIVE JUSTICE IMPORTANT?

The public administration of a country represents the main interface between the state and its citizens. The acts and decisions of administrative authorities have a direct impact on the daily life of individuals as they deal with issues such as taxes, public registries, education, social services or health. These acts and decisions contribute to creating conditions for security, stability and public trust, which are prerequisites for the development of stable and democratic societies.¹

A proper public administration requires that the public is empowered to effectively challenge administrative acts, and to hold the public officials accountable for their decision making. Administrative justice therefore constitutes a core component of democratic governance, and its existence is fundamental in any society based on the rule of law, as it entails that the government, and thereby its administration, acts within the scope of legal authority. Notwithstanding, administrative justice has for long been a neglected area implying consequences for individuals.

Central to the effective protection of human rights and respect for the rule of law is the right for individuals to appeal against administrative decisions, and to have the possibility to seek legal redress through the application of fair administrative procedural rules whenever their rights, liberties or interests have been affected. This is applicable to administrative decisions just as it is to criminal and civil law proceedings, with the main difference being that the responsibility is more burdensome for the individual in administrative processes. The aim of an administrative justice system is to ensure that administrative acts can be reviewed in proceedings adhering to fair trial standards by a competent, independent and impartial court or tribunal. It should help people to resolve disputes with the providers of public services, guarantee that the decision makers are held accountable, and enhance public trust in the administrative justice system.

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1. In 2008, the Folke Bernadotte Academy published a study entitled “Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development” specifically addressing the necessity of rule of law programmes targeting public administrations in countries in transition.

The interest for administrative justice, in particular for the establishment of new specialised courts, tribunals or chambers within regular courts dealing with judicial review of administrative acts, has recently grown in many countries. This trend has been visible in Central and Eastern Europe (Ukraine, Albania), the South Caucasus (Georgia, Armenia, Azerbaijan), and Central Asia (Kazakhstan). The international community, donors and aid agencies have demonstrated strong interest in supporting initiatives to both establishing new administrative justice systems and modernising the existing ones. However, public awareness about access to administrative justice, and the standards it is subject to, remains low. The problem is enhanced by the fact that administrative justice places most of the responsibility on the private person to initiate administrative proceedings against the state in a judicial system that can be difficult to understand, and often without access to free legal aid.

Regardless of whether administrative justice includes a determination of the lawfulness of the decision, or facts of the appeal, a minimum of fair trial standards should apply. Some of these standards can be found within the right to a fair trial through the concepts of civil rights and obligations as stipulated under Article 6(1) of the Convention, which is the main subject of this casebook.

MONITORING ADMINISTRATIVE JUSTICE PROCEEDINGS

Monitoring administrative justice – appeal processes and judicial review proceedings – can provide valuable information on the strengths and weaknesses of the system, as well as information on rule of law issues in the public administration generally. In many post-conflict and developing countries, individuals’ awareness about fair trial standards in proceedings is relatively low and few are aware of their right to challenge administrative acts and decisions that affect them. For this reason, monitoring administrative proceedings can generate and disseminate knowledge on the right to appeal and procedural guarantees, and facilitate capacity-building initiatives for the benefit of executive, judicial, and legislative powers.

Sharing the objective of promoting rule of law in public administration, the FBA and ODIHR have published a *Handbook for Monitoring Administrative Justice* (“the handbook”) to support OSCE field operations and those monitoring administrative cases before courts. The handbook is a diagnostic tool complementing existing trial monitoring tools developed by the OSCE.² It provides an overview of core fair trial standards and practical guidance on running a trial monitoring operation in the field of administrative justice, with the aim of increasing national and international capacities to support administrative justice reforms – not least legislative reforms of administrative law and administrative procedure – and to enhance adherence to international and European fair trial standards. Although different instruments have been adopted in the field of administrative law, such as legal instruments from the Council of Europe on the protection of the individual in relation to the acts of the administrative authorities, and the publication “The Administration and you”,

2. The handbook is meant to be read as a complement to ODIHR’s *Trial Monitoring: A Reference Manual for Practitioners*.

prior to the handbook there was no tool specifically addressing trial monitoring of administrative justice.³ In monitoring administrative justice proceedings, however, it became clear that one fundamental impediment was a lack of access to a compilation of fair trial standards in the field.

CASEBOOK ON EUROPEAN FAIR TRIAL STANDARDS IN ADMINISTRATIVE JUSTICE

From this perspective, the casebook on European fair trial standards in administrative justice, comprising relevant case law from the Court on administrative justice, is a useful addition to the handbook. It can serve to facilitate reform efforts and academic discussions, and support the implementation of international standards and principles of administrative justice in domestic legal systems.

Objectives of the casebook

The overall goal of the casebook is to strengthen the rule of law by enhancing the implementation of international obligations, principles, commitments and standards on fair trial. The casebook further aims to:

- ▶ promote administrative justice reforms;
- ▶ complement the handbook with an in-depth understanding of some of the most salient fair trial standards in administrative justice;
- ▶ guide policy makers and legislators when drafting or amending legislation on administrative justice;
- ▶ guide judges adjudicating administrative acts and decisions, thereby contributing to the development of national administrative procedure law in line with fair trial standards of the Court;
- ▶ function as a resource guide for international and regional organisations, international professional associations, national non-governmental and civil society organisations working in the fields of rule of law, judicial and legal reform, good governance, public administration and human rights; and
- ▶ support higher legal education for professionals.

Structure and content of the casebook

The casebook provides some of the most important judgments of the Court up to 2014 on the right to a fair trial in administrative proceedings, including leading judgments and decisions in which the Court has elucidated and further developed the rules established under Article 6(1) and in its previous case law. The focus of the casebook is on fair trial standards in administrative proceedings, which is why its

3. The handbook has been translated into Russian and Albanian, and is scheduled to be translated into Ukrainian in 2017.

scope has been limited to cover only Article 6(1) of the Convention. There are other articles in the Convention that might be of interest for administrative law, such as Articles 5, 8 and 13. However, since Article 6(1) is a *lex specialis* in relation to these articles, cases concerning these articles have not been included in this publication.

The casebook begins with a general introduction to the scope of Article 6(1) of the Convention, explaining the distinction between administrative issues from civil and criminal proceedings. It is structured according to key principles on fair trial applicable to administrative proceedings under Article 6(1), and builds upon the principles and the case law outlined in the handbook. These include a definition of courts and tribunals; access to court; public and oral hearings; equality of arms and adversarial trial; trial within a reasonable time; public and reasoned judgment; and the execution of judgments.

The casebook consists of 95 judgments and decisions, and refers in total to 125 judgments and decisions. The cases are briefed and analysed, with particular focus on landmark and significant judgments. The casebook excludes, however, any evaluation of the Court's holding or reasoning. Unlike other similar casebooks of the Court's case law, or collections on fair trial rights in criminal and civil proceedings, the casebook includes both the circumstances under which a decision was taken, the facts, and what the Court has held. The casebook is therefore the first collection of excerpts of the most significant cases decided by the Court with regard to administrative proceedings.

Target group

The casebook is primarily intended to be used by policy and decision makers; legislators; legal experts engaged in reforming or creating new administrative justice systems; legal professionals (judges, lawyers); academics; trial monitoring teams or practitioners who wish to set up monitoring activities in the field of administrative justice; members of the high judicial councils; civil society groups; and others who are engaged in judicial and legal reform in the field of administrative justice. It can also be a valuable tool for Council of Europe member states wanting to establish, or who are in the process of establishing, new administrative jurisdictions.

Chapter 1

The scope of Article 6(1)

INTRODUCTION

The right to a fair trial, enshrined in Article 6 of the Convention and interpreted in the case law of the Court, is one of the most fundamental principles of any democratic society. Article 6 is applicable in all circumstances where the determination of an individual's civil rights and obligations (the civil component of the article) or any criminal charge (the criminal component of the article) against an individual is at stake.

The first paragraph of Article 6 states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

This chapter deals with the scope of Article 6(1). It examines the substance of, and difference between, the civil and criminal components and the circumstances where a case falls under the scope of the respective component. To achieve this, the chapter first discusses what constitutes civil rights and obligations for the purposes of Article 6(1). It then focuses on sanctions imposed by administrative authorities on individuals and explores whether or not they are covered by the civil or criminal components of Article 6(1). Finally, it considers cases of an administrative or public law nature that are excluded from the scope of Article 6(1).

A. Administrative cases of a “civil law” nature

This casebook includes European Court of Human Rights⁴ cases originating from domestic administrative justice systems or otherwise related to a dispute under domestic public law that falls within the scope of Article 6(1). A case originating from a domestic administrative justice/public law system must, unless it comes under the criminal component of the article, involve the “determination of civil rights and obligations” to come within the ambit of Article 6(1). This section deals with administrative/public law cases that the Court has considered to fall within the concept of “civil rights or obligations”.

4. Throughout this publication, the terms “the Court” and “the Convention” are used to signify, respectively, the European Court of Human Rights and the European Convention on Human Rights.

Dispute over a civil right under domestic law

Ringeisen⁵ is one of the leading cases in which the Court clarified the concept of “civil rights and obligations”. The applicant concluded a land transaction and submitted the contract of sale to the District Real Property Transaction Commission (RPTC) for approval. After the District RPTC’s refusal to approve the contract the applicant appealed to the Regional RPTC, which dismissed the appeal. Though approval of a real property transaction contract by an administrative authority is a classic example of an administrative action, the Court held that the case involved the determination of the applicant’s civil rights and obligations. The Court reasoned that the concept of “civil rights and obligations” under Article 6(1) did not require the dispute to be between two private persons. Disputes between administrative authorities and individuals before administrative or judicial authorities may, therefore, fall under the concept of “determination of civil rights and obligations”.

The French expression “contestations sur (des) droits et obligations de caractère civil” covers all proceedings the result of which is decisive for private rights and obligations. The English text “determination of ... civil rights and obligations”, confirms this interpretation.

The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.⁶

In Ringeisen, neither the domestic classification of the procedure of determining the applicant’s civil rights and obligations, nor the body competent to conduct such determination, were decisive for the applicability of Article 6(1) under its civil component. What was important instead was that the result of such proceedings, however domestically classified, was decisive for the private rights and obligations of the applicant. The Court’s approach concentrated on the result of the proceedings for individuals and avoided including any complex legal or theoretical issues distinguishing between different branches of the law. In this case the applicant retained the right to have the contract for sale approved under the domestic law if he fulfilled the legislative requirements. Though the Regional RPTC was an administrative authority applying administrative law, its decision had been decisive for the relations in civil law (between the applicant and another private person) affecting their property rights, which were civil rights.

The Court also reiterated that for Article 6(1) to be applicable under its civil component, there must be a dispute (“contestation”) over a “right” that could be (at least on arguable grounds) recognised under the domestic law. Such a dispute must be genuine and serious; it should relate not only to the actual existence of a right but also to its scope and the way in which it can be exercised. The outcome of the proceedings must also be directly decisive for the right in question: mere tenuous connections or remote consequences are not sufficient to bring Article 6(1) into play.⁷ The first step in the Court’s analysis in such cases has been to assess whether or not the applicant

5. *Ringeisen v. Austria*, 16 July 1971, Series A No. 13.

6. *Ibid.* § 94.

7. *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 47, Serie A No. 43.

possessed a right under the domestic law. The Court has then proceeded by determining whether there was a dispute over that right under the domestic law.

In *Tre Traktörer Aktiebolag*⁸ the applicant's claim concerned the withdrawal of a licence to serve alcoholic beverages granted for the applicant company's restaurant on the grounds of certain discrepancies in the restaurant's book-keeping, as well as the lack of judicial review of the decision to withdraw the licence. In contrast to *Ringeisen*, which concerned a dispute between the applicant and an administrative authority affecting the applicant's civil law relationships with other private persons, this case involved a revocation of a licence – a textbook example of an administrative act where administrative authorities grant or refuse to grant individuals certain services. The applicant company contested before the Court that there had been a violation of Article 6(1), since the applicant could not have the revocation of the licence reviewed by a court. The question before the Court was whether or not a domestic dispute over an administrative act was decisive for the civil rights and obligations of the applicant, thus rendering the fair trial guarantees of Article 6(1) applicable. The Court found that Article 6(1) was applicable.

Under the domestic law the licence conferred a "right" on the applicant to sell alcoholic beverages in the restaurant. The applicant therefore retained a "civil right" to run a business under the licence and to enter into private contractual relationships with other persons. Thus even if the dispute under the domestic law involved the classic form of an administrative act (a licence), the guarantees of Article 6(1) applied under the civil component, if the dispute was decisive for the applicant's civil rights. The Court concluded that most disputes involving a licence to run a private business render Article 6(1) guarantees applicable, since running a private business entails contractual relationships with other persons – which is a civil right.

In the following cases, the Court held that Article 6(1) was applicable because the applicants' civil rights and obligations had been determined by domestic authorities (although the dispute and the right in question was not considered to be of a private law nature under the domestic legal system).

- ▶ ***Emine Araç v. Turkey***: refusal by a public university to enrol the applicant as a student on the grounds that the applicant's identity photograph did not satisfy the regulations. The right to enrol at a public university, as a user of a public service, was considered to be a civil right.⁹
- ▶ ***Gorraiz Lizarraga and Others v. Spain***: appeal against the construction of a dam by an association on behalf of its members on the grounds that the construction would affect their lifestyles and properties. The association came within the protection of Article 6(1) as it sought the recognition of specific rights and interests of its members.¹⁰
- ▶ ***Pocius v. Lithuania***: the revocation of the applicant's gun licence under domestic administrative law affected the applicant's reputation, which was protected under civil law in the domestic system.¹¹

8. *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989, Series A No. 159.

9. *Emine Araç v. Turkey*, No. 9907/02, ECHR 2008.

10. *Gorraiz Lizarraga and Others v. Spain*, No. 62543/00, ECHR 2004-III.

11. *Pocius v. Lithuania*, No. 35601/04, 6 July 2010.

Social benefits

Many of the cases where the Court has been required to determine whether or not the contested right was civil or public have concerned social security benefits under domestic law. The right to social security is a human right under international law¹² and a constitutional right of many contracting states, and thus imposes obligations on the contracting state. In several cases concerning disputes over social security matters, the Court has noted private law elements and has held that Article 6(1) is applicable.

In the case of *Feldbrugge*,¹³ the administrative authority examined the applicant and decided to discontinue a payment of sickness allowances on the grounds that the applicant was fit to work. In this case, for the first time, the Court had to assess whether or not the right to health insurance benefits that the applicant enjoyed under the domestic law was a “civil right” within the meaning of Article 6(1). The Court first examined the domestic laws of the Council of Europe member states to establish whether health insurance was a public or a private law right, and found that there existed “no common standard pointing to a uniform European notion in this regard. An analysis of the characteristics of the Netherlands’ system of social health insurance discloses that the claimed entitlement comprises features of both public law and private law”.¹⁴ The Court singled out those factors indicating a public law nature, and those of a private law nature, and compared the two groups of factors to see which one was the most dominant. Considering the personal and economic nature of the applicant’s right, the connection with the employment contract and the affinities with the insurance under the ordinary law, the Court concluded that the disputed right was more civil than public in nature.¹⁵

Similarly, in *Deumeland*,¹⁶ applying its approach in distinguishing public law rights from private law rights in the field of social security benefits adopted in *Feldbrugge*,¹⁷ the Court held that entitlement to industrial-accident insurance benefits under the social security scheme in Germany was a “civil right” for the purposes of the Convention.

Public service

The regulation of public service has traditionally been governed by the rules of general public law, administrative law or constitutional law, depending on the national legal tradition and classification. While disputes relating to the recruitment, careers and termination of service of civil servants, as a general rule, fall outside the scope of Article 6(1),¹⁸ they have not followed that in certain other cases where civil servants

12. International Covenant on Economic, Social and Cultural Rights, Article 9; and European Social Charter, Article 12.

13. *Feldbrugge v. the Netherlands*, 29 May 1986, Series A No. 99.

14. *Ibid.* § 29.

15. *Ibid.* § 31-40.

16. *Deumeland v. Germany*, 29 May 1986, Series A No. 100.

17. *Feldbrugge v. the Netherlands* (op. cit.).

18. *Massa v. Italy*, 24 August 1993, § 26, Series A No. 265-B; *Neigel v. France*, 17 March 1997, § 43, Reports of Judgments and Decisions 1997-II.

would otherwise fall outside the scope of the article.¹⁹ In *Francesco Lombardo*,²⁰ the Court held that the right of a *carabiniere* to receive an “enhanced ordinary pension” was a “civil right” because in performing its obligation to pay a pension to a public servant, the state might be compared to an employer who was a party to a contract of employment governed by private law. The Court stressed that this case did not concern the recruitment or the careers of public servants, but rather pecuniary matters after the termination of service.²¹

In *Benkessiouer*,²² while working as a civil servant in the post office, the applicant made an application for extended sick leave, which was refused. The applicant instituted judicial review proceedings aiming to quash the decision refusing him extended sick leave and the suspension of payment of his salary. A grant of such leave would have enabled the applicant to enjoy the salary benefits envisaged by law. The Court distinguished this case from those involving recruitment, careers and termination of service of civil servants²³ and applied the *Lombardo* “purely economic” right test.²⁴ The Court found Article 6(1) applicable on the grounds that the payment of a salary was essentially an economic right – hence, the applicant’s claims were “civil” within the meaning of Article 6(1).²⁵ By contrast, in *Huber*, where the applicant challenged the decision of an administrative authority to send him on compulsory leave, which resulted in the suspension of payment of the applicant’s salary, the Court ruled that where the dispute primarily concerned the career of a public servant, the mere fact that the proceedings had some pecuniary consequences was not sufficient to bring it within the scope of Article 6(1).²⁶

The Court later acknowledged that there was uncertainty for contracting states as to the range of their obligations under Article 6(1) in disputes raised by employees in the public sector over their conditions of service. The Court set itself the task of clarifying its case law in *Pellegrin*,²⁷ which marked a turning point in its case law relating to disputes involving public servants. The French ministry recruited the applicant under contract as a technical adviser. After the termination of the contract, the ministry intended to give the applicant a new contract if he satisfied, *inter alia*, certain medical requirements. After medical examinations, the applicant was found unfit to serve overseas and was therefore denied the post. The applicant lodged an application in the Administrative Court to set the decision aside. The Court concluded that Article 6(1) was not applicable, since the post occupied by the applicant involved a specific obligation that entailed direct participation in the exercise of powers

19. *Glaserapp v. Germany*, 28 August 1986, § 49, Series A No. 104.

20. *Francesco Lombardo v. Italy*, 26 November 1992, Series A No. 249-B.

21. See also *Massa* (op. cit.) concerning a dispute involving an obligation on the state to pay a reversionary pension to the husband of a public servant in accordance with the legislation in force.

22. *Benkessiouer v. France*, 24 August 1998, Reports of Judgments and Decisions 1998-V.

23. Such as in *Neigel v. France* (op. cit.), p. 14; and *Huber v. France*, 19 February 1998, Reports of Judgments and Decisions 1998-I.

24. *Francesco Lombardo v. Italy* (op. cit.), p. 14.

25. *Benkessiouer v. France*, § 30 (op. cit.), p. 14.

26. *Huber v. France*, § 37 (op. cit.).

27. *Pellegrin v. France* [GC], No. 28541/95, ECHR 1999-VIII.