cornerstone barristers

The Reach of Article 6 in Civil Litigation:

ECHR and Fair Trial rights

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June 2026

Your presenters

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Article 6

An introduction

An overview of Article 6(1), ECHR

Paragraph 1

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

1. Civil rights and obligations – e.g. property law, planning law, employment law

2. Section 3(1) of the Human Rights Act 1998 - "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

3. Article 6 is not an absolute right.

   In Ashingdane v. United Kingdom (1985) 7 EHRR 528 it was held that it may be subject to limitation provided that the limitation is not of such a degree as to impair the essence of the right, is in pursuit of a legitimate aim, and is reasonably proportionate to that aim.

(Articles 6(2) and 6(3) provide for the presumption of innocence and specific protections which arise in determination of criminal charges)

Civil right

Lewis LJ in R. (Oji) v The Director of Legal Aid Casework [2026] EWCA Civ 11; [2026] 4 WLR 9 at [10]:

"Article 6(1) is concerned with the procedural safeguards that an individual enjoys when a dispute about that individual's civil rights is being determined. It is intended to ensure, for example, that the determination of that dispute will be undertaken by an independent and impartial tribunal."

Longmore LJ in R. (K and others) v Secretary of State for Defence [2016] EWCA Civ 1149; [2017] 1 WLR 1671 at [20]:

"…the concept of a "civil right" is an autonomous phrase in article 6 of the Convention and the Strasbourg court is the ultimate arbiter of the meaning of such phrases."

"44. It is not in my opinion necessary to resolve this question in the present cases since, whether or not the civil limb of article 6(1) is engaged, determinate sentence prisoners wishing to challenge the revocation of their licences have the protection of the board's common law duty of procedural fairness, and I am not persuaded that the civil limb of article 6(1), even if applicable, would afford any greater protection. I would therefore prefer to defer expressing a concluded opinion on this question until a case arises in which a decision will have some practical effect."

Lord Bingham in **R. (West) v Parole Board**
[2005] UKHL 1; [2005] 1 WLR 350

But where it is relevant there must be...

01

A dispute

Konig v Germany (1978) 2 EHRR 170 para 87

Grzeda v Poland (2022) 54 BHRC 632 at para. 257

Oji v Director of Legal Aid Casework at paras. 10-11

02

Decision which is decisive of civil rights & obligations

Ringeisen v Austria (1971) 1 EHRR 466 para 94

03

But not the determination of issue of pure public interest/policy

R. (Alconbury Developments Ltd) v SoS for the Environment, Transport & the Regions [2001] UKHL 23 at [74] per Lord Hoffmann

Oji v Director of Legal Aid Casework at para.43

“21. For these reasons I would conclude that the resolution of the public law claim does constitute a determination of the claimants' civil rights and that there will have to be whatever disclosure is necessary for the claimants to have the “fair hearing” to which article 6 entitles them. If such disclosure cannot be agreed, the case will have to be remitted to the Divisional Court for further hearing.”

Lord Justice Longmore in R. (K and others) v Secretary of State for Defence [2016] EWCA Civ 1149; [2017] 1 WLR 1671

R. (Oji) v The Director of Legal Aid Casework [2026] EWCA Civ 11; [2026] 4 WLR 9

Facts and Conclusion

1. Concerned the Windrush Compensation Scheme.
2. Not statutory – own rules + guidance: case by case basis.
3. Sought legal aid to help make (2022) application.
4. Eventually offered £65,404.40 – accepted.
5. Claimant refused legal aid (exceptional case funding – s. 10(3), LASPOA 2012 i.e. refusal would = breach of Convention right) – Art. 6 not engaged.
6. JR – refused: art. 6 not engaged: application for compensation not = to a determination of any dispute.
7. Lewis LJ… ➡️

46 The appeal against the decision of the judge must be dismissed. Article 6 applies to, and provides certain procedural safeguards in, the determination of a dispute over the existence or scope of a civil right, or something that it arguably recognised as a right. The process of applying to the Home Office for an award of compensation did not, at that stage, involve the determination of any dispute in the sense that that term is used in the case law of the European Court. That was accepted by the appellant in her skeleton argument and oral submissions. The Director was correct, therefore, to conclude that article 6 did not apply to that process and to refuse to make an exceptional case determination.

The decisions

01

Review of decision 31/10/2022

Application for compensation not a determination of a civil right or obligation

02

DHCJ Bird KC

- **No dispute with WCS at time of application**
- Obiter - right dependent on evaluative judgement (qualification or quantum) does not engage art. 6

03

CA Judgment – Lewis LJ

- Appeal dismissed
- No dispute

4 Observations by Lewis LJ at [97]

01

First

No specific right to legal representation recognised in article 6

02

Second

Many cases where legal aid n/a and fairness not impugned

03

Third

The Secretary of State did provide assistance in various forms to those applying for compensation

04

Fourth

It would have been a matter for the court to assess whether or not a failure to provide legal representation would, in this particular case, have led to a breach of article 6

"…if there were a genuine dispute about a decision governing eligibility under the Scheme, I would regard that as involving a determination of a civil right within the meaning of article 6 of the Convention. The Scheme is established by government. It sets out precise, defined conditions which, if they are met, entitles the applicant to an award of monetary compensation in an amount specified by, or determined in accordance with, the rules. Money from public funds is provided to pay such awards. Claims for compensation under such a scheme are in my view capable of constituting civil rights within the meaning of article 6 of the Convention."

Lewis LJ at [95]

Poshteh v RBKC [2017] UKSC 36; [2017] AC 624

Facts and Conclusion

1. Refugee sought Part 7 housing (homelessness) assistance.
2. Full duty accepted – refused accommodation as unsuitable.
3. Unsuccessful review and appeals to county court and Court of Appeal.
4. Post-CA there was a ECtHR judgment – right to accommodate was a civil right for art. 6 purposes.
5. Ali v Birmingham City Council [2010] UKSC 8; [2010] 2 A.C. 39 - civil rights for the purposes of art.6 do not arise in cases where the award of services or benefits is not an individual right of which the applicant can consider himself the holder but is instead dependent on a series of evaluative judgments by the provider as to whether statutory criteria are satisfied and how the need for it ought to be met: accordingly, an applicant's right to accommodation under s.193 of the 1996 Act, did not engage art.6.
6. Lord Carnwath... ➡️

37. The scope and limits of the concept of a "civil right", as applied to entitlements in the field of public welfare, raise important issues as to the interpretation of art.6 , on which the views of the Chamber are unlikely to be the last word. In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of the court in *Ali*. It is appropriate that we should await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position.

What is a fair hearing?

→

Access to court

Real & effective hearing

Independent & impartial tribunal

(Usually) in public

Within a reasonable time

Equality of arms

Reasoned decision

2

Extending time limits under article 6

Key cases

Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442
Pomiechowski v Poland [2012] 1 WLR 1604
Adesina v Nursing and Midwifery Council [2013] EWCA Civ 818
Rakoczy v General Medical Council [2022] EWHC 890 (Admin)
GJ v SSWP (PIP) [2022] UKUT 340 (AAC)

Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442

59. The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, 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. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Pomiechowski v Poland [2012] 1 WLR 1604

39. In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider that … the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time …, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Article 6.1 in Tolstoy Miloslavsky. The High Court … must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring … timeously.

Adesina v Nursing and Midwifery Council [2013] EWCA Civ 818

14. Are these differences sufficient to leave the *Mitchell/Reddy* line of authority untouched by *Pomiechowski*? In my judgment, they are not. The context, exclusion from a profession, is still one of great importance to an appellant. There is good reason for there to be time limits with a high degree of strictness. However, one only has to consider hypothetical cases to appreciate that, without some margin for discretion, circumstances may cause absolute time limits to impair "the very essence" of the right of appeal conferred by statute. Take, for example, a case in which a person, having received a decision removing him or her from the Register, immediately succumbs to serious illness and remains in intensive care; or a case in which notice of the disciplinary decision has been sent by post but never arrives and time begins to run by reason of deemed service on the day after it was sent (Nursing and Midwifery Council (Fitness to Practice) Rules 2004, rule 34(4)). In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28 day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal.

Adesina v Nursing and Midwifery Council [2013] EWCA Civ 818

15. The real difficulty is where to draw the line. Mr Pascall, on behalf of the appellants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions (see, for example Employment Rights Act 1996, section 111(2), in relation to unfair dismissal). The omission to do so on this occasion was no doubt deliberate. If Article 6 and section 3 of the Human Rights Act require Article 29(10) of the Order to be read down, it must be to the minimum extent necessary to secure ECHR compliance. In my judgment, this requires adoption of the same approach as that of Lord Mance in *Pomiechowski*. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" (paragraph 39). I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality. See, for example, the strictness with which the discretion is approached in relation to the 42 day time limit and the discretion to extend in connection with appeals from Employment Tribunals to the Employment Appeal Tribunal: *United Arab Emirates v Abdelghafar* [1995] ICR 65; *Jurkowska v HLMAD Ltd* [2008] EWCA Civ 231.

Rakoczy v General Medical Council [2022] EWHC 890 (Admin)

… The function of extending time is one which arises exclusively in the context of securing compatibility with Article 6 of the ECHR as scheduled to the Human Rights Act 1998, as applicable to this context. It is a function discussed in Adesina at §§14-15 and, more recently, in Gupta v General Medical Council [2020] EWHC 38 Admin at §§44 to 47. The line of cases involving refusals to extend time are set out in *Gupta* at §§46-47.

> 46. In her Skeleton Argument for the GMC Ms Emmerson referred to a number of first-instance cases which she rightly said demonstrate the strictness with which the Court has applied the Adesina test. These include *Adegbulugbe v Nursing and Midwifery Council* [2013] EWHC 3301 (Admin); *Pinto v Nursing and Midwifery Council* [2014] EWHC 403 (Admin); *Parkin v Nursing and Midwifery Council* [2014] EWHC 519 (Admin); *Darfoor v General Dental Council* [2016] EWHC 2715 (Admin); *Kabba v Nursing and Midwifery Council* [2016] EWHC 3677 (Admin). The earlier of these cases were cited with approval by the Court of Appeal in *Nursing and Midwifery Council v Daniels* [2015] EWCA Civ 225.
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> 47. In these decisions a wide range of circumstances were rejected by the Court as amounting to exceptional circumstances justifying an extension of time to comply with Article 6. These include (a) difficulties in obtaining legal advice or legal aid (*Adesina*; *Kabba*); (b) inability to raise funds to pay the court fee in time (*Daniels*); (c) a degree of ill health or stress (*Pinto*); (d) where the delay in question was very short, ie, one or two days after the deadline (*Adesina*; *Adegbulugbe*; *Parkin*; *Darfoor*).

Rakoczy v General Medical Council [2022] EWHC 890 (Admin)

Key principles:

- Time for appeal in extradition context can be extended in “exceptional circumstances” where refused would “operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under Art 6.1 in Tolstoy”.
- An expected essential characteristic of such a case is "an out of time appeal which a litigant personally has done all [they] can to bring and notify timeously".
- This applies to the disciplinary and regulatory statutory context: *Adesina*.
- The “exceptional circumstances” test will be satisfied in a “very small number of cases”.
- Where there are such exceptional circumstances, there is a duty to avoid the article 6 breach.

GJ v SSWP (PIP) [2022] UKUT 340 (AAC)

60. […] the Adesina case law has developed in the context of a short and strict 28-day time limit for lodging an appeal. If it difficult in practice to find cases that can benefit from the Adesina principle in this context, it is surely going to be that much more difficult to find them in the social security context with a standard one-month time limit but subject to an outer limit of 13 months. As Upper Tribunal Judge Poole QC put it (see paragraph 56 above), "There is therefore already considerable scope for extensions under the Tribunal Rules way beyond the 28 day limit found compliant in *Adesina*. In my opinion the scope for further extensions under the application of the *Adesina* principle is very limited indeed."

61. Against this, it might be objected that the two contexts are very different – Adesina and the related cases arise in a professional regulatory jurisdiction which is effectively adversarial in nature, whereas the Secretary of State rarely takes an adversarial approach in social security cases and so a more flexible culture may operate. However, drawing such a distinction finds little support in the case law. In particular, the absolute 13-month time limit was found to be consistent with Article 6 in the child support context (where the rules mirror those in social security) in *Denson v Secretary of State for Work and Pensions* [2004] EWCA Civ 462 (reported as R(CS) 4/04; the 28-day limit is now a one month limit but it makes no difference to the analysis).

3

Disclosure in the national security context

Closed Material Procedure

Key points

- Evidence and information withheld on the basis of national security.
- Special advocates appointed.
- Special advocate represents “interests” of individual.
- Special advocate cannot take instructions once material has been seen.
- Gisting of a case against individual.
- Applied in SIAC.
- Applied in other proceedings under Justice and Security Act 2013.

6 Declaration permitting closed material applications in proceedings

(1) The court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.

(3) The court may make such a declaration if it considers that the following two conditions are met.

(4)The first condition is that—

(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or

(b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following […]

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

R (Roberts) v Parole Board [2005] UKHL 45 [2005] 2 A.C. 738

Lord Woolf (majority)

76. The fact that information is withheld from a prisoner does not mean that there is automatically such a fundamental breach of the prisoner's rights either under article 5(4) or under domestic law. There can be an infinite variety of circumstances as to the degree of information that is withheld completely or partially without any significant unfairness being caused…There may need initially to be a total withholding of information, but at an early stage of the hearing the prisoner may be able to be informed of the gist of what is relied on against him. Documents can be edited. There has to be detailed management of the hearing to ensure that the prisoner has the widest information possible. In relation to this management the [Special Advocate] can have a critical role to play on the prisoner's behalf.

77. There are two extreme positions so far as the prisoner is concerned. On the one hand there is full disclosure and on the other hand there is no knowledge of the case against him being made available to the prisoner, so that even with a [Special Advocate] he cannot defend himself. In between the two there is a grey area and within that grey area is the border which is the parameter between what is acceptable and what is not acceptable. Where that border is situated is fact-specific, depending on all the circumstances that have to be balanced…To make rulings in advance of the actual hearing would be to introduce a rigidity that would make the task of the board extraordinarily difficult. The position has to be looked at in the round examining the proceedings as a whole with hindsight and taking into account the task of the board.

R (Roberts) v Parole Board [2005] UKHL 45 [2005] 2 A.C. 738

Lord Bingham (dissenting)

18. […] The board will receive and be free to act on material adverse to the appellant which will not, even in an anonymised or summarised form, be made available to him or his legal representatives. Both he and his legal representatives will be excluded from the hearing when such evidence is given or adduced, denying him and them the opportunity to participate in the hearing, by questioning any witness or challenging any evidence called or adduced to vouch the sensitive material, or by giving or calling evidence to contradict that material, or by addressing argument. The appellant and his legal representatives are free to instruct the specially appointed advocate (whose integrity and skill are not in question) so long as none of them knows anything of the case made against the appellant on the basis of the sensitive material, but the specially appointed advocate is forbidden to communicate with the appellant or his legal representatives once he knows the nature of the case against the appellant based on the sensitive material. It is only at that stage that meaningful instructions can be given, unless the appellant has successfully predicted the nature of the case in advance, in which case he may well have identified the source and undermined the need for secrecy…In *M v Secretary of State for the Home Department* [2004] 2 All ER 863, the Court of Appeal acknowledged in para 13 that a person appealing to SIAC, in much the same position as the appellant would be under the proposed procedure, was "undoubtedly under a grave disadvantage" and, in para 16, that "to be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights". In its decision letter challenged in these proceedings the board realistically accepted that as compared with the appellant's solicitor a specially appointed advocate would be at a "serious disadvantage" and that adoption of the special advocate procedure would result in prejudice to the appellant.I regard these observations as amply justified. In the vivid language used by Lord Hewart CJ in a very different context in *Coles v Odhams Press Ltd* [1936] 1 KB 416, 426, the specially-appointed advocate would inevitably be "taking blind shots at a hidden target".

MB & AF (No 1) v Secretary of State for the Home Department [2007] UKHL 46

Lady Hale

65. […] [I]t is necessary to…ask whether the use of a special advocate can solve the problem where the Secretary of State wishes to withhold from the controlled person material upon which she wishes to rely in order to establish her case. We are all agreed that these are not criminal proceedings for the purpose of article 6; in ordinary civil proceedings it is appropriate to give weight to the interests of each side; nevertheless, the state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy, in some cases seriously. It seems probable that Strasbourg would apply very similar principles to those applicable in criminal proceedings, but would be more inclined to hold that the measures taken by the judicial authorities had been sufficient to protect the interests of the controlled person. It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to G challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been "given a meaningful opportunity to contest the factual basis" for the order.

MB & AF (No 1) v Secretary of State for the Home Department [2007] UKHL 46

Lord Brown

90. […] I agree further that the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so. There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded…he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even "a substantial measure of procedural justice" (*Chahal v United Kingdom* 23 EHRR 413, para 131) notwithstanding the use of the special advocate procedure; "the very essence of [his] right [to a fair hearing] [will have been] impaired": *Tinnelly & Sons Ltd v United Kingdom* 27 EHRR 249, para 72.

91. I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.

A & Ors v United Kingdom (2009) 49 EHRR 29 (No. 3455/05) [GC]

218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

A & Ors v United Kingdom (2009) 49 EHRR 29 (No. 3455/05) [GC]

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

Secretary of State for the Home Department v AF (No.3) [2009] UKHL 28

Lord Phillips

59. […] I am satisfied that the essence of the Grand Chamber's decision lies in para 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be. […]

Secretary of State for the Home Department v AF (No.3) [2009] UKHL 28

Lord Phillips

63. There are…strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made by Megarry J in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.

Secretary of State for the Home Department v AF (No.3) [2009] UKHL 28

Baroness Hale

“the bottom line is that the control order cannot be upheld if the hearing cannot be fair. That seems to me to be an entirely proper and principled conclusion. If the Government adjudges that it is necessary to impose serious restrictions upon an individual's liberty without giving that individual a fair opportunity to challenge the reasons for doing so, as to which it is not for us to express a view, then the Government will have to consider whether or not to derogate from article 6 of the Convention” (§106)

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Mance

27… the balancing exercise called for in para 217 of the judgment in A v United Kingdom depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself.

40. Neither of these possibilities is one which the law should readily contemplate. In the penal context, an accused is presumed innocent until proved guilty; there is a public interest in the trial of suspects before a court, but it is better that the state should forgo prosecution than that there should be any risk of an innocent person being found guilty through inability to respond to the full case against them. These imperatives do not operate in quite the same way in a civil context like the present, where the state may not be directly involved as a party at all. The rule of law must, so far as possible, stand for the objective resolution of civil disputes on their merits by a tribunal or court which has before it material enabling it to do this. In considering how this may be achieved, if a defendant can only defend itself by relying on material the disclosure of which would damage national security, a balance may have to be struck between the interests of claimant and defendant in a civil context. […]

42. I do not therefore consider that a closed material procedure is in principle inconsistent with the right to an effective remedy in respect of alleged discrimination or with the Human Rights Convention."

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Mance

80. Procedural justice indicates that Mr Tariq should be given sufficient information to enable him to give detailed instructions to his special advocate so that she can challenge the withheld material on his behalf. But Mr Eadie QC for the Home Office insists that the process of gisting as envisaged in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 cannot be resorted to in this case without risk to those who were involved in the security vetting process. In the *AF (No 3)* case I said that what would be needed would vary from case to case, and that the judge would be in the best position to strike the balance between what was needed to enable the special advocate to challenge the case against the individual and what could properly be kept closed: para 86. But I also said that if the concept of an effective challenge was to be applied, where detail matters it must be met by detail: para 87. That is what Mr Eadie objects to in this case.

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Mance

81. Here again the context for the argument is what matters. This is an entirely different case from *Secretary of State for the Home Department v AF (No 3).* There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings against him or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages. He is entitled to a fair hearing of his claim before an independent and impartial tribunal. But the Home Office says that it cannot defend the claim in open proceedings as, for understandable reasons, it cannot reveal how the security vetting was done in his case. That conclusion is unavoidable, given the nature of the work Mr Tariq was employed to do.

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Mance

82. How then is the balance to be struck here? Mr Tariq will be at a disadvantage if the closed procedure is adopted. But the disadvantage to the Home Office is greater, as unless the closed procedure is adopted it will have to concede the claim. There is no way that the disadvantage to the Home Office can be minimised. It will simply be unable to defend itself. It will be unable to obtain a judicial ruling on the point at all. That would plainly be a denial of justice. The disadvantage to Mr Tariq, on the other hand, is less clear cut. He is not entirely without information, as the general nature of the Home Office's case has been disclosed to him. He will have the services of the special advocate, with all that that involves second best by far, no doubt, but at least the special advocate will be there. His claim will be judicially determined by an independent and impartial tribunal, which can be expected to take full account of the fact that the details of the case for the Home Office have had to be kept closed. If inferences have to be drawn because of the quality or nature of the evidence for the Home Office, they will have to be drawn in Mr Tariq's favour and not against him. And throughout the process the need for the evidence to be kept closed will be kept under review as rule 54 of Schedule 1 to the Regulations requires, with the assistance of the special advocate.

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Mance

83. There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will give rise to can to some extent be minimised and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office. I would allow the appeal.

Tariq v Home Office [2011] UKSC 35 [2012] 1 AC 452

Lord Kerr (Dissenting)

108. The withholding of information from a claimant which is then deployed to defeat his claim is, in my opinion, a breach of his fundamental common law right to a fair trial. Even if the closed material procedure is compatible with article 6 of the European Convention on Human Rights (and for reasons that I will discuss presently, I do not believe that it is) this has no bearing on Mr Tariq's right at common law to be provided with details of the case against him sufficient to enable him to present a reasoned challenge to it. […]

110. To recognise that this right continues to exist at common law does not mean that every time the state wishes to withhold information from a claimant which, although vital to the defence of the claim, cannot be revealed for reasons of national security, it must submit to settlement of the claim. As the experience in *Carnduff v Rock* [2001] 1 WLR 1786 illustrates, it is perfectly proper and, more importantly, principled in such cases that they cannot be regarded as justiciable because no just trial is possible. Where insistence upon a fully fair hearing for a claimant will deny the defendant (or where it is not a party, the state) the protection of its vital interests that the law should recognise, then a truly fair proceeding is not possible and the trial should be halted in limine. Lord Mance has said that this is not an option that the law should readily contemplate. I agree but it seems to me to be a plainly more palatable course than to permit a proceeding in which one party knows nothing of the case made against him and which, by definition, cannot be subject to properly informed challenge. At least in the Carnduff situation both parties are excluded from the judgment seat. In the state of affairs that will result from the decision of the majority in this case, one party has exclusive access to that seat and the system of justice cannot fail to be tainted in consequence."

IR (Sri Lanka) v SSHD [2011] EWCA Civ 704

8. It is common ground that, where Article 6 is not engaged, Article 8 may impose procedural obligations. […]

20. To encapsulate what I have said about the point of principle in this case: the procedural requirements of Article 8 do impact on a case of deportation or exclusion for national security reasons (assuming that there is an interference with family or private life) but they do not equiparate with the procedural requirements of Article 5 or Article 6. They have the more limited content…The procedure in SIAC, as developed in the domestic jurisprudence, satisfies those requirements.

IR & GT v United Kingdom (2014) 58 EHRR SE14 (Nos. 14876/12 and 63339/12)

63. The Court is satisfied that the procedure in place in the United Kingdom is such as to offer sufficient procedural guarantees for the purposes of Article 8. First, SIAC is a fully independent court. Second, SIAC sees all the evidence upon which the Secretary of State's decision to exclude an individual is based and forms its own, independent view as to whether the Secretary of State reached the correct decision…It is thus competent to examine and, if necessary, to reject the Secretary of State's assertion that the appellant poses a threat to national security. Third, there is some form of adversarial proceedings before SIAC, with appropriate procedural limitations – in the form of the special advocates – on the use of classified information. During the closed sessions before SIAC, the special advocate can make submissions on behalf of appellants, both as regards procedural matters and as to the substance of the case. Importantly, Rule 38 of the SIAC 2003 Rules…provides explicitly for a procedure where the special advocate may challenge the Secretary of State´s objections to disclosure of the closed material…In this way, the special advocate provides an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure…While contact between the appellant and the special representative generally ceases once the closed material has been served in order to preserve the confidentiality of the information, it is not wholly excluded.

IR & GT v United Kingdom (2014) 58 EHRR SE14 (Nos. 14876/12 and 63339/12)

63. […] There is provision for requesting authorisation from SIAC to permit contact in specific circumstances. In particular, the appellant may still contact the special advocate, through his representative, and the special advocate can then request permission for contact if he deems it necessary…Fourth, cases before SIAC are primarily concerned with allegations of terrorist activity: there is no evidence that SIAC has allowed the Secretary of State to adopt an interpretation of "national security" which is unlawful, contrary to common sense or arbitrary…Fifth…only parts of SIAC's judgments are classified (or "closed"). The appellant is provided with an "open" judgment providing as much information as possible on the reasons for SIAC's decision. Further, the "closed" parts of the judgment are disclosed to his special advocate. Finally, SIAC has full jurisdiction to determine whether the exclusion interferes with the individual's Article 8 rights and, if so, whether a fair balance has been struck between the public interest and the appellant's rights. If it finds that the exclusion is not compatible with Article 8, it will quash the exclusion order.

QX v Secretary of State for the Home Department [2024] UKSC 26

Lord Reed

64. The case of *Pomiechowski* concerned section 26(4) of the Extradition Act 2003 ("the 2003 Act"), which requires that notice of an appeal against a judge's decision to order extradition must be given within seven days starting with the date when the order is made. One of the appellants, Mr Halligen, was a British citizen. This court held that section 3 of the Human Rights Act required section 26(4) of the 2003 Act to be read, in the case of a British citizen, as enabling a court to extend the time for giving notice. An essential step in the reasoning which led to that conclusion was that, as a British citizen, Mr Halligen had a "civil right" to enter and remain in the United Kingdom as and when he pleased. Proceedings under the 2003 Act involved a "determination" of that civil right, to which article 6(1) applied.

75. The matter was considered again in *Pomiechowski*. Considered in the light of his judgment in *Bancoult*, Lord Mance's description in *Pomiechowski* [2012] 1 WLR 1604, para 32 of the right of abode as a common law right (see para 67 above) cannot be regarded as being per incuriam. Furthermore, as explained earlier, all the members of this court agreed with his reasoning. I am not persuaded that Lord Mance was in error.

QX v Secretary of State for the Home Department [2024] UKSC 26

Lord Reed

85. It is not possible for this court to predict how the case law of the European court may develop in the future. However, against the background which I have described (including, in particular, the decision in *Monedero Angora v Spain*, and the implications of article 3 of Protocol No 4, by parity of reasoning with *Maaouia v France*), it is reasonable to conclude that the European court would not regard the right of abode in the United Kingdom as a civil right within the meaning of article 6(1). Applying the approach to the application of the Human Rights Act explained in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, paras 54–59, this court should therefore conclude that proceedings concerned with that right do not fall within the ambit of that article.

R (C3) v Foreign Secretary [2026] EWHC 34 (Admin)

32. Ms Mitchell's analysis was helpful in showing that a claimant may have two bites at the metaphorical cherry. When the case of *QX* comes to be analysed, that point will be made good. What Ms Mitchell was, I think, accepting was that on the facts of the present case, at the first stage of the analysis, C3 and the three children did not have a "civil right" they could invoke. This was because a claim for consular assistance is not a claim which entails the exercise of any "civil right". Consular assistance is in the nature of being discretionary and is not akin to certain types of State benefits where, for example, the applicant does have an entitlement subject to certain factual preconditions being met. Ms Mitchell's argument was that the present case engages the second stage of the analysis. Unless the present case falls within one of the "excluded categories", it must follow that the determination of this judicial review application entails the determination of a "civil right" because it is directly dispositive of Article 8 and Article 3 rights.

55. Overall, I have no doubt but that the Strasbourg Court, if confronted with the unusual facts of the instant case, would hold that a claim for consular assistance is almost a paradigm case of the exercise of a public authority prerogative.

71. The application for *AF (No 3)* disclosure must be refused.

4

Legal Aid and Article 6

LASPO 2012

10 Exceptional cases

(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.

(2) This subsection is satisfied where the Director—

(a) has made an exceptional case determination in relation to the individual and the services, and

(b) has determined that the individual qualifies for the services in accordance with this Part,

(and has not withdrawn either determination).

(3) For the purposes of subsection (2), an exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of the individual to the provision of legal services that are assimilated enforceable rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

Airey v Ireland (1979) 2 EHRR 305

24. […]The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily. […] For these reasons, the court considers it most improbable that a person in Mrs. Airey's position […] can effectively present his or her own case.

26 […] In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of article 6.1 ; there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances. In addition, whilst article 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 … 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 6.1 . The conclusion appearing at the end of para 24 above does not therefore imply that the state must provide free legal aid for every dispute relating to a 'civil right'.

X v United Kingdom (Application No 9444/81) (1984) 6 EHRR 136

3 […] the Commission recalls that unlike the situation concerning criminal proceedings (cf article 6.3(c)) the Convention does not guarantee as such a right to free legal aid in civil cases. Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked by virtue of article 6.1 of the Convention (cf Airey v Ireland 2 EHRR 305).

Steel and Morris v UK (2005) 41 EHRR 403

61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively...

Steel and Morris v UK (2005) 41 EHRR 403

63. The Court must examine the facts of the present case with reference to the above criteria.
First, as regards what was at stake for the applicants, it is true that, in contrast to certain earlier cases where the Court has found legal assistance to have been necessary for a fair trial (for example, *Airey* and *P., C. and S. v. the United Kingdom*, both cited above), the proceedings in issue here were not determinative of important family rights and relationships. The Convention organs have observed in the past that the general nature of a defamation action, brought to protect an individual's reputation, is to be distinguished, for example, from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family (see *McVicar*, § 61, and *Munro*, both cited above).
However, it must be recalled that the applicants did not choose to commence defamation proceedings, but acted as defendants to protect their right to freedom of expression, a right accorded considerable importance under the Convention (see paragraph 87 below). Moreover, the financial consequences for the applicants of failing to verify each defamatory statement complained of were significant. McDonald's claimed damages up of to GBP 100,000 and the awards actually made, even after reduction by the Court of Appeal, were high when compared to the applicants' low incomes: GBP 36,000 for the first applicant, who was, at the time of the trial, a bar worker earning approximately GBP 65 a week, and GBP 40,000 for the second applicant, an unwaged single parent (see paragraphs 9, 14 and 35 above). McDonald's have not, to date, attempted to enforce payment if the awards, but this was not an outcome which the applicants could have foreseen or relied upon.

Gudanaviciene v Director of Legal Aid Casework [2014] EWCA Civ 1622

29. We respectfully disagree with the passage in the judgment of Coulson J that we have quoted at para 26 above. The fact that section 10 is headed “exceptional cases” and that it provides for an “exceptional case determination” says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. The criteria for deciding whether an ECF determination should or may be made are set out in section 10(3) by reference to the requirements of the Convention and the Charter. In our view, there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made.

42. […] the key question is said to be whether legal aid is necessary for “effective access to the court”. The cases set out the kind of factors which are relevant for a resolution of this issue. But the phrase “obvious unfairness” (as a summary) is wide enough to capture the guidance given in the jurisprudence. Indeed, as we have seen, the European Court of Human Rights said in the P, C and S case 35 EHRR 1075 , para 91, that the “key principle governing the application of article 6 is fairness”.

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32. In short, therefore, if the Director concludes that a denial of ECF would be a breach of an individual's Convention or EU rights, he must make an exceptional funding determination. But as we shall see, the application of the European Court of Human Rights and Court of Justice case law is not hard-edged. It requires an assessment of the likely shape of the proposed litigation and the individual's ability to have effective access to justice in relation to it. […]

42. […] the key question is said to be whether legal aid is necessary for “effective access to the court”. The cases set out the kind of factors which are relevant for a resolution of this issue. But the phrase “obvious unfairness” (as a summary) is wide enough to capture the guidance given in the jurisprudence. Indeed, as we have seen, the European Court of Human Rights said in the P, C and S case 35 EHRR 1075 , para 91, that the “key principle governing the application of article 6 is fairness”.

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46. The general principles established by the European Court of Human Rights are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6.1 in proceedings which had already taken place. We accept the following summary of the relevant case law given by Mr Drabble: (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts (the Airey case 2 EHRR 305 , para 24, the Steel and Morris case 41 EHRR 403 , para 59); (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily (the Airey case, para 24, the McVicar case 35 EHRR 566 , para 48 and the Steel and Morris case, para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (the McVicar case, para 50, the P, C and S case 35 EHRR 1075 , para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through “in the teeth of all the difficulties” does not necessarily mean that the procedure was fair (the P, C and S case, para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent: the Steel and Morris case, para 62.

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56. It can therefore be seen that the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6.1 will require the provision of legal services (subject always to any reasonable merits and means test). The cases demonstrate that article 6.1 does not require civil legal aid in most or even many cases. It all depends on the circumstances. It should be borne in mind that, although in the United Kingdom we have an adversarial system of litigation, judges can and do provide assistance to litigants in person. The outcomes in *X v United Kingdom* 6 EHRR 136 , the *Munro* case 10 EHRR CD516 and the *McVicar* 35 EHRR 566 case show that it is not a requirement of article 6.1 that legal services be provided in all but the most straightforward of cases. On the other hand, the outcomes in the *Airey* 2 EHRR 305 case, *the P, C and S* case 35 EHRR 1075 , the *Steel and Morris* 41 EHRR 403 case and AK and L v Croatia do not show that legal services are required only in such extreme cases as these. In short, we do not accept the submission of Mr Chamberlain that these decisions justify the passages in the Guidance which we have criticised at paras 44-45 above.

Gudanaviciene v Director of Legal Aid Casework [2014] EWCA Civ 1622

72. Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity.

Lord Chancellor's Guidance

3.10. Assuming that the proceedings in question involve the determination of a civil right or obligation, caseworkers should then go on to consider whether the failure to provide legal aid would be a breach of the applicant's rights under Article 6(1) ECHR.

The overarching question to consider is whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness.

3.11. The following factors should be taken into account. No one of these factors is necessarily determinative and each case needs to be assessed on its particular facts and in the light of representations made by applicants. However, the factors must be carefully weighed – for example, the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that Article 6(1) will require the provision of legal services.

Types of cases where article 6 may be engaged

- Planning and compulsory purchase cases:
  - *Bryan v United Kingdom* (1995) 21 EHRR 342.
  - *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295.
- Social security cases:
  - Contributory – *Feldbrugge v Netherlands* (8562/79) (1986) 8 EHRR 425.
  - Non-contributory – *Salesi v Italy* (A/257-E) (1998) 26 EHRR 187.
- Establishing a right of ownership:
  - *Lupeni Greek Catholic Parish and Others v. Romania* App no 76943/11 (ECtHR, 29 November 2016).
- Licensing for businesses:
  - *Tre Traktörer Aktiebolag v. Sweden* App no 10873/84 (ECtHR, 7 July 1989).
  - *R (Brogan) v Metropolitan Police* [2002] EWHC 2127, [2002] All ER (D) 66.
- Most disputes between private individuals and civil actions against the state (e.g. against the police):
  - *QX v SSHD* [2024] UKSC 26, [2024] 3 WWLR 547.
  - *Osman v UK* (23452/94) (2000) 29 EHRR 245.
- Possession proceedings:
  - *McLellan v Bracknell Forest DC* [2001] EWCA Civ 1510 [2002] QB 1129
  - *R (Gilboy) v Liverpool CC* [2008] EWCA Civ 751 [2009] QB 699.

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Thank you

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