

CHAPTER 7:

THE RIGHT TO A FAIR HEARING

On completing this chapter the reader should understand:

- the main terms of article 6, the Convention right protecting the right to a fair trial (but also that there are other rights to a fair hearing such as in article 5(3) and (4) – see Chapter 6.)
- the kinds of trial or hearing which are covered by article 6 and the kinds which are not covered.
- some of the principal rights that are inherent in the concept of a “fair...hearing!” – article 6(1).
- the application of article 6 specifically to criminal charges in article 6(2) (presumption of innocence) and article 6(3) (defendants’ rights).
- the extent to which article 6 rights are flexible and context-dependent.

INTRODUCTION

The right to a fair trial deals with procedures and can sound dull. It is not. Rights without remedies are pointless and it is through court hearings that remedies can be ordered. Defendants in criminal charges are up against the full might of the state. Litigants in civil proceedings may be taking on massive corporations who exercise great economic power. It is vital that these trials and other procedures are fair and that even the weakest or most unpleasant persons are treated equally and are able to make their cases or defend themselves under equal terms with the powerful. This is central to the rule of law and it is what distinguishes the administration of justice in a decent society from the show trials of dictatorships.

A right to a fair trial is, therefore, widely recognized. It is implied by Magna Carta (1215). It is an important feature of written constitutions (such as the US Constitution, 1789, which requires “due process” of law). Likewise it is an important principle of international law, expressed in the UN Declaration of Human Rights (articles 10 and 11) and given fuller legal effect by the International Covenant on Civil and Political Rights (article 14.)

UK LAW: ARTICLE 6, THE HRA AND THE COMMON LAW

In the European Convention on Human Rights, Article 6 guarantees the “right to a fair trial” to claimants in civil cases and to defendants in criminal trials. Article 6 rights are, of course, given effect in UK law through the terms of the Human Rights Act 1998 (HRA). Procedures before the courts and tribunals of the UK tend to be found in

- primary legislation (such as the Senior Courts Act 1981, the Police and Criminal Evidence Act 1984) or the Tribunals Courts and Enforcement Act 2007.

- secondary legislation (such as the Civil Procedure Rules or the **tribunal** rules).

Section 3 HRA requires this primary and secondary legislation to be interpreted consistently with article 6 (unless it is really impossible). Likewise the courts and tribunals are expressly defined as “public authorities” and so, under section 6 HRA, must act compatibly with Convention rights.

Key Definition

Courts and tribunals.

In England the “Senior courts” are the High Court, the Crown Court and the Court of Appeal (all subordinate to the Supreme Court of the UK).

Other courts, such as the County Court and Magistrates Courts, are established by Acts of Parliament which define the “jurisdiction” of these courts - the types of cases they can lawfully decide.

“Tribunals” court-like bodies which are established by statute to decide particular issues often dealing with disputes between an individual and a government department. In England many tribunals are part of the “First Tier Tribunal” with an appeal to the “Upper Tribunal”.

Article 6

Article 6 guarantees a general right to a fair hearing etc with additional rights for criminal defendants. It should be noted that fair hearing rights are also found expressly in other places. Article 5(4) gives a person deprived of his or her liberty a right to go to court to have the legality of their detention tested by a judge. The procedure must be fair. Other rights can also be violated by the failure of the state to provide a fair procedure in the context. For example: long delays in dealing with property disputes can violate article 1 of the First Protocol (the right to the “protection of property”) - *Sporrong & Lönnroth v Sweden* (1983) 5 EHRR 35.

The common law

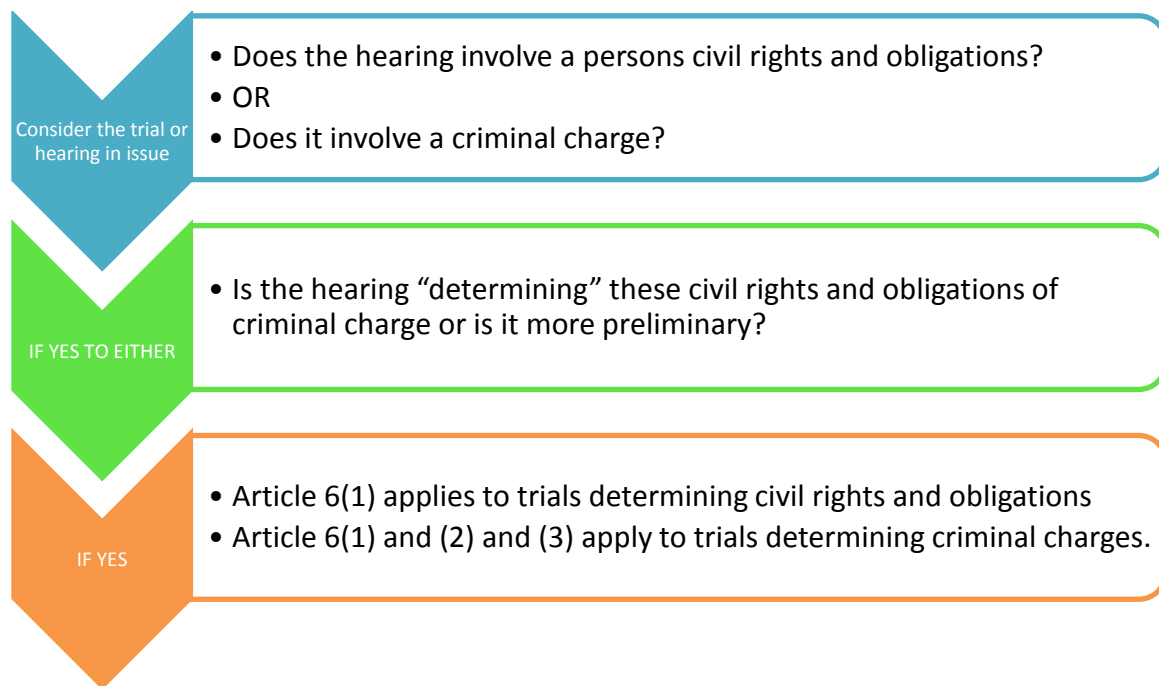
Despite article 6 and other Convention rights, it is wrong not to understand the longstanding impact of common law on fair procedures in England and Wales. Judges are given considerable discretion on the way in which they conduct trials and deal with issues such as the admissibility of evidence. The common law rules of “natural justice” give people an actionable right to a fair and impartial hearing. They apply widely, but in particular, to magistrates, tribunals and also administrative bodies (like council licencing committees) taking decisions which directly affect an individuals rights or their “legitimate expectations” of a government body.

The focus of this chapter is on article 6. There are two principal issues:

- to what trials and hearings does article 6 apply; and
- what is the content of article 6 rights?

APPLICATION OF ARTICLE 6.

Fig 7.1 summarises the issues about the application of article 6



A person can rely on his or her article 6 only when a court or tribunal etc is “determining” “civil rights and obligations” or a “criminal trial”.

The distinction made in the article between civil or criminal trials matters. If the trial or hearing is determining a person’s “civil rights and obligations” then there is just the general right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

(article 6(1)). Where a “criminal charge” is being determined, however, the accused person has not only this general right but, also, additional protections under article 6(2) and (3) such as the right to be presumed innocent and other rights necessary for an effective defence.

Civil rights and obligations

“Civil rights and obligations” include private law rights such as those derived from contract, property (including intellectual property) or the law of torts. But the term is more extensive and has been applied, for example, to hearings determining whether a person has a right to pursue a profession or whether (most) Convention rights have been violated.

Criminal law

Criminal law has an autonomous meaning under the Convention. This means that whether a matter is criminal or civil is measured by the Convention standard and is not just dependent on how a matter is described under domestic law. In essence, a criminal procedure is one whose main point is to decide whether a person should be punished.

Ezeh v UK (2004) 39 EHRR 1

BACKGROUND

E, a prisoner, was accused of threatening to kill his probation officer. He was charged with a prison disciplinary offence though he could have been charged with a criminal offence. He requested representation at the hearing before the prison governor and was refused.

First he argued that representation was necessary under common law “natural justice”; this was refused.

Then he argued he had a right to legal representation under article 6(3)(c). However this provision would only apply if the prison governor was determining a “criminal charge”.

PRINCIPLE ESTABLISHED

The European Court of Human Rights (ECtHR) held that though the offence with which E was charged was classed, under English law, as a disciplinary offence, at its heart this was a criminal matter. If the governor found E guilty he could impose “additional days” in prison as a punishment.

Therefore the governor was determining a criminal charge and article 6(3)(c) should have been applied.

Criminal or civil?

All this matters because, in various contexts, such as anti-social behavior, mental health, child protection and anti-terrorism, Parliament has introduced protective measures. These may significantly interfere with a person's freedom of action. Often they can be obtained from a court on the basis of **hearsay** evidence or evidence which is not fully disclosed to the parties.

Key definition

Hearsay

The evidence is of a person who is not present in court and who cannot be cross-examined.

If such measures are considered to be "criminal" then the specific rights in article 6(2) and (3) apply and these include a specific right to examine witnesses (article 6(3)(d)). In respect of determinations of civil rights, however, such rights are just inferences from the general right to a fair hearing and, consequently, they are more context dependant and flexible. The matter is, however, complex. In *R (McCann) v Crown Court at Manchester* [2002] UKHL 39 the House of Lords held that a magistrate imposing an "Asbo" (Anti-Social Behaviour Order) was determining a civil, not a criminal, matter. However, the impact of an Asbo was so severe that the magistrate should be satisfied beyond a reasonable doubt that the Asbo was necessary – ie to the criminal standard of proof.

Public law

There is a middle range of hearings that, in the Convention sense, are neither civil nor criminal. Matters which are strictly public law and do not also involve private rights, are outside the scope of article 6. Hearings dealing with tax and immigration have been held, by the ECtHR, not to involve private rights but, rather, civic duties or privileges which are within the discretion of the state. As such they are not covered by article 6 at all. Difficult questions arise over hearings determining disputes about welfare (pensions, unemployment pay, housing entitlement etc). The extent to which article 6 applies depends on the degree to which courts, tribunals and officials are giving effect to settled rights in contrast to them exercising discretion within a policy framework. Where the issue is clearly the latter, article 6 may not apply. It needs to be remembered, though, that "public law" decisions of this kind can still be challenged, in England and Wales, through an application for judicial review and one of the grounds of such an application is that the procedure is unfair – lacking "natural justice".

Determination.

Article 6 only applies when a civil right or criminal charge is being “determined” by the court, tribunal, etc whose procedure is being questioned. Usually, therefore, article 6 does not apply to preliminary matters - such as the procedures for investigating a complaint against an individual prior to deciding whether to take further action. Whether a matter is merely preliminary can be difficult to define. The UK case, *G v Governors of X School*, illustrates some of the issues.

R (G) v Governors of X School [2011] UKSC 30

BACKGROUND

Sexual misbehavior was alleged against G, a classroom assistant at X School. G was sacked by the governors on the basis of an investigation and hearing at which he was denied representation. If article 6(1) applied, representation in these circumstances would be required.

Consequently the school had a statutory duty to report G to the Independent Safeguarding Authority (ISA). The ISA had the power to deny G the right to continue working as a teacher.

PRINCIPLE ESTABLISHED

The UKSC held that right to practice a profession is a civil right (see, for example, *Le Compte v Belgium* (1983) 5 EHRR 533).

Normally, however, the procedure by which an employer dismisses an employee will not be determining this right: this is done by the County Court or Employment Tribunal to whom the employee can apply to test the legality of the dismissal. Court or Tribunal procedures must satisfy article 6.

It was the ISA which determined G’s civil right. If the dismissal by the school was a significant factor in the decision by the ISA, article 6 rights would apply to the school as well as the ISA – the law would see it as a single procedure. However, on the facts the ISA made its own assessment and did not rely on the school’s view.

Therefore article 6 rights did not apply to the dismissal proceedings.

On-the spot-question

What kinds of hearings or trials are NOT covered by article 6?

SUBSTANCE OF A FAIR HEARING: CIVIL AND CRIMINAL HEARINGS

Having considered the kinds of hearing to which article 6 applies, we now should discuss the content of those rights.

Fig 7.2 summarises the rights of civil litigants and criminal defendants.



“Fair hearing” – inherent rights

Civil litigants and criminal defendants enjoy a right to a fair hearing. However, article 6 says little about what that means in practice. So the substance and application of the right is left to the way article 6 is interpreted by the ECtHR and domestic courts under the HRA.

European countries have very different legal systems and approaches to fairness. In particular there are significant differences between the common law approach of England and Wales and the “civilian” system found on the continent. The role of ECtHR is not to enforce any particular system. It does not, for example, require a jury. Its concern is with the overall fairness of the procedure used, whatever it is.

What the ECtHR has done is to identify a number of basic rights that are inherent in, or implied by, the idea of a fair hearing. These are rights without which it would be hard to see a procedure as fair. Two of these inherent rights are of great importance:

- the right of “access to court”. There may be a breach of article 6 if some legal rule or administrative practice has the effect of preventing a person from pursuing a legal right through the courts. A breach of this rights is arguable if, for example, the law allows the prison authorities to restrict a prisoner’s ability to contact a solicitor and pursue a case against the prison authorities, or if court fees are raised so high that they deter would be litigant.
- the principle of “equality of arms”. Under this principle a hearing as only fair if all parties have equal access to the evidence. Systems which, for example, allow the prosecution to have special access to the judge, not enjoyed by the defence, may breach this principle. In the counter-terrorism context in the UK, there are various procedures which arguably undermine the principle. An examples is that a person can be deported without knowing the details of the evidence against him or her.

Inherent rights are not treated as absolute. They are flexible and the specifics of what they require depend very much on context and circumstance. However, there are limits to this flexibility. The courts must ensure that the “essence” of the right is maintained. Any restrictions must be for a legitimate purpose and proportionate and there should be counter-balancing measures to protect the person involved. Restrictions which deny the protection of article 6 altogether will be violations.

A v UK (2009) 49 EHRR 29

BACKGROUND

AF and others were foreign terrorist suspects held in prison without trial after “9/11”. Although they could challenge their position before a special tribunal (the Special Immigration Appeals Commission) they were not allowed to see the “closed evidence” upon which the Commission relied. AF alleged a breach of the fair hearing provision in article 5 (the right to liberty, see Chapter 6) – but the position adopted by the ECtHR applies to article 6 as well.

PRINCIPLE ESTABLISHED

A Grand Chamber held that equality of arms had been violated. If, as in this case, the “sole or decisive” evidence against a person was unknown to them and could not be challenged, the right to a fair hearing was violated. The existence of counter-balancing provisions (such as the use of **special counsel**) could not remedy this. The very essence of the right was lost.

This point is discussed further below in respect of article 6(3).

Key definition

Special counsel

These are security cleared advocates, who can see all the secret ("closed") material but cannot disclose it to or discuss it with their clients.

Overall the ECtHR requires an "adversarial" approach in the limited sense that a litigant or criminal defendant must be able to make his or case in an effective way. The principles of access to court and equality of arms embody this principle. So do other issues such as whether or not, in the context, an oral hearing is necessary for fairness, where the burden of proof lies, the ability of a litigant or defendant (such as a child) to follow proceedings and whether, in the circumstances, representation is necessary. As said above, it is not for the ECtHR to lay down particular rules and practices but to decide whether, in the circumstances, the procedure was fair.

Delay in proceedings is a matter, expressly mentioned in article 6, which can affect the overall fairness of civil or criminal proceedings. The ECtHR does not identify particular time periods (e.g. the maximum time a prisoner can be kept on remand before trial) but is concerned with what is acceptable in the circumstances.

Independence and impartiality

A court or tribunal subject to article 6 must be independent and impartial.

Broadly speaking:

- independence - courts and tribunals determining civil rights and obligations or criminal charges must make their own decision and not allow themselves to be persuaded by the views of others, especially those of the government.
- impartiality - such bodies must not be swayed by prior assumptions or prejudices which might create a possibility that the decision would be arrived at unfairly.

There is nothing new in this under domestic law. English common law already gives a remedy if courts, tribunals and administrative bodies allow their freedom to decide cases to be "fettered" by outside bodies or if they allow themselves to be dictated to by others, including political superiors. Likewise they must be seen to be acting without "bias". These rules of "natural justice" were amended a little to bring in line with Article 6.

Article 6 has had a significant impact in the UK in respect of independence. Some important and long standing institutions and procedures have been scrutinized under article 6 and, because they lacked independence, needed to be changed. Thus the system of courts martial had to be reformed because the links between the officer who ordered the court martial and the court were too close setting up a possible presumption of guilt (*Findlay v UK* (1997) 24 EHRR 221); and employment tribunal rules had to

be changed in respect of cases in which the Secretary of State, who appointed the members, was a party (*Scanfuture v Secretary of State for Trade and Industry* [2001] ICR 1096). In Scotland radical reform of the system of appointing temporary sheriffs (magistrates) was required following *Starrs v Ruxton* (2000) SLT 42.

Some decisions taken by administrative bodies (such as local authority planning committees or housing departments) can involve determining civil rights. If so any internal system of review or appeal is likely to lack the independence required by article 6. If such bodies had to organize themselves so as to satisfy article 6 there would be huge consequences for efficient public administration (e.g. if all housing decisions had to be tested by a specially constituted independent judicial body). The way out of this dilemma is that article 6 is satisfied so long as there is a right of appeal to a court, such as the County Court. So long as this appellate court or tribunal has “full jurisdiction”, in the sense of being able to deal with all the relevant issues of fact and law, article 6 can be satisfied.

Openness

The other basic right is to a public hearing and to the decision being given in public.

It is a long standing principle, found in common law as much as in article 6, that justice must be done in public. There is both an individual right to a trial in public but also a strong public interest in open justice. As always, though, there are exceptions. Article 6 allows the exclusion of the media and the public from trials when this is necessary, for example, to protect the rights of juveniles or other vulnerable persons. But exceptions need to be carefully scrutinized. There is an increasing tendency in the UK to have secret proceedings in the context of trials and hearings dealing with national security and anti-terrorism. Article 6 can allow this subject to proper scrutiny. The danger is that such proceedings can be used to keep wrong doing, particularly complicity in torture, from the public eye. This matter is discussed further, below, in the context of the withholding of evidence.

On-the-spot-question

Consider the disciplinary procedures at the place where you study or work – how fair are they?

SUBSTANCE OF A FAIR HEARING: CRIMINAL CHARGES

Persons being tried for a criminal offence enjoy not only the full gamut of rights under article 6(1) (interpreted in the context of a criminal offence) but also additional rights which are those which aim to protect the defence in a criminal process. Again, these rights are also found in common law and statute. Although there is much common ground, there are, as will be demonstrated, a number of issues where article 6 may have made a difference.

Article 6(2) The right to be presumed innocent

There are few, if any, principles of criminal law more fundamental than the right of the defendant to be presumed innocent and the consequential duty is on the prosecuting authorities to prove the case “beyond a reasonable doubt”. This right is firmly entrenched in the common law and is reinforced by article 6. It is inherent both the general idea of a fair trial (article 6(1)) and in article 6(2).

The extent to which this principle requires a defendant to have the right to remain silent and the right not to be tried on the basis of evidence he or she has been compelled to produce, has been problematic.

English law, for instance, allows a jury to infer guilt from the silence of a defendant in certain circumstances. Embodying the general approach of the ECtHR, these provisions will not violate article 6 so long as there is some supporting evidence upon which the conviction can be based and thus the essence of the right is not destroyed (see *Murray v UK* (1996) 22 EHRR 29).

O'Halloran v UK (2008) 46 EHRR 21 .

BACKGROUND

Owners of cars caught on speed cameras receive a letter asking whether they were driving the car. It is a criminal offence not to answer truthfully. That answer can then be used as evidence in a separate prosecution, of the owner, for speeding.

O'H argued that he was being convicted, for speeding, on the basis of evidence he had been compelled to provide and this destroyed his right to be presumed innocent of the speeding charge.

PRINCIPLE ESTABLISHED

The right to silence was not absolute. In the circumstances, particularly road safety and the fact that driving was a licenced and regulated activity, the interference with the right was proportionate. The court dealt with the right to silence as inherent in a “fair hearing” in article 6(1); article 6(2) raised no separate points.

Another commonly found feature of English criminal law is the “reverse onus” defence. This is where, if a certain set of facts are proved, the defendant is presumed guilty unless he or she can prove otherwise. For example, the occupier of premises on which explosives are found is presumed to be guilty of an offence unless he or she can prove that they had no knowledge of the explosives. Article 6 can be used to ensure that the burden of proof remains with the prosecution. Normally the defendant’s explanation for what happened will be accepted unless the prosecution can prove that it is false or inadequate (e.g.

Sheldrake v DPP [2004] UKHL 43). Again, this is a matter that engages both article 6(2) and the general right to fairness in article 6(1).

Article 6(3)(a)-(e)

Criminal defendants enjoy the general right to a fair hearing in article 6(1) and the specific rights inherent in it and also the presumption of innocence in article 6(2). In addition Article 6(3) provides a criminal defendant with a number of basic rights concerning the fair conduct of the trial. Thus a defendant must

- know the case against him or her;
- have adequate time and facilities to prepare a defence;
- be able to defend him or herself; and this includes a right to be represented and have the benefit of legal aid if “the interests of justice so require”;
- To cross examine prosecution witnesses and have equal rights as the prosecution to compel the attendance of and examine defence witnesses;
- To use an interpreter if necessary.

These rights are also strongly guarded principles of fairness in the common law. Nevertheless, the fact that they are express rights in the Convention may give them a stronger presence and make them less vulnerable to being weakened by statutory change. The issue of tension between the common law approach and the Convention showed itself in *Horncastle*.

R v Horncastle [2009] UKSC 14

BACKGROUND

In *Al-Khawaja v UK* (2009) 49 EHRR 1, a chamber of the ECtHR had held that a conviction based “solely or to a decisive extent” on hearsay evidence would necessarily violate Article 6.

In English law, an Act of Parliament gave judges discretion to admit **hearsay** in a criminal trial. H and C were convicted on evidence given in court from witnesses who had died or absconded. This was decisive evidence on which H and C were convicted.

PRINCIPLE ESTABLISHED

The UKSC declined to follow *Al-Khawaja*. A conviction solely or decisively based on hearsay could, nevertheless, be fair overall because of protections in the Act of Parliament and because of the discretion of judges to exclude evidence if it would be unfair to admit it (see s78 Police and Criminal Evidence Act 1984).

In *Al-Khawaja v UK* (2012) 54 EHRR 23, a Grand Chamber of the ECtHR departed somewhat from the chamber and held that the sole or decisive rule was not an absolute. Later cases in the UK have allowed

decisive hearsay evidence if tests of reliability and other protections are satisfied (eg: *R v Riat* [2012] EWCA Crim 1509).

The underlying human rights issue in *Horncastle* is the extent to which a criminal defendant has an absolute right, under article 6(3)(d), to know the case against him or herself and be able to challenge and test the evidence in court. The same issue has given rise to great political and legal controversy in the context of counter-terrorism law. Here the context is “civil”, engaging article 6(1), rather than criminal trials. Special powers, such as public interest deportations or the imposition of controls (Terrorist Prevention and Investigation Measures) on suspects, all involve hearings before judges. The evidence may have been obtained from a foreign power under the condition that it would not be disclosed. On the other hand the evidence may be unreliable or suggest that there has been torture or other ill-treatment which the applicant needs to have disclosed if he is to defend him or herself or pursue a legal action. The UK’s answer has been to use **special counsel**. Under the Justice and Security Act 2013 use of special counsel in closed hearings will be permitted for civil actions (such as suing UK officials in Tort for alleged complicity in torture).

SUMMARY

Article 6 guarantees rights to a fair hearing for those pursuing their private rights (“civil rights”) in the courts and those who have been accused on crimes. As some of the cases discussed above illustrate, article 6 rights are involved in some of the great legal controversies of the times, such as over counter-terrorism and anti-social behavior. Article 6 is an important inhibition on governments, acting in good faith, for the public interest, who are trying to push back the boundaries of the rule of law. Though article 6 is clearly flexible and what it requires can be affected by context, the courts must, nevertheless, uphold the essence of a fair trial.

ISSUES TO THINK ABOUT FURTHER

Maintaining fair trials in the national security context remains controversial. The Justice and Security Act 2013 allows the wider use of closed evidence in civil actions against the government. Critics argue that this may mean that evidence of government complicity in torture might not be publicly disclosed and that the rule of law, generally, will be weakened. The government’s defence is that this allows the evidence to be tested under judicial standards and officials to defend themselves from extremely serious allegations.

FURTHER READING

- Fordham, M. "Security and Fair Trials: the UK Constitution in Transition" (2012) *Judicial Review*, 17(3), 187-202
A thorough examination of the law on closed material procedures in the context of the Justice and Security Bill (now enacted).
- *Begum v Tower Hamlets LBC* [2003] UKHL 5, paragraphs 25-35.
In these paragraphs Lord Hoffmann explains "civil rights and obligations" in the context of administrative decisions.
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- Clayton, R and Tomlinson, H. *Fair Trial Rights* (2010) Oxford: OUP
A full exploration of both common law and Convention law on the issue.