

Articles 5 and 6, European Convention on Human Rights

Schedule 1, Human Rights Act 1998

Introduction

In practice, the Article 5 right to liberty arises almost solely in the context of criminal proceedings. It sets out a variety of conditions forming minimum standards of conduct to be adhered to when a state wishes to arrest and/or detain an individual.

Article 6, the right to a fair trial, has a far broader practical application, potentially binding all triers of issues in a variety of legal proceedings: both criminal and civil; in trials, tribunals and other hearings. It grants people a right to a fair and public hearing before an independent and impartial tribunal within a reasonable time.

Article 5: the right to liberty and security

The right to liberty and security of a person is enshrined in Article 5 of the Convention. It is not an unconditional right (it is a “limited” right), in that the right may be cut short, but only in the six exceptional procedural circumstances contained in Article 5(1)(a) to (f). The Article goes on to set out rights in relation to arrest and/or detention in Article 5(2) to (5).

Procedural circumstances: Article 5(1)(a) to (f)

The procedural circumstances in which the right may be curtailed may be summarized as:

- lawful detention after conviction;
- lawful arrest or detention for non-compliance with a court order **OR** to secure compliance with a legal obligation;
- lawful arrest or detention where there is reasonable suspicion a crime was or will be committed **OR** to prevent such a person fleeing;
- lawful detention of a minor to ensure educational supervision **OR** to bring a minor before the court;

- lawful detention to prevent the spread of disease **OR** detention of those of unsound mind, the alcohol-dependant, drug-dependant, or vagrants; and
- lawful arrest or detention of those either entering the country illegally **OR** subject to deportation or extradition.

Arrest or detention: Article 5(2) to (5)

Specific provisions relating to the rights of those detained and/or arrested may be summarized as the:

- right to be informed of the reasons for arrest **AND** of any charge;
- right to be brought promptly before a judge **AND** right to trial in a reasonable time **AND** conditions as to bail, where granted;
- right to review of proceedings **AND** right to liberty where such proceedings are deemed unlawful; and
- right to compensation if such proceedings are deemed unlawful.

Summary

Article 5 broadly defines a set of both individual rights and imposed obligations on the state in relation to any arrest and/or detention of a person. An individual may forfeit their right in the explicit, finite and exhaustive circumstances set out in the Article.

Derogation

Shortly after the terrorist attacks on New York and Washington DC, the UK enacted The Anti-Terrorism, Crime and Security Act 2001. The Act is a good example of derogation from the right to liberty: it allowed for the detention of suspected terrorists outside of the circumstances set out in the Article. The House of Lords, however, ruled the provisions unlawful.¹

Further government attempts at derogation from the right have followed, most notably perhaps “control orders” under the Prevention of Terrorism Act 2005,

¹ *A (FC) and Others v Secretary of State for the Home Department* [2005] 2 AC 68, HL.

introduced to replace the flawed regime of the 2001 Act. Multiple challenges to the legitimacy of these orders have followed. A recent case quashed a control order *ab initio*.²

Cases

Some of the more interesting cases include:

- *Winterwerp v Netherlands* 2 EHRR 387 – Article 5(1)(a) to (f) to be narrowly construed;
- *Bozano v France* 9 EHRR 297; *Benham v UK* 22 EHRR 293 – the ECtHR is the ultimate authority in determining Article 5’s application in national law;
- *Van Droogenbroek v Belgium* 4 EHRR 443; *R v Governor of HMP Brockhill, ex parte Evans (No. 2)* [2001] 2 AC 19, HL; *A v Secretary of State for the Home Department* [2005] 2 AC 68, HL – on arbitrary detention;
- *Krzycki v Germany* 13 DR 57; *Weeks v UK* 10 EHRR 293 – Article 5 not a basis for challenging the fairness of a trial or sentence; and
- *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2005] QB 678, CA (Civ.); *Al Fayed v Metropolitan Police Commissioner* (2004) 148 SJ 1405, CA (Civ.) – “reasonable suspicion” to be construed objectively.

See also lines of cases on bail (Archbold, 16-52 ff.), *habeas corpus* (16-55), and life/extended sentences (16-56).

² *Secretary of State for the Home Department v AF* [2010] EWHC 42 (Admin), 18 January 2010.

Article 6: the right to a fair trial

In language typical of the ECHR, Article 6 expansively defines the guarantee to a fair trial. The right is set out in terms at 6(1); 6(2) ensures the presumption of innocence (stemming, it is assumed, from the “burden of proof rests on who asserts, not on who denies” concept: *ei incumbit probatio qui dicit, non qui negat*); and 6(3)(a) to (e) are a set of minimum fair trial rights.

Minimum rights: Article 6(3)(a) to (e)

The minimum rights may be summarized as the:

- right to be informed of the nature **AND** cause of any accusation;
- right to be given time **AND** resources to prepare a defence;
- right to appear in person **AND** to free assistance where needed;
- right to examine witnesses against him/her **AND** to have witnesses on his/her behalf produced; and
- right to interpretation where needed.

Summary

Article 6 broadly defines a set of both individual rights and imposed obligations on the state in relation to the fairness of trials. An individual is guaranteed specified, minimal and non-exhaustive rights as set out in the Article.

Constantly evolving...

In a practical context, the right is importantly defined as a fluid concept: what was, say, at a particular point in a trial, no breach of the right, may become one over time. This closely mirrors typical abuse of process arguments seen on a daily basis in the courts. By definition, therefore, the right demands of trial lawyers constant vigilance over the course of each individual case for a possible breach.

Criminal versus civil

The right established by the Article draws a distinction between criminal and civil proceedings. In the broadest terms, the rights of an individual accused of a crime are set at a higher watermark than those involved in civil proceedings.

Public versus private

Again in a gross over-simplification of the highly-evolved case law, it might be said that only private rights are subject to the protection afforded by the Article; pure public rights are excluded. A good example of this is a dispute under immigration legislation.

Cases

The volume of cases concerned (or *partly* concerned) with fair trial rights vastly outnumber those dealing with Article 5. A minimal selection of some of the more interesting cases on the general aspects of the right include:

- *Morieva de Azvedo v Portugal* 13 EHRR 721; *Delcourt v Belgium* 1 EHRR 355; *De Cubber v Belgium* 7 EHRR 236 – Article to be given a broad and purposive interpretation;
- *R v H* [2004] 2 AC 134, HL – the right in constant evolution;
- *Artico v Italy* 3 EHRR 1; *Edwards v UK* 15 EHRR 417 – minimum guarantees are specific aspects of the general right and therefore non-exhaustive;
- *Engel v Netherlands* 1 EHRR 647 – scope of “criminal proceedings” confined to proceedings involving a “criminal charge”; and
- *R v Weir* [2001] WLR 421, HL; *Helmets v Sweden* 15 EHRR 285 – rights extend only to a defendant, not to the prosecution.

Further topics

Time does not permit covering all aspects of the right and the case law. Some of the other important areas are: equality of arms (Archbold, 16-63 ff.); juries (16-65); evidence generally (16-66 ff.); anonymous witnesses (16-68); self-incrimination (16-69 ff.); private hearings and hearings in the absence of the accused (16-71 ff.);

efficiency and impartiality (16-73 ff.); public interest immunity (16-85 ff.); hearsay evidence (16-91 ff.); and appeals (16-95 ff.).

Conclusion

Articles 5 and 6 of the Convention are not, as some say, the “last refuge of the damned”; they are important and powerful tools available to any lawyer in a seemingly endless set of circumstances. Their application by trial chambers, tribunals and other triers of facts and issues ought to be tough, uniform and supreme. Does this always happen in practice? Even the generous must admit that it does not. But there ought to be no shame in invoking *in practice* the rights and obligations set down by the Convention’s framers, and interpreted and applied from the lowliest courts in the country, through our appeals courts and the Supreme Court, up to the full, seventeen-strong bench of the Grand Chamber in Strasbourg.

Will Byrne
Pupil
Trinity Chambers
Newcastle upon Tyne
4 March 2010

Selected resources

Books

European Human Rights Law *Starmer, Kilroy*

2nd revised edition, to be published 30 September 2010.

Human Rights and Criminal Justice *Knowles, Emmerson QC, Ashworth QC, Macdonald*

2nd revised edition, 22 Jun 2007.

Archbold: Criminal Pleading, Evidence and Practice

2010 edition, chapter 16 – Article 5: 16-43 ff.; Article 6, 16-57 ff.

Websites

<http://www.crimeline.info>

Constantly updated, especially on the line of control order cases, and on abuse of process. Excellent, free email updates on both substantive and procedural criminal law – especially good on the recent legal aid proposals for reform.

<http://www.justice.gov.uk/guidance/humanrights.htm>

Useful, if basic, government-produced guides and annual human rights reviews.