

ALBA SUMMER CONFERENCE 2009

PROPERTY RIGHTS AND THE ECHR

THE ROLE OF PROCEDURAL PROTECTION: OUTLINE

Javan Herberg
Blackstone Chambers

Introduction

1. This paper is concerned with the procedural aspects of Article 1 of the First Protocol (“A1P1”): the circumstances in which a person claiming a violation of A1P1 rights is able to claim (as part of the protection offered by A1P1) procedural or other representational rights in respect of the decision of which he or she complains, either before the decision is taken, or afterwards, by way of challenge.

2. It has been suggested that recent Strasbourg case law has considerably expanded the procedural ambit of A1P1. Some commentators have suggested that A1P1 now incorporates, via its requirement that an interference with property rights be “*in accordance with law*”, a guarantee of fair process or hearing complying with all material aspects of Article 6 ECHR. The main (English) textbooks do not (yet) reflect this position, and have in many cases afforded relatively brief treatment to the procedural aspect of A1P1.¹

3. A number of distinctions, or complications, need to be borne in mind in considering the applicable principles:
 - (a) First, the question of the extent of procedural rights falls to be considered against a great range of types of interference, ranging from, at one extreme, a challenge to the substance of an out and out

¹ See e.g. Harris, O’Boyle & Warbrick, *Law of the ECHR* (2nd ed, 2009), at 671-2; 676-7; 682; Lester, Pannick & Herberg, *Human Rights Law and Practice* (3rd ed, 2009) at 4.19.25 and 4.19.30; Clayton and Tomlinson, *Law of Human Rights* (2nd ed) 18.42; 18.119; van Dijk et al, *Theory and Practice of the ECHR* (4th ed), at 866-7.

statutory expropriation/nationalisation programme; to, on the other hand, challenges to controls of use. The case for an injection of procedural rights may look very different depending upon the nature of the interference.

- (b) Secondly, the extent of procedural rights may (arguably) be affected by whether the challenge is to the expropriation itself (i.e. the justification for the deprivation or control of use), or is principally directed to the issue of compensation (remembering always that the two are not wholly distinct in A1P1 jurisprudence).
- (c) Thirdly, A1P1 should not be viewed in isolation. An interference with property rights may well involve a determination of civil rights and obligations so as to engage the procedural protections of Article 6. That is no doubt one of the reasons for the underdeveloped nature of the A1P1 case law. But A1P1 is not just duplicative. There may be no determination of civil rights. And there are areas (e.g. taxation) where Art 6 may not be engaged.

Traditional Strasbourg approach to procedural rights

- 4. There are no express procedural obligations under any of the three limbs of A1P1. Absence of power of judicial review of an impugned interference does not necessarily amount, of itself, to a violation of A1P1 : *Fredin v. Sweden* (1991) EHRR 784, para 50 (“*This matter falls instead to be considered under Article 6*”) – a much distinguished passage.
- 5. Instead, procedural safeguards are relevant to the question of whether the impugned measure satisfies the proportionality test; whether it strikes a “*fair balance*”, or whether (when the test is applicable) the impugned measure is “*manifestly without reasonable foundation*” : *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35. The fair balance test provides (inter alia) protection against the arbitrary and disproportionate effects of an otherwise valid

national law. *Sporrong and Lonnroth* was itself in one sense a “procedure” case: the applicants succeeded because (inter alia) there was no procedure by which they could challenge the long-continued application of expropriation permits which were blighting their property.

6. In some instances, it is strongly arguable that the location of procedural rights as no more than a factor under the “fair balance” proportionality test means that even the complete absence of a route of challenge will not mean that the measure violates A1P1. At the extreme: a manifesto-promised nationalisation programme, embodied in primary legislation (cf *James v. UK* (1986) 8 EHRR 123; *Lithgow v. UK* (1986) 8 EHRR 329). It is hard to envisage a successful challenge to the substance of the deprivation (i.e. not just to the compensation offered) on the basis that no procedural rights were offered before the legislation was enacted.
7. However, the importance of procedural avenues of challenge in establishing a “fair balance” was emphasised in the much-cited case of *AGOSI v. UK* (1986) 9 EHRR 1 (forfeited smuggled Krugerrands; innocent owner alleging deprivation):

“... although the second paragraph of A1P1 contains no explicit procedural requirements, the Court must consider whether the applicable procedures in the present case were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company’s conduct and the breach of the law which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities” (para 55).

On the facts, the ECtHR set the bar very low for being satisfied as to the procedural avenues available: administrative review by Customs coupled with the availability of judicial review were sufficient, including *Wednesbury* review of factual questions at issue. It is difficult to see how this could have satisfied the corresponding *Bryan* Article 6 question. See also, for the approach in confiscation cases, eg *Air Canada v. UK* (1995) 20 EHRR 150; *Yildirum v Italy* 38602/02/, 2003-IV DA; *Raimondo v Italy* (1994) 18 EHRR 237.

Positive Obligations

8. A1P1 carries with it *positive* obligations on the State to provide an expeditious process for challenge, at least where interference leads to the determination of a civil right : i.e. an art 6(1) compliant process. See e.g., *Sovtransavto Holding v Ukraine* (2004) 38 EHRR 911:

“States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons”[96].

The State failed to do so in circumstances where the entire litigation process, including the State intervention, was conducted in an unfair manner [97-8].

Expansion of procedural rights

9. Two cases often cited as initiating a greater prominence for procedural rights are *Hentrich* and *Jokela*. In *Hentrich v. France* (1994) 18 EHRR 440 (challenge to pre-emption confiscation by tax authorities, where Revenue considered purchase price of land below market value), the Court held that the pre-emption *“operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards”* [42]. But in finding an violation of A1P1, it went further:

“A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price ...”.

Note, however, that (a) while expressed in general terms, this was a limited finding of necessary procedural protections in the context of a factual challenge to the Revenue’s case, and (b) the reasoning as to procedural safeguards was still mediated through the *“fair balance”* proportionality approach: it was because the Applicant had not been able to challenge what was an arbitrary procedure that *“she bore an individual and excessive burden”*, with the result that the measure offended the *“fair balance which should be struck between the protection of the right of property and the requirements of the*

general interest" [49]. The case provides no support for the suggestion of a free-standing procedural right free of the "fair balance" test.

10. *Jokela v Finland* (2003) 37 EHRR 581 was another challenge to the way in which the state authorities had calculated the market value of inherited property for the purposes of expropriation and (separately) inheritance tax assessment. The ECt HR described in broad terms the procedural aspect of A1P1: (at [45]), citing *AGOSI* but going further:

"the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition is satisfied, a comprehensive view must be taken of the applicable procedures".

Despite the apparently unqualified nature of the proposition, it is notable that on the facts, the Court found no procedural breach on the basis that (fairly limited) expropriation proceedings gave the applicants a reasonable opportunity to put their case [55]. The breach of A1P1 which was found related to a separate issue: the inconsistency between the state approach in the inheritance tax and expropriation limbs of the case.

11. Some more recent examples of the procedural limb:
 - (a) *Capital Bank v Bulgaria* (2007) 44 EHRR 48 (challenge to withdrawal of banking licence, putting bank into compulsory liquidation). Despite citing *Fredin* (absence of judicial review does not amount, of itself, to a violation of A1P1), the ECt HR held [134] that the concept of lawfulness required "*in certain cases ... some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence ... any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual ... a reasonable opportunity of presenting their case to the responsible authorities ...*". The absence of such an opportunity led to the striking down of the measure – but it should be noted that the ECtHR still considered, before reaching that conclusion, the "fair balance" (here, a "wide margin of appreciation"

[136]). It was only because there was no justification, judged against that basis, for the absence of procedural rights, that the measure failed to comply.

- (b) *Druzstevni Zalozna Pri v Czech Republic*, Hudoc, 72034/01 (2009). ECtHR found that the exercise of a statutory power to place a credit union in receivership was not lawful for the purpose of A1P1 solely because of the absence of procedural safeguards accompanying the interference. The Court (a) continued to use the *Capital Bank* formulation of “in certain cases, subject to some form of adversarial proceedings” and (b) still located the procedural obligations under general rubric of fair balance [93]. It concluded that while the taking of the credit union into receivership without procedural challenge *could* have passed A1P1 muster, the denial of access to its business documents thereafter to assist in a challenge to the measure contravened A1P1 [94].
- (c) *Forminster Enterprises v. Czech Republic* (38238/04, ECtHR 9 October 2008) (seizure of securities of company). The ECtHR held [71-2] that the power of the Constitutional Court (despite limited jurisdiction) to deal with and rule on the complaint of the applicant challenging the seizure meant that it could not be regarded as having been deprived of its procedural rights : despite the fact that the jurisdiction of the Constitutional Court was plainly narrower than judicial review.
- (d) A reality check : *Security Industry Authority v Stewart* [2009] 1 WLR 466, Div Ct, per Laws LJ at 43-47.

“Deeming” cases: Procedure or Substantive A1P1?

- 12. *Katkaridis v Greece* (2001) 32 EHRR 107: the blanket assumption contained in Greek legislation providing a scheme for compensation for expropriation of

land for roadbuilding that there was a financial benefit in having a major road built abutting one's property was "*too inflexible*" : what was needed to satisfy the "fair balance" requirement was a system which gave landowners *an opportunity to make representations* in the valuation proceedings that the work had no, or less, benefit than assumed – or , indeed, caused a loss.

13. See also *Efstathiou v Greece* (2006) 43 EHRR 24 (modified presumption in road expropriation case still unlawful).
14. These cases can be regarded *either* as examples of procedural requirements (Applicant closed off from arguing that his property was not enhanced by road building) or as concerned with the substantive A1P1 obligation (the value given to the Applicant's property by the valuation assumptions was far less than it was actually worth).

Parallel approach in EU Law

15. *Partridge Farms Ltd v. Secretary of State for the Environment, Food and Rural Affairs* [2009] EWCA Civ 284, 1 April 2009: challenge to adequacy of compensation based upon breach of Community principle of equality.