Case-law of the ECtHR on the Right to an Effective Judicial Review

The ECHR does not provide for the right to judicial review as such. However, it is indirectly established by Article 6(1) and Article 13 ECHR which provide for the right to a fair trial and the right to an effective remedy respectively. Unlike Article 6(1) ECHR, Article 13 applies equally to all types of disputes adjudicated by courts and administrative tribunals.

Article 13 ECHR stipulates that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

Two judges have called Article 13 ECHR “the most obscure” provision of the Convention.\(^1\) In the same vein, it has been noted that the approaches to the interpretation of Article 13 ECHR by the ECtHR “have oscillated, now demanding more of states, now less, as they have sought an understanding of Article 13 which fits into the whole structure of the Convention”.\(^2\)

The ECtHR explained that Article 13 ECHR is an auxiliary provision, which can only be invoked in relation to another Convention right. In this sense, Article 13 guarantees “the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order”.\(^3\)

The effectiveness of the remedy provided for by Article 13 ECHR has four elements:

1) institutional, requiring that the decision-maker fulfils a minimum standard of independence from the authority allegedly responsible for the breach of the Convention;

2) substantive, establishing that where a member state incorporates the Convention into the domestic law, Convention rights can be directly invoked before the domestic courts;

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1 Judges Matscher and Pinheiro Farinha, partly dissenting opinion in ECtHR. *Malone v. the United Kingdom*, application no. 8691/79, judgement of 2 Aug 1984.
2 Harris, D., M. O’Boyle, Ed Bates and C.M. Buckley, *op. cit.*, p. 445.
3 ECtHR. *Soering v. the United Kingdom*, application no. 14038/88, judgement of 7 Jul 1989, paragraph 12.
3) remedial, granting remedies for applicants whose claims are accepted by
the domestic courts;
4) material, implying that the applicant must be able to take advantage of
the remedy at her disposal. 4

Article 13 ECHR partially covers the subject-matter of Article 6(1) ECHR. When
there is substantive overlap, the Court considers only the complaints raised
under Article 6(1) ECHR because the requirements of Article 13 ECHR are less
strict than the requirements of Article 6(1) ECHR which absorbs them for this
matter.

14.1 Judicial Review in Administrative Law Disputes

In Obermeier, following unsuccessful domestic proceedings to challenge the
applicant’s dismissal, he lodged an application at the ECtHR complaining that
the domestic labour courts had considered themselves bound by the adminis-
trative decisions authorising his dismissal and that they had thereby deprived
him of the right to judicial review. 5

The ECtHR noted that the domestic Austrian courts have inferred from the
existing legislation that they were precluded from inquiring into the validity of
a dismissal which had received the authorisation of the administration’s board.
The domestic courts could only determine “whether the discretion enjoyed by
the administrative authorities has been used in a manner compatible with the
object and purpose of the law”. 6 In practice, the test applied by the domestic
administrative courts meant that they could not re-examine decisions taken
by the administrative authorities. As a result, individuals challenging their dis-
missal remained in the majority of cases, including the present one, did not
benefit from judicial review.

A few years later, another case against Austria raising the issue of effective
judicial review reached the ECtHR. In that case, a plot of land belonging to the
applicant and cutting in two his estate had been expropriated in order to build
a provincial highway. 7 The applicant contested this measure, complaining in
particular about the lack of a public hearing and about the refuse to appoint
an independent expert to assess the consequences of the proposed expropria-
tion. The relevant administrative authorities, the Constitutional Court and the

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4 Harris, D., M. O’Boyle, Ed Bates and C.M. Buckley, op. cit., p. 450.
5 ECtHR. Obermeier v. Austria, application no. 11761/85, judgement of 28 Jun 1990.
6 Obermeier v. Austria, quoted above, paragraph 70.
7 ECtHR. Zumtobel v. Austria, application no. 12235/86, judgement of 21 Sep 1993.
Administrative Court all dismissed the applicant’s appeal. The Constitutional Court of Austria decided “not to entertain the application since, in view of (...) the authorities’ discretion in determining the routes of highways, the application did not have sufficient prospects of success”.

The Administrative Court of Austria defined its jurisdiction in the following way. First, it was not allowed to put itself in the place of the administrative authority in order to take evidence, which the latter may have omitted to take, and was not allowed to supplement the investigation by itself taking investigative measures to establish the facts. Second, the Administrative Court could take evidence in order to determine whether an essential procedural requirement has been breached and to establish whether a procedural defect was essential or whether the administrative authority could have reached a different decision if that procedural defect had been avoided.

The ECtHR centred its analysis on the fact that, under Austrian Law, expropriation was not a matter exclusively within the discretion of the administrative authorities. The ECtHR noted, that despite its deference to the administrative authority, there was no violation of Article 6 because the Austrian Administrative Court “in fact considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts”.

In Bryan, an enforcement notice was served on the applicant to demolish two buildings that he had allegedly erected in breach of the planning legislation. The applicant complained that the High Court had no power to disturb the findings of fact made by the administrative authority unless there was a defect which was so great as to go to jurisdiction.

The ECtHR started its analysis by noting that the High Court’s appeal could not embrace all the aspects raised by the applicant against the administrative authority’s decision. The ECtHR noted that, as it was frequent in the Council of Europe Member States, administrative law appeals did not embrace (1) rehearing of original complaints, (2) substitution of the domestic courts’ reasoning for that of the administration or (3) unlimited jurisdiction over the facts. However, in the case brought by Mr Bryan, the administrative decision at issue could have been quashed by the High Court if “it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational.

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8 Zumtobel v. Austria, quoted above, paragraph 12.
9 Zumtobel v. Austria, quoted above, paragraph 32.
10 ECtHR. Bryan v. the United Kingdom, application no. 19178/91, judgement of 22 Nov 1995.
in the sense that no inspector properly directing himself would have drawn such an inference”.\textsuperscript{11}

Furthermore, the ECtHR stressed that the sufficiency of review should be tested in relation to matters such as the (1) subject-matter of the decision appealed against, (2) the manner in which that decision was arrived at, (3) the content of the dispute, including the desired and actual grounds of appeal, (4) the possibility to review shortcomings in the procedure.\textsuperscript{12}

Focusing on the subject-matter of the dispute, the ECtHR highlighted that there was no conflict over the facts of the case or the inferences that the inspector drew from the facts. Rather, the case revolved around “a panoply of policy matters” such as development plans, and the fact that the property was situated in a green belt and a conservation area. The ECtHR noted that such set-ups can “reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 § 1”.\textsuperscript{13} Highlighting that the case at hand was a typical example of the exercise of discretionary judgement in the regulation of citizens’ conduct in the sphere of town and country planning, the ECtHR concluded that there was no violation of Article 6(1) ECHR.

Some 10 years later, the ECtHR reassessed the test proposed in Bryan. In Tsfayo the applicant, who was a political refugee, benefitted from social housing provided by the social services department of Hammersmith and Fulham Council (the Council). Due to the applicant’s lack of familiarity with the benefits system and her poor English, she was late to re-apply for social housing. As a result, the housing association started eviction proceedings against the applicant. At the same time, a court order allowed the Council to deduct GBP 2.60 per week from the applicant’s income support of GBP 35.87.\textsuperscript{14}

The applicant’s appeal to the Housing Benefit Review Board (HBRB) was rejected. The High Court dismissed the applicant’s application for leave to apply for judicial review because, first, the ECHR had not yet been incorporated into English law and, second, because the HBRB’s decision was neither unreasonable nor irrational. The applicant complained to the ECtHR that her right to a fair trial had been breached in the domestic proceedings due to the fact that the HBRB was not independent and impartial and, unlike Bryan, the

\begin{itemize}
\item \textsuperscript{11} Bryan v. the United Kingdom, quoted above, paragraph 44.
\item \textsuperscript{12} Bryan v. the United Kingdom, quoted above, paragraphs 45–46.
\item \textsuperscript{13} Bryan v. the United Kingdom, quoted above, paragraph 47.
\item \textsuperscript{14} ECtHR. Tsfayo v. the United Kingdom, application no. 60860/00, judgement of 14 Nov 2006.
\end{itemize}
judicial review performed by the High Court was not such as to remedy a lack of independence at first instance.

The ECtHR first distinguished the present case from *Bryan* and the ensuing case-law against the United Kingdom in which the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, the case at hand posed a simple question of fact, by trying to clarify whether there was “good cause” for the applicant’s delay in reapplying for social housing. In addition, the HBRB rejected the applicant’s claim on the basis of their assessment of her credibility.

Second, the ECtHR noted that, in contrast to domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute. In fact, the HBRB included five councillors from the local authority which would be required to pay the benefit if awarded. The ECtHR unanimously found a violation of Article 6 and highlighted that such a connection might “infest the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure were not adequate to overcome this fundamental lack of objective impartiality”.

In *Terra Woningen b.v.*, the applicant company alleged a violation of Article 6(1) *ECHR* in that they had not had the benefit of effective judicial review because the District Court had considered itself bound by the Provincial Executive’s finding in respect of the soil pollution and its effects on public health and the environment.

The ECtHR noted that it was indeed unclear whether the soil pollution reached the threshold of serious danger to public health or the environment

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15 See, for example, ECHR. *X. v. the United Kingdom* (dec.), application no. 28530/95, judgement of 19 Jan 1998, concerning a determination by the Secretary of State that the applicant was not a fit and proper person to be chief executive of an insurance company.

ECHR. *Stefan v. the United Kingdom* (dec.), application no. 29419/95, judgement of 9 Dec 1997, concerning proceedings before the General Medical Council (“GMC”) to establish whether or not the applicant was mentally ill and thus unfit to practise as a doctor.

ECHR. *Wickramsinghe v. the United Kingdom* (dec.), application no. 31503/96, judgement of 9 Dec 1997, concerning disciplinary proceedings before the GMC.

And see also ECHR. *Kingsley v. the United Kingdom* [GC], application no. 35635/97, judgement of 28 May 2002, paragraph 32.

16 *Tsfayo v. the United Kingdom*, quoted above, paragraphs 47–49.

17 ECHR. *Terra Woningen b.v. v. the Netherlands*, application no. 20641/92, judgement of 17 Dec 1996.
such as to justify a reduction of the rent applied by the applicant company. However, what went against the spirit of the right to a fair trial was the domestic courts’ assumption that the serious danger to public health and to the environment was necessarily implied by the decision of the administrative authority. By drawing a relationship of necessary implication between the contested facts and the administrative authority’s qualification of them, domestic courts deprived themselves of jurisdiction to examine crucial facts concerning the dispute at hand. The Court concluded that for these reasons, the applicant company did not have access to a tribunal having sufficient jurisdiction to adjudicate the case before it.\textsuperscript{18}

In a similar case, the applicant was employed by the Bulgarian Railroad Office.\textsuperscript{19} Her contract of employment stated that she worked as a dormitory supervisor and social activities coordinator, but, in fact, the applicant worked as a typist at the local section of the Bulgarian Communist Party. The applicant was examined by the Diagnostic Expert Commission (\textit{DEC}) that found that she was suffering from vegetative polyneuropathy of the upper limbs, a disease featured on the Table of Occupational Diseases. The \textit{DEC}, relying solely on the applicant’s job description, found that the position occupied by her officially – dormitory supervisor and social activities coordinator – did not entail increased strain on her upper limbs. The \textit{DEC} concluded therefore that the applicant suffered from a non-occupational disease as no causal link could be established between her work conditions and the disease. This finding was upheld by the Central Diagnostic Expert Commission (\textit{CDEC}) and by the domestic courts. The Bulgarian Supreme Court deferred to the reasoning of \textit{DEC} and concluded that the applicant has not established before them the existence of a causal link between her disease and the conditions of work as a typist.\textsuperscript{20}

The ECtHR started its assessment by noting that the domestic courts have deferred the assessment of a crucial fact to the domestic administrative authorities and have thus deprived themselves of jurisdiction to sit on the applicant’s case. Such a set-up is compatible with the right to a fair trial only when the decisions of the administrative authorities were delivered following a procedure that is itself in line with Article 6. In the case at hand, the disputed administrative authority was under the authority of the Ministry of Health, their members were remunerated under service contracts with the Ministry of Health and did not have tenure. Furthermore, the \textit{DEC} did not have rules

\begin{footnotes}
\item[18] \textit{Terra Woningen B.V. v. the Netherlands}, quoted above, paragraphs 50–55.
\item[19] \textit{ECtHR. I.D. v. Bulgaria}, application no. 43578/98, judgement of 28 Apr 2005.
\item[20] \textit{i.D. v. Bulgaria}, quoted above, paragraph 24.
\end{footnotes}
of procedure, did not hold public hearings and took decisions about medical examinations that they themselves held. As to the judicial review performed by the domestic courts, the ECtHR noted that the Government have not furnished any example of a judicial decision confirming that a person was able to appeal against a decision of the cdec during the period at issue. The ECtHR found unanimously a violation of Article 6.21

In Kingsley, the applicant applied for judicial review of the decision of the Gaming Board by which he has been deprived of the right to hold a managerial position in the gaming industry. Both Justice Jowitt and the Court of Appeal dismissed the applicant's request for judicial review.22

Justice Jowitt noted that counsel from the Gaming Board accepted the existence of an appearance of bias in the proceedings involving the applicant. However, he noted that the existing appearance of bias did not give rise to a real gander of injustice due to the following elements: (1) the applicant benefitted from an extended hearing, (2) he had ample opportunity to present evidence in his favour, (3) there a few findings in favor of the applicant and 4) the calibre and experience of the Panel Members. Justice Jowitt found that even if there was bias on the part of the Gaming Board, it was justified by the doctrine of necessity:

When a body is charged by statute with the power or duty, which cannot be delegated, to make a decision in circumstances in which a question of bias arises because:

(i) in pursuance of that statutory power or duty an initial view has been formed upon a matter affecting the interests of someone in respect of whom the body in the exercise of its statutory power or duty has thereafter to make a decision, or final decision, after receiving and considering representations which he is entitled to make or

(ii) in the exercise of a statutory power or duty to make a decision a conflict arises between the interests of another or others which have to be taken into account and the body’s own interests.

The decision will not be liable to be impugned on account of bias provided that:

21 I.D. v. Bulgária, quoted above, paragraphs 50–55.
22 ECtHR. Kingsley v. the United Kingdom, application no. 35605/97, judgement of 7 Nov 2000.
(i) if only some of those charged with the power or duty to decide are potentially affected by bias such of them as can lawfully withdraw from the decision making do so and

(ii) those of the decision makers who are potentially affected by bias but cannot lawfully withdraw use their best endeavours to avoid the effect of bias and, consistently with the purpose for which its decision has to be made the body takes what reasonable steps are open to it to minimise the risk of bias affecting them.\(^{23}\)

The Court disagreed with the UK domestic authorities and found a violation of Article 6(1) ECHR, arguing that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of full jurisdiction involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body.\(^{24}\)

In another case involving deference to administrative bodies justified by the technical knowledge they held, the applicant was dismissed from a high-ranking position in the Ministry of Internal Affairs as a result of a psychological assessment performed on him.\(^{25}\) The applicant unsuccessfully contested his dismissal before the national courts.

The ECtHR highlighted that the reliance of the domestic courts on the expert opinions of specialized agencies was not contrary to Article 6(1) ECHR. However, when the domestic courts consider themselves bound by the assessment of such agencies and refuse to analyse the facts of the case for that matter, they may breach the right of access to a court as guaranteed by Article 6(1) ECHR. In the case at issue, the domestic courts refused to scrutinize the most important issue of the applicant’s case, that is his mental fitness to carry duties in the Ministry of Internal Affairs. In addition, none of the authorities involved with the case put forward a justification for such an approach, except for the

\(^{23}\) Kingsley v. the United Kingdom, quoted above, paragraph 24.

\(^{24}\) Kingsley v. the United Kingdom, quoted above, paragraph 58.

\(^{25}\) Fazliyski v. Bulgaria, quoted above.
existing statutory bar. For these reasons, the Court concluded that Article 6(1) ECHR has been violated in the case at issue.

14.2 Judicial Review in Disputes Involving “Criminal Charges”

The general applicability of Article 6(1) ECHR to disputes concerning a “criminal charge” has been discussed in Section 5.3. above.

In the early case Schmautzer the applicant was fined by the federal police 300 Austrian schillings with twenty-four hours’ imprisonment in default of payment for not wearing a seat-belt. The latter was considered an administrative criminal offence under Austrian Law. The applicant complained at the ECtHR that the domestic authorities that were involved in his case were not “tribunals” as required by Article 6(1) ECHR.

The ECtHR highlighted that the powers of the Administrative Court in the present case must be assessed in the light of the fact that the court was sitting in proceedings that were of a criminal nature for the purposes of the Convention. This meant therefore that a judicial body with full jurisdiction should have the “power to quash in all respects, on questions of fact and law, the decision of the body below”. The ECtHR also took into account a judgement of the Austrian Constitutional Court which held that limited review of criminal penalties was unconstitutional.

In Menarini, the applicant received a fine of 6 million euro from the Italian Competition Authority (AGCM) for breach of competition law. The applicant complained that the review of legality performed by the Italian administrative courts was incompatible with Article 6(1) ECHR. The applicant company further complained that the Italian administrative courts could not substitute their own assessments to those of AGCM, could only apply the legal norms identified by AGCM and had no means to modify AGCM’s decision. The applicant company contested the practice of the Italian Court of Cassation to consider that, when the administrative authority was endowed with discretionary powers, the domestic courts could not substitute their arguments to those of the independent administrative authority, but merely verify the logic and coherence of the power exercised by the administrative body.

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26 Fazliyski v. Bulgaria, quoted above, paragraphs 56–62.
27 ECtHR. Schmautzer v. Austria, application no. 15523/89, judgement of 23 Oct 1995.
28 Schmautzer v. Austria, quoted above, paragraph 36.
29 Menarini Diagnostics s.r.l. v Italy, quoted above.
The ECtHR highlighted that Article 6(1) *ECHR* required a full review of decisions reached by administrative authorities that did not meet independence requirements. The Court further noted that the characteristics of an administrative procedure may differ from those of a purely criminal procedure. However, the Court insisted that, while these characteristics cannot relieve a Member State from their obligation to respect all the guarantees enshrined in Article 6(1) *ECHR*, they can, however, influence means of implementation.\(^30\)

On the facts of the case, the Court found – with five votes to one – that the Italian system of judicial review of competition decisions was compatible with Article 6(1) *ECHR*. The Italian courts went beyond a review of legality, they verified if *AGCM* has used its powers appropriately, they assessed the soundness and proportionality of the choices made by *AGCM* and they even checked the soundness and proportionality of the *AGCM*’s technical evaluations. Lastly, the Italian courts performed a full review of the fine imposed by *AGCM*.\(^31\)

In his dissenting opinion, Judge Pinto de Albuquerque disagreed with the majority’s conclusion. He drew the attention to the long-standing and constant jurisprudence of the Italian courts to exercise restraint when reviewing the decisions of *AGCM*. According to this jurisprudence, the administrative courts cannot exercise a substitutive power to replace the reasoning of the administrative authority concerning the technical assessment of facts with their own. Judge Albuquerque argued that this jurisprudence leads to the extraction of the essence of the case from the Italian courts’ jurisdiction.

He further argued that in the case at hand, the Italian administrative judges have merely given a formal *beneplacitus* while performing an internal control that does not offer any guarantees for the already convicted. He draws the attention to the fact that the text of the Administrative Tribunals referred 60 times to the text of the administrative decision and the judgement delivered by the *Conseil d’Etat* referred to it 40 times. The courts called to review the decision of the *AGCM* merely repeated the arguments already presented by the latter. Lastly, they presented no autonomous, concrete and detailed analysis of the illegality and culpability of the applicant’s behaviour.

Judge Albuquerque intimates that a full review performed by an administrative tribunal is not a mere *reformatio* (reform) of the administrative decision, but a *revisio* (re-examination) of it. He also highlights that full review is necessarily an exhaustive review as well. He further contends that acceptance of pseudo-criminal law or of a criminal law with two speeds as in the case at

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30 Menarini Diagnostics s.r.l. *v Italy*, quoted above, paragraph 60.
31 Menarini Diagnostics s.r.l. *v Italy*, quoted above, paragraphs 64–65.
hand will have two inevitable consequences: the usurpation by the administrative authorities of the judicial power to punish and the capitulation of individual freedom before a powerful administration. Judge Albuquerque insists that whereas imperatives such as the efficiency of the justice system and the technical complexity of the modern administrative organization can justify endowing the latter with a punitive power, this does not justify the fact that the administrative authorities have the last word concerning the exercise of repressive power.32

In Steininger, the applicant company complained about a breach of their right to a fair trial in a case concerning the payment of state aid parafiscal surcharges.33 The administrative authorities that adopted decisions in the applicant’s case were Agrarmarkt Austria (AMA), the Federal Ministry of Agriculture, Forestry, Environment and Water, the Constitutional Court and the Supreme Administrative Court. The Court noted that neither AMA, nor the Ministry that acted as appeal authorities, could be deemed “tribunals” for the purpose of Article 6(1) ECHR because AMA was a public law body in which some administrative powers were vested and the Federal Ministry of Agriculture, Forestry, Environment and Water was a government authority.

Relying on Schmautzer, the Court highlighted that Article 6(1) ECHR was applicable under its criminal head in the present case and found that the review provided by the Administrative Court was insufficient in that it merely related to questions of law, contained no answer to the complaints raised in relation to the facts and consisted merely of a simple reference to a previous decision on a similar matter.34

14.3 Judicial Review in Banking Law Disputes

In the case Credit and Industrial Bank, compulsory administration was imposed and extended by the Central National Bank (CNB) on the applicant company without its knowledge. The applicant bank complained that it had no effective access to a tribunal.35

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32 Dissenting opinion Judge Pinto de Albuquerque in ECHR, Menarini Diagnostics s.r.l. v Italy, quoted above, p. 20.
33 ECHR. Steininger v. Austria, application no. 21539/07, judgement of 17 Jul 2012.
34 Steininger v. Austria, quoted above, paragraph 57.
35 ECHR. Credit and Industrial Bank v. the Czech Republic, application no. 29010/95, judgement of 21 Oct 2003.
The ECtHR noted that domestic legislation provided for limited review of the CNB’s decisions. This review was considered incompatible with Article 6(1) **ECHR** for the following reasons. First, the domestic courts were precluded in their exercise of judicial review from any substantive analysis of the CNB’s decision to impose and extend the compulsory administration. Their only function was to verify if the formal conditions for making an entry in the Companies Register concerning the compulsory administration were met. Second, domestic legislation provided only for a written and private procedure for this type of disputes, without a hearing and without the possibility of opposition from the management of the bank.36

In another dispute concerning banking activities, the applicant bank complained about the lack of judicial review in its dispute with the Bulgarian National Bank (BNB) concerning a withdrawal of banking licence and a wind-up order.37

The ECtHR noted that the domestic courts thought they were precluded from performing their own examination of a bank’s insolvency in those instances when the BNB found the bank to be insolvent. Thus, Sofia City Court and the Supreme Court of Cassation have expressly rejected the applicant’s bank requests to present evidence as to its solvability. The Court held that the deferral to the findings of the BNB for an issue which was crucial to the determination of a case was incompatible with Article 6(1) **ECHR**. The Court accepted that the BNB had significant knowledge in the field of banking and that the measures complained of were imposed during a serious financial crisis that called for immediate response from the authorities. However, no alternative, less radical solution has been considered by the domestic authorities and, what is more, the provision of the Bulgarian Banks Act laying down the prohibition to review the BNB’s decisions remained in force despite the end of the crisis.

Interestingly, the Bulgarian Government argued in this case that the limited review of the BNB’s decisions was introduced at the demand of IMF during the negotiation concerning the establishment of a currency board. The Court noted however that, on the one hand, the Government had not produced any evidence as to the existence of the alleged agreement and that, on the other hand, even assuming that the agreement existed, its existence did not justify a limitation of the right to a fair trial. The Court stressed in this sense that it was not indifferent to the need to interpret the Convention in such a way as

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36 **Credit and Industrial Bank v. the Czech Republic**, quoted above, paragraphs 60–62.
37 **ECtHR. Capital Bank AD v. Bulgaria**, application no. 49429/99, judgement of 24 Nov 2005.
to allow the member states to comply with their international obligations. Despite this, the ECtHR highlighted that the member states’ responsibility arising from the ECHR continues after they assume new international obligations. The opposite view would mean that when assuming new international obligations, member states are absolved from their responsibility under the Convention.38

14.4 Non-Pecuniary Damage for Breach of the Right to Judicial Review

Article 41 ECHR provides that “if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only a partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

The Court can award two types of damage under Article 41 ECHR: pecuniary and non-pecuniary damage. However, the Court has been less generous in the cases where it found a violation of Article 6(1) ECHR on account of lack of judicial review. In the majority of cases in which the ECtHR has found a breach of the right to a fair trial for lack of access to judicial review, it did not award non-pecuniary damage. The ECtHR reasons that no causal link can be established between the violation and the damage allegedly suffered because of it and that it is highly unclear what the decision of the domestic authorities would have been provided that judicial review had been effective.

This question has been raised in Kingsley.39 The Grand Chamber highlighted that the principle underlying the provision of just satisfaction for a breach of Article 6(1) ECHR was that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention. The Court however will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation that the Court has found. This is a corollary of the principle that the State cannot be held liable to pay damages in respect of losses for which it is not responsible.40

The ECtHR rejected thus by ten votes to seven the applicant’s request to award financial compensation in respect of loss of procedural opportunity or any distress, loss or damage allegedly flowing from the outcome of the domestic

38 Capital Bank AD v. Bulgaria, quoted above, paragraph 111.
39 Kingsley v. the United Kingdom [GC], quoted above.
40 Kingsley v. the United Kingdom [GC], quoted above, paragraph 40.
proceedings. The Court highlighted that a finding of a violation of Article 6 does not entail that the contested domestic decision was not well-founded or that a differently constituted tribunal would have found for the applicant.\footnote{Kingsley v. the United Kingdom [GC], quoted above, paragraph 42.}