

Art. 6(1) ECHR and Judicial Review of Administrative Decision-Making in England and Switzerland – A Comparative Perspective

By **Benjamin Schindler***

Table of content

- I. Introduction
- II. Political and legal framework
 - A. Role of the judiciary
 - B. Structure of administration
- III. Requirements of Art. 6(1) ECHR
 - A. Civil rights and obligations
 - B. Access to an independent and impartial tribunal with full jurisdiction
- IV. Impact of Art. 6(1) ECHR on the Scope of Judicial Control
 - A. Approach of English courts
 - B. Approach of Swiss courts
 - C. Differences
 - D. Common points
- V. Conclusion

I. Introduction

Art. 6(1) of the European Convention on Human Rights (ECHR) states that “in the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law”. The ECHR came into force in Switzerland in 1974, in England¹ it was “incorporated” into domestic law by the Human Rights Act (HRA) in 1998. The European Court of Human Rights (ECtHR) has recognised that some administrative law decisions may affect civil rights and therefore require a decision taken by an “independent and impartial tribunal”. In England and Switzerland, many administrative decisions affecting civil rights are taken by administrative rather than judicial decision-makers. Domestic courts are therefore confronted with the question of whether administrative decision-making

* Dr. iur., Rechtsanwalt, MJur (Oxon), Heidelberg.

¹ Strictly speaking what is referred to here is the United Kingdom of Great Britain (whose constituent nations are: England, Wales and Scotland) and Northern Ireland. Although most characteristics of the English legal system are also typical of the others (particularly when compared to Switzerland) I do not intend to refer to any of the particular traditional characteristics of these jurisdictions or those which are new as a result of devolution.

and its judicial control comply with the requirements of art. 6(1). The principle question to be addressed is whether art. 6(1) has had an impact on the scope, meaning the ambit as well as the intensity, of judicial control in administrative law matters.

II. Political and legal framework

The design of judicial control on administrative decision-making is heavily influenced by the individual political and legal framework of a country. Explaining these differences at the beginning may be of help when subsequently discussing the distinct fields of conflict in the two systems and the general attitude (whether pessimistic or optimistic) towards the integration of new law on the part of important groups in society.

A. Role of the judiciary

Unlike the USA or Germany, the English and Swiss approach towards the separation of powers is rather asymmetrical, with legislative and executive powers playing a predominant role: the prevailing constitutional concepts are parliamentary supremacy in England and popular sovereignty in Switzerland. The theoretically powerful position of the legislature is supplemented by an apparently strong executive. However, the perception of a self-correcting democracy, in which the rights of the individual are protected mainly by political rather than by legal means, has never been wholly accurate. In both jurisdictions, judicial control of the executive has been expanded since the end of the nineteenth century. Whereas in England judicial review has played an increasing role in policing the legal boundaries of executive power,² Switzerland has introduced administrative courts on the federal and cantonal level, a process that was concluded as recently as 1996.³

Another factor in the present context is the traditional role of judges in common and continental law systems respectively. Whereas court procedures in England are traditionally governed by the adversarial principle and the idea of a

² PETER CANE, *Understanding Judicial Review and its Impact*, in: Marc Hertogh/Simon Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, Cambridge (UK) 2004, p. 17; DAVID FELDMAN, *Convention Rights and Substantive Ultra Vires*, in: Christopher Forsyth (ed.), *Judicial Review and the Constitution*, Oxford 2000, p. 248.

³ ARNOLD MARTI, *Die aktuelle Justizreform – Abschluss einer über hundertjährigen Entwicklung hin zur umfassenden Verwaltungsgerichtsbarkeit in der Schweiz*, in: Roger Zäch et al. (eds.), *Individuum und Verband: Festgabe zum Schweizerischen Juristentag, Zürich 2006*, p. 505, 515.

neutral (and relatively passive) umpire,⁴ the Swiss administrative court procedure – which differs from the procedure in ordinary courts – is dominated by the inquisitorial principle and an active role is played by the judge. The role of specialized continental administrative courts is to fully reassess the administrative decision whereas the generalist common law judge limits his control to procedural fairness and the rationality of the original decision.⁵ Thus, Swiss administrative judges examine the facts *ex officio*, thereupon the calling of evidence is within the domain of the court. The fact-finding procedures of administrative courts and administrative bodies therefore are very similar, sometimes even identical.⁶ Despite their inquisitorial nature, most administrative (court) proceedings in Switzerland traditionally take written form. The hearing of witnesses in administrative law matters is the exception and takes place only where the facts cannot be established in a different, i.e. written way. Even though oral (and public) hearings in administrative court proceedings may be required, recent statistics show that written procedures are still the standard practise.⁷ By contrast, procedural law in England is dominated by two paradigms: the rather informal and inquisitorial decision-making by administrators and the highly formalised and adversarial procedure of the courts (and tribunals).⁸ In addition, hearings are quite common, even in administrative court proceedings.⁹

Whereas the main mechanism of judicial control is judicial review in England,¹⁰ it is *Verwaltungsgerichtsbeschwerde* or *recours de droit administratif* in Switzerland.¹¹ The most important difference, which reflects the differing roles of the judiciary, is the *ground for review*: whereas judicial review in England

⁴ MARGARET ALLARS, *Neutrality, the Judicial Paradigm and Tribunal Procedure*, in: Sydney Law Review 1991, pp. 377, 381–393; JOHN ALLISON, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, Oxford 1996, pp. 216–227; PAUL CRAIG, *Administrative Law*, 5th edn London 2003, pp. 264–265.

⁵ FRITZ SCHARPF, *Die politischen Kosten des Rechtsstaates*, Tübingen 1970, pp. 38–40, 46.

⁶ The new Federal Administrative Court (operational from 2007) will apply the same procedural rules as the Federal Administration.

⁷ The Federal Court holds an oral and public hearing in about 2% of all administrative appeals (Annual Reports 2001–2005). The administrative courts of the two largest cantons hold a hearing in about 3% of all cases (Zürich Administrative Court, enquiry of 5 April 2005; Berne Administrative Court, Annual Reports 2003–2005).

⁸ ALLARS (n. 4) pp. 378–392. See further DENIS GALLIGAN, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford 1996, pp. 309, 312.

⁹ According to the Civil Procedure Rules (CPR) Part 54.18, “The court may decide the claim for judicial review without a hearing where all parties agree”. Pursuant to the Civil Law and Justice Division of the Department for Constitutional Affairs “virtually all cases in administrative law matters are dealt with at a hearing” (enquiry of 10 March 2005).

¹⁰ Supreme Court Act 1981 (SCA) s 31.

¹¹ BENOÎT BOVAY, *Procédure administrative*, Berne 2000, pp. 321–333; ULRICH HÄFELIN/GEORG MÜLLER/FELIX UHLMANN, *Allgemeines Verwaltungsrecht*, 5th ed. Zürich 2006, para. 1851, 1904.

means a claim to review the lawfulness of an administrative action only,¹² in Switzerland one possible reason for an administrative appeal, apart from a breach of law, is the “incorrect or incomplete establishment of facts”.¹³

B. Structure of administration

The structure of what is generally called “administration”, as well as the systems of internal review and appeal, are complex in both England and Switzerland. The complexity of modern administrative bodies in England is mainly due to their fragmented structure and the blurred line between the public and private sectors.¹⁴ By contrast, Swiss administration is largely organised into a limited number of departments with tight hierarchical structures.¹⁵ The complexity of the Swiss model is largely a product of federalism with its 27 different administrative organisations and administrative courts each with their own distinctive regulations and procedures.

III. Requirements of Art. 6(1) ECHR

Art. 6(1) provides:

“In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]”

Fully aware that this is only a fraction of the body of ECtHR-case law I will focus on two aspects: the meaning of “civil rights and obligations” and the concept of “full jurisdiction”.

A. Civil rights and obligations

The Strasbourg institutions have given the term “civil” its own meaning which is different from the distinction between private and public in English or Swiss domestic law. Art. 6(1) therefore applies to matters which are regarded in both jurisdictions as matters of public law and which are subject to judicial review and administrative appeal. “Civil rights and obligations” encompasses decisions

¹² CPR (n. 9) 54.1(2)(a).

¹³ BOVAY (n. 11) p. 393; HÄFELIN/MÜLLER/UHLMANN (n. 11) para. 1932–1935.

¹⁴ CRAIG (n. 4) pp. 64–122; MARTIN LOUGHLIN, *The Idea of Public Law*, Oxford 2003, pp. 26–27.

¹⁵ See HÄFELIN/MÜLLER/UHLMANN (n. 11) para. 1225–1234; PIERRE TSCHANNEN/ULRICH ZIMMERLI, *Allgemeines Verwaltungsrecht*, 2nd ed. Bern 2005, pp. 45–48.

regarding property rights,¹⁶ the exercise of a professional or commercial activity¹⁷ or social security and social welfare schemes.¹⁸

B. Access to an independent and impartial tribunal with full jurisdiction

The ECtHR held in *Albert v Belgium*¹⁹ that access to an independent and impartial tribunal may be granted in two ways: the decision-making body itself complies with the requirements of art. 6(1) or the decision-making body is *subject to control by a judicial body* which complies with the requirements of art. 6(1) and *which has full jurisdiction*. In the present context I will focus on this second approach. In *Belilos v Switzerland*,²⁰ the ECtHR had to assess whether or not the jurisdiction of a Swiss court – in this particular case limited to questions of law – actually complied with the requirements of art. 6(1). The reviewing court was unable to reassess the way in which a police board had initially established the facts of the case. The ECtHR held that this review “was inadequate; so it was not possible subsequently to remedy the shortcomings found at the level of the police board”.²¹

In *Bryan v UK*²² the ECtHR held that, although the statutory planning procedure did not itself comply with art. 6(1), those defects could be cured by the availability of a planning appeal (confined to issues of law, but not facts):

“Such an approach by an appeal tribunal on questions of fact can reasonably be expected in *specialised areas of 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 art. 6(1) [...] Indeed, in the instant case, the subject matter of the contested decision by the inspector was a *typical example of the exercise of discretionary judgment* in the regulation of citizen’s conduct in the sphere of town and country

¹⁶ *Eisenstecken v Austria* (2002) 34 EHRR 35; *Ringeisen v Austria* Series A No 13 (1979–80) 1 EHRR 455; *Sramek v Austria* Series A No 84 (1985) 7 EHRR 351.

¹⁷ *Albert Le Compte v Belgium* Series A No 58 (1983) 5 EHRR 533; *Kingsley v UK* (2002) 35 EHRR 10; *König v Germany* Series A No 27 (1979–80) 2 EHRR 170.

¹⁸ *Mennitto v Italy* (2002) 34 EHRR 1122; *Salesi v Italy* Series A No 257-E (1998) 26 EHRR 187; *Schuler-Zgraggen v Switzerland* Series A No 263 (1993) 16 EHRR 405; *Feldbrugge v The Netherlands* Series A No 99 (1986) 8 EHRR 425; *Deumeland v Germany* Series A No 120 (1986) 8 EHRR 448.

¹⁹ See n. 17.

²⁰ Series A No 132 (1988) 10 EHRR 466.

²¹ Ibid. [72].

²² Series A No 335-A (1996) 21 EHRR 342.

planning. The scope of review of the High Court was therefore sufficient to comply with art. 6(1).²³

The reasoning of the ECtHR in *Bryan* may be illuminated by looking at the controversial opinions, which were given in the Commission. Whereas the British member of the Commission, Mr Bratza (as he then was), supported the decision in his concurring opinion,²⁴ Mr Trechsel (the Swiss member and then president of the Commission), stated in his dissenting opinion:

“Whilst questions of expediency play a large role [...] the present case concerns, at least in part, the fundamental factual issue [...] This factual issue was in dispute and in the circumstances of this case the High Court judge was not able to provide a ‘determination’ of it. For us, this deprived the applicant of access to a ‘tribunal’ to which Article 6(1) of the Convention entitled him.”²⁵

IV. Impact of Art. 6(1) ECHR on the Scope of Judicial Control

A. Approach of English courts

1. Holistic approach

Unlike the situation in Switzerland, English jurisprudence in the field of art. 6(1) is only just emerging and there is not yet an established standard scheme that judges may follow when answering the question of whether or not review procedures in administrative law comply with ECHR requirements.

In the *Begum* decision of the Court of Appeal, Laws LJ tackled the problem step-by-step in that he first looked at the question of whether there was a civil right. He then addressed the issue of the independent and impartial tribunal and finally answered whether or not the tribunal had full jurisdiction.²⁶ However, he ultimately stressed that

“one of the most important insights [...] is that the three issues which I have identified and addressed in this judgment are not hermetically sealed, each from the others.”²⁷

²³ Ibid. 361 [47] (emphasis added).

²⁴ Ibid. 354.

²⁵ Ibid. 356.

²⁶ *Runa Begum v Tower Hamlets LBC* [2002] 1 WLR 2491 (CA) [18], [27], [31].

²⁷ *Begum* (n. 26) [45]. See further the dictum of Lord Millet in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 (HL) [77] and that of Lord Bingham, *ibid.* [5].

Lord Hoffmann – who gave the leading opinion in the House of Lords – deliberately reversed the sequence and started with the third question, the full jurisdiction issue.²⁸ However, it is probably Clarke LJ in *Thompson* who has addressed the issue of the correct approach most clearly:

“Logic might suggest that the question whether there has been a breach of art. 6(1) should be approached by asking first whether there has been a determination of the claimant’s civil rights and obligations and then by asking whether, if there has, there has been a breach of them. It is of course relevant to consider those questions but both the English authorities and the Strasbourg jurisprudence show that those questions cannot be treated entirely separately and that the question whether there has been a breach of art. 6(1) should be answered by considering all the circumstances of the case [...]”²⁹

Thus, the subsequent three headings are simply a means of grouping the various arguments. They do not reflect a chronological approach by the courts.

2. Civil rights

The methodical approach of the courts also has implications on the way they deal with the civil rights question. Courts pursuing a step-by-step method will answer the question with a clear (though not enthusiastic) yes or no. The decisions of the lower courts in *Alconbury* and *Begum* are examples of this.³⁰ The courts adopting a more holistic approach tend to preclude an unambiguous answer even though they assume the applicability of art. 6(1).³¹ This approach, however, does not mean that the nature or qualification of the right in dispute would be irrelevant. By contrast, the requirements regarding an independent and impartial tribunal and its full jurisdiction may differ, depending on the nature of the civil right. As Lord Bingham said in the *Begum* decision of the House of Lords:

“The narrower the interpretation given to ‘civil rights’, the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to ‘civil rights’, the more flexible must be the approach to the requirement of independent and impartial

²⁸ *Begum* (n. 27) [36].

²⁹ *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167 [57].

³⁰ *Alconbury* [2001] 2 All ER 929 (QB) [2] (Tuckey LJ); *Begum* (n. 26) [26] (Laws LJ). See further *R (on the application of McLellan) v Bracknell Forest Borough Council* [2002] QB 1129 [83] (Waller LJ); *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2004] EWCA Civ 225 [61] (Ward LJ).

³¹ *Begum* (n. 27) [6] (Lord Bingham), [70] (Lord Hoffmann), [94] (Lord Millet), [115] (Lord Walker). See further *Thompson* (n. 29) [57]–[59], [76] (Clarke LJ).

review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided.”³²

3. Independent and impartial tribunal

The understanding of the ECHR concept of an independent and impartial tribunal is not a major problem as the issues raised by art. 6(1) are in many respects similar to those that arise at common law under natural justice.³³ Reviewing courts normally fulfil these requirements, which are independence from other governmental branches, impartiality from the parties, and that they are established by law.³⁴

However, there is a certain confusion regarding the procedural stage at which these requirements should be employed. Lower courts tend to focus on an early procedural stage and try to press administrative bodies into an independent and impartial “straitjacket”. In *Alconbury*, Tuckey LJ considered at length whether the Secretary of State himself was impartial or not.³⁵ And in *Adan*, Brooke LJ and Steel J considered whether the lack of independence and impartiality of a reviewing officer could be cured by “contracting out” the establishment of facts.³⁶ By contrast, the House of Lords’ approach is relatively straightforward, as it takes executive bodies for what they are and rejects the idea of “contracting out” decision-making functions as this “would create an administrative nightmare”.³⁷ However, as will be seen later, even the House of Lords takes procedural protection in the early stages of the administrative decision-making process into account when answering the question of whether or not the procedure as a whole complies with art. 6(1).

³² *Begum* (n. 27) [5].

³³ *In re Medicaments (No 2)* [2001] 1 WLR 700 (CA) [35], [85] (Lord Phillips MR); *Lawal v Northern Spirit Ltd* [2003] UKHL 35 (HL) [14].

³⁴ *Millar v Dickson* [2002] 3 All ER 1041 (PC) [41], [65]–[67] (Lord Hope).

³⁵ *Alconbury* (n. 30) [71]–[86] (Tuckey LJ).

³⁶ *Adan v Newham London Borough Council and another* [2001] EWCA Civ 1916 (CA) [43]–[45] (Brooke LJ), [94] (Steel J). Contra Hale LJ, *ibid.* [76]–[78], [80].

³⁷ *Begum* (n. 27) [97] (Lord Millet). See further *ibid.* [3] (Lord Bingham), [46] (Lord Hoffmann); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2003] 2 AC 295 (HL) [124] (Lord Hoffmann); *Feld v Barnet London Borough Council* [2004] EWCA Civ 1307 (CA) [45] (Ward LJ).

4. Full jurisdiction

a. “As the nature of the decision requires”

The English understanding of the full jurisdiction concept can best be described by quoting Lord Hoffmann’s dictum in *Alconbury*:

“The reference to ‘full jurisdiction’ has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be reviewable on its merits by an independent and impartial tribunal. [...] But subsequent European authority shows that ‘full jurisdiction’ does not mean full decision-making power. *It means full jurisdiction to deal with the case as the nature of the decision requires.*”³⁸

The factors that influence the “nature of the decision” are varied. They may concern the controversial contents of a decision, particularly whether it addresses questions of expediency (see below at b) or fact (c). But the decision’s nature may also be affected by the way in which it has been reached (d) and the field of administrative law concerned (e).

b. Questions of policy and expediency

It has been confirmed in several decisions that full jurisdiction does not require a court to review “decisions on questions of policy or expediency”.³⁹ Judicial deference with regard to questions of expediency or policy thus seems uncontested and is in conformity with ECtHR jurisprudence, particularly the seminal case of *Zumtobel v Austria*.⁴⁰ The justification for such deference is a matter of controversy in the House of Lords, however. For Lord Hoffmann, the separation of powers and the “democratic principle” require the courts to abstain from certain discretionary areas (e.g. policy issues).⁴¹ In contrast, for Lord Steyn,

³⁸ *Alconbury* (n. 37) [87] (emphasis added). See further Lord Clyde, *ibid.* [154]; *Begum* (n. 26) [31] (Laws LJ); *Begum* (n. 27) [5] (Lord Bingham); *Adan* (n. 36) [56] (Hale LJ).

³⁹ *Alconbury* (n. 37) [117], [122] (Lord Hoffmann). See further *Friends Provident Life & Pensions Ltd v the Secretary of State for Transport, Local Government and Regions* [2001] EWHC Admin 820 [117], [122] (Forbes J); *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (QB) [107] (Forbes J).

⁴⁰ *Zumtobel v Austria* Series A No 268-A (1994) 17 EHRR 116 [32]. See further *Alconbury* (n. 37) [88], [117] (Lord Hoffmann).

⁴¹ *Alconbury* (n. 37) [69]–[73]. See further Lord Nolan, *ibid.* [60]; *Begum* (n. 27) [37] (Lord Hoffmann).

judicial deference is rather a “passive virtue” not justified by a constitutional principle but by institutional competence or capacity.⁴²

c. Questions of fact

Unlike their rather straightforward approach to questions of policy and expediency, the courts’ approach to questions of fact is much more complex. In *Alconbury*, Lord Hoffmann appears to draw a distinction between questions of policy and expediency and questions of fact:

“The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the ‘safeguards’ but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts [...] that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.”⁴³

“Full jurisdiction” therefore does not mean jurisdiction regarding questions of fact as long as there are sufficient safeguards at an earlier procedural stage. This approach is in accordance with ECtHR jurisprudence in *Bryan* and reflects a compromise between the requirements of art. 6(1) and the traditional understanding of judicial review and its scope, which does not include a full review of the establishment of facts. The lack of procedural protection at the reviewing stage must therefore be compensated at an earlier stage of the decision-making process. This approach has been followed in several cases.⁴⁴

A different approach (quite similar to the Swiss one: IV/B/2/c) proposes that judicial review procedures comply with the “full jurisdiction” requirement as “mere factual mistakes” have become a ground for judicial review. It is true that there are eminent voices proposing an expansion of judicial review to questions of fact and recent cases suggest that the scope of judicial review is broadening.⁴⁵ This view has been most prominently held by Lord Slynn in *Alconbury*.⁴⁶ There was, however, little support in the other judgments⁴⁷ and the criteria as to when courts may intervene with regard to mistakes of fact are not

⁴² LORD STEYN, *Deference: a Tangled Story*, in: Public Law 2005, pp. 346, 350–357.

⁴³ *Alconbury* (n. 37) [117] (Lord Hoffmann). See further *Adan* (n. 36) [64] (Brooke LJ).

⁴⁴ *Adan* (n. 36) [43] (Brooke LJ), [58]–[60] (Hale LJ); *Begum* (n. 26) [37], [40] (Laws LJ); *Friends Provident* (n. 39) [93] (Forbes J); *R (on the application of Kathro and others) v Rhondda Cynon Taff County Borough Council* [2001] EWHC Admin 527 [25]–[29] (Richards J); *Re MB* [2006] EWHC Admin 1000 [45] (Sullivan LJ).

⁴⁵ *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 [63] (Carnwath LJ). For a more cautious approach in this regard see *McLellan* (n. 30) [86]–[101] (Waller LJ).

⁴⁶ *Alconbury* (n. 37) [53]–[54].

⁴⁷ Lord Nolan, *ibid.* [62]; Lord Clyde, *ibid.* [169]. See further *Adan* (n. 36) [29]–[41] (Brooke LJ); *Begum* (n. 26) [15] (Laws LJ).

at all coherent (yet).⁴⁸ It is therefore tantamount to “skating on thin ice” to proclaim that judicial review procedures comply with the full jurisdiction requirement.⁴⁹

More radical seems Lord Hoffmann’s approach in *Begum* which may be described as an about turn compared with what he said in *Alconbury*:

“I have to confess that I think that [read ‘that’ as ‘my statement in *Alconbury*’] was an incautious remark. The question in the *Alconbury* case was whether the appellate tribunal had to be able to review the Secretary of State’s decisions based on policy. The extent to which it had to be able to review questions of fact did not arise.⁵⁰ [...] All that we are concerned with in this appeal is the requirements of article 6, which I do not think mandates a more intensive approach to judicial review of questions of fact.”⁵¹

How can this sudden change be explained? One argument is the simple fact that quasi-judicial safeguards, as they exist in planning law (like *Alconbury*), are not appropriate in social welfare matters (like *Begum*). Lord Hoffmann admitted that “there was nothing like the panoply of quasi-judicial safeguards”.⁵² In the similar *Adan* case the Court of Appeal thus suggested possible safeguards – either contracting out the establishment of facts⁵³ or intensifying the scope of judicial review with regard to factual questions.⁵⁴ Both suggestions have been rejected by the House of Lords,⁵⁵ however. A further argument is the difficulty of separating questions of fact from questions of expediency and policy in social welfare matters. Very often “factual findings will only be staging posts on the way to the much broader judgments”⁵⁶ and regulatory schemes in social welfare are “shot through with discretions [...]”.⁵⁷ Finally, ECtHR jurisprudence in *Bryan* is not wholly clear with regard to this point. The Court held that a limited review of questions of fact may be justified “in specialised areas of law [...] particularly where the facts have already been established in the course of

⁴⁸ PAUL CRAIG, *Judicial Review, Appeal and Factual Error*, in: Public Law 2004, pp. 788, 796–797.

⁴⁹ See SIR NICHOLAS BRATZA, *The Implications of the Human Rights Act 1998 for Commercial Practice*, in: EHRLR 2000, p. 13; RICHARD CLAYTON, *Developing Principles for Human Rights*, in: EHRLR 2002, p. 193; CHRISTOPHER FORSYTH, *Article 6(1) of the European Convention and the Curative Powers of Judicial Review*, in: Cambridge Law Journal 2001, p. 451.

⁵⁰ *Begum* (n. 27) [40].

⁵¹ *Begum* (n. 27) [50].

⁵² *Begum* (n. 27) [39].

⁵³ See n. 36.

⁵⁴ Hale LJ (n. 36) [81]–[82].

⁵⁵ *Begum* (n. 27) [10] (Lord Bingham), [46] (Lord Hoffmann). See further *Begum* (n. 26) [45] (Laws LJ).

⁵⁶ *Begum* (n. 27) [9] (Lord Bingham).

⁵⁷ *Begum* (n. 27) [67] (Lord Hoffmann). See further *R (on the application of Beeson) v Dorset CC* [2002] EWCA Civ 1812 [21] (Laws LJ).

planning. The scope of review of the High Court was therefore sufficient to comply with art. 6(1).²³

The reasoning of the ECtHR in *Bryan* may be illuminated by looking at the controversial opinions, which were given in the Commission. Whereas the British member of the Commission, Mr Bratza (as he then was), supported the decision in his concurring opinion,²⁴ Mr Trechsel (the Swiss member and then president of the Commission), stated in his dissenting opinion:

“Whilst questions of expediency play a large role [...] the present case concerns, at least in part, the fundamental factual issue [...] This factual issue was in dispute and in the circumstances of this case the High Court judge was not able to provide a ‘determination’ of it. For us, this deprived the applicant of access to a ‘tribunal’ to which Article 6(1) of the Convention entitled him.”²⁵

IV. Impact of Art. 6(1) ECHR on the Scope of Judicial Control

A. Approach of English courts

1. Holistic approach

Unlike the situation in Switzerland, English jurisprudence in the field of art. 6(1) is only just emerging and there is not yet an established standard scheme that judges may follow when answering the question of whether or not review procedures in administrative law comply with ECHR requirements.

In the *Begum* decision of the Court of Appeal, Laws LJ tackled the problem step-by-step in that he first looked at the question of whether there was a civil right. He then addressed the issue of the independent and impartial tribunal and finally answered whether or not the tribunal had full jurisdiction.²⁶ However, he ultimately stressed that

“one of the most important insights [...] is that the three issues which I have identified and addressed in this judgment are not hermetically sealed, each from the others.”²⁷

Lord Hoffmann – who gave the leading opinion in the House of Lords – deliberately reversed the sequence and started with the third question, the full jurisdiction issue.²⁸ However, it is probably Clarke LJ in *Thompson* who has addressed the issue of the correct approach most clearly:

“Logic might suggest that the question whether there has been a breach of art. 6(1) should be approached by asking first whether there has been a determination of the claimant’s civil rights and obligations and then by asking whether, if there has, there has been a breach of them. It is of course relevant to consider those questions but both the English authorities and the Strasbourg jurisprudence show that those questions cannot be treated entirely separately and that the question whether there has been a breach of art. 6(1) should be answered by considering all the circumstances of the case [...]”²⁹

Thus, the subsequent three headings are simply a means of grouping the various arguments. They do not reflect a chronological approach by the courts.

2. Civil rights

The methodical approach of the courts also has implications on the way they deal with the civil rights question. Courts pursuing a step-by-step method will answer the question with a clear (though not enthusiastic) yes or no. The decisions of the lower courts in *Alconbury* and *Begum* are examples of this.³⁰ The courts adopting a more holistic approach tend to preclude an unambiguous answer even though they assume the applicability of art. 6(1).³¹ This approach, however, does not mean that the nature or qualification of the right in dispute would be irrelevant. By contrast, the requirements regarding an independent and impartial tribunal and its full jurisdiction may differ, depending on the nature of the civil right. As Lord Bingham said in the *Begum* decision of the House of Lords:

“The narrower the interpretation given to ‘civil rights’, the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to ‘civil rights’, the more flexible must be the approach to the requirement of independent and impartial

²⁸ *Begum* (n. 27) [36].

²⁹ *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167 [57].

³⁰ *Alconbury* [2001] 2 All ER 929 (QB) [2] (Tuckey LJ); *Begum* (n. 26) [26] (Laws LJ). See further *R (on the application of McLellan) v Bracknell Forest Borough Council* [2002] QB 1129 [83] (Waller LJ); *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2004] EWCA Civ 225 [61] (Ward LJ).

³¹ *Begum* (n. 27) [6] (Lord Bingham), [70] (Lord Hoffmann), [94] (Lord Millet), [115] (Lord Walker). See further *Thompson* (n. 29) [57]–[59], [76] (Clarke LJ).

²³ Ibid. 361 [47] (emphasis added).

²⁴ Ibid. 354.

²⁵ Ibid. 356.

²⁶ *Runa Begum v Tower Hamlets LBC* [2002] 1 WLR 2491 (CA) [18], [27], [31].

²⁷ *Begum* (n. 26) [45]. See further the dictum of Lord Millet in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 (HL) [77] and that of Lord Bingham, *ibid.* [5].

review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided.”³²

3. Independent and impartial tribunal

The understanding of the ECHR concept of an independent and impartial tribunal is not a major problem as the issues raised by art. 6(1) are in many respects similar to those that arise at common law under natural justice.³³ Reviewing courts normally fulfil these requirements, which are independence from other governmental branches, impartiality from the parties, and that they are established by law.³⁴

However, there is a certain confusion regarding the procedural stage at which these requirements should be employed. Lower courts tend to focus on an early procedural stage and try to press administrative bodies into an independent and impartial “straitjacket”. In *Alconbury*, Tuckey LJ considered at length whether the Secretary of State himself was impartial or not.³⁵ And in *Adan*, Brooke LJ and Steel J considered whether the lack of independence and impartiality of a reviewing officer could be cured by “contracting out” the establishment of facts.³⁶ By contrast, the House of Lords’ approach is relatively straightforward, as it takes executive bodies for what they are and rejects the idea of “contracting out” decision-making functions as this “would create an administrative nightmare”.³⁷ However, as will be seen later, even the House of Lords takes procedural protection in the early stages of the administrative decision-making process into account when answering the question of whether or not the procedure as a whole complies with art. 6(1).

4. Full jurisdiction

a. “As the nature of the decision requires”

The English understanding of the full jurisdiction concept can best be described by quoting Lord Hoffmann’s dictum in *Alconbury*:

“The reference to ‘full jurisdiction’ has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be reviewable on its merits by an independent and impartial tribunal. [...] But subsequent European authority shows that ‘full jurisdiction’ does not mean full decision-making power. *It means full jurisdiction to deal with the case as the nature of the decision requires.*”³⁸

The factors that influence the “nature of the decision” are varied. They may concern the controversial contents of a decision, particularly whether it addresses questions of expediency (see below at b) or fact (c). But the decision’s nature may also be affected by the way in which it has been reached (d) and the field of administrative law concerned (e).

b. Questions of policy and expediency

It has been confirmed in several decisions that full jurisdiction does not require a court to review “decisions on questions of policy or expediency”.³⁹ Judicial deference with regard to questions of expediency or policy thus seems uncontested and is in conformity with ECtHR jurisprudence, particularly the seminal case of *Zumtobel v Austria*.⁴⁰ The justification for such deference is a matter of controversy in the House of Lords, however. For Lord Hoffmann, the separation of powers and the “democratic principle” require the courts to abstain from certain discretionary areas (e.g. policy issues).⁴¹ In contrast, for Lord Steyn,

³² *Begum* (n. 27) [5].

³³ *In re Medicaments (No 2)* [2001] 1 WLR 700 (CA) [35], [85] (Lord Phillips MR); *Lawal v Northern Spirit Ltd* [2003] UKHL 35 (HL) [14].

³⁴ *Millar v Dickson* [2002] 3 All ER 1041 (PC) [41], [65]–[67] (Lord Hope).

³⁵ *Alconbury* (n. 30) [71]–[86] (Tuckey LJ).

³⁶ *Adan v Newham London Borough Council and another* [2001] EWCA Civ 1916 (CA) [43]–[45] (Brooke LJ), [94] (Steel J). Contra Hale LJ, *ibid.* [76]–[78], [80].

³⁷ *Begum* (n. 27) [97] (Lord Millet). See further *ibid.* [3] (Lord Bingham), [46] (Lord Hoffmann); *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2003] 2 AC 295 (HL) [124] (Lord Hoffmann); *Feld v Barnet London Borough Council* [2004] EWCA Civ 1307 (CA) [45] (Ward LJ).

³⁸ *Alconbury* (n. 37) [87] (emphasis added). See further Lord Clyde, *ibid.* [154]; *Begum* (n. 26) [31] (Laws LJ); *Begum* (n. 27) [5] (Lord Bingham); *Adan* (n. 36) [56] (Hale LJ).

³⁹ *Alconbury* (n. 37) [117], [122] (Lord Hoffmann). See further *Friends Provident Life & Pensions Ltd v the Secretary of State for Transport, Local Government and Regions* [2001] EWHC Admin 820 [117], [122] (Forbes J); *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (QB) [107] (Forbes J).

⁴⁰ *Zumtobel v Austria* Series A No 268-A (1994) 17 EHRR 116 [32]. See further *Alconbury* (n. 37) [88], [117] (Lord Hoffmann).

⁴¹ *Alconbury* (n. 37) [69]–[73]. See further Lord Nolan, *ibid.* [60]; *Begum* (n. 27) [37] (Lord Hoffmann).

judicial deference is rather a “passive virtue” not justified by a constitutional principle but by institutional competence or capacity.⁴²

c. Questions of fact

Unlike their rather straightforward approach to questions of policy and expediency, the courts’ approach to questions of fact is much more complex. In *Alconbury*, Lord Hoffmann appears to draw a distinction between questions of policy and expediency and questions of fact:

“The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the ‘safeguards’ but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts [...] that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.”⁴³

“Full jurisdiction” therefore does not mean jurisdiction regarding questions of fact as long as there are sufficient safeguards at an earlier procedural stage. This approach is in accordance with ECtHR jurisprudence in *Bryan* and reflects a compromise between the requirements of art. 6(1) and the traditional understanding of judicial review and its scope, which does not include a full review of the establishment of facts. The lack of procedural protection at the reviewing stage must therefore be compensated at an earlier stage of the decision-making process. This approach has been followed in several cases.⁴⁴

A different approach (quite similar to the Swiss one: IV/B/2/c) proposes that judicial review procedures comply with the “full jurisdiction” requirement as “mere factual mistakes” have become a ground for judicial review. It is true that there are eminent voices proposing an expansion of judicial review to questions of fact and recent cases suggest that the scope of judicial review is broadening.⁴⁵ This view has been most prominently held by Lord Slynn in *Alconbury*.⁴⁶ There was, however, little support in the other judgments⁴⁷ and the criteria as to when courts may intervene with regard to mistakes of fact are not

at all coherent (yet).⁴⁸ It is therefore tantamount to “skating on thin ice” to proclaim that judicial review procedures comply with the full jurisdiction requirement.⁴⁹

More radical seems Lord Hoffmann’s approach in *Begum* which may be described as an about turn compared with what he said in *Alconbury*:

“I have to confess that I think that [read ‘that’ as ‘my statement in *Alconbury*’] was an incautious remark. The question in the *Alconbury* case was whether the appellate tribunal had to be able to review the Secretary of State’s decisions based on policy. The extent to which it had to be able to review questions of fact did not arise.⁵⁰ [...] All that we are concerned with in this appeal is the requirements of article 6, which I do not think mandates a more intensive approach to judicial review of questions of fact.”⁵¹

How can this sudden change be explained? One argument is the simple fact that quasi-judicial safeguards, as they exist in planning law (like *Alconbury*), are not appropriate in social welfare matters (like *Begum*). Lord Hoffmann admitted that “there was nothing like the panoply of quasi-judicial safeguards”.⁵² In the similar *Adan* case the Court of Appeal thus suggested possible safeguards – either contracting out the establishment of facts⁵³ or intensifying the scope of judicial review with regard to factual questions.⁵⁴ Both suggestions have been rejected by the House of Lords,⁵⁵ however. A further argument is the difficulty of separating questions of fact from questions of expediency and policy in social welfare matters. Very often “factual findings will only be staging posts on the way to the much broader judgments”⁵⁶ and regulatory schemes in social welfare are “shot through with discretions [...]”.⁵⁷ Finally, ECtHR jurisprudence in *Bryan* is not wholly clear with regard to this point. The Court held that a limited review of questions of fact may be justified “in specialised areas of law [...] particularly where the facts have already been established in the course of

⁴² LORD STEYN, *Deference: a Tangled Story*, in: Public Law 2005, pp. 346, 350–357.

⁴³ *Alconbury* (n. 37) [117] (Lord Hoffmann). See further *Adan* (n. 36) [64] (Brooke LJ).

⁴⁴ *Adan* (n. 36) [43] (Brooke LJ), [58]–[60] (Hale LJ); *Begum* (n. 26) [37], [40] (Laws LJ); *Friends Provident* (n. 39) [93] (Forbes J); *R (on the application of Kathro and others) v Rhondda Cynon Taff County Borough Council* [2001] EWHC Admin 527 [25]–[29] (Richards J); *Re MB* [2006] EWHC Admin 1000 [45] (Sullivan LJ).

⁴⁵ *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 [63] (Carnwath LJ). For a more cautious approach in this regard see *McLellan* (n. 30) [86]–[101] (Waller LJ).

⁴⁶ *Alconbury* (n. 37) [53]–[54].

⁴⁷ Lord Nolan, *ibid.* [62]; Lord Clyde, *ibid.* [169]. See further *Adan* (n. 36) [29]–[41] (Brooke LJ); *Begum* (n. 26) [15] (Laws LJ).

⁴⁸ PAUL CRAIG, *Judicial Review, Appeal and Factual Error*, in: Public Law 2004, pp. 788, 796–797.

⁴⁹ See SIR NICHOLAS BRATZA, *The Implications of the Human Rights Act 1998 for Commercial Practice*, in: EHRLR 2000, p. 13; RICHARD CLAYTON, *Developing Principles for Human Rights*, in: EHRLR 2002, p. 193; CHRISTOPHER FORSYTH, *Article 6(1) of the European Convention and the Curative Powers of Judicial Review*, in: Cambridge Law Journal 2001, p. 451.

⁵⁰ *Begum* (n. 27) [40].

⁵¹ *Begum* (n. 27) [50].

⁵² *Begum* (n. 27) [39].

⁵³ See n. 36.

⁵⁴ Hale LJ (n. 36) [81]–[82].

⁵⁵ *Begum* (n. 27) [10] (Lord Bingham), [46] (Lord Hoffmann). See further *Begum* (n. 26) [45] (Laws LJ).

⁵⁶ *Begum* (n. 27) [9] (Lord Bingham).

⁵⁷ *Begum* (n. 27) [67] (Lord Hoffmann). See further *R (on the application of Beeson) v Dorset CC* [2002] EWCA Civ 1812 [21] (Laws LJ).

a quasi-judicial procedure" (III/B). The core of Lord Hoffmann's argument is the word "particularly", which he interprets to mean "for example" – in contrast to "only" or "specifically".⁵⁸ As a result we may conclude that Lord Hoffmann is satisfied with an orthodox (i.e. restrained) level of judicial review in social welfare matters, even where there are no safeguards such as the establishment of facts in a quasi-judicial manner. This interpretation of ECtHR jurisprudence (i.e. the *Bryan* case) seems far-fetched, particularly in the light of an extra-curial statement by Sir Nicholas Bratza (now judge at the ECtHR), stressing that the HRA will require both a "reappraisal by decision-making bodies of the fairness of the procedures leading up to the decision" and greater readiness on the part of English courts "to examine the grounds of challenge, even those of factual nature".⁵⁹

d. Procedural protection attendant to the whole process

As I pointed out in the previous paragraph, the lack of procedural protection at the review stage must be compensated for at an earlier stage of the decision-making process. The corollary is therefore that the scope of judicial review depends on the procedural safeguards attendant to the *whole process* leading up to the final decision. As Lord Clyde held in *Alconbury*:

"If a global view is adopted one may then take into account not only the eventual opportunity for appeal or review to a court of law, but also the earlier processes and in particular the process of public inquiry at which essentially the facts can be explored in a quasi-judicial procedure and a determination on factual matters achieved."⁶⁰

This global view of procedural aspects has been stressed in other cases.⁶¹ Sometimes it becomes indistinct from the holistic approach described above, including the nature of the civil right at stake.⁶²

⁵⁸ *Begum* (n. 27) [54] (Lord Hoffmann).

⁵⁹ BRATZA (n. 49) p. 13. See further MARK POUSTIE, *The Rule of Law or the Rule of Lawyers?* *Alconbury*, Article 6(1) and the Role of Courts in Administrative Decision-Making, in: EHRLR 2001, p. 669.

⁶⁰ *Alconbury* (n. 37) [152]. See further *ibid.* [154] (Lord Clyde), [46] (Lord Slynn).

⁶¹ *Begum* (n. 27) [9] (Lord Bingham); *Kathro* (n. 44) [15] (Richards J); *R (on the application of Adlard) v Secretary of State for Environment, Transport and Regions* [2002] EWCA Civ 735 [16] (Dyson LJ); *Thompson* (n. 29) [69], [76] (Clarke LJ); *McLellan* (n. 30) [84] (Waller LJ); *R (on the application of M) v Secretary of State for Constitutional Affairs & Lord Chancellors and others* [2004] EWCA Civ 312 [39] (Kennedy LJ); *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 [116] (Lord Phillips MR); *R (on the Application of Whitmey) v The Commons Commissioners* [2004] EWCA Civ 951 [59] (Waller LJ).

⁶² *R (on the application of Vetterlein) v Hampshire CC* [2001] EWHC Admin 560 [68] (Sullivan J).

e. Field of administrative law

It is self-evident that the following parameters differ from field to field in administrative law: the nature of the rights at stake, the weighting of policy and expediency issues within a decision and procedural protection at the initial decision-making stage. As argued above, all these factors are relevant for the scope of judicial review and the "full jurisdiction" issue could also be addressed by exploring the particularities of planning law,⁶³ social welfare law,⁶⁴ disciplinary law,⁶⁵ or asylum law.⁶⁶ The dissimilitude in administrative law is not an English particularity but the general tendency may be amplified by the fragmented structure of administrative bodies, the different legal schemes and "a plethora of different decision-making structures".⁶⁷

B. Approach of Swiss courts

1. Preliminary question: civil rights

According to the Federal Court's jurisprudence, "the concept of 'civil rights and obligations' has to be interpreted according to the jurisprudence of the Strasbourg institutions and independent of domestic law."⁶⁸ Although Strasbourg jurisprudence is not always crystal-clear⁶⁹ and eminent doctrinal voices have criticised the "over-stretched" civil rights concept,⁷⁰ the Federal Court supports this broad approach:

⁶³ *Adlard* (n. 61); *Alconbury* (n. 37); *Friends Provident* (n. 39); *Kathro* (n. 44); *Vetterlein* (n. 62); *Whitney* (n. 61).

⁶⁴ *Adan* (n. 36); *Beeson* (n. 57); *Begum* (n. 26, 27); *McLellan* (n. 30).

⁶⁵ *Preiss v General Dental Council* [2001] 1 WLR 1926 (PC); *Thompson* (n. 29).

⁶⁶ *R (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852; *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC Admin 364 [116] (Lord Phillips MR).

⁶⁷ PAUL CRAIG, *The Human Rights Act, Article 6 and Procedural Rights*, in: *Public Law* 2003, p. 773.

⁶⁸ BGE 129 I 207, 210.

⁶⁹ See ARTHUR HAEFLIGER/FRANK SCHÜRMANN, *Die Europäische Menschenrechtskonvention und die Schweiz*, 2nd edn Bern 1999, pp. 132–133, 149–150; ANDREAS KLEY-STROLLER, *Art. 6 EMRK als Rechtsschutzgarantie gegen die öffentliche Gewalt*, Zürich 1993, para. 42; RAINER J. SCHWEIZER, *Die schweizerischen Gerichte und das europäische Recht*, in: *Zeitschrift für Schweizerisches Recht* 112 (1993) II, p. 678; MARK E. VILLIGER, *Handbuch der Europäischen Menschenrechtskonvention*, 2nd edn Zürich 1999, para. 375.

⁷⁰ SCHWEIZER (n. 69) pp. 675–678; DANIEL THÜRER, *Europäische Menschenrechtskonvention und schweizerisches Verwaltungsverfahren*, in: *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 1986, pp. 241, 252–254; ULRICH ZIMMERLI, *EMRK und schweizerische Verwaltungsverfahren*, in: Daniel Thürer et al., *Aktuelle Fragen zur Europäischen Menschenrechtskonvention*, Zürich 1994, pp. 41, 54–55, 66. Contra KLEY-STROLLER (n. 69) para. 19–22, 49; HEINER WOHLFART, *Anforderungen der Art. 6 Abs. 1 EMRK und Art. 98a OG an die kantonalen Verwaltungsrechtspflegegesetze*, in: *Aktuelle Juristische Praxis* 1995, pp. 1421, 1422–1423.

“The Federal Court interprets the conventional concept of ‘civil rights and obligations’ in the same broad manner as the organs of the European Convention do.”⁷¹

2. Principle question: Whether or not the reviewing court complies with art. 6(1)

The most striking difference between the English and Swiss approaches is that courts and doctrine in Switzerland focus on one specific step of the procedure: the court’s review of an administrative decision. They hardly look at the initial decision-making process and whether the procedure as a whole was fair or not.⁷² In answering this question, the Federal Court follows a four-step process;

a. Organisation and function of the reviewing court

The organisational structure of the court must guarantee its independence in general and its function must be jurisdictional, i.e. the court must be a “fair intermediary” (*rechter Mittler*) between the parties. The court, its organisation and its function must be established by (written) law.⁷³ Apart from these general safeguards, “justice [...] must also be seen to be done” in the evident impartiality of every single judge involved in the case in question.⁷⁴ When expressing this requirement, the Federal Court explicitly referred to the well-known statement of Lord Hewart in *R v Sussex Justices, ex p McCarthy*.⁷⁵ This reference shows that the familiar concepts of the “natural judge”⁷⁶ in Switzerland and “natural justice” in England facilitated the implementation of art. 6(1) in quite a similar way.

b. Procedure of the reviewing court

Administrative appeal procedures usually take written form. If the taking of new evidence is necessary, then this is undertaken mainly by a delegate of the court

⁷¹ BGE 125 I 209, 215–216. See further 129 I 207 E 4.3 213, E 5.1 215; HAEFLIGER/SCHÜRMANN (n. 69) pp. 439–440.

⁷² See the exception (proving the rule) in BGE 122 V 157, 164. The only author promoting a more holistic approach is SCHWEIZER (n. 69) pp. 683–685. See further HAEFLIGER/SCHÜRMANN (n. 69) p. 180; RUTH HERZOG, Art. 6 EMRK und die kantonale Verwaltungsrechtspflege, Bern 1995, p. 313.

⁷³ BGE 124 I 255, 261.

⁷⁴ BGE 112 Ia 290, 294.

⁷⁵ [1924] I KB 256, 259.

⁷⁶ Art. 53 of the Federal Constitution 1848: “Nul ne peut être distrait de son juge naturel”. See art. 58 of the Constitution 1874 and art. 30(1) of the Constitution 1999; BGE 6, 516, 520.

(*Instruktionsrichter/juge d’instruction*).⁷⁷ Oral and public hearings in administrative appeal proceedings tend to be the exception. However, the crucial question is whether a hearing is granted automatically or whether the appellant must explicitly request a hearing. The jurisprudence of the Federal Court (dealing with general administrative law matters) and the Federal Insurance Court⁷⁸ (dealing with social welfare matters) differ regarding this point. According to the Federal Court, a purely written procedure is possible only if the appellant has explicitly waived a hearing. If the appellant did not make clear representations regarding this point, then the court must enquire.⁷⁹ However, the reviewing court does not need to hold a hearing if a lower court, fulfilling the requirements of art. 6(1), has already done so and the dispute in the higher court is limited to questions of law.⁸⁰ Unlike the Federal Court, the Federal Insurance Court demands a hearing only if there is a “clear and unambiguous request” by the appellant.⁸¹ Furthermore, the court holds that, even where an appellant requests a hearing, proceedings that are entirely in written form may comply with art. 6(1) if “highly technical issues” are at stake. The court argues that one “should have regard to the demands of efficiency and economy” in social welfare matters and refers to the *Schuler-Zraggen* case.⁸²

c. Full jurisdiction of the reviewing court

Whether or not a reviewing court has full jurisdiction according to art. 6(1) depends on the scope or intensity of judicial control (*Kognition, pouvoir d’examen*). The court’s jurisdiction must cover the following two aspects:

Lawfulness of a decision: This not only includes the question of whether a decision complies with constitutional and ordinary law, but also whether a decision is proportionate – proportionality being a fundamental principle of Swiss constitutional law.⁸³ Although the Swiss concept of legality may be broader than its English counterpart, particularly regarding questions of proportionality,⁸⁴ the courts are not obliged to supersede the administrators’ deci-

⁷⁷ HERZOG (n. 72) pp. 402–406; WOHLFART (n. 70) p. 1434. See further art. 55(2) of the Bundesgerichtsgesetz (BGG) 2005.

⁷⁸ The Federal Insurance Court will be incorporated into the Federal Court in January 2007. However, specialised chambers for social insurance matters (equivalent to the former Court) will remain.

⁷⁹ BGE 127 I 44, 48. See further BGE 128 I 59, 61; 121 I 30, 39.

⁸⁰ BGE 121 I 30, 36.

⁸¹ BGE 122 V 47, 52; 119 V 375, 381.

⁸² BGE 122 V 47, 53–54; 120 V 1, 6; 119 V 375, 380. See further *Schuler-Zraggen v Switzerland* (n. 18).

⁸³ Art. 5(2) of the Federal Constitution 1999; HÄFELIN/MÜLLER/UHLMANN (n. 11) para. 364, 581–584.

⁸⁴ An aspect of major importance in all UK Human Rights cases. See among many others: *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (particularly the dictum of Lord Steyn).

sions with their own judgments.⁸⁵ The courts do not have to answer as to whether an administrative decision was expedient or “inopportune” (*unangemessen, inopportun*).⁸⁶ Particularly in the field of planning law, the Federal Court approves the *modus operandi* of most administrative courts to show judicial deference.⁸⁷ The Federal Court hardly ever gives reasons for its approach, although in BGE 115 Ia 189 it held that

“[...] this deference arises from a well-understood principle of the *separation of powers*, which on one hand leaves discretionary power to the government and administration and on the other hand limits judicial control to questions of law.”⁸⁸

Another reason for judicial deference – again in planning law cases – is the deeply rooted subsidiarity principle: the conviction that communal or cantonal authorities are best suited to dealing with local or regional planning decisions.⁸⁹

Establishing the facts of a case: The reviewing court’s jurisdiction must cover all the “pertinent facts” of the case (*rechtserhebliche Tatsachen, faits pertinents*).⁹⁰ This reviewing power is not limited to “jurisdictional facts”,⁹¹ but also includes the “unlimited” or “free” scrutiny of all facts (*freie richterliche Überprüfung des Sachverhalts, pouvoir d’examen non limité en fait*).⁹² A court confining its review to the arbitrariness of how the facts have been established is therefore failing to fulfil the requirements of art. 6(1).⁹⁴

C. Differences

1. Judicial methodology

English courts look at the judicial and non-judicial decision-making process as a whole and ask whether it is compliant with art. 6(1). In answering this question they move between three groups of arguments. A standardised step-by-step

⁸⁵ BGE 129 II 193, 208; 111 Ib 227, 232–233. See further 123 I 87, 90; 118 Ia 223, 227; KLEY-STRULLER (n. 69) para. 64.

⁸⁶ BGE 117 Ia 497, 502; BOVAY (n. 11) p. 393; HÄFELIN/MÜLLER/UHLMANN (n. 11) para. 1936–1939. Contra VILLIGER (n. 69) para. 427; JOACHIM WYSSMANN, Art. 6 EMRK und seine Anwendung im Steuerrecht, in: Archiv für Schweizerisches Abgaberecht 1996, p. 769.

⁸⁷ BGE 119 Ia 411, 419–421; 117 Ia 497, 502–503.

⁸⁸ BGE 115 Ia 189, 191 (emphasis added).

⁸⁹ BGE 117 Ia 497, 502.

⁹⁰ BGE 118 Ia 473, 478; SCHWEIZER (n. 69) p. 691.

⁹¹ See CRAIG (n. 48) p. 797.

⁹² BGE 120 Ia 19, 30.

⁹³ BGE 127 I 115, 124.

⁹⁴ BGE 117 Ia 378, 386.

approach – as there is in Switzerland – does not exist. The most reasonable explanation for this methodological difference would seem to be the fact that the English legal tradition is based on common law whereas Switzerland has a civil law background. English court decisions are reached through incremental reasoning from case to case and the reasons are given in the form of individual judges’ opinions. By contrast, Swiss courts (rather than single judges) give uniform reasons that reflect the quest to systematise and structure the law in a statute-like manner. There are other, more profound reasons for the different methods, however.

Firstly: reviewing courts in England do not provide full jurisdiction because the intensity of judicial review – at least in the traditional sense – is too restrained. If this concept of review is not to undergo fundamental change, the lack of judicial protection at the review stage must be compensated for by other safeguards at earlier stages of decision-making. Proceedings must therefore be evaluated from a global perspective and not in a step-by-step approach. Swiss courts, on the other hand, may focus on a specific stage of the (judicial) decision-making process as administrative appeal procedures easily fulfil the full jurisdiction requirement. An analysis of the whole procedure would therefore be redundant. *Secondly:* the fragmented structure of administrative decision-makers in England permits procedural safeguards to vary from field to field; a uniform approach is hardly possible. *Thirdly:* courts in England stress the fact that the concept of civil rights and obligations has been expanded by the ECtHR and that the nature of civil rights may differ enormously as a result. The nature of the rights at stake is another means to loosen the rigid full jurisdiction requirement by varying the degree of procedural protection.⁹⁵ *Fourthly:* the clearly structured scheme applied by the Swiss Federal Court also serves as a federal standard for cantonal administrative courts. The Federal Court can nonetheless build on a traditional understanding of administrative courts and appeal procedures and so its jurisprudence is more akin to a fine-tuning at the federal level.⁹⁶

2. Full jurisdiction – a continental concept

The main reason that England struggles with the concept of full jurisdiction – and that Switzerland does not – is its continental origin. As already pointed out, the role of specialised continental administrative courts is to fully reassess the

⁹⁵ See JAVAN HERBERG/ANDREW LE SUEUR/JANE MULCAHY, Determining Civil Rights and Obligations, in: Jeffrey Jowell and Jonathan Cooper (eds.), Understanding Human Rights Principles, Oxford 2001, p. 121.

⁹⁶ See HAEFLIGER/SCHÜRMAN (n. 69) p. 447; WOHLFART (n. 70) p. 1430.

administrative decision. Thus, their jurisdiction is traditionally broad. It is therefore unsurprising that judicial review proceedings in England fall short of the full jurisdiction requirement. However, changing the concept of judicial review by broadening its scope would also change the traditional relationship between the executive and the judiciary. Lord Clyde expressed this concern in *Alconbury*:

“The suggestion was advanced that, [...] the scope of judicial review might somehow be enlarged so as to provide a complete remedy. [...] I consider that it might well be difficult to achieve a sufficient enlargement to meet the stated purpose *without jeopardising the constitutional balance between the role of the courts and the role of the executive.*”⁹⁷

The full jurisdiction issue is therefore more than just a “simple” problem of procedural law. It also reflects the role of the judiciary in administrative law matters. The distinct understandings collide most apparently in the *Bryan* case, specifically in the different opinions of Mr Bratza and Mr Trechsel (see above III/B). Whereas the statement of the Swiss member of the Commission reflects the ideal of specialist administrative courts ready to intervene on factual issues and to replace the administrative decision by a judicial one, the British statement is based on a far more restrained role of the judiciary.

3. Fair and public hearing – a common law concept

The right to a fair hearing has strong roots in the common law tradition and one of the significant features of English judicial procedure has been the emphasis on orality.⁹⁸ In a traditional Swiss understanding, the principle of *audi alteram partem*⁹⁹ does not necessarily include the right to be heard orally.¹⁰⁰ The establishment of facts under Swiss administrative law, even before the courts, is based almost exclusively on written evidence. The implementation of art. 6(1) means that oral and public hearings will henceforth be granted when parties require them. However, the courts are prepared to sanction exceptions, particularly in the field of social welfare law, and the practice shows that most administrative law disputes are still settled in a wholly written procedure.

Here again, the different legal cultures clash in a Strasbourg decision. In *Schuler-Zraggen* the dissenting opinion was given by the Irish judge, Mr Walsh – the only judge with a common law background:

“I am also of the opinion that there was a breach of Article 6(1) by reason of the absence of an oral hearing in accordance with that Article. [...] That such application may be thought to be inconvenient for the ‘demands of efficiency’ by the bureaucracy can scarcely be regarded as a justification for ignoring the requirements of the Article.”¹⁰¹

D. Common points

1. Misgivings about over-judicialisation

Art. 6(1) raised fears of over-judicialisation in both jurisdictions. In England, these fears have been expressed by the most senior judge, Lord Bingham (see IV/A/2). In Switzerland, the *Belilos* decision caused massive political outrage. A member of parliament demanded that the Federal Council withdraw from the ECHR.¹⁰² The Council of States ultimately rejected the demand by only one vote, thanks to a tie-break decision by its chairman.¹⁰³ Social actors in England and Switzerland alike take widespread pride in their long tradition of protecting civil rights. Scepticism about the internationalisation of human rights therefore prevailed. As UK Prime Minister John Major asserted in 1996: “We have no need of a Bill of Rights because we have freedom”. Psychological reservations about the ECHR may also explain the late ratification of the ECHR in Switzerland (1974) and its tardy implementation in England (1989).¹⁰⁴ General scepticism culminates where art. 6(1) is concerned. If this provision requires a more intensive judicial review (in England) or an extension of judicial control (as it was in Switzerland until 1996), then it must necessarily influence the constitutional balance between the role of the courts and the role of the executive.

In the case of England, there is another point which may be mentioned as “judicialisation” has a different and, more far-reaching meaning: judicial procedures are governed by the adversarial principle as well as by laboured evidence procedures.¹⁰⁵ They are not tailor-made to disputes under administrative law, particularly where the nature of a decision is polycentric.¹⁰⁶ In addition, they complicate the establishment of facts and may not be in the interest of the citi-

¹⁰¹ *Schuler-Zraggen v Switzerland* (n. 18) 438–439.

¹⁰² AB SR 1988 554–561.

¹⁰³ AB SR 1988 561.

¹⁰⁴ LORD BINGHAM, *The European Convention on Human Rights: Time To Incorporate*, in: Richard Gordon/Richard Wilmot-Smith (eds.), *Human Rights in the United Kingdom*, Oxford 1996, p. 9; JON A. FANZUN, *Die Grenzen der Solidarität: Schweizerische Menschenrechtspolitik im Kalten Krieg*, Zürich 2005, pp. 175–256.

¹⁰⁵ See *Begum* (n. 26) [40] (Laws LJ).

¹⁰⁶ ALLARS (n. 4) p. 412; ALLISON (n. 4) pp. 221–227, 233–234, 242–243; CRAIG (n. 4) p. 454.

⁹⁷ *Alconbury* (n. 37) [169] (emphasis added). Contra *Adan* (n. 36) [81]–[82] (Hale LJ).

⁹⁸ DAVID HOFFMAN/JOHN ROWE, *Human Rights in the UK*, Harlow 2003, p. 150. See further GALLIGAN (n. 8) pp. 357–359.

⁹⁹ Art. 29(2) Federal Constitution 1999: “The parties have the right to be heard”.

¹⁰⁰ BGE 122 II 464, 469.

zens, as the latter are forced to seek professional representation.¹⁰⁷ By contrast, there is much more similarity between administrative and judicial procedures in Switzerland. Judicial procedures are less formalised, the judges play a more active role and their expertise is greater owing to the specialisation of the administrative courts.

2. Social welfare matters: Trying to close "Pandora's box"

Both "supreme" courts struggle with the fact that the ECtHR has extended the meaning of civil rights so that art. 6(1) applies to social welfare matters. ECtHR jurisprudence has thus been described as "opening Pandora's box".¹⁰⁸ National courts are not able to close this box, but they try to soften the blow of its contents by interpreting Strasbourg decisions (i.e. *Bryan* and *Schuler-Zgraggen*) in a rather generous manner. We might regard this approach as a last pocket of resistance and as an expression of national scepticism. In my view, however, the reaction of the national courts should not be criticised too hastily.

Characteristic of social welfare and social insurance law is that it concerns the allocation of scarce financial resources, that its application needs specific (social, financial and medical) expertise and that it is a matter of mass-administration (*Massenverwaltung*).¹⁰⁹ In addition, the pressing social needs of the persons concerned may require rapid decisions.¹¹⁰ The application of legislative schemes is therefore entrusted to specialist administrative bodies possessing a high degree of discretionary power and expertise. Courts are ill-suited to fully reassessing these decisions and judges must be taken seriously if they fear a capacity overload because they have to scrutinize the entire fact-establishing process (in England) or to grant oral hearings (in Switzerland).¹¹¹ It is thus undisputable that courts are pushed to the limit when reviewing social welfare decisions with full jurisdiction. It is all the more important, however, to improve procedural safeguards in the initial decision-making process.¹¹²

¹⁰⁷ Ms Booth QC in *Adan* (n. 36) [10]; ALLARS (n. 4) p. 386.

¹⁰⁸ *Alconbury* (n. 37) [81] (Lord Hoffmann).

¹⁰⁹ IAN LOVELAND, Does Homelessness Decision Making Engage Article 6(1) of the European Convention on Human Rights?, in: EHRLR 2003, pp. 176, 188–189, 193; ULRICH MEYER-BLASER, Der Einfluss der Europäischen Menschenrechtskonvention (EMRK) auf das Schweizerische Sozialversicherungsrecht, in: Zeitschrift für Schweizerisches Recht 113 (1994) I, pp. 389, 397–401. See further *Begum* (n. 27) [9] (Lord Bingham), [43], [67] (Lord Hoffmann), [114] (Lord Walker).

¹¹⁰ BGE 119 V 375, 381.

¹¹¹ *Begum* (n. 27) [34] (Lord Hoffmann); MEYER-BLASER (n. 109) p. 400.

¹¹² GALLIGAN (n. 8) pp. 221, 309, 312; MEYER-BLASER (n. 109) p. 401.

V. Conclusion

The question in both jurisdictions is how to ensure access to a court with full jurisdiction when civil rights and obligations are at stake? In answering this question, the two national "supreme" courts follow rather different approaches. Whereas the House of Lords has adopted a holistic method, the Swiss Federal Court addresses the question in a clearly structured step-by-step manner. This methodological difference is due primarily to the fact that reviewing courts in England do not provide full jurisdiction as their *intensity* of review is too shallow. If this concept of judicial review is not to undergo fundamental change, it is necessary to compensate for the lack of judicial protection at the review stage through other safeguards at earlier stages of the decision-making process. Owing to the fragmented structure of administrative bodies and procedures these safeguards vary from field to field; a uniform approach is hardly possible.

By contrast, Swiss administrative courts easily fulfil the full jurisdiction requirement as their powers of review are more extensive. Decision-making procedures are therefore in compliance with art. 6(1) as long as a court may review administrative decisions. The safeguards at earlier stages of the process and the field of administrative law are irrelevant. However, even in Switzerland the implementation of art. 6(1) has not been entirely smooth, because judicial review has traditionally been a written procedure and (public) hearings have not been granted. Nowadays, hearings must be held in most cases if parties ask for them. More far-reaching was the impact of art. 6(1) on the *ambit* of judicial review, since certain fields of administrative law were completely excluded from judicial control. It was therefore necessary to extend the existing courts' jurisdiction and in certain cases even to establish new administrative courts. This development has since been concluded.

Notwithstanding these differences, two areas of common ground have been revealed. *Firstly*, strengthening the intensity of judicial review (in England) and extending its ambit (in Switzerland) influences the constitutional balance between the role of the courts and the role of the executive. These changes are particularly incisive in countries where the executive traditionally plays an important role and where concerns about the legitimacy of the judiciary are widespread. This fact may explain why fears of over-judicialisation arose in both jurisdictions. *Secondly*, both "supreme" courts still struggle with the rather extensive interpretation of the concept of "civil rights" given by the Strasbourg authorities, particularly in the field of social welfare matters. The national courts try to limit the consequences of this "opening of Pandora's box" by interpreting the Strasbourg jurisprudence in a rather flexible way. By doing so, they are attempting to implement art. 6(1) while retaining the particularities of their own judicial review procedures.

Article

The impact of art. 6(1) on judicial review in England and Switzerland shows plainly that the ECHR reflects a compromise of different legal traditions. The process of harmonization is not free from clashes in legal culture and demands the willingness to make concessions on the part of both countries.