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In Search of a Principled Approach—Article 6(1) ECHR and Administrative Decisions Through the Lens of UK Housing Assistance

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ABSTRACT

This article proposes a new framework which could be adopted by the ECtHR to address current criticisms of its unprincipled approach to the application of Article 6(1) ECHR to administrative decisions. The framework proposed focuses on the existence of a "right", according to its substantive content and effect, as the determining factor for the application of Article 6(1). The exclusionary effect of the term "civil" is then restricted to the anomalous cases which fall within the "hard core of public authority prerogatives". In doing so, this framework breaks away from the ECtHR's historic approach of analogising certain public law rights with superficially similar private law rights to justify the application of Article 6(1). The proposed framework is explored through Section 193 of the Housing Act 1996 and this exploration shows two things. First, that the proposed framework can resolve points of contention by settling the dispute between the ECtHR and UKSC over Article 6(1)'s application to Section 193. Second, that the proposed framework is neither inconsistent with the terms of Article 6(1) itself nor the ECtHR's caselaw in its current state.

Keywords: Article 6(1) ECHR; civil rights; administrative decisions; Ali v UK; Poshteh

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I. INTRODUCTION

Under Section 193(2) of the Housing Act 1996, a local authority has a duty to make accommodation available for occupation by an applicant, provided they are unintentionally homeless and in priority need. This duty is terminated if the applicant refuses suitable accommodation (Section 193(5), (7)), or can no longer be considered unintentionally homeless (Section 193(6)). The duty will be discharged when the local authority makes suitable council or private accommodation available or provides advice and assistance to ensure that accommodation is available (Section 206). Section 202 provides for a review by a housing officer of, *inter alia*, any decision concerning eligibility for assistance, termination or discharge of the local authority's duty, and suitability of the accommodation offered. Section 204 then provides a right of appeal to a county court on a point of law.

Article 6(1) of the European Convention on Human Rights[1] (Article 6(1)) is engaged by decisions determining an individual's "civil rights and obligations". In *Fazia Ali v The United Kingdom*,[2] the Chamber of the European Court of Human Rights (ECtHR) extended its application to decisions that end the local authority's duty under Section 193(2). Importantly, however, the Chamber held there had been no violation of Article 6(1) since the county court had sufficient jurisdiction to remedy the lack of independence of the prior decision-makers. The procedure as a whole, therefore, complied with Article 6(1). A mere two years later, the UK Supreme Court (UKSC) in *Poshteh v Royal Borough of Kensington and Chelsea* declined to follow the Chamber,[3] instead affirming its earlier decision of *Ali v Birmingham City Council* (*Ali v BCC*) that Article 6(1) is not engaged by these decisions.[4]

The ECtHR has been criticised for its failure to provide a coherent set of guiding principles to determine Article 6(1)'s application to administrative decisions.[5] *Ali v UK*—described by Elliott as "another expansionist decision" that dismantles the limiting principles which formerly existed in the realm of social welfare but "makes little, if any, effort to articulate any other serviceable principle" that might guide further decision making in this area—can be seen as an unfortunate continuation of this pattern.[6] The UKSC in *Poshteh* expressed similar

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1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 6(1).

2 *Fazia Ali v The United Kingdom* [2015] ECHR 924.

3 *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] AC 624.

4 *Ali v Birmingham CC* [2010] UKSC 8, [2010] 2 AC 39.

5 Thomas Cross, 'Is There a "Civil Right" under Article 6? Ten Principles for Public Lawyers' (2010) 15 JR 366, 366.

6 Mark Elliott, '*Ali v United Kingdom*: Article 6(1) ECHR and Administrative Decision-making' (Public Law for Everyone, 13 March 2016) <https://publiclawforeveryone.com/2016/03/13/ali-v-united-kingdom-article-61-echr-and-administrative-decision-making/> accessed 21 February 2022.

concern at the ECtHR's failure to provide a clear stopping point to the expansion of Article 6(1) and its disregard for the practical implications of that expansion.[7] This article will suggest a principled framework for the application of Article 6(1) to administrative decisions which satisfies these criticisms and would justify the application of Article 6(1) to Section 193.

II. A New Principled Approach

Strasbourg has been criticised by Craig and Lord Millett for its unprincipled approach to the scope of civil rights. In particular, the ECtHR determines Article 6(1)'s scope by making superficial analogies with private law rights, leading to "casuistic distinctions" with "little normative merit".[8] This formalistic approach makes it difficult to determine and predict the boundaries of Article 6(1).[9] Addressing these criticisms, this article proposes an approach which focuses on the existence of a right, according to its substantive content and effect,[10] as opposed to whether that right is "civil". This approach enables national legislatures to make a normative assessment of what citizens should be entitled to but allows the courts to ensure that those entitlements receive appropriate procedural protection.

A. Do qualifying section 193 applicants have a right?

It should be noted that much of the discussion in the caselaw conflates the interest being a *civil* right with the interest being a *right* in the first place. It is, therefore, difficult to separate the two completely within this caselaw. Doing so, however, could facilitate a more structured and principled approach. This section will proceed on the basis that a right is something to which an applicant is entitled, and which cannot be revoked outside legally prescribed circumstances.[11]

In *Tsfayo v The United Kingdom*,[12] UK housing benefits were classed as a civil right. Though this point was conceded by the Government, the ECtHR expressly agreed that Article 6(1) was applicable.[13] *Tsfayo* produces a curious position whereby applicants qualifying for housing *benefits* have the protections of Article 6(1), but applicants qualifying for housing

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7 *Poshteh* (n 3) [36] (Lord Carnwath).
8 Paul Craig, 'The Human Rights Act, Article 6 and Procedural Rights' [2003] PL 753, 758–59.
9 *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430.
10 *König v Germany* (1978) Series A no 27, para 89.
11 The ECtHR has generally been unwilling to apply Article 6(1) to administrative decisions if a local authority has discretion to refuse an entitlement despite the statutory criteria being met. See Cross (n 5) 372–73.
12 *Tsfayo v The United Kingdom* [2007] ECHR 656.
13 Cross (n 5) 372.

assistance do not. As Lord Kerr opined in *Ali v BCC*, it is difficult to reach a principled basis for distinguishing between the two when both involve spending public resources, both provide a valuable resource to the beneficiary, and both are activated by the need of that beneficiary.[14]

The UKSC and Loveland have sought to justify this distinction by reference to the precise content of the alleged right.[15] Unlike in *Feldbrugge v The Netherlands*,[16] *Salesi v Italy*,[17] and *Tsfayo*, which all concerned a largely fixed monetary sum, the entitlement under Section 193 is to a "benefit in kind",[18] the substantive content of the Section 193(2) duty being one "loosely structured by principles rather than tightly determined by rules".[19] As such, the right cannot be considered individual, economic, and flowing from specific rules laid down in statute.[20] In particular, decision-makers have discretion when terminating or discharging their duty under Section 193(2). Loveland's argument permeates the judgments of *Begum v Tower Hamlets LBC*,[21] *Ali v BCC*,[22] and *Poshteh*[23] and received express endorsement from Lord Hope.[24] Loveland relies first on the phrase "suitable accommodation".[25] This provides the local authority with limited discretion when satisfying their duty under Section 193(2). Unlike a monetary sum, "suitable accommodation" cannot be considered a fixed entitlement. Loveland further relies on two decisions which concerned the Housing Act 1996's predecessor: *R v Brent LBC, ex p Awua*[26] and *Puhlhofer v Hillingdon LBC*.[27] *Awua* determined that there was no requirement that the local authority provide *permanent* accommodation. This supports Loveland's contention that the predecessor act was not intended to provide a lifelong home.

Loveland, however, relies on the following passage by Lord Brightman in *Pulhofer*: "it is an Act to assist persons who are homeless, not an Act to provide them with homes …".[28] This reliance is misplaced. Lord Brightman was making the same point about *permanence* as

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14 *Ali v BCC* (n 4) [75].

15 Ian Loveland, 'Does Homelessness Decision Making Engage Article 6(1) of the European Convention on Human Rights?' [2003] European Human Rights Law Review 176; *Ali v BCC* (n 4); *Poshteh* (n 3). As Cross neatly outlines, this was the crux of the decision in *Ali v BCC* and a reading of Lord Hope's judgment as suggesting that the evaluative nature of the criteria under Section 193(1) (leading to an entitlement under Section 193(2)) precludes the application of Article 6(1) would be contrary to a clear line of ECtHR authority: Cross (n 5) 373–76.

16 *Feldbrugge v The Netherlands* (1986) Series A no 99.

17 *Salesi v Italy* (1993), Series A no 257–E, para 19.

18 *Begum* (n 9) [61] (Lord Millett), [67] (Lord Hoffmann); *Ali v BCC* (n 4) [42], [49] (Lord Hope).

19 Loveland (n 15) 184.

20 *Salesi* (n 17) para 19; Loveland (n 15) 184.

21 *Begum* (n 9) [67], [69] (Lord Hoffman), [91] (Lord Millett).

22 *Ali v BCC* (n 4) [36], [49] (Lord Hope).

23 *Poshteh* (n 3) [34] (Lord Carnwath).

24 *Ali v BCC* (n 4) [27].

25 Housing Act 1996, Section 206.

26 *R v Brent LBC, ex p Awua* [1996] 1 AC 55 (HL).

27 *Puhlhofer v Hillingdon LBC* [1986] AC 484 (HL).

28 ibid 517.

the court in *Awua*. In citing this passage without context, Loveland implies that there is no duty to house a qualifying applicant. Yet, the local authority's duty under the predecessor act was to make suitable accommodation available for the applicant.[29] While this is not an obligation to *home* an applicant, it is an obligation to *house* an applicant. The duty under Section 193(2) is substantively the same: "[the local authority] shall secure that accommodation is available for occupation by the applicant". That obligation can only be terminated in circumstances strictly circumscribed by statute.[30] Outside these circumstances, the entitlement is irrevocable. Although Loveland is right to highlight that the local authority has some flexibility in respect of what constitutes "suitable accommodation", once the applicant qualifies under Section 193(1), they have a minimum entitlement to some form of accommodation.[31] For instance, for the local authority's decision on suitability to not be considered irrational,[32] it can be expected that any accommodation provided *must* meet some basic requirements, such as adequate sanitation and running water. As the ECtHR noted, the local authority's discretion has "clearly defined limits"[33] and, as Hale LJ pointed out in *Adan v Newham LBC*, a failure to exercise that discretion would be unlawful.[34] Once the local authority is satisfied that the statutory criteria for providing accommodation are fulfilled, they must provide it. Lord Carnwath criticised the ECtHR for citing Hale LJ's statement out of context.[35] He opined it was unclear whether Hale LJ was merely recording the basis of counsel's concession that Article 6(1) applied, particularly given her endorsement of Lord Hope's judgment in *Ali v BCC*.[36] However, Hale LJ was quite clear that an applicant owed a duty under Section 193(2) has a right. Her endorsement of Lord Hope's judgment, which acknowledged that applicants have a right to assistance but that this is not a civil right,[37] does not cast doubt on this.

The question, then, is whether the existence of limited discretion over the content of the entitlement excludes the application of Article 6(1). The ECtHR noted the existence of some discretion over the content of the right in the prior case of *Schuler-Zgraggen v Switzerland*,[38]

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29 Housing Act 1985, Section 65(2).
30 See Section I.
31 Baker has convincingly analogised the right to *some* accommodation, without that right being to any specific accommodation, to making a hotel reservation. The client has a right to *a* room, but not to any specific room. See Christopher Baker, '*Tomlinson*: A Supreme Case of Clutching at Straws in the Wind: Part 1', (2010) 13 Journal of Housing Law 76 (note), 81.
32 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).
33 *Ali v UK* (n 2), para 59.
34 *Adan v Newham LBC* [2001] EWCA Civ 1916, [2002] 1 WLR 2120 [55].
35 *Poshteh* (n 3) [33].
36 ibid [34].
37 *Ali v BCC* (n 4) [27].
38 *Ali v UK* (n 2), para 59.

where the authority had to judge the applicant's level of incapacity to determine the amount of benefit she would receive. As pointed out in *Poshteh*,[39] however, this is unconvincing. Once incapacity of at least 66.66% was established, the financial benefit followed as a matter of right with no further discretion. Nevertheless, while *Ali v UK* went further than the prior caselaw on social welfare, the existence of discretion after the right has been established is not novel to Article 6(1) more generally. This feature is present in decisions about the provision of licences, such as *Pudas v Sweden*.[40] In *Pudas*, the applicant acquired consequential rights after the administrative decision-maker exercised their discretion to grant the applicant a licence to operate public transport.[41] The decision to terminate that licence thus engaged Article 6(1).[42] This was despite two significant elements of discretion: the licence was subject to conditions by the licensing authority, such as particular routes and timetables;[43] and the licence could be revoked if the authority deemed the holder no longer suitable.[44] The court noted that, according to generally recognised legal and administrative principles, the authorities "did not have an unfettered discretion" in these decisions.[45] Licensing cases such as *Pudas* show that the existence of fettered discretion after a right is established cannot exclude Article 6(1).[46]

A broader point can be made about why it was legitimate for the ECtHR to extend the scope of rights within the meaning of Article 6(1) in *Ali v UK*. It is trite to observe that the ECtHR is competent to develop the ECHR progressively.[47] As the next step in a chain of incremental developments regarding social welfare, *Ali v UK* did not exceed the ECtHR's competence. These developments began with *Feldbrugge*, which concerned statutory sickness allowance.[48] The ECtHR found Article 6(1) to be applicable on the basis of identifiable private law characteristics, which were held to outweigh the public law characteristics of the right. In particular, the applicant had participated in the financing of the scheme, making it akin to private insurance, [49] and the right was closely linked to the contract of employment and was personal, economic, and individual.[50] The next notable development was *Schouten and*

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39 *Poshteh* (n 3) [35].
40 *Pudas v Sweden* (1987) Series A no 125–A.
41 ibid paras 34, 37.
42 ibid.
43 ibid para 17.
44 ibid para 21.
45 ibid para 34.
46 This is also expressed in *Jacobsen v Sweden* (1989) Series A no 163, which concerned the granting of a building permit. See Cross (n 5) 372.
47 *Tyrer v The United Kingdom* (1978) Series A no 26, para 31.
48 *Feldbrugge* (n 16).
49 ibid para 39.
50 ibid paras 37–38.

Meldrum v The Netherlands[51] and *Salesi*.[52] In the former, concerning contributions to social welfare, the ECtHR suggested that even welfare assistance granted unilaterally by the state could fall within Article 6(1).[53] In the latter, the ECtHR then applied Article 6(1) to unilaterally granted welfare assistance (a monthly disability allowance). Finally, in *Tsfayo*, Article 6(1) was applied to UK housing benefits,[54] which, as Lord Kerr opined, are difficult to distinguish from housing assistance on a principled basis.[55] While *Ali v UK* went a step further by applying Article 6(1) to a "benefit in kind", this was a step, not a leap.

B. DEFINING THE "CIVIL" IN CIVIL RIGHTS AND OBLIGATIONS

It is clear that rights straightforwardly derived from private law ("private law rights"), such as the law of tort or real property, are civil rights for the purposes of Article 6(1).[56] Far more vexing for the ECtHR have been rights which are produced by an administrative decision ("public law rights"). This section will suggest that "civil" should be given the broadest possible definition and should not be tied to the misconceived analogies with private law rights from the ECtHR's earlier caselaw.[57] The social welfare context is a particularly useful lens, as it distinctly captures how such analogies have led to laboured and unsatisfactory judgments.

In their dissenting opinion in *Maaouia v France*, Judges Louciades and Traja suggested that "civil" should be interpreted as "non-criminal".[58] They argued that the term "criminal charge" necessitated another term to encompass all other (non-criminal) adjudicative procedures.[59] Yet, depriving the term "civil" of any real restrictive scope would conflict with the ECtHR's reticence to intervene in matters it considers within the "hard core of public authority prerogatives".[60] This category includes the obligation to pay tax,[61] the right to hold a passport,[62] and the right to stand for election.[63] It is suggested that these areas reflect what the ECtHR believes to be the hard limits of Article 6(1), beyond which the ECtHR would receive backlash from the Convention States for over-extending Article 6(1). It must therefore be

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51 *Schouten and Meldrum v The Netherlands* (1994) Series A no 304.
52 *Salesi* (n 17).
53 *Schouten and Meldrum* (n 51), para 47.
54 *Tsfayo* (n 12).
55 *Ali v BCC* (n 4) [74]; text to n 11.
56 Cross (n 5) 366.
57 See, for example, *Le Compte, Van Leuven and De Meyere v Belgium* (1981) Series A no 43, para 28.
58 *Maaouia v France* (2001) 33 EHRR 42, Dissenting Opinion of Judge Loucaides Joined by Judge Traja, para 5.
59 ibid.
60 *Ferrazzini v Italy* ECHR 2001–VII 349, para 29.
61 ibid.
62 *Smirnov v Russia* App no 14085/04 (ECtHR, 6 July 2006).
63 *Pierre-Bloch v France* ECHR 1997–VI.

accepted that there is *some* limit to the scope of Article 6(1), as both originally and presently conceived of by the Convention States, beyond which any extension of Article 6(1) would be illegitimate.[64] This acceptance of hard limits has produced some rather paradoxical and unsatisfactory caselaw. Van Dijk and others rightly point out that the resulting dividing line, between civil and non-civil rights and obligations, appears arbitrary.[65] They cite the curious outcome that an obligation to pay a contribution under a social security scheme is a civil obligation,[66] but that an obligation to pay a wage tax is not,[67] despite both having close links to the contract of employment. Craig has provided criticism on two further fronts: that the "hard core of public authority prerogatives" criterion is extremely vague, and that it does not justify the exclusion of Article 6(1).[68] In particular, the expectation that citizens undertake the obligation and the state's right to demand its performance do not tell us whether process rights should attach to the administration of the legislation imposing that obligation.[69] Craig rightly points out that there is a disconcerting lack of logic behind the court's reasoning in these cases. Yet, as suggested above, perhaps this is because the court's approach is not rooted in logic, but pragmatism about how far Article 6(1) can be extended without backlash.

Accepting that "civil" cannot be deprived of all meaning, three things are suggested. Firstly, that rights not falling within the hard core of public authority prerogatives should be considered civil rights. Secondly, the hard core of public authority prerogatives should be circumscribed as restrictively as possible, to give "civil" its broadest possible meaning. Thirdly, that Section 193 does not fall within the hard core of public authority prerogatives. This approach represents a compromise. On one hand, it accepts the reality that the hard core of public authority prerogatives has been firmly entrenched in ECtHR jurisprudence. On the other, it acknowledges the adverse consequences that category has, namely introducing illogicality and uncertainty into the law, and seeks to mitigate them. It would allow for an *assumption* that Article 6(1) applies whenever there is a right engaged, which could only be rebutted by the State demonstrating that this right falls within the anomalous hard core of public authority prerogatives. With this approach, Article 6(1) would be applied in a principled way (being determined by whether a right is engaged) save for these anomalous cases. Furthermore, the

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64 Alastair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014) 36–37.

65 Pieter van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 403–06.

66 *Schouten and Meldrum* (n 51).

67 *Ferrazzini* (n 60).

68 Craig (n 8) 758.

69 ibid 758–59.

assumption that Article 6(1) applies would introduce certainty into the law, as States would bear the burden of proving an exception to the general rule.

The primary objection to considering the Section 193 entitlement a civil right is that it is not analogous to a private law right. In response, it will be shown that, firstly, the equation of civil rights with private law rights was erroneous and, secondly, such analogies no longer prevail in the context of social welfare.

(i) The Conflation of "Civil" with "Private"

In *Delcourt v Belgium*, the court provided the guideline that in a democratic society, the right to a fair administration of justice within the meaning of the Convention holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.[70] If this is so, why has the ECtHR restrictively interpreted "civil" by equating it with "private", which significantly confines the scope of Article 6(1)? A positive justification is required.

In *König v Germany*,[71] the ECtHR first weighed the private law characteristics of the right against its public law characteristics.[72] Yet, it provided no justification for why resemblance to a private law right was to be the sole determinant for the applicability of Article 6(1). It seems the court understood from *Ringeisen v Austria* that Article 6(1) would always apply where the outcome was determinative of a private law right.[73] In *Ringeisen v Austria*, the applicant had a contract for the sale of land. The decision, although applying rules of administrative law, would affect his property rights.[74] The court held that Article 6(1) applies to all proceedings "the result of which is decisive for private rights and obligations".[75] The question is therefore whether, in so holding, the court equated civil with private. If so, the court provided no explanation for doing so. It is suggested that the court was not exhaustively defining the remit of Article 6(1), but merely pointing out that where a private right will be affected by the outcome Article 6(1) will clearly be engaged. So why, in *König*, did the ECtHR appear to adopt the approach that Article 6(1) would *only* apply where the outcome was determinative for a *private* (as opposed to *civil*) law right? The separate opinion of Judge Matscher in *König* helps in answering this question.

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70 *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970), para 25.
71 *König* (n 10).
72 ibid.
73 ibid paras 86–96.
74 *Ringeisen v Austria* (1971) Series A no 13, para 94.
75 ibid.

Judge Matscher made the following insightful points. Firstly, one cannot obtain an idea of Article 6(1)'s scope from its legislative history. Secondly, the majority failed to understand and correctly apply *Ringeisen*. Thirdly, the majority confused the applicant's private law relations that were affected by the decision with the right at issue (a right to practice his profession). Fourthly, the Convention's authors did not appear to intend to bring all public law disputes under Article 6(1) simply because their outcome might affect the applicant's private law relations.[76] Judge Matscher rightly criticised the majority's approach—in particular, their failure to directly address whether Article 6(1) should be confined to private law rights, or whether it can also encompass public law rights. Perhaps this was a deliberate, strategic move by the majority to avoid openly acknowledging that Article 6(1) had been extended to what was really a public law right. Judge Matscher, however, appears simply to have assumed that Article 6(1) applies exclusively to private law rights.

Judge Matscher's separate opinion in *Le Compte v Belgium* provides some further explanation.[77] He opined that it is not the function of an international court to give recognition to rights which the authors of the Convention did not intend to include.[78] One key point Judge Matscher makes in support of his view of the drafters' intentions is that applying only some, and not all, of the procedural guarantees within Article 6(1) whenever it is engaged would be incompatible with the provision and could be dangerous for the interests of those involved in litigation.[79] Two points can be made in response. Firstly, had the majority in *König* and *Le Compte* been open about applying Article 6(1) to public law rights, a clear distinction could have been drawn between private law rights, which merit the full force of Article 6(1), and public law rights which do not. Secondly, there are instances where parties can waive some of the protections of Article 6(1). In particular, a claimant can waive their right to participate in a public hearing,[80] and the text of Article 6(1) itself provides exceptions when the presence of the press and public can be excluded. This casts doubt on Judge Matscher's assertion that Article 6(1) must always be applied in full.

A more comprehensive attempt to justify the equation of "civil" with "private" is the Dissenting Opinion of Sir Vincent Evans.[81] He argued that equating "civil" with "private" is consistent with the French text and borne out by the negotiating history of Article 6(1), which

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76 *König* (n 10), Separate Opinion of Judge Matscher.
77 *Le Compte* (n 57).
78 *Le Compte* (n 57), Partly Dissenting Opinion of Judge Matscher, para 1.
79 ibid para 5.
80 *Le Compte* (n 57), para 59.
81 *Le Compte* (n 57), Dissenting Opinion of Judge Sir Vincent Evans.

supports the view that "civil" should be given a restrictive meaning, particularly in the realm of administrative law.[82] This was elaborated on in the Joint Dissenting Opinion in *Feldbrugge*.[83] The dissenters' key point was that the drafters had deliberately restricted Article 6(1) to *civil* rights and obligations.[84] They made several points in support of this view. Firstly, the nature of the safeguards provided shows that the object and purpose of Article 6(1) does not extend to the administration of statutory schemes for distribution of public welfare. Judicialisation is less appropriate for administrative proceedings, and neither the humanitarian objective of the Convention nor the extreme importance of the protection of entitlement to social security benefits to the individual is sufficient to bring it within the scope of Article 6(1).[85] Secondly, "criminal" and "civil" cannot be seen as a comprehensive reference to all systems of adjudicative proceedings under domestic law.[86] Thirdly, not extending Article 6(1) to social security benefits is corroborated by the fact that the domestic legislation predated the elaboration of the Convention by some decades.[87] Fourthly, the drafting history of the Convention confirms this view.[88] Fifthly, state practice has not developed to this point and the approach of states has been very inconsistent.[89] Sixthly, evolutive interpretation does not allow entirely new concepts and spheres of application to be introduced into the Convention.[90]

In response, the following points can be made. On their first point, there is nothing in the text to suggest that Article 6(1) must always be applied in full.[91] The curative principle has given much flexibility to Article 6(1): administrative decision-makers need not be independent and impartial tribunals if there is supervision by a court or tribunal which is independent and impartial.[92] This does constitute some level of judicialisation, but judicial review is already common across the Convention States. On their second point, it is reasonable to suggest that the terms "civil" and "criminal" were not intended to be a comprehensive reference to all systems of adjudicative proceedings. Even assuming that is correct, however, there are many adjudicative proceedings in administrative law which concern no conceivable right at all, and

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82 ibid para 4.
83 *Feldbrugge* (n 16), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt, and Gersing.
84 ibid para 4.
85 ibid para 15.
86 ibid para 16.
87 ibid para 19.
88 ibid.
89 ibid para 24.
90 ibid.
91 Text to n 80.
92 This will be discussed in Section III.A.

will always be outside the scope of Article 6(1).[93] Therefore, "civil" could encompass all rights cases without Article 6(1) encompassing all systems of adjudicative proceedings. Indeed, it was argued in the dissenting opinion of Judges Loucaides and Traja in *Maaouia* that the interpretation that "civil" encompasses all rights cases is a viable one.[94] Alternatively, "civil" could be seen to exclude the hard core of public authority prerogatives.[95] On their fourth point, the analysis in paragraphs 20–23 of their dissenting judgment (based on the drafting history of the International Covenant on Civil and Political Rights (ICCPR)) does not support the proposition that "civil" ought to be equated with "private". In particular, they assert the following:

> [it is] reasonably clear that the intended effect of the insertion of the qualifying term '*de caractère civil*' in the French text of the draft International Covenant was to exclude from the scope of the provision certain categories of disputes in the field of administration "concerning the exercise of justice in the relationships between individuals and governments".[96]

Two rebuttals can be made. First, "*certain*" does not mean *all* administrative disputes. An intention to exclude *certain* administrative disputes could be seen to exclude the hard core of public authority prerogatives, or disputes which do not engage any rights. It should be noted that the drafters of the ICCPR never resolved which administrative disputes they intended to exclude.[97] Further, the word "*certain*" implicitly suggests that *some* administrative disputes were intended to be included. It would therefore be wrong to equate "civil" with "private", which could exclude *all* administrative disputes.

The fifth and sixth arguments presuppose that Article 6(1) was originally intended to apply exclusively to private law rights. According to the dissenters, the drafting history of Article 6(1) ECHR and Article 14 ICCPR (which Article 6(1) was modelled on) supports their view that Article 6(1) was not intended to apply to administrative decisions. Yet, the in-depth studies of the drafting history of Article 14 ICCPR by Velu, Patsch, Buergenthal, Kewenig, and Newman reveal no intention that this right should be restricted to determinations of rights

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93 See, for example, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.
94 *Maaouia* (n 58).
95 Text to n 60.
96 *Feldbrugge* (n 16), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt, and Gersing, para 22.
97 Frank C Newman, 'Natural Justice, Due Process and the New International Covenant on Human Rights: Prospectus' [1967] Public Law 274, 306–09.

and obligations of a private law character.[98] To the contrary, proposals which might have risked implying such a restriction were criticised because of that risk, and were rejected or amended.[99] Newman reinforces this point by explaining that the deletion in the French text of "*en matière civile*" after "*droits et obligations*" demonstrates that the majority of contracting parties wished to reinforce their intention *not* to confine procedural justice to justice in court.[100] Newman further points out that the Universal Declaration of Human Rights (UDHR) was adopted without the term "civil", and therefore clearly covers administrative proceedings. The drafting history shows that the inclusion of "suit at law" in Article 14 ICCPR was not intended to change the provision's meaning from that of the UDHR. The suggestions of US advisers to do so were not adopted by the majority of contracting parties.[101]

Additionally, Newman makes the compelling point that, if the drafting history does not will it, there is simply no good reason to confine the phrase "suit at law" to a lawsuit in court. Given that administrative proceedings tend to be less procedurally fair, it would be strange to ensure due process only in judicial proceedings where the right to fair hearing is already best observed.[102] In his separate opinion for the Commission in *Salesi*, Mr Sperduti makes a similar point: any suggestion that Article 6(1) should be restricted to cases where the law confers a prior right of access to the court was firmly rejected in *Golder v The United Kingdom*.[103]

At its lowest, the drafting history of Article 14 ICCPR and Article 6(1) ECHR shows a lack of unanimity in the intentions of its drafters on whether Article 6(1) should be confined to private law rights,[104] and provides no positive justification for equating "civil" with "private".[105] At its highest, the drafting history shows a majority view contradicting the findings of the dissenting judges in *Feldbrugge*. On this view, equating "civil" with "private" would directly contradict the intention of the Convention States. At least, "civil" *should not* be equated with "private"; at most, "civil" *cannot* be equated with "private".

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98 van Dijk and others (n 65) 392–93. The conclusions of van Dijk and others have been relied on because of the unavailability of translated editions of such studies.
99 ibid.
100 Newman (n 97).
101 ibid.
102 ibid 293–94.
103 *Salesi* (n 17), para 5.
104 Mowbray (n 64). Cf Cross (n 5) 367.
105 ibid.

(ii) Social Welfare and the Private-public Distinction

Harris and others have noted that it is difficult to explain many of the rights and obligations that now fall within Article 6(1) on the basis of the private-public law distinction.[106] Instead, increasing weight is given to the pecuniary nature of the right or whether the state action affecting that right will have pecuniary consequences for the applicant.[107] This shift from a focus from the private law aspects of the right to its individualised nature and economic consequences for the applicant is clear from the development of caselaw on social welfare. In *Feldbrugge*, the application of Article 6(1) to social welfare was premised on the identifiable private law elements of the right.[108] Less than a decade later, the ECtHR in *Schuler-Zgraggen v Switzerland* held that the most important factors in favour of applicability were the interference with the applicant's means of subsistence, and that the right was individual and economic, and flowed from specific legal rules.[109] Evident public law features were afforded little weight—a clear shift away from the private-public distinction as the ECtHR's central analytical tool. The biggest shift can be seen in *Salesi*. The decision of the Commission is particularly useful in revealing how Article 6(1) applied, despite the relevant scheme being non-contributory[110] and having no link to a contract of employment,[111] and therefore lacking two of the three key private law elements present in *Feldbrugge*. The individual and pecuniary nature of the right and the interference with the applicant's means of subsistence were decisive.[112] The abandonment of the private-public law distinction is clear from the dissenting opinion, which stressed that the extension renders meaningless any reference to the court's criteria based on the relative importance of the public and private law features of the right.[113]

It is true that the right or obligation being of an individual and pecuniary nature will not always lead to the conclusion that Article 6(1) applies, as demonstrated by *Ferrazzini v Italy*,[114] which concerned a supplementary tax assessment. The ECtHR held that merely showing the dispute was pecuniary was insufficient to attract the application of Article 6(1),[115] and that

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106 David J Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 381–82.
107 ibid 383–84. Cross (n 5) 373.
108 Text to n 49 and n 50.
109 *Schuler-Zgraggen v Switzerland* (1993) Series A no 263, para 46.
110 *Salesi v Italy* App No 13023/87 (Commission Decision), 20 February 1992, para 30.
111 ibid para 32.
112 ibid para 31; *Salesi* (n 17), para 19.
113 *Salesi* (n 17), Dissenting Opinion of MM C A Nørgaard, S Trechsel, F Ermacora, G Jörundsson, H Danelius, Mrs J Liddy, Mr L Loucaides, and Mr P Pellonpää, para 6. Cf Cross (n 5) 369–372.
114 *Ferrazzini* (n 60). See also *Pierre-Bloch* (n 63); Cross (n 5) 374.
115 *Ferrazzini* (n 60), para 25.

rights and obligations existing for an individual are not necessarily civil in nature.[116] However, *Ferrazzini* falls within the hard core of public authority prerogatives.[117] As an anomaly, it should not detract from the otherwise clear and consistent rationale of the ECtHR's caselaw.[118]

C. Preliminary conclusions

This section has proposed a structured and principled approach to determine the application of Article 6(1) to administrative decisions—one which focuses on the existence of a right and limits the qualifying influence of the term "civil" to the anomalous cases which fall within the hard core of public authority prerogatives. It has shown that adopting this approach would neither be inconsistent with the terms of Article 6(1) itself nor the ECtHR's caselaw in its current state. In the following section, two further concerns about the alleged consequences of over-extending Article 6(1) will be addressed: institutional concerns about the role of the courts (Section III.A), and practical concerns about local authority and court resources (Section III.B).

III. Concerns About Over-Extension

A. Institutional concerns

In *Begum*, Lords Bingham, Hoffmann, and Millett expressed concern about the "emasculation",[119] by over-judicialisation, of administrative welfare schemes.[120] Firstly, Lord Hoffmann stressed that when determining the scope of judicial review of social welfare schemes, democratic accountability, efficient administration, and Parliamentary sovereignty must be taken into account.[121] Granting review under Section 204 an expansive scope and allowing for harsh scrutiny of even factual findings would ignore these concerns. The court lacks democratic accountability, and an intense review would increase the administrative burden on local authorities and ignore Parliament's expression of policy in respect of the review procedure in enacting Section 202 and 204. Craig has similarly highlighted that requiring findings of fact to always be made by a body independent from the primary decision-maker would be extremely difficult in practice, particularly as those findings can be inseparable from decisions of policy.[122] Secondly, Lord Millett stressed that the nature of the decisions, as

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116 ibid para 28.
117 ibid para 29.
118 The same applies for *Pierre-Bloch* (n 63).
119 *Begum* (n 9) [5] (Lord Bingham).
120 ibid [5] (Lord Bingham), [56], [59] (Lord Hoffmann), [91], [93] (Lord Millett).
121 ibid [43].
122 Craig (n 8) 771.

involving discretionary policy choices, makes their determination by the ordinary judicial process inappropriate.[123] Thirdly, Lord Kerr expressed concern in *Ali v BCC* that judicial review was unsuitable for examining issues of credibility, which were central to the appeals in that case.[124] The rebuttal of these arguments rests on the ECtHR's approach to the curative principle. Admittedly, that approach can be criticised for the strained reading of Article 6(1) that it involves,[125] but this article does not have the capacity to address this.

The review procedure under Sections 202 and 204 has already been held to satisfy the curative principle by both the UKSC and ECtHR.[126] This is crucial, as there is no need for the courts to extend their jurisdiction any further, since Section 204 includes the full range of issues that could be raised in a judicial review.[127] The ECtHR in *Ali v UK* in fact displayed an acute sensitivity to the institutional concerns of the UKSC. To satisfy the curative principle, the supervising court of a non-independent decision-maker must have "full jurisdiction".[128] In *Ali v UK*, the court was prepared to adjust this requirement based on contextual factors, and accepted the lesser requirement of "sufficient review".[129] The ECtHR noted that the Review Officer lacked independence (but not impartiality)[130] and that the scope of the County Court's review over facts is limited.[131] However, the ECtHR also considered that the enquiries under Section 202 are not purely factual,[132] and require a level of administrative discretion. The ECtHR therefore concluded that the procedural safeguards built into the Section 202 review and the existence of a certain level of review of both the facts and fact-finding procedure (including review of irrelevant considerations and fundamental mistake of fact) by the County Court under Section 204[133] were sufficient to secure compliance with Article 6(1).

It is true that the curative principle has its limits.[134] In *Tsfayo*, an asylum seeker had successfully applied for housing benefits but failed to submit her renewal form to the council in time because of her unfamiliarity with the benefits system and poor English. Only her prospective claim, and not her backdated claim, succeeded. The Housing Benefit and Council

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123 *Begum* (n 9) [91], [93].
124 *Ali v BCC* (n 4) [78].
125 Harris and others (n 106) 396.
126 *Ali v BCC* (n 4) [55]; *Ali v UK* (n 2) paras 85, 87, 88.
127 *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306 (CA).
128 *Le Compte* (n 57), para 29.
129 *Ali v UK* (n 2), para 76.
130 *Ali v UK* (n 2), para 74.
131 ibid para 83.
132 ibid para 80.
133 ibid paras 82–83.
134 Christopher Forsyth, 'Article 6(1) of the European Convention and the Curative Powers of Judicial Review' (2001) 60 CLJ 449 (note).

Tax Benefit Review Board, which included five councillors from the local authority responsible for paying large sums of any backdated benefits, rejected evidence that she had not received a letter about renewal and so dismissed her appeal. The Chamber held that judicial review could not rectify this lack of independence, owing to the limited scrutiny of the Board's findings of fact coupled with the danger that the independent judgment of such findings may be infected by the direct connection between the Board and the Council. The procedure under Section 202 and Section 204, however, does not exceed the curative principle's limits.[135] Furthermore, the limitations of the curative principle are an important safeguard. A core advantage of applying Article 6(1) to Section 193 is that it will prevent future governments from attempting to weaken the current appeal procedure.

B. PRACTICAL CONCERNS

Another core concern of the UKSC has been that judicialising decisions under Section 193 will have significant negative implications for public authorities' resources.[136] *Poshteh* echoed Lord Hope's concern in *Ali v BCC* that it was not in the public interest for funds that had been allocated to a social welfare scheme to be unduly consumed in the administration of legal disputes.[137] Furthermore, extending Article 6(1) to Section 193 could swamp the courts with (unmeritorious) claims. This section will address these concerns.

Firstly, Article 6(1) will remain confined to where the individual has an established right. Only once the local authority has exercised their discretion in the applicant's favour (under Section 193) will an applicant receive the protection of Article 6(1). A local authority can therefore find that an applicant does not qualify under Section 193, without engaging Article 6(1) and its accompanying procedural obligations. Unmeritorious claimants will therefore have no right to which Article 6(1) can attach. Furthermore, the need for the benefit to be a right provides a backstop against the alleged over-expansion of Article 6(1) into a miscellany of other administrative law matters.[138]

Secondly, in *Poshteh*, the Supreme Court criticised the ECtHR in *Ali v UK* for its failure to address the judicialisation of welfare services and the negative implications for resources.[139] Yet, Strasbourg indirectly addressed this issue by finding that the existing procedure (under

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135 *Ali v BCC* (n 4) [54]; *Ali v UK* (n 2), paras 85, 87, 88.
136 *Begum* (n 9) [44] (Lord Hoffmann); *Poshteh* (n 3) [33].
137 *Poshteh* (n 3) [23].
138 ibid [19]. The Secretary of State expressed concern about the effect Article 6 might have if extended into other areas of government activity relating to community care and education.
139 ibid [33].

Sections 202 and 204) satisfies the curative principle.[140] There is no need for the courts to extend their jurisdiction further than that which already exists under judicial review or reassess the local authority's decision on the facts—something which would otherwise significantly protract litigation and increase the burden on local authority and court resources. This addresses Lord Hoffmann's two primary concerns: that Parliament can take the view that it is not in the public interest for an excessive proportion of welfare scheme funds to be consumed by legal disputes; and that the sheer volume of applications and appeals makes it inappropriate to require that findings of fact are made by an independent body.[141] Following *Ali v UK*, the procedure specified by Parliament requires no adjustment.

Thirdly, the court in *Poshteh* opined that the ECtHR jurisprudence before *Ali v BCC* was uncertain, that case having been intended to resolve this.[142] In *Ali v BCC*, Lord Hope was concerned that this uncertainty was encouraging unnecessary litigation, wasting resources better deployed elsewhere.[143] Ironically, however, it is now the UKSC's decision in *Poshteh* that may give rise to uncertainty. At present, the ECtHR and the UKSC are in disagreement. This is problematic for applicants who must exhaust all domestic remedies before petitioning to the ECtHR.[144] They will not succeed with an Article 6(1) claim in the UK courts after *Poshteh*, but, depending on their grounds, may have some prospect of success before the ECtHR. Although Poshteh's application to the ECtHR was declared inadmissible, this was because her grounds were materially identical to the applicant in *Ali v UK* in which no violation of Article 6(1) was found.[145] Were an applicant to bring a claim on different grounds, for example breach of the reasonable time requirement, it is possible they would succeed before the ECtHR. Such an applicant's prospects of success would be very uncertain, and they would expend a significant amount of their own resources, as well as local authority and court resources, before that uncertainty could be resolved by the ECtHR. Litigation would be not nearly as protracted and resource-intensive if the claim could be dealt with conclusively at first instance.

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140 *Ali v UK* (n 2), paras 85, 87, 88.
141 *Begum* (n 9) [44]–[46].
142 *Poshteh* (n 3) [32]–[34].
143 *Ali v BCC* (n 4) [32].
144 ECHR (n 1) Article 35.
145 *Poshteh* (n 3) [38].

IV. Conclusion

It is perhaps unsurprising that the ECtHR has been heavily criticised for its judgment in *Ali v UK*. The UKSC's primary refrain has been that the local authority has substantial discretion in fulfilling its duty under Section 193(2). The two paragraphs the ECtHR devoted to this objection can hardly be considered a comprehensive rebuttal.[146] Moreover, the UKSC's secondary concerns about institutional competence and the practical consequences of expanding Article 6(1) were not expressly addressed. This article has sought to provide what the judgment in *Ali v UK* lacked: a comprehensive articulation of why the extension of Article 6(1) to Section 193 of the Housing Act 1996 was justified.

Ali v UK need not be the death knell for any hopes of a principled and coherent approach to the application of Article 6(1). This article has proposed a principled framework, which applies Article 6(1) where the applicant can be said to hold a right under domestic law. This could only be rebutted by the State showing that the right falls within the hard core of public authority prerogatives. This framework has potential beyond the context of social welfare, and could be adopted to avoid further criticism of the ECtHR's approach.

[146] *Ali v UK* (n 2), paras 58–59.