



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF FERRAZZINI v. ITALY

(Application no. 44759/98)

JUDGMENT

STRASBOURG

12 July 2001

In the case of Ferrazzini v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr L. FERRARI BRAVO,
Mr G. BONELLO,
Mr P. KŪRIS,
Mr R. TÜRMEŒ,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr M. UGREKHELIDZE,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 28 March and 13 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44759/98) against the Italian Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Giorgio Ferrazzini (“the applicant”), on 26 February 1998.

2. The Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, and by their Co-Agent, Mr V. Esposito.

3. The applicant alleged that there had been a violation of Article 6 § 1 of the Convention on account of the length of three sets of tax proceedings to which he was a party. He also complained of a violation of Article 14 on the ground that he had been “persecuted by the Italian courts”.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 18 May 2000 a Chamber of that Section, composed of the following judges: Mr C.L. Rozakis, Mr A.B. Baka, Mr B. Conforti, Mr G. Bonello, Mr M. Fischbach, Mr E. Levits, Mr P. Lorenzen, and also of Mr E. Fribergh, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Following the departure of Mr Conforti, the judge elected in respect of Italy (Rule 28), the Government appointed Mr L. Ferrari Bravo, the judge elected in respect of San Marino, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

7. The applicant and the Government each filed written observations on the admissibility and merits of the case. The Grand Chamber decided, after consulting the parties, that no hearing was required (Rule 54 § 4).

8. On 28 March 2001 the Court, considering that the complaint based on Article 6 was admissible, decided, under Article 29 § 3 of the Convention, to take a decision on the admissibility and merits of the application at the same time.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

9. The applicant is an Italian citizen, born in 1947 and living in Oristano (Italy).

10. The applicant and another person transferred land, property and a sum of money to a limited liability company, A., which the applicant had just formed and of which he owned – directly and indirectly – almost the entire share capital and was the representative. The company, whose object was organising farm holidays for tourists (*agriturismo*), applied to the tax authorities for a reduction in the applicable rate of certain taxes payable on the above-mentioned transfer of property, in accordance with a statute which it deemed applicable, and paid the sum it considered due.

11. The present case concerns three sets of proceedings. The first concerned in particular the payment of capital-gains tax (*INVIM, imposta sull'incremento di valore immobiliare*) and the two others the applicable

rate of stamp duty, mortgage-registry tax and capital-transfer tax (*imposta di registro, ipotecaria e voltura*), and the application of a reduction in the rate.

12. In the first set of proceedings, the tax authorities served a supplementary tax assessment on the applicant on 31 August 1987 on the ground that the property transferred to the company had been incorrectly valued. They requested payment of an aggregate sum of 43,624,700 Italian lire comprising the tax due and penalties. On 14 January 1988 the applicant applied to the Oristano District Tax Commission for the supplementary tax assessment to be set aside.

In a letter of 7 February 1998 the District Tax Commission informed the applicant that a hearing had been listed for 21 March 1998. In the meantime, on 23 February 1998, the tax authorities informed the commission that they accepted the applicant's comments and requested the case to be struck out of the list.

In a decision of 21 March 1998, the text of which was deposited on 4 April 1998, the District Tax Commission struck the case out of the list.

13. In the other two sets of proceedings, the tax authorities served two supplementary tax assessments on A. on 16 November 1987 on the ground that the company was ineligible for the reduced rate of tax to which it had referred. The tax authorities' note stated that the company would be liable to an administrative penalty of 20% of the amounts requested if payment was not made within sixty days.

On 15 January 1988 the applicant, acting in his own right, although the matter concerned the company A., lodged two applications with the Oristano District Tax Commission for the above-mentioned supplementary tax assessments to be set aside.

In two letters of 20 March 1998 the District Tax Commission informed the applicant, in his capacity as representative of A., that a hearing had been listed for 9 May 1998 in the two other cases. In two orders of that date the District Tax Commission adjourned the cases *sine die* and gave the applicant thirty days in which to appoint a lawyer. Subsequently, a hearing was listed for 24 April 1999.

In two decisions of 22 May 1999, the text of which was deposited at the registry on 16 July 1999, the District Tax Commission dismissed A.'s applications on the ground that the transferred property, which included, among other things, a swimming pool and a tennis court, could not be regarded as the normal assets of an agricultural company.

On 27 October 2000 A. lodged an appeal with the Regional Tax Commission.

THE LAW

I. THE COMPLAINT UNDER ARTICLE 6 § 1 OF THE CONVENTION

14. The applicant alleged that the length of the proceedings had exceeded a “reasonable time” contrary to Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

15. In respect of the first set of proceedings, the period to be considered began on 14 January 1988 and ended on 4 April 1998. It therefore lasted more than ten years and two months for a single level of jurisdiction.

In respect of the other sets of proceedings, the period to be considered began on 15 January 1988 and, since the proceedings were still pending as at 27 October 2000, has therefore lasted more than twelve years and nine months for two levels of jurisdiction.

A. Admissibility of the complaint based on Article 6 § 1

16. The Government submitted that this complaint should be declared inadmissible within the meaning of Article 35 § 3 of the Convention because Article 6 § 1 did not apply to disputes relating to tax proceedings. In their submission, the proceedings in question did not relate to “a criminal charge”. They pointed out that in Italy enforcement of the tax courts’ judgments was effected according to the procedure used to enforce civil obligations. The amount payable by the applicant could not be converted into a custodial sentence. Only enforcement measures, such as the seizure and possible sale of the debtor’s assets, were available. In respect of the “civil” aspect, the Government pointed out that, in accordance with the established case-law of the Convention institutions, taxation matters concerned only public law.

17. The applicant, for his part, agreed with the Government that the proceedings in question were not criminal. He emphasised, however, the financial aspect of the proceedings, which accordingly concerned a “civil right”.

18. The Court notes that both parties acknowledged that Article 6 did not apply under its criminal head. In respect of the civil head, and despite the existence of the established case-law referred to by the Government, the Court considers that the complaint raises questions of law which are

sufficiently complex not to be susceptible of being resolved at the admissibility stage. Accordingly, the determination of this complaint, including the question, raised by the Government, of the applicability of Article 6 § 1 of the Convention, depends on an examination of the merits.

19. That being so, this complaint cannot be declared inadmissible on the ground that it is incompatible *ratione materiae* with the provisions of the Convention. The Court notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

B. Applicability of Article 6 § 1

20. The parties having agreed that a “criminal charge” was not in issue, and the Court, for its part, not perceiving any “criminal connotation” in the instant case (see, *a contrario*, *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, p. 20, § 47), it remains to be examined whether the proceedings in question did or did not concern the “determination of civil rights and obligations”.

21. The Government argued that Article 6 was inapplicable to the proceedings in question, considering that they did not concern a “civil right”. The existence of an individual’s tax obligation *vis-à-vis* the State belonged, in their submission, exclusively to the realm of public law. That obligation was part of the civic duties imposed in a democratic society and the purpose of the specific provisions of public law was to support national economic policy.

22. The applicant, for his part, stressed the pecuniary aspect of his claims and contended that the proceedings accordingly concerned “civil rights and obligations”.

23. As it is common ground that there was a “dispute” (*contestatio*), the Court’s task is confined to determining whether it was over “civil rights and obligations”.

24. According to the Court’s case-law, the concept of “civil rights and obligations” cannot be interpreted solely by reference to the domestic law of the respondent State. The Court has on several occasions affirmed the principle that this concept is “autonomous”, within the meaning of Article 6 § 1 of the Convention (see, among other authorities, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp. 29-30, §§ 88-89, and *Baraona v. Portugal*, judgment of 8 July 1987, Series A no. 122, pp. 17-18, § 42). The Court confirms this case-law in the instant case. It considers that any other solution is liable to lead to results that are incompatible with the object and purpose of the Convention (see, *mutatis mutandis*, *König*, cited above, pp. 29-30, § 88, and *Maaouia v. France* [GC], no. 39652/98, § 34, ECHR 2000-X).

25. Pecuniary interests are clearly at stake in tax proceedings, but merely showing that a dispute is “pecuniary” in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its “civil” head (see *Pierre-Bloch v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2223, § 51, and *Pellegrin v. France* [GC], no. 28541/95, § 60, ECHR 1999-VIII; cf. *Editions Périscope v. France*, judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40). In particular, according to the traditional case-law of the Convention institutions,

“There may exist ‘pecuniary’ obligations *vis-à-vis* the State or its subordinate authorities which, for the purpose of Article 6 § 1, are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of ‘civil rights and obligations’. Apart from fines imposed by way of ‘criminal sanction’, this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society”. (See, among other authorities, *Schouten and Meldrum v. the Netherlands*, judgment of 9 December 1994, Series A no. 304, p. 21, § 50; *Company S. and T. v. Sweden*, no. 11189/84, Commission decision of 11 December 1986, *Decisions and Reports* (DR) 50, p. 121, at p. 140; and *Kustannus oy Vapaa Ajattelija AB, Vapaa-Ajattelijain Liitto – Fritänkarnas Förbund r.y. and Kimmo Sundström v. Finland*, no. 20471/92, Commission decision of 15 April 1996, DR 85-A, p. 29, at p. 46)

26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (see, among other authorities, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities’ decisions.

27. Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of “public law” could come within the purview of Article 6 under its “civil” head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (see, among other authorities, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 39, § 94; *König*, cited above, p. 32, §§ 94-95; *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 29, § 79; *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, pp. 20-21, § 73; *Bentham v. the*

Netherlands, judgment of 23 October 1985, Series A no. 97, p. 16, § 36; and *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, p. 19, § 43). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil" (see, among other authorities, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, p. 16, § 40; *Deumeland v. Germany*, judgment of 29 May 1986, Series A no. 100, p. 25, § 74; *Salesi v. Italy*, judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, § 19; and *Schouten and Meldrum*, cited above, p. 24, § 60).

28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly (see *Pierre-Bloch*, cited above, p. 2223, § 50), even though in those proceedings the applicant's pecuniary interests were at stake (*ibid.*, § 51), are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see *Pellegrin*, cited above, §§ 66-67). Similarly, the expulsion of aliens does not give rise to disputes (*contestations*) over civil rights for the purposes of Article 6 § 1 of the Convention, which accordingly does not apply (see *Maaouia*, cited above, §§ 37-38).

29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, *mutatis mutandis*, *Gasus Dossier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day

conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective “civil” (with the restriction that that adjective necessarily places on the category of “rights and obligations” to which that Article applies) were not present in the text.

31. Accordingly, Article 6 § 1 of the Convention does not apply in the instant case.

II. THE COMPLAINT UNDER ARTICLE 14 OF THE CONVENTION

Admissibility

32. The applicant also complained that he had been “persecuted by the Italian courts” and relied on Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

33. The Court reiterates that discrimination is not forbidden by the Convention unless different measures are taken in respect of persons in comparable situations (see *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, judgment of 23 July 1968, Series A no. 6, pp. 33-34, §§ 9-10).

34. The applicant has not explained how there has been an infringement of that provision. Accordingly, since this complaint has not been substantiated, the Court considers that there is no appearance of a violation of that provision and that the complaint must therefore be dismissed as manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. Unanimously *joins to the merits* the Government’s submission as to the applicability of Article 6 § 1 of the Convention and, accordingly, *declares admissible* the complaint based on that Article;
2. *Holds* by eleven votes to six that Article 6 § 1 of the Convention does not apply in the instant case;
3. *Declares inadmissible* by sixteen votes to one the complaint under Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 July 2001.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Ress;
- (b) dissenting opinion of Mr Lorenzen joined by Mr Rozakis, Mr Bonello, Mrs Strážnická, Mr Bîrsan and Mr Fischbach.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE RESS

(Translation)

As the Court has rightly stressed, the increasing intervention of the State in the individual's day-to-day life has required the Court to evaluate features of public law and private law before it could conclude that an asserted right could be classified as civil. Moreover, it was not the intrinsically public-law nature of proceedings for the expulsion of aliens which resulted in a ruling in *Maaouia* that Article 6 did not apply, but the existence of Protocol No. 7, and specifically Article 1 thereof, read in conjunction with the Convention itself (see *Maaouia v. France* [GC], no. 39652/98, §§ 36-37, ECHR 2000-X).

The Court found that developments in the tax field do not affect the fundamental nature of the obligation on individuals or companies to pay tax. However, there is an element in tax proceedings which might lead to a different result, at least in some cases. As the criminal aspects of tax cases are not excluded from the application of Article 6 (see *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284), I consider that the aspect of immediate enforcement, which presents similarities with the effect of penalties and can be even more severe from an economic point of view, should not be excluded *a priori* from the scope of application of Article 6.

Even if tax matters, at least generally speaking, still form part of the hard core of public-authority prerogatives, there is an aspect in which the State transgresses those prerogatives and enters a sphere in which the individual should, in a democratic society, be able to challenge such a duty on the taxpayer by arguing that there has been an abuse of rights in immediate enforcement proceedings. In the same way as the Court has established an obligation in respect of penalties not to proceed to enforcement before the individual has had the possibility of having the lawfulness reviewed, that aspect seems to me to be also valid in respect of tax proceedings. If the procedure in tax cases in some Contracting States does not provide for a stay of proceedings where the individual disputes his obligation to pay or does not at least give him the possibility of requesting a stay of execution before paying sometimes considerable amounts, the lawfulness of which is disputed, the State is using the predominant position conferred on it by its sovereign prerogatives in a manner which might be deemed excessive. That may also be the case if the State requests, in the event of a stay of enforcement, bank guarantees imposing an excessive burden on the individual.

If account is taken of the sometimes very lengthy tax proceedings before tax authorities and courts dealing with tax cases, the taxpayer is left in a position which one would be hard pressed to describe as "part of the normal

civic obligations in a democratic society” (see *Schouten and Meldrum v. the Netherlands*, judgment of 9 December 1994, Series A no. 304, p. 21, § 50). That is a factor which might, in my opinion, induce the Court to review certain aspects of the application of Article 6 in taxation cases.

On the basis of the information produced, that aspect is not decisive in *Ferrazzini* because, after receiving the supplementary tax assessment of 31 August 1987, the applicant did not pay the difference in tax due between 1987 and 1998 when the Tax Commission struck the case out of the list. Similarly, with regard to the two applications lodged by A., that company has not yet paid the money allegedly due following the supplementary tax assessment of 16 November 1987. That is probably due to the fact that, under Italian law, Article 47 of Legislative Decree no. 546 of 31 December 1992¹ provides for a stay of enforcement if serious and irreparable damage might otherwise ensue.

1. D.Lgs. 31.12.1992 no. 546 (Articolo 47 comma 1 e 5 “Sospensione dell’atto impugnato” disposizioni sul Contenzioso Tributario)

“(1) Il ricorrente, se dall’atto impugnato può derivargli un danno grave ed irreparabile, può chiedere alla commissione provinciale competente la sospensione dell’esecuzione dell’atto stesso con istanza motivata proposta nel ricorso o con atto separato notificata alle altre parti e depositato in segreteria sempre che siano osservate le disposizioni di cui all’art. 22.”

“(5) La sospensione può anche essere parziale e subordinata alla prestazione di idonea garanzia mediante cauzione o fideiussione bancaria o assicurativa, nei modi e termini indicati nel provvedimento.”

DISSENTING OPINION OF JUDGE LORENZEN
JOINED BY JUDGES ROZAKIS, BONELLO,
STRÁŽNICKÁ, BÎRSAN AND FISCHBACH

1. The present case raises the important issue whether Article 6 § 1 of the Convention under its civil head is applicable to proceedings concerning tax assessments. So far the majority has confirmed the case-law of the Convention institutions, which have constantly held that not to be the case. I am not able to share the opinion of the majority for the reasons stated below.

2. The Convention does not contain any definition of what is meant by “civil rights and obligations”. Even if the Convention institutions have ruled on this issue several times over the years and more than once revised earlier case-law, such a definition is not to be found in the case-law. The Convention institutions have ruled on the applicability of Article 6 in that respect on a case-by-case basis, although some important general elements have been identified.

3. In order to understand the present case-law and the possible need to revise it, it is in my opinion essential to recall the historical background for introducing the concept “civil” into Article 6 § 1 – a concept which is not found in the English text of the corresponding Article 14 of The International Covenant on Civil and Political Rights. Article 8 of the American Convention on Human Rights, on the contrary, expressly covers tax disputes (“rights and obligations of a civil, labour, fiscal or any other nature”).

The *travaux préparatoires* relating to Article 6 of the Convention – closely linked to those of Article 14 of the Covenant – demonstrate in my opinion the following: (1) it was the intention of the drafters to exclude disputes between individuals and governments on a more general basis mainly owing to difficulties at that time in making a precise division of powers between, on the one hand, administrative bodies exercising discretionary powers and, on the other hand, judicial bodies; (2) no specific reference was made to taxation matters, which are normally not based on a discretion but on the application of more or less precise legal rules; (3) the exclusion of the applicability of Article 6 should be followed by a more detailed study of the problems relating to “the exercise of justice in the relations between individuals and governments”; accordingly, (4) it seems not to have been the intention of the drafters that disputes in the field of

administration should be excluded forever from the scope of applicability of Article 6 § 1 (see, for a detailed analysis, paragraphs 19 to 22 of the joint dissenting opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing in *Deumeland v. Germany*, judgment of 29 May 1986, Series A no. 100, pp. 38-39, and the concurring opinion of Mr Sperduti in *Salesi v. Italy* (judgment of 26 February 1993, Series A no. 257-E, opinion of the Commission, pp. 67-70).

4. Against that background it is understandable that the Convention institutions, in the first years after the Convention came into force, applied Article 6 § 1 under its civil head on a restrictive basis in respect of disputes between individuals and governments. On the other hand, it is hard to accept that the *travaux préparatoires*, dating more than fifty years back and partly based on preconditions that have not been fulfilled or are no longer relevant should remain a permanent obstacle to a reasonable development of the case-law concerning the scope of Article 6 – in particular in areas where there is an obvious need to extend the protection granted by that Article to individuals. The present case-law clearly demonstrates in fact that the Convention institutions have not felt bound to maintain a restrictive attitude, but have extended the applicability of Article 6 § 1 to a considerable number of relationships between individuals and governments, which originally must have been held to be excluded.

The following examples could be mentioned to illustrate what disputes between individuals and governments the Court has so far held to be covered by the civil head of Article 6:

(a) proceedings concerning expropriation, planning decisions, building permits and, more generally, decisions which interfere with the use or the enjoyment of property (see, for example, *Sporrong Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52; *Ettl and Others v. Austria*, *Erkner and Hofauer v. Austria*, and *Poiss v. Austria*, judgments of 23 April 1987, Series A no. 117; *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A; and *Mats Jacobsson v. Sweden* and *Skärby v. Sweden*, judgments of 28 June 1990, Series A no. 180-A and B);

(b) proceedings concerning a permit, licence or other act of a public authority, which forms a condition for the legality of a contract between private persons (see, for example, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13);

(c) proceedings concerning the grant or revocation of a licence by a public authority which is required in order to carry out certain economic activities (see, for example, *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97; *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A; *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159; and *Fredin v. Sweden (no. 1)*, judgment of 18 February 1991, Series A no. 192);

(d) proceedings concerning the cancellation or suspension by a public authority of the right to practise a particular profession, etc. (see, for example, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, and *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A);

(e) proceedings concerning damages in administrative proceedings (see, for example, *Editions Périscope v. France*, judgment of 26 March 1992, Series A no. 234-B);

(f) proceedings concerning the obligation to pay contributions to a public security scheme (see, for example, *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, and *Deumeland*, cited above);

(g) proceedings concerning disputes in the context of employment in the civil service, if “a purely economic right” was asserted, for instance the level of salary, and “administrative authorities’ discretionary powers were not in issue” (see, for instance, *De Santa v. Italy*, judgment of 2 September 1997, *Reports of Judgments and Decisions* 1997-V). If, on the other hand, “the economic aspect” was dependent on the prior finding of an unlawful act or based on the exercise of discretionary powers, Article 6 was held not to be applicable (see, for instance, *Spurio v. Italy*, judgment of 2 September 1997, *Reports* 1997-V). In this respect the case-law of the Court has later been changed (see point 6 below on the judgment of 8 December 1999 in *Pellegrin v. France*).

It is true, however, – as stressed by the majority – that in other situations the Court has held that Article 6 is not applicable to disputes between individuals and governments, (see, *inter alia*, *Pierre-Bloch v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2223, concerning the right to stand for election, and *Maaouia v. France*, no. 39652/98, ECHR 2000-X, concerning decisions regarding the entry, stay and deportation of aliens).

5. One may raise the question whether it is at all possible to draw any clear and convincing dividing line between “civil” and “non-civil” rights and obligations based on the Court’s present case-law, and, if not, whether the time has come to end that uncertainty by extending the protection under Article 6 § 1 to all cases in which a determination by a public authority of the legal position of a private party is at stake (see, for such a solution, *inter alia*, Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed., 1998, p. 406).

This would be a rather far-reaching step that would considerably reduce the independent content of the concept “civil”, which would then become merely a cover for all cases not belonging to the criminal head. In my opinion the case-law of the Court so far does not support the conclusion that such a radical step is the only way to overcome uncertainty as to the scope of applicability of Article 6. However, as long as a dividing line between “civil” and “non-civil” rights and obligations is maintained in respect of

proceedings between individuals and governments, it is important to ensure that the relevant criteria for determining what is “civil” are applied in a logical and reasonable manner – and that may make it necessary from time to time to adjust the case-law in order to make it consistent in the light of recent developments.

6. There can be no doubt that a central factor for the Court, when ruling on the “civil” character of rights and obligations, has been whether the pecuniary interests of the individual have been at stake in the proceedings. Thus in *Editions Périscope*, cited above, the Court noted that the subject matter of the action was “pecuniary” in nature and founded on an infringement of rights which were likewise pecuniary rights. The Court found that the right in question “was therefore a ‘civil right’, notwithstanding the origin of the dispute ...”. The pecuniary aspect has been stressed in many other judgments – even in situations where the background of the dispute was clearly fiscal. Thus, in *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (judgment of 23 October 1997, *Reports* 1997-VII), the Court held proceedings to attain restitution of monies paid under invalidated tax provisions to be “civil” with reference to the pecuniary aspect and added: “This conclusion is not affected by the fact that the rights asserted in those proceedings had their background in tax legislation and the obligation of the applicant societies to account for tax under that legislation” (p. 2379, § 97).

It is true that the Court has stated in other judgments that proceedings do not become “civil” merely because they raise an economic issue (see, for example, *Schouten and Meldrum v. the Netherlands*, judgment of 9 December 1994, Series A no. 304, p. 21, § 50; *Pierre-Bloch*, cited above, p. 2223, § 51; and *Pellegrin v. France* [GC], no. 28541/95, § 60, ECHR 1999-VIII). In the first of those judgments the Court – in an *obiter dictum* – considered the civil head of Article 6 inapplicable if rights and obligations “derive from tax legislation or [are] otherwise part of normal civic duties in a democratic society” (emphasis added). In the later judgments the Court has not – at least not expressly – relied on that general criterion: in *Pierre-Bloch* the Court simply said that the right to stand for election was “a political one and not a ‘civil’ one” and that it was not in itself decisive that the proceedings also had an economic aspect for the applicant as that aspect formed part of the arrangements for the exercise of the right in question. In *Pellegrin* the Court realised that the “economic” criterion applied so far had proved not to be suitable to determine the applicability of Article 6 § 1 to disputes between States and their servants. However, the Court did not rely on another general-purpose criterion, but adopted a specific one in such cases. In *Maaouia* the Court’s majority did not apply the criterion established in *Schouten and Meldrum* either, but held that Article 6 § 1 was

inapplicable on the basis of an interpretation of the intentions behind Article 1 of Protocol No. 7.

In my opinion the criterion “normal civic duties in a democratic society” is not suitable to form the basis for a general distinction between “civil” and “non-civil” rights and obligations. Thus it is difficult to see why, for example, the obligation to hand over property for public use in return for compensation is not a “normal civic duty” whereas the obligation to tolerate tax-based reductions of the compensation is. How can it be explained that the right to obtain tax concessions and preferential postal charges is not “civil”, but that a claim for compensation for alleged failure to grant such concessions is? Or how can it be explained that an obligation to pay contributions under a social security scheme is “civil”, but an obligation to pay income tax is not? (see, Van Dijk and Van Hoof, cited above, p. 406).

7. At least when the pecuniary interests of an individual are directly affected and the interference is not based on the exercise of discretionary powers, the economic criterion established in *Editions Périscope* and other judgments should still be the starting-point. However, exceptions must be accepted when they are justified by special circumstances. This has been the case in respect of the right to stand for elections because of its political character (see *Pierre-Bloch*), in respect of the relations between States and their servants (see *Pellegrin*) and in respect of the right of aliens to enter and stay in a country (see *Maaouia*).

It is not open to doubt that the obligation to pay taxes directly and substantially affects the pecuniary interests of citizens and that, in a democratic society, taxation (its base, payment and collection as opposed to litigation under budgetary law) is based on the application of legal rules and not on the authorities’ discretion. Accordingly, in my view Article 6 should apply to such disputes unless there are special circumstances justifying the conclusion that the obligation to pay taxes should not be considered “civil” under Article 6 § 1 of the Convention.

8. The majority considers that in the field of taxation there have been no major developments concerning the nature of the obligations of individuals and companies compared with the situation at the time of the drafting of the Convention. Accordingly, the majority is of the opinion that taxation still belongs to the “hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant”. The majority also takes into account that Article 1 of Protocol No. 1 reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes.

I am not convinced by that reasoning.

The finding that Article 6 § 1 of the Convention under its civil head is applicable to tax cases does not in any way restrict the States’ power to place whatever fiscal obligations they wish on individuals and companies. Nor does such a finding restrict the States’ freedom to enforce any such

laws as they deem necessary in order to secure the payment of taxes (see Article 1 of Protocol No. 1). Article 6 of the Convention is a procedural guarantee that grants primarily the right of access to a court and the right to have court proceedings determined fairly within a reasonable time. In that respect there have in fact been important developments in the field of taxation since the drafting of the Convention. Whereas at that time it was doubtful in some legal systems to what extent administrative decisions in fiscal matters could be reviewed by a court – if at all – it is now recognised, at least in the vast majority of the Contracting Parties, that disputes in fiscal matters can be decided in ordinary proceedings by a court or a tribunal. It is therefore difficult to see why it is still necessary to grant the States a special prerogative under the Convention in this field and thus deny litigants in tax proceedings the elementary procedural guarantees of Article 6 § 1. As demonstrated, *inter alia*, in the concurring opinion of Judge Ress, there is a clear need to grant such protection – not least against lengthy proceedings combined with an obligation to pay taxes before a dispute concerning the legality of the tax decision is finally settled. In my opinion there is no basis in Article 1 of Protocol No. 1 for the assumption that the intention was to grant States the right to deny individuals any procedural protection in disputes on tax matters. How might it be justifiable to exempt from the Court's scrutiny the procedural rights guaranteed by Article 6 § 1 in respect of a dispute whose substance is directly linked to a civil right (in this case the right to peaceful enjoyment of possessions)? Such an interpretation would also be contrary to the constantly developing case-law of the Court according to which substantive Articles of the Convention, such as Articles 2, 3 and 8, must be interpreted as also implying procedural obligations on States.

Furthermore, it is difficult to justify that an extended application of Article 6 § 1 under its civil head is not possible on grounds of the need to preserve a prerogative for States in fiscal matters, when the Court has gone sufficiently far in its case-law to include tax disputes under its criminal head. Since *Bendenoun v. France* (judgment of 24 February 1994, Series A no. 284), the Court has consistently considered proceedings relating to tax disputes to be “criminal” if tax fines, surcharges, etc., with a deterrent and punitive purpose are imposed or even if there is a risk that they may be imposed (see, most recently, *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III). The result is no different if the proceedings also concern the tax assessment as such (see the admissibility decision of 16 May 2000 in *Georgiou v. the United Kingdom*, no. 40042/98, unreported). This implies that the level of protection under Article 6 § 1 of the Convention varies depending on how the legal framework for tax proceedings is organised in the different legal systems; and even within one legal system it may be purely a matter of coincidence whether penalty proceedings and tax

assessment proceedings are joined or not. An interpretation of the Convention that leads to such random results is far from satisfactory.

9. For the above reasons, I conclude that there are no convincing arguments for maintaining the present case-law of the Court that proceedings regarding taxation do not determine “civil rights and obligations” for the purposes of Article 6 of the Convention. Accordingly, I find that Article 6 § 1 of the Convention is applicable in the instant case.