

**RISK AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TOWARDS A
NEW APPROACH**

*The final and definitive version of this pre-print paper has been published in The Cambridge
Yearbook of European Studies 2008-2009, Volume 11
(Hart Publishing)*

Chris Hilson

RISK AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TOWARDS A NEW APPROACH

Chris Hilson*

I. Introduction

While much has been written on human rights and the environment in general and on the European Convention on Human Rights (ECHR) and the environment in particular, most if not all of this literature has examined the issue from a pollution perspective or, to a lesser degree, a nature conservation one.¹ There has been little attempt to focus explicitly on how questions of risk are addressed within the Convention jurisprudence.²

The aim of this article is thus to provide an initial attempt at analysis of the place of risk within the case law of the European Court of Human Rights (ECtHR) and, where appropriate, the Commission. However, rather than attempting to provide a comprehensive picture, the article has a more limited ambition. The focus will be squarely on the related issues of public concern and perception of risk and how the ECHR dispute bodies have addressed these.

The article will argue that, for quite some time, the Court has tended to adopt a particular, liberal conception of risk in which it stresses the right of applicants to be provided with information on risk to enable them to make effective choices.³ On this model – which one also finds elsewhere in environmental law such as in the regulation of GMOs, where labelling and consumer and producer choice are also emphasised⁴ – public concern around risk is seen as adequately dealt with by providing the public with information; rather than regulate away the risk by, for example, banning it, the risk is left in place (albeit typically subject to regulatory safety checks), but people are supposedly left ‘free’ to choose to avoid it as they see fit.

* School of Law, University of Reading, UK (c.j.hilson@reading.ac.uk). I am grateful to Joy Reddy for her research assistance.

¹ From a voluminous literature, see eg C Miller *Environmental Rights: Critical Perspectives* (Oxford, Routledge, 1998); A Boyle and M Andersen (eds) *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press, 1996); M DeMerieux ‘Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2001) 21 *OJLS* 521; C Miller ‘Environmental Rights in a Welfare State? A Comment on DeMerieux’ (2003) 23 *OJLS* 111; A Boyle ‘Human Rights or Environmental Rights? A Reassessment’ (2007) 18 *Fordham Environmental Law Review* 471; J Thornton and S Tromans ‘Human Rights and Environmental Wrongs’ (1999) 11 *JEL* 35.

² The article that comes closest is DeMerieux, above (n 1). However, although this discusses many of the relevant risk cases, it does so only incidentally as part of an Article-by-Article assessment of the ECHR for environmental rights.

³ On liberalism, information and choice, see further N Lewis *Choice and the Legal Order: Rising Above Politics* (London, Butterworths, 1996).

⁴ See eg C Hilson ‘Information Disclosure and the Regulation of Traded Product Risks’ (2005) 17 *JEL* 305; L Carson and R Lee ‘Consumer Sovereignty and the Regulatory History of the European Market for Genetically Modified Foods’ (2005) 7 *Env Law Rev* 173; and M Lee *EU Regulation of GMOs: Law and Decision Making for a New Technology* (London, Edward Elgar, 2008).

Historically, this has been as far as the Court has been prepared to go in relation to public concern over risk. Where public concerns in relation to particular risks are greater than those of scientific experts – nuclear radiation being the prime example in the case law – the Court has adopted a particularly restrictive approach, stressing the need for risk to be ‘imminent’ in order to engage the relevant Convention protections such as a right of access to domestic judicial review by an independent tribunal.

However, more recently, there have been emerging but as yet still rather undeveloped signs of the Court adopting a more sensitive approach to risk. One possible explanation for this lies in the Court’s growing awareness of and reference to the Aarhus Convention.⁵ Insofar as the Court has continued to employ its longstanding liberal approach to risk based on information, it is already in tune with the Aarhus times, with access to environmental information forming one of the three key limbs of the Aarhus Convention. However, it has also begun to be influenced by the other two Aarhus limbs – public participation in decision-making and access to justice in environmental matters.⁶ So far though, this latter Aarhus-effect or ‘proceduralisation’⁷ of the ECHR environmental case law has only been seen in cases where the respondent state government has established the existence of a likely risk to human health in a relevant risk assessment. What we have yet to see – because there has not yet been a recent, post-Aarhus example involving such facts – is a case where no imminent risk is evident. Nevertheless, the article concludes that the Court’s old-style approach to public concern in such cases, in which it rode roughshod over rights to judicial review, is out of line with the third, access to justice limb of Aarhus.

II. A Right to Information

The first major case to stress a right of access to information concerning risk was the *Guerra* case,⁸ which involved a failure to inform the concerned local population near a chemical plant about the hazards and procedures to be followed in the event of a major accident, as required by the EC ‘Seveso’ Directive.⁹ The Court rejected the

⁵ On Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The influence of Aarhus on the ECtHR has been noted, in a broader context, by Boyle (2007) (n 1). Evidence of the Court’s engagement with the Convention can be found, in particular in the Court’s judgments in eg *Okyay and Others v Turkey* (2006) 43 EHRR 37 (para 52), *Taşkin and Others v Turkey* (2006) 42 EHRR 50 (paras 99-100), and *Tătar v Romania*, application no. 67021/01, 27 January 2009, paras 69, 118. See also *Demir v Turkey* (2009) 48 EHRR 54, where the Grand Chamber stated: “In the *Taşkin* ... case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection ... largely on the basis of principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters” (para 83).

⁶ Boyle (2007) (n 1).

⁷ In EU environmental law, this process tends to refer to a shift away from a reliance on substantive environmental standards in EU legislation to a more procedural emphasis. Here in the ECHR context, it can be seen as involving a move away from the Court engaging in substantive balancing of individual versus wider community interests towards a greater reliance on ensuring that states have put in place appropriate, Aarhus-type procedures. On ‘proceduralisation’ in EU environmental law, see further J Scott ‘Flexibility, ‘Proceduralization’ and Environmental Governance in the EU’ in de Búrca and Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart, 2000) 259; J Scott ‘Flexibility in the Implementation of EC Environmental Law’ (2000) 1 *YEEL* 37; M Lee *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford, Hart, 2005) 151-2, 163.

⁸ *Guerra v Italy* (1998) 26 EHRR 357.

⁹ Directive 82/501/EEC on the major-accident hazards of certain industrial activities OJ 1982 L 230/1.

applicants' claim based on Article 10 on freedom of expression, which includes the right to receive and impart information, on the basis that Article 10 essentially prohibits states from restricting a person from receiving information from others; it does not impose a positive obligation on states to collect and disseminate information on risks such as those involving pollution.¹⁰ However, the Court did find a breach of the applicants' Article 8 right to respect for their private and family life stemming from the failure to inform them about the risks from the chemical factory:

the applicants waited ... for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.¹¹

The Court's liberal approach to risk is particularly apparent here – stressing as it does, not the need to eliminate risk, but rather the role of information in enabling citizens to assess risks for themselves and to make choices (such as continuing to live in Manfredonia) based on their assessments.¹²

No one having died in the *Guerra* case, it was not strictly necessary for the Court to consider Article 2 involving the right to life – with the Court itself claiming that it was unnecessary because it had already found a violation of Article 8. However, in *Öneryildiz*,¹³ the applicant lost nine members of his family in addition to his slum dwelling as a result of a methane explosion at a poorly regulated Turkish landfill site or rubbish tip. In essence, the case was a straightforward application of *Guerra* to Article 2 instead of Article 8.¹⁴ The Turkish Government argued that the public had been provided with information about the relevant risks and that the applicant had knowingly chosen to accept the risks of living in the vicinity of a tip.¹⁵ The Court rejected this argument, holding that there had been a breach of Article 2 in relation to the state's failure to provide the applicant with sufficient information about the risks. The fact that the applicant was aware of some of the obvious health risks associated with living near a rubbish tip, did not mean that he could be taken to have accepted other less well-known risks, such as that of methane explosions.¹⁶ Choice around risk, in other words, has to be based on possession of appropriate information about the specific risk.

The *Budayeva*¹⁷ case similarly involved death and destruction of property, but as a result of a natural risk – a mudslide – rather than a man-made, industrial one as in previous cases such as *Guerra* and *Öneryildiz*. The Court reiterated that Article 2 not only concerns deaths resulting from state force, but also imposes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This positive obligation applies to “any activity, whether public or not, in

¹⁰ *Guerra* (n 8), para 53; See also *Roche v UK* (2006) 42 EHRR 30, paras 172-173.

¹¹ *Guerra* (n 8), para 60.

¹² See also *Giacomelli v Italy* (2007) 45 EHRR 38, para 83; *Táatar* (n 5), para 113; *Branduse v Romania*, application no. 6586/03, 7 April 2009, para 74.

¹³ *Öneryildiz v. Turkey* (2005) 41 EHRR 20.

¹⁴ Para 84.

¹⁵ Para 82.

¹⁶ Paras 85-86.

¹⁷ *Budayeva and Others v Russia* (2008) ECHR, No. 15339/02, 20 March 2008.

which the right to life may be at stake”.¹⁸ Although the Court states that it applies in particular to ‘industrial risks’ or ‘dangerous activities’ such as waste sites in *Öneryıldız*,¹⁹ it is implicit that the obligation also applies to activities and omissions to control natural risks such as mudslides, floods and so on as in the instant case.

The obligation of the state to safeguard the lives of those within its jurisdiction was held by the Court to include both substantive and procedural aspects.²⁰ The substantive aspect of the positive obligation is to take *ex ante* regulatory measures to control risk and to adequately inform the public about any *life-threatening* emergency;²¹ the procedural aspect is to ensure that, if the risk transpires and deaths result, an *ex post* judicial inquiry is held.²² Fleshing out the substantive obligation, the Court stated that, in the particular context of dangerous or risk activities:

“special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. *Among these preventive measures, particular emphasis should be placed on the public’s right to information*, as established in the case-law of the Convention institutions.”²³

As for the procedural aspect, the Court observed that “(t)he relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.”²⁴

In relation to the substantive aspect, the Court was keen to stress that the state has a margin of appreciation in its choice of particular practical, preventive measures,²⁵ including the choice as to whether to take active steps to physically reduce the risk or to provide information instead.²⁶ The Court also emphasised that in difficult social and technical spheres involving priority-setting and resource allocation, states enjoy a wide margin of appreciation, with a wider margin applicable to activities associated with natural risks²⁷ than with dangerous activities of a man-made nature.²⁸

¹⁸ Para 130.

¹⁹ Para 130.

²⁰ Para 131.

²¹ The emphasis reflecting the Art 2 right. Cf also Art 8, considered below at n 113, where (more logically it would seem) information comes within the procedural aspect.

²² Para 131.

²³ Para 132, emphasis added.

²⁴ Para 132.

²⁵ Para 134.

²⁶ Paras 154-156.

²⁷ Such as those, as in the case, involving a meteorological event (mudslide caused by excessive rainfall) – para 135.

²⁸ Para 135. The margin of appreciation for states is also (as one might expect) larger in relation to property under Art 1 of Protocol 1 than under Art 2 of the Convention relating to life – see para 175.

In the event, the Court ruled that Russia was in breach, *inter alia*, of its Article 2 substantive obligation, by failing to inform the public about the risks from mudslides, which was identified as one of the “essential practical measures needed to ensure effective protection of the citizens concerned.”²⁹ There was no effective advance warning or evacuation order prior to the mudslide due to a failure to set up temporary observation posts in the mountains; there also appeared to have been no continuing evacuation order in place after the first mudslide to prevent residents from returning to their homes prematurely.³⁰

A. Past Risk-Exposure Causation Cases

Not all cases involving access to information on risk involve concrete, proven risks from industrial or natural hazards, where information on risk can ground a choice on whether and how to avoid it. There is another sub-set of the ECHR case law where individuals have been exposed to a toxic risk in the past and have developed a resulting fear or anxiety concerning this exposure which leads them to link their current health problems with it. Typically, they want access to information on the exposure incident and subsequent monitoring data to try to prove a causal link between their illnesses and the exposure. Thus, unlike in cases such as *Guerra*, where it was not disputed that the applicants were at present risk from the relevant factory, here, the very heart of the cases turns on a dispute about whether the applicants past risk exposure did in fact turn out to put them at risk of harm.³¹

In these cases, the Court’s liberal, choice-based approach to information and risk does not really work in the same way: the information sought by the applicants will not enable them to avoid the risk, since the exposure event lies in the past; it may, rather, help them to come to terms with their exposure and reduce their associated fear or anxiety. Choice may still be relevant however: instead of enabling them to avoid the risk, here it becomes a matter of providing them with causal ammunition for the purposes of choosing to pursue compensation or welfare entitlements.³²

The first such case dealt with by the Court was *McGinley and Egan*.³³ Both applicants were servicemen who had been within 60-70 miles of the UK Christmas Island atmospheric nuclear tests in the 1950s. During the tests, they were ordered to line up in the open and to face away from the explosions with their eyes closed and covered.³⁴ Both applicants later contracted diseases – none classically associated with nuclear radiation – which they nevertheless perceived as having been caused by exposure to radiation at Christmas Island.³⁵ Their human rights challenge before the ECtHR was

²⁹ Para 152.

³⁰ Paras 153-155.

³¹ See eg *McGinley and Egan v UK* (1998) 27 EHRR 1, para 99, distinguishing *McGinley* from *Guerra* on the basis, *inter alia*, that it was not disputed that the applicants in *Guerra* were at risk from the factory in question. See also *Roche* (n 10), para 160.

³² The relevant information could also, conceivably, provide them with a choice as to potential medical monitoring or treatment.

³³ (n 31).

³⁴ Para 10. The applicants contended that this was deliberate exposure for scientific purposes; the UK Government claimed it was to ensure that all personnel were seen to obey orders to look away.

³⁵ In *McGinley*’s case, there was evidence that he came to attribute his health problems to the exposure after reading a series of press articles in 1982 about the potential health effects of the Christmas Island explosions – para 22.

not based on their exposure per se, as this took place before the UK had accepted the right of individual petition in 1966.³⁶ It was, rather, based on the UK Government's alleged failure to allow them access to information which might enable them to establish a causal link, for the purposes of claiming a war pension, between their presence at Christmas Island and their subsequent health problems.

The Court initially found that their complaint about access to information did raise an issue under Article 8:

The Court considers that ... the issue of access to information which could either have allayed the applicants' fears in this respect, or enabled them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives within the meaning of Article 8 as to raise an issue under that provision.³⁷

Having held that Article 8 was applicable, the Court proceeded to determine whether the UK had breached that Article. It stated that:

Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.³⁸

However, it then ruled that the relevant national pension tribunal rules did provide a sufficient discovery procedure which would have enabled the applicants effectively to secure access to the relevant documents they were seeking.³⁹ For that reason, there was, in the end, held to have been no violation of Article 8.⁴⁰

In *Roche*,⁴¹ the applicant was a serviceman who had, in 1963, been subjected to the infamous nerve gas experiments at Porton Down, the UK's chemical and biological warfare research establishment. Like the applicants in *McGinley*, Roche had developed health problems, none of which were thought by his doctors to be associated with his earlier exposure to nerve gas. Again, Roche was not complaining of the exposure per se, but rather, inter alia, about inadequate access to information about the tests performed on him at Porton Down. Since Roche too had been involved in applying for a services pension, the UK Government argued that, as in *McGinley*, the pension tribunal rules provided an effective and accessible procedure enabling access to all relevant and appropriate information.⁴²

The Court reiterated its observation from *McGinley* to the effect that access to information, which could either have allayed the applicant's fears or enabled him to

³⁶ Para 64.

³⁷ Para 97.

³⁸ Para 101.

³⁹ Para 102.

⁴⁰ Para 103.

⁴¹ (n 10).

⁴² *Roche* (n 10), para 149.

assess the danger, raised the issue of his right to a *private* life under Article 8.⁴³ Again, based on *McGinley* above, it also stressed the need for “an effective and accessible procedure” enabling the applicant to secure access to “all relevant and appropriate information” adding, based on *Guerra*, that this was needed “to allow him to assess any risk to which he had been exposed during his participation in the tests”.⁴⁴ However, it distinguished *McGinley* in finding that there had been a breach of Article 8 in relation to the present applicant. It was not convinced by the Government’s argument concerning the pension tribunal rules:

the essential complaints of Mr McGinley and Mr Egan and the present applicant are not comparable. The search for documents by the former was inextricably bound up with their domestic applications for pensions in respect of illnesses they maintained were caused by their participation in nuclear tests. In contrast, the present applicant had made numerous attempts to obtain the relevant records ... independently of any litigation and, in particular, of a pension application. Indeed, even when he applied for a pension in 1991, he continued to seek documents in parallel with that application since the Rule 6 procedure was not, in any event, available at first instance. If the present applicant appealed to the PAT it was because he felt constrained to do so in order to make his Rule 6 request for documents following the judgment of this Court in *McGinley and Egan*.⁴⁵

On one level, one might claim, as the Court does here, that the cases are indeed different and that *McGinley* turns on its own particular facts which led the Court to find no information-denying breach of Article 8 there. However, the dates of the cases perhaps point to a more systemic (though speculative) explanation for the difference in outcomes, with the Court adopting a more stringent approach to access to information in *Roche*. *McGinley* was decided on 9 June 1998. The Aarhus Convention was adopted on 25 June 1998 and came into force on 30 October 2001, with *Roche* decided in 2005. In other words, the Aarhus right of access to information may have been one factor which influenced the Court in finding an information-related breach of Article 8 in *Roche* in a way they had not done in the pre-Aarhus *McGinley* case.

The *LCB* case is also worth mentioning here. Like the *McGinley* case in this section, it involved exposure to radiation at Christmas Island. However, the applicant in *LCB* was not the serviceman, but rather his daughter, who had contracted leukaemia – she claimed, as a result of her father’s pre-paternal exposure to radiation. The applicant argued that, had the State provided her parents with information on the extent of her father’s exposure to radiation and monitored her health from infancy, she would have been in a position to have her leukaemia diagnosed and treated earlier and thus more effectively.⁴⁶ To analyse this in liberal choice terms, lacking such information curtailed her family’s ability to make effective, early treatment choices.

In failing to provide this information, the State had, the applicant argued, breached Article 2 on the right to life. However, the Court found no such breach. First, it was

⁴³ Cf private and family life in *McGinley*. The Court in *Roche* considered it unnecessary to consider the separate issue of family life (para 155).

⁴⁴ *Roche* (n 10), para 162.

⁴⁵ Para 164.

⁴⁶ *LCB v United Kingdom* (1999) 27 EHRR 212, para 29.

not clear that the State possessed information, at the relevant time, which would have led it to believe that the father had been exposed to dangerous levels of radiation.⁴⁷ Second, even if it had possessed such information, the State could only have been expected to advise the parents of the risk and to monitor the child's health if it had appeared likely at the time that pre-paternal exposure to radiation could cause subsequent health risks in the father's children.⁴⁸ The Court dismissed this – referring to the UK domestic *Reay and Hope*⁴⁹ case in which no causal link between childhood leukaemia and pre-paternal exposure to radiation had been established. Finally, the Court held that it was in any event uncertain whether monitoring of the applicant's health *in utero* and from birth would have led to earlier diagnosis and treatment so as to reduce the severity of her illness.⁵⁰ Nevertheless, in relation to this last point, the Court observed, obiter, that it was perhaps arguable that:

Had there been reason to believe that she was in danger of contracting a life-threatening disease owing to her father's presence on Christmas Island, the State authorities would have been under a duty to have made this known to her parents whether or not they considered that the information would assist the applicant.⁵¹

The *LCB* judgment was delivered on the same day as that in *McGinley* – the 9 June 1998 – and, like *McGinley*, one must wonder about its status as a judgment post-Aarhus. However, it also seems out of line with the narrower reading of *McGinley* and *Roche*. After all, in those cases, the Court appeared to accept that the applicants' right to access information lay in order to alleviate, for example, their uncertainty and anxieties over the origins of their current health problems. In neither did the Court require the applicants to prove that their health problems were caused by their earlier exposure: indeed, the whole point of providing access to the relevant information would be either to enable them to establish such causation or else, more likely, to put their minds at rest as far as possible, by revealing that there was unlikely to be any association between their current health problems and the exposure incident. If that was true there, why then should the applicant in *LCB* have been required to establish a causal relationship between her disease and her father's exposure to radiation? Could it not be argued that she too might have benefited from accessing any relevant information on, say, her father's exposure, just to put her mind at rest that this was not the cause of her leukaemia?

The recent case of *Tătar v Romania*⁵² is one that could conceivably fit into this section, or the one before, though it does not exactly sit comfortably in either. The case involved the well-known 'Baia Mare' gold mine pollution incident, where breach of a dam led to significant water pollution from cyanide. The applicants, father and son, who lived in the vicinity of the mine, were concerned about the health effects of the cyanide process employed by the mine operators and alleged that it had aggravated the son's asthma. Although the Court did in the end rule that there had

⁴⁷ Para 41.

⁴⁸ Para 38. As DeMerieux notes, this requirement for near certainty before taking action seems out of line with the precautionary principle (n 1, 543).

⁴⁹ Para 39.

⁵⁰ Para 40.

⁵¹ Ibid.

⁵² (n 5).

been a breach of Article 8, inter alia because of a *Guerra*-type failure to provide citizens with information on the risks from the operation, it was not prepared to endorse the asthma-related element of the claim. The case is not on all fours with the other, military-related cases in this section in that the applicants in *Tatar* were not, as in those cases, seeking allegedly withheld information as a basis for attempting to prove the cause of the disease. However, it does bear some resemblance to them insofar as there was an allegation of a causal link between exposure (in this case, continuing, since the mine continued to operate after the disaster) and disease. In other words, in terms of it being an information case, it more closely resembles the *Guerra* type than the *McGinley* type. Nevertheless, it has the perception of risk hallmarks of the *McGinley* type because the perception was that the asthma was exacerbated by the mine operation. In rejecting this part of the claim, the Court was not prepared to rely on epidemiological evidence of a certain increase in cases of respiratory disease in the area as a means of establishing causation.⁵³

B. Choice

We have already seen in *Öneryildiz* above, an argument rejected by the Court that the applicant was in possession of information about the risk and effectively chose to stay residing near the tip and thus to accept the risk. There, this argument by the state failed because the Court did not believe that the applicant was appropriately informed about the particular risk associated with methane. Similar arguments have been made in other risk cases. In *Fadayeva*⁵⁴ for example, the applicant was complaining of a violation of her rights under Article 8 caused by excessive air pollution from a Russian steelworks. The applicant was housed within the so-called ‘sanitary security zone’ near the plant, where breaches of the relevant air quality standards meant that, under Russian law, no-one should be living. The Government argued, inter alia, that the applicant had moved into her flat within the sanitary zone “of her own free will and that nothing prevented her from leaving it. Moreover, she could always privatise the flat and then sell it in order to purchase housing in another district of the city.”⁵⁵ However, the Court was far from convinced by this argument. While it accepted that it was material that the applicant had, in effect, moved to the nuisance, knowing the environmental situation was bad, given the shortage of housing at the time, the Court held that the applicant really had no choice other than to accept the flat she had been offered.⁵⁶ In addition, the Court stated that, “due to the scarcity of environmental information at that time, the applicant may have underestimated the seriousness of the pollution problem”.⁵⁷ There was thus no sense in which the applicant could herself be considered responsible for the air pollution risks of which she was complaining.⁵⁸

As for her ability to move away in more recent years since the demise of the Soviet system and the ability to rent or buy property in the private sector, while theoretically not prevented from moving, the Court recognised that, given her income and the relative costs of her current accommodation when compared with private sector

⁵³ Ibid, para 106. Cf the partially dissenting judgment of Judge Gyulumyan.

⁵⁴ *Fadayeve v Russia* (2007) 45 EHRR 10.

⁵⁵ Para 112.

⁵⁶ Para 120.

⁵⁷ Ibid.

⁵⁸ Ibid.

alternatives, in practice, moving would be very difficult.⁵⁹ Thus, choice is acknowledged by the Court as being economically determined; choice, in other words, depends not just on having access to appropriate information resources about risk, but also on having appropriate financial resources to be able to avoid it.

Although not a risk case as such, it is worth mentioning the *Hatton*,⁶⁰ aircraft noise case at this point, as that too involved issues of residential choice. In rejecting the applicants' allegation that UK government policy on night flights at Heathrow Airport violated their rights under Article 8, the Grand Chamber of the Court noted, inter alia, that house prices in the applicants' area had not been adversely affected by the night-time aircraft noise. The Court considered it "reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area",⁶¹ and went on to observe that:

Where a limited number of people in an area (2 to 3% of the affected population, according to the 1992 sleep study) are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.⁶²

While these observations were made in a (noise) pollution case rather than a risk one, it seems clear that they would also apply in risk cases. In many ways, *Hatton* is simply the flip-side of *Fadayeveva*: in the latter case, moving was economically unrealistic, whereas in *Hatton*, moving away was a realistic economic proposition. The applicants had no doubt paid a reduced price for their houses on moving to the area to reflect the considerable, existing Heathrow noise; any increase in night-time noise would very likely produce only a marginal, if any, effect on house prices and would not deter self-selecting buyers with a tolerance for noise. In any event, the liberal choice overtones of *Hatton* are clear: the Court is not prepared to conclude that pollution (or risk) has interfered with an individual's rights where that person has a reasonable choice to move and avoid it.⁶³

III. Public Concern, access to justice and imminent risk

In cases such as *Guerra*, public concerns over risk were undoubtedly objectively well-grounded, given the history of trouble from the relevant plant. In others, such as *McGinley*, *Roche* and *LCB*, there was arguably more of a disconnect between the applicants' perceptions of the relevant, *past* risks to which they had been exposed and the scientific evidence about the (un)likely connection with their current health problems. However, the Court – particularly in *Roche* – was rightly sensitive to these perceptions given the infamy of the relevant incidents in the public imagination. There is yet another set of cases in which a section of the public is concerned about *present* risks, such as nuclear power stations, in a way that is out of line with majority scientific and political opinion. This may be because their perception of the relevant

⁵⁹ Para 121.

⁶⁰ *Hatton v UK* (2003) 37 EHRR 28.

⁶¹ Para 127.

⁶² *Ibid.*

⁶³ For academic endorsement of such a liberal approach to location, see further Miller (2003) (n 1).

risks is guided by certain factors beyond mere statistical probabilities, taking into account, for example, issues such as lack of control and irreversibility.⁶⁴ Very often with such cases, the applicants are not seeking information on the relevant risk, as they are more than likely to contest the scientific accuracy of this in any event and thus it will not help them to make liberal choices about it. What they are typically seeking is, rather, the ability to judicially review the decision to grant authorisation to the relevant risk activities.

The Court's initial attitude to such cases appeared, from the *Zander*⁶⁵ case, to be quite favourable. That case involved a decision by the Swedish Licensing Board to renew a permit for a landfill close to the applicants' well from which they obtained their water supply. The applicants had demanded that, in the light of previous water pollution incidents involving cyanide contamination, the permit not be renewed without an obligation being imposed to supply them with drinking water free of charge, as a precautionary measure. The Licensing Board refused this demand – a decision upheld by the Government on appeal – because of the lack of a likely pollution pathway between the landfill site and the well; nevertheless, as a precautionary measure, the authorities did impose stringent monitoring requirements on the company regarding water quality in the well. Under Swedish law at the time, it was not possible to have the Government's decision on appeal judicially reviewed by an independent tribunal or court,⁶⁶ and the applicants argued before the ECtHR that this was in breach of their rights under Article 6, which provides that, "(i)n the determination of his civil rights and obligations ... everyone is entitled to a ... hearing ... by [a] ... tribunal". This was a classic case in which the applicants' perceptions of the relevant risks were out of line with those of the authorities. The scientific evidence suggested that there was no likelihood of pollution of the well by the landfill site. Nevertheless, despite this, the applicants lived "in fear of pollution of the well" and, as a result, collected drinking water elsewhere – "in buckets, cans and bottles".⁶⁷ The Swedish Government had argued against applying Article 6, on the grounds that States would, as a result, be obliged "to introduce a multitude of comprehensive court remedies, covering a wide range of environmental matters, in order to deal with complaints by large numbers of plaintiffs about exposure to potential, not just actual risks of damage."⁶⁸ However, this did not find favour with the Court, which held that there had indeed been a violation of Article 6.

This initial sign of promise for applicants seeking judicial review in public concern risk cases was, however, subsequently dealt a blow in two Commission cases⁶⁹ and in two further cases involving the Court. In the *Tauira v France* case,⁷⁰ the applicants were residents of French Polynesia who had in the past worked on or currently lived between 400km and over 1000km away from the Mururoa Atol, where France was resuming underground testing of nuclear weapons. Their applications alleged

⁶⁴ See P Slovic 'Perception of Risk' (1987) 236 *Science* 280; and C Sunstein *Risk and Reason* (Cambridge, CUP, 2002); N Stanley 'Public Concern: The Decision-Makers' Dilemma' (1998) *JPL* 919, provides a helpful analysis in a UK planning law context.

⁶⁵ *Zander v Sweden* (1994) 18 EHRR 175.

⁶⁶ Para 29.

⁶⁷ Para 31.

⁶⁸ Para 23. As Demerieux (n 1, 556) states, this does indeed represent "a vivid articulation of the potential of Article 6(1) as an article from which to derive procedural environmental rights."

⁶⁹ Prior to the change in 1998, introduced by Protocol 11, to a single, Court system.

⁷⁰ *Noel Narvii Tauira and Eighteen Others v France* (1995) 3 IELR 774.

breaches of a range of Articles under the Convention, including, inter alia, Articles 2, 3,⁷¹ and 8, and Article 1 of Protocol 1 (though at first sight, strangely perhaps, not Article 6). However, the Commission rejected their claim on the basis that the applicants could not be considered ‘victims’ for the purposes of the general admissibility Article 25 (now 34). The Commission held that it was insufficient merely to invoke the risks inherent in the use of nuclear power in order to claim to be victims, “as many human activities generate risks.”⁷² The applicants needed to provide evidence to show a sufficient degree of probability of damage that was not too remote. According to the Commission they had failed to do so, observing that “the resumption of the tests has had only potential consequences which are too remote to be considered to be an act directly affecting their personal situation.”⁷³ On one level, it is difficult to be too critical of the Commission’s ruling in this case, not least because the evidence put forward by the applicants on issues such as their health, effects on their property values and the risks from eating contaminated migratory fish, was all rather insubstantial. However, this is perhaps to miss the point: the Commission seemed to be looking for evidence of harm, whereas the applicants were really concerned by the lack of procedural integrity involved in France’s decision. As part of their Article 2 case, the applicants had, for example, drawn attention to the lack of an environmental impact assessment⁷⁴ or opportunity for public participation⁷⁵ before the decision to resume testing was taken. Similarly, they contested the French Government’s argument that they had failed to exhaust domestic remedies by pointing to Greenpeace’s signal failure in the claim it had brought in the French domestic courts: that case had shown that it was pointless for the applicants to bring a domestic case themselves because it would be doomed to fail in the same way. However, the fact that they had failed to bring domestic proceedings at all perhaps explains why the applicants felt unable to claim a breach of Article 6 in the end – unlike all of the other cases in this section.

In *L, M and R v Switzerland*,⁷⁶ the applicants were concerned about the risks from accidents involving rail transport of nuclear waste. They lived near to a railway station goods yard through which the relevant material was transported, and had sought to challenge authorisation of the transport in domestic proceedings. However, the Swiss Federal Court denied them standing on the basis that the risk for those living along the transport line was not significantly higher than that faced by the population in general. The applicants complained, inter alia, that they had been denied access to court resulting in a breach of Article 6, and also that the risks from the transportation of nuclear waste were such that to authorise them would involve a breach of Article 2 and the right to life. The Commission dismissed both claims. In relation to Article 6, it held that it was not unreasonable for the Swiss Court to have adopted the approach which it had taken towards standing, observing that it “clearly did not exclude that in circumstances where an applicant could demonstrate an extraordinary and concrete danger, he would be granted standing in such

⁷¹ In relation to Art 3, the applicants contended that their feelings of fear and anxiety in connection with the tests meant that they had suffered inhuman and degrading treatment within the terms of the Art.

⁷² (n 70), 798.

⁷³ (n 70), 799.

⁷⁴ Though one was not legally required for such military testing under EU law.

⁷⁵ Eg through a public inquiry.

⁷⁶ *L, M and R v Switzerland* (1996) 22 EHRR CD130.

proceedings.”⁷⁷ It could not therefore be said that the essence of the right of access to court within Article 6 had been impaired.

As for Article 2, the Commission drew attention to the fact that the decision of the Swiss authorities had ensured that the transports were carried out in conformity with relevant national and international safety norms on carriage. The Commission regarded this as precautionary enough for the purposes of protecting life under Article 2: no further protection for individuals living near the transport routes was required by the Swiss authorities.

While the decision on national standing laws is probably technically unimpeachable on the basis of Aarhus – since the latter’s provisions on access to justice do not technically require liberalisation of such laws⁷⁸ – it is arguably contrary to the spirit of Aarhus insofar as the applicants in *L, M and R* were effectively denied access to judicial review.⁷⁹ To point out that their degree of concern over the relevant transport risks seemed out of line with the scientific and technical opinion enshrined in the international transport safety norms is to miss the point: they contested the science underpinning those norms and all that they were seeking was an opportunity to air that in domestic proceedings. In recent times, challenges to the scientific basis of decisions have become the bread and butter of case law in many settings:⁸⁰ it should not be regarded as an unusual request; indeed the ability to challenge potentially arbitrary decisions via judicial review ought to be regarded as a cornerstone of the rule of law.

Moving on to consider decisions by the Court, the *Balmer-Schafroth*⁸¹ case involved an application by the operator of a nuclear power station for the extension of its operating licence and an increase in production output. The applicants were local residents, living within 4-5 kilometres of the plant, who were concerned that it was outdated in its design and construction and thus posed a greater than usual risk.⁸² Their objections were rejected by the Swiss Federal Council, which proceeded to grant the relevant licence and production increase on the basis that older plant could be modernised and maintained so as to operate quite safely.⁸³ The applicants argued before the ECHR that there had been a breach of Article 6 because they had been unable to secure a ruling by an independent tribunal on their objections;⁸⁴ the case had only been determined by the Federal Council which was part of the Swiss executive.

⁷⁷ Ibid, para 1.

⁷⁸ See further C Schall ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’ (2008) 20 *JEL* 417, 437-438.

⁷⁹ On the distinction between technical compliance and compliance with the spirit, see Schall, *ibid*, 437-441.

⁸⁰ See eg EU law with cases such as Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305 involving challenges based on the precautionary principle (on which see further below, n 89). Of course standing before the ECJ for non-commercial applicants is also a problem there.

⁸¹ *Balmer-Schafroth and Others v Switzerland* (1998) 25 EHRR 598. DeMerieux points out that it is hard to see how the nuclear cases like *Balmer* can be distinguished from *Zander* (which was not mentioned in them), except insofar as they relate to nuclear power which is more of a matter of high-politics (n 1, 548, 554).

⁸² Paras 7-9.

⁸³ Para 11.

⁸⁴ Para 27.

The Court held that Article 6 was not applicable because the applicants had failed to show that the outcome of the Federal Council's decision was directly decisive for the right they asserted (to have their physical integrity adequately protected from the risks of nuclear energy). According to the Court:

they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical.⁸⁵

There was, however, a powerful 7-judge, dissenting opinion in the case.⁸⁶ This stressed that it was not the government policy decision to have nuclear power that was being challenged by the applicants, but rather the "lack of any means of securing a review of the safety of the operating conditions when the operating licence was renewed."⁸⁷ The dissenting judges felt that it was unwise to leave the executive unchecked in such a sensitive area as nuclear power, arguing that "(p)eople are entitled to adequate judicial review."⁸⁸ They observed that the applicants had pointed to a sufficient risk faced by them which would give rise to damage, citing the applicants' submission that only those like them living in the direct vicinity of the plant had been given iodine tablets to take in the event of an emergency. The precautionary principle, which argues in favour of taking action even in the face of uncertain risks,⁸⁹ was also mentioned in support of the applicants' case.

Much the same factual situation – this time relating to another ageing nuclear power station – came before the ECtHR again in *Athanassoglou*.⁹⁰ Here, the applicants were careful to emphasise that the case was not simply a political challenge to nuclear power in general; they were, rather, seeking to challenge the legality under national law of the particular licensing decision at hand, and this could only be satisfactorily examined by an independent tribunal or court.⁹¹ However, the Court appeared to think otherwise, suggesting that the nature of the applicants' challenge was indeed against nuclear power in general.⁹² The applicants also contended that a serious risk should be sufficient for the purposes of Article 6 and that there should be no need for the risk to be imminent.⁹³ Alternatively, the applicants appear to have claimed that there was new evidence that had come to light since *Balmer-Schafroth* – in the shape of a recent report from the Institute for Applied Ecology in Darmstadt – to establish a serious and immediate danger. The Court stuck resolutely to the requirement to show an imminent

⁸⁵ Para 40.

⁸⁶ As well as 1 further, separate one.

⁸⁷ Dissenting opinion, para 42.

⁸⁸ *Ibid.*

⁸⁹ On the precautionary principle, see further eg E Fisher 'Is the Precautionary Principle Justiciable?' (2001) 13 *JEL* 315; N de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford, OUP, 2000); J Scott 'The Precautionary Principle Before the European Courts', in R Macrory (ed) *Principles of European Environmental Law* (Groningen, Europa, 2004); V Heyvaert 'Facing The Consequences of the Precautionary Principle in European Community Law' (2006) 31 *EL Rev* 185.

⁹⁰ *Athanassoglou and Others v Switzerland* (2001) 31 *EHRR* 13.

⁹¹ Para 38.

⁹² Paras 52-54.

⁹³ See also DeMerieux (n 1, 546), who points out that *Zander* contained no such requirement of imminence of the risk.

risk and dismissed the claim that the Institute evidence established this, stating that the preponderance of independent evidence showed that the plant was safe.⁹⁴

There was, again, a powerful 5-judge dissent here. First, like the dissent in *Balmer-Schafroth*, it argued that judicial review of executive licensing decisions should be available. Second, it observed that it was “virtually impossible to prove imminent danger in the case of inherently dangerous installations: the catastrophes that have happened in a number of countries were obviously unforeseeable or, in any event, unforeseen.”⁹⁵ And finally, the dissenting judges were of the view that, on the basis of the subsidiarity principle, the question of whether the applicants had established a sufficiently close link between their rights and the operation of the plant should have been left to the relevant domestic courts to decide.⁹⁶

In two more recent cases, the Court has adopted a fairly generous approach to the question of hypothetical and imminent risk under Article 6, though as we shall see, this is on the basis of somewhat different facts to those of the cases above. In *Taşkin*,⁹⁷ the applicants were complaining, *inter alia*, about the risks posed by a local gold mine which used sodium cyanide to extract the gold. The Turkish Government argued that Article 6 did not apply since the risk alleged by the applicants was hypothetical and “not at all imminent”, meaning that the complaints did not involve “civil rights and obligations” within that Article.⁹⁸ The Court, in contrast, held that the applicants’ right to protection of their physical integrity was directly at stake because the Turkish Supreme Administrative Court had itself confirmed the existence of a risk from the relevant cyanidation process on the basis of previous reports.⁹⁹ In addition, the applicants had brought proceedings in the Turkish administrative courts, the outcome of which did directly relate to the applicants’ civil rights.¹⁰⁰ Having found that Article 6 was applicable, because the Turkish executive had effectively given an order attempting to bypass the judgment of the Turkish courts, the ECHR had no difficulty in finding, subsequently, that Article 6 had been breached.¹⁰¹

In *Okuyay*,¹⁰² the applicants were three lawyers living and working approximately 250 kilometres from three coal-fired power stations operated without a relevant licence and causing significant pollution. Again, like in *Taşkin*, the Turkish Government argued that the applicants had failed to show that the plants exposed them to a serious, specific and imminent danger.¹⁰³ However, the ECHR similarly pointed to the findings of the relevant Turkish administrative court, which, on the basis of an expert report, had found that there was a risk to public health which included the applicants because the hazardous gas emitted by the plant could extend over an area 2,350 kilometres in diameter.¹⁰⁴ The applicants’ right to the protection of their physical integrity was thus brought into play, “despite the fact that the risk which they run is

⁹⁴ *Athanassoglou* (n 90), paras 49-51.

⁹⁵ Dissenting Opinion, para O-I6.

⁹⁶ Dissenting Opinion, para O-I7.

⁹⁷ *Taşkin* (n 5).

⁹⁸ Para 128.

⁹⁹ Para 133.

¹⁰⁰ Para 133.

¹⁰¹ Paras 135-138.

¹⁰² *Okuyay* (n 5).

¹⁰³ Para 61.

¹⁰⁴ Para 66.

not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants.”¹⁰⁵ The Court subsequently went on to find that Article 6 was applicable and had been breached, for much the same reasons as the earlier *Taşkin* judgment.¹⁰⁶

Taşkin is also an interesting case insofar as it reveals an increasing potential overlap between Articles 6 and 8 in terms of access to judicial review. The applicants in the case complained of a breach of Article 8 in addition to Article 6 discussed above. The Turkish Government contested the applicability of Article 8, again on the basis of the hypothetical nature of the risk, which they alleged, might materialise only in twenty to fifty years time.¹⁰⁷ This, it claimed, “was not a serious and imminent risk.”¹⁰⁸ In ruling that Article 8 was in fact applicable, as with Article 6, the Court emphasised that previous reports and the Turkish Supreme Administrative Court had highlighted the risks posed by the gold mine. However, it also saw fit to add what might be called a ‘risk rider’ to its standard *López Ostra* formulation about pollution and Article 8. The latter formulation states:

Article 8 applies to severe environmental pollution which may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.¹⁰⁹

The new risk rider crucially adds:

The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 8 would be set at naught.¹¹⁰

This addition is crucial because otherwise, Article 8 would only be applicable in straightforward, visible, pollution cases and not, as in *Taşkin*, where there is a real and serious long-term, but less tangible, risk posed by an activity. There is, therefore, no need to show pollution or direct harm as such: all that is needed is to establish the existence of a risk as part of an environmental impact, risk assessment.

In going on to rule that there had been a breach of Article 8, the Court, as we saw in *Budayeva* above in relation to Article 2, drew a distinction between the substantive and procedural aspects of Article 8.¹¹¹ This development of a procedural side to both

¹⁰⁵ Ibid.

¹⁰⁶ Paras 67-75.

¹⁰⁷ *Taşkin* (n 5), para 107.

¹⁰⁸ Ibid.

¹⁰⁹ *Taşkin* (n 5), para 113.

¹¹⁰ Ibid. See also *Branduse* (n 12), para 65.

¹¹¹ See also *Giacomelli* (n 12), para 79; *Branduse* (n 12), para 62.

Articles 2 and 8 might be characterised in terms of a ‘proceduralisation’¹¹² or procedural turn in environmental cases involving these Articles and may, one might argue, be linked to the influence of Aarhus on the Court’s case law in this area.

The Court spelled out the procedural aspect of Article 8 in the following terms:

whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual ... It is therefore necessary to consider *all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available* ... However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.¹¹³

Though the final sentences from the above quote stem from the *Hatton* aircraft noise case, which, as we have seen, involved pollution rather than risk, the reference to taking action even in the absence of comprehensive data contains obvious echoes of the precautionary principle and it will be interesting to see how this is developed in future risk cases.¹¹⁴

Returning to the facts of *Taşkin*, the Court, in finding that Turkey was in breach of the procedural aspect of Article 8, drew attention to the fact that the Turkish executive had effectively authorised the bypassing of Turkish court judgments in the applicants’ favour, contrary to the rule of law. As the Court stated, in doing this, the Turkish authorities had deprived the procedural safeguards or guarantees available to the applicants during the judicial phase of the proceedings, of any useful effect.¹¹⁵ The result was thus effectively the same for Article 8 and Article 6, with the Turkish Government’s overriding of court judgments giving rise to a breach of both.

The likely influence of Aarhus on the above proceduralisation of Article 8 is perhaps the most noticeable, with the Court implicitly stressing Aarhus-type procedural aspects including public participation, access to information,¹¹⁶ and, most notably on the facts of the case itself, access to justice.¹¹⁷ However, the influence of Aarhus can arguably also be felt in relation to the Court’s conclusions on Article 6, which similarly involves access to justice. The real question however is whether, in future

¹¹² See (n 16) above.

¹¹³ *Taşkin* (n 5), para 118, emphasis added. This is then further fleshed out in para 119 which mentions, *inter alia*, the need, under the procedural aspect, for the public to be able to access information on risk. Cf Art 2, n 21 above, where information comes within the substantive part (which is less logical in terms of Aarhus fit).

¹¹⁴ The precautionary principle played a significant role in the recent *Tătar* case (n 5), para 69, 109, 120, where the Court drew attention to the principle in criticising the State’s failure to halt the mine’s operation after the accident.

¹¹⁵ *Taşkin* (n 5), paras 124-125.

¹¹⁶ See the reference to para 119 of the *Taşkin* judgment contained in n 113 above.

¹¹⁷ As noted earlier (n 5) above, this Aarhus influence is apparent in the case itself and has been confirmed in the later *Demir* case. Also noting this Aarhus influence, see Boyle, above (2007) (n 1); and Schall (n 78, 433). In the more recent *Tătar* case (n 5), the Court’s reference to Aarhus in the main body of the judgment is more *explicit*, perhaps reflecting the fact that the respondent State, Romania, had ratified the Convention (unlike Turkey in *Taşkin*, which had neither signed nor ratified).

cases where the national authorities have not acknowledged a risk in a prior risk assessment – in other words in cases more like *Tauira, L, M and R, Athanassoglou* and *Balmer-Schafroth* than *Taşkin* and *Okyay* – the ECtHR will be more inclined, as a result of Aarhus, to be more demanding of access to justice under Article 6. I would argue that Aarhus generally requires a more demanding approach from the Court than we saw in those earlier, nuclear-related cases.

IV. Conclusion

For a long time in the ECHR environmental case law, the procedural rights under the Convention have arguably played second-fiddle, in terms of academic focus, to their more glamorous substantive cousins within Articles 8 and, more recently, 2. Part of the reason for this may be that a number of the procedural rights tended to be employed by those on the side of industry instead of on the side of the environment.¹¹⁸ However, because of the influence of the Aarhus Convention, things look set to change. In truth, the substantive cousin always had too many hopes unrealistically piled upon it. The search for a substantive right to a clean environment was always likely to prove elusive: in all but the most egregious examples of pollution, the Court always seemed likely – many would say quite rightly – to bow to the democratic wishes of individual states, balancing the rights of individuals and the broader collective economic interest.¹¹⁹ However, while *Hatton*, in this mould, was an intense disappointment for many environmentalist lawyers, it also sowed the seeds of the new procedural turn in the environmental case law of the ECHR, with the Court placing less emphasis on substantive balancing of individual and collective interests and more on ensuring that states have put relevant, Aarhus-type procedures in place.¹²⁰ Article 6 has of course always been procedural; but in stressing the Aarhus procedural rights of public participation, access to information and access to justice across all of the relevant ECHR rights – including those such as Articles 2 and 8 perhaps more often in the past seen in predominantly substantive terms – the Court has begun to reinvigorate its environmental jurisprudence. That many of these cases involve risk rather than pollution per se is perhaps no surprise, since, if a substantive approach is, as argued above, problematic in pollution cases, it is arguably even less well suited to the complexities of risk, where a procedural approach to rights seems much more appropriate.¹²¹ However, whether the Court will truly take up the mantle of Aarhus by moving away from some of its questionable earlier Article 6 case law remains to be seen.

¹¹⁸ See eg *Fischer v Austria* (1995) 20 EHRR 349, on Art 6.

¹¹⁹ To similar effect, see Boyle (2007) (n 1).

¹²⁰ See the quote in the main text and the sentence following it at n 113 above.

¹²¹ Boyle (2007) (n 1) argues convincingly for a procedural approach to rights across all environmental cases – ie not just ones involving risk.