Pensions and human rights: A view from the United Kingdom

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Abstract This article explores the impact of the coming into force in the UK of the Human Rights Act 1998 on the operation and regulation of pension schemes, concluding that there are major issues for regulators who need to comply with the Act.

Keywords: *Human Rights Act 1998; regulation; pension scheme compliance; non-discrimination; equal treatment; whether pensions are property; European Convention on Human Rights*

Introduction

The Human Rights Act 1998 and the European Convention

In the United Kingdom the impact of human rights law has so far been modest. We have not thus far enjoyed a formal constitution and the impact generally of both the Universal Declaration and the European Convention on Human Rights has been modest. So far as pensions are concerned, there have been references to the European Court of Human Rights in relation to pensions claims, and even the odd reference in the European Court of Justice (the EU court) to human rights law in pensions matters (particularly equal treatment issues); in 2000,

however, the UK brought into force its own human rights act, and its impact is expected to be significant.¹

Following the implementation of the Act any person who is, for example, a defendant in a civil case (where the plaintiff is a public authority, or in a criminal case) is able to rely on the rights expressed in the European Convention on Human Rights in any legal proceedings.²

In all cases where Convention rights are in question the Act applies the Convention whether the litigants are private persons or public authorities by requiring the courts to decide all cases brought before them (whether under statute or common law) compatibly with

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Convention rights. Primary legislation can however still override the Convention. Courts must also interpret current and future legislation in conformity with the Convention. And the courts must take into account decisions of the Court of Human Rights. However, the Act does not make the Convention rights directly enforceable in proceedings against a private litigant nor against a quasi-public body with some private functions where it acts in a private capacity, although there may be some indirect effects.

The Act also creates directly enforceable rights against public bodies (and quasi-public bodies which have some public functions) by introducing a ground of illegality into proceedings brought by way of judicial review. There is now also a cause of action against public bodies which fail to act compatibly with the Convention. And Convention rights are available as a ground of defence in cases brought by public bodies against private bodies (in both criminal and civil cases). In practice there will be a major impact in the areas of court procedures and in particular the procedures of quasi-judicial authorities such as regulators.

This is not the place for a review of the Act or the history of its introduction; nor is there room for a review of the Convention. This paper examines simply the impact so far and some expected developments in the area of pensions law. However, some general principles underlying the application of the Convention employed by the Court, which may be employed by the UK courts, may be relevant. The Convention is regarded as organic, to be interpreted by the mores of the time, and to reflect current conditions. Accordingly older decisions are less influential than later ones. The state has the right to interfere

in the application of rights in certain cases, provided it is within the rule of law designed to achieve a legitimate objective and to be proportionate to that objective. In other words, there needs to be a balance between the general public interest and the protection of an individual human right.³

This paper does not cover the issues of human rights involved in relation to investments.⁴

Other international influences

The European Convention on Human Rights has not been the sole source of international influence on UK domestic pensions policy. While it is destined to have the most impact, there have been others which have gently influenced policy and practice. Most international influences on benefits policy have derived notably from the International Labour Organisation (ILO)⁵ and the Council of Europe,⁶ predominantly of course in relation to social security pensions rather than private pensions. For example, the ILO's Social Security (Minimum Standards) Convention does not apply directly to private schemes, but has been held to have been influential.⁷

'[there] has been misapprehension in some quarters concerning the relationship between the Convention and voluntary private insurance. The Convention is not material to, and does not interfere with, voluntary private insurance in any way.'

Nonetheless, this does not mean that it is without influence on the private sector:⁸

'It provides for a basic code of protection on which voluntary private insurance can and should build.'

Similarly the European Code of Social Security provides:⁹

‘Article 25: Each contracting party for which this part of the Code is in force shall deem to the persons protected the provision of old-age benefit in accordance with the following Article of this Part.

Article 26: The prescribed ages shall be not more than 65 years of age or than such higher age that the number of residents having attained the age is not less than 10 per cent of the number of residents under that age but over 15 years of age.’

Other studies have been carried out by the Organisation for Economic Cooperation and Development¹⁰ and the International Social Security Association;¹¹ and even the Universal Declaration of Human Rights has something to say about pensions.¹²

Pensions and human rights

The question of whether pension rights and benefits are eligible to be protected under human rights legislation has already been considered in a number of cases prior to the UK Act. While the European Convention on Human Rights has many articles and protocols which set out a series of rights (eg, prohibition of torture, freedom of thought etc) there are four provisions which have been considered as directly applicable to the protection of pension rights, namely:¹³

- (a) Article 6 (whether a pension is a ‘civil right’ such that in the determination of his civil rights an individual is entitled to a fair and public hearing);
- (b) Article 10, which requires freedom of expression (whether the government must disclose information which might lead to a pension being granted);
- (c) Article 14, which prohibits

discrimination (whether a pension right is a right protected under the Convention); and

- (d) Article 1 of the First Protocol (whether a pension is a possession which everyone is entitled to peaceful possession of).

There are also, of course, the articles relating to regulation and procedure.

The passing of the Human Rights Act 1998 now makes it easier to introduce the principles underlying the Convention into UK law, and disputes. In the UK the law requires all domestic legislation to be read and applied so as to be compatible with Convention rights, and makes it unlawful for public authorities to act in a way which is incompatible with a Convention right. The domestic courts must take into account not only the terms of the Convention itself but also the accompanying jurisprudence (decisions of the European Court, opinions of the former European Commission, and decisions of the Commission and the Council of Ministers). Where there is a breach, the domestic courts cannot override domestic legislation, only declare it to be incompatible with the Convention and leave it to Parliament to reform the position.

So far much of the attention has been directed on the anomalous position of the regulators, particularly the Occupational Pensions Regulatory Authority (Opra) whose procedures, especially its appeal procedures, pose obvious difficulties. Whether it can continue its operations when acting as investigator, prosecutor, judge and appeal court all in one seems to be in doubt, but challenges have so far been few.¹⁴ There are similar concerns about the procedures of the Pensions Ombudsman.

European Convention, Art 6

The expectation is that the greatest exploitation of the Human Rights Act will be in the area of regulatory procedure. Article 6 covers the rights to a fair trial; it provides:

‘1 In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal published by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In *X v. Federal Republic of Germany* the question was first considered whether an old age pension could be held to be a civil right so as to qualify for protection under the Convention. It should be borne in mind that the complainant also alleged that his own lawyers were acting against him, that three judges of the appeal court were incompetent, as were the government, the secretaries of state, the federal court, the public prosecutor's court in Essen and lawyers in Essen generally. In relation to the claim for an increased pension on the grounds that he had contracted silicosis while working as a coal miner, the Commission refused to accept his complaint that such a pension had been unjustly refused by the authorities, since the Convention under which the Commission operated and drew its authority was not a right which could be held to be included in the term ‘civil right’, furthermore, the Commission added, the right to a pension is not as such included among

the rights and freedoms guaranteed by the Convention.¹⁵

The other area covered by the Article is procedural; first the question arises whether under the Article there is a need for example for the pensions regulator Opra and the Pensions Ombudsman to offer oral hearings as part of compliance, but also trustees.¹⁶

The Pensions Ombudsman

The operation of the Pensions Ombudsman, certainly the way in which it has been managed in the last few years, gives rise to indications that there may be areas of challenge in two main areas: whether the Pensions Ombudsman is an ‘independent and impartial tribunal’ under Article 6, and whether its procedures meet the requirements for a ‘fair and public hearing’. The Pensions Ombudsman is intended to offer a cheap, simple and speedy resolution of pension disputes, mostly between member and scheme.¹⁷

It is clear that the Pensions Ombudsman is subject to the provisions of Article 6. The rights under Article 6(1) arise in relation to proceedings for the ‘determination’ of ‘civil rights and obligations’, and what counts in interpreting these terms is the substance rather than the domestic form or terminology.¹⁸ So far, as is indicated below, pension rights have not always been considered to be civil right, but it may be that the trend of decisions is moving that way so that rights to a pension, especially a state pension, is not so much a public law right as a civil law right. Some of the rights under an occupational scheme could fall within a broad definition of civil rights.¹⁹

One of the issues recently discussed in relation to judicial independence is the method of appointment of the court. In

*Findlay v. United Kingdom*²⁰ it was held that²⁰

‘In order to establish whether a tribunal can be considered as ‘independent’, regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.’

Since the Pensions Ombudsman can be removed at any time by the Secretary of State for Social Security by notice in writing, it is arguable that this infringes the provisions of Article 6. The Pensions Ombudsman is the only ombudsman with powers of enforcement of determination issued by him, and is clearly a tribunal within the meaning of Article 6.²¹ An instance where judiciary were subject to recall occurred in *Starrs v. Ruxton*,²² where it was held that judges appointed for one year at a time subject to recall were not within the definition of an ‘independent and impartial tribunal’.

A second issue has been the practice of the Pensions Ombudsman to comment widely on decisions which have successfully been appealed against him, or on matters generally in lectures and in his annual report. Whether a tribunal is impartial is subject to both a subjective and objective test:

‘As to the question of ‘impartiality’ there are two aspects to this requirement. First, the tribunal must be free of personal prejudice or bias. Secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.’²³

Thirdly, there are several procedural issues. The Pensions Ombudsman has in the past himself appeared on occasion in

appeals against his determination. This curious procedure has been commented on by the courts,²⁴ but is enshrined in the legislation and is designed to avoid the complainant being exposed to liability for cost of the appeal. It does however give the appearance if not the reality of bias in favour of the complainant. While the Article does not of itself create a right to an oral hearing, but since there is an appeal from the Pensions Ombudsman only on a point of law and not of fact, the right of appeal is limited, and procedurally the lack of the right to express orally any views coupled with inability to appeal may be regarded as a breach of the right to a fair trial. And in certain cases the Pensions Ombudsman has the right to delegate his functions to employees (although not in respect of determinations of complaints and disputes).²⁵ In practice, the Ombudsman employs investigators to examine the case and then prepare a draft Notification of Preliminary Conclusions which is reviewed by the Ombudsman and approved. Such a procedure could be regarded as being in breach of the Pension Schemes Act, since the investigator is not a tribunal established by law; if there is no breach, the question arises whether the Pensions Ombudsman has considered all the evidence so as to meet the fair hearing obligations. The informal communications between the parties and the investigator may also be suspect. And the requirement to exhaust the internal dispute resolution procedure and the services provided by the Office of the Pensions Advisory Service (OPAS) could be held to be a breach of the obligation not to restrict access to a tribunal.²⁶

Finally, there have been several cases where the Pensions Ombudsman has attempted to exercise the discretions normally exercised by trustees.²⁷ Where he continues to do so, such exercise will

now become subject to a proportionality test.²⁸

Occupational Pensions Regulatory Authority

In an issue of the Opra Bulletin, the Bulletin issued by the UK regulatory authority, its Chairman John Hayes, by profession a solicitor and former Secretary General of the Law Society, the UK professional body for lawyers, reflected at some length on the impact of the Human Rights Act 1998 on the procedures of the Regulator (and incidentally other regulators and the Pensions Ombudsman).²⁹ He pointed out that Opra procedures could be open to criticism because of the fact that the regulator is investigator, prosecutor, judge and appeal court. Opra has now changed its procedures. For example, Board members are now restricted to seeing only the papers which the person at risk of receiving the sanction also sees. And the switch of civil penalties from criminal penalties in relation to late payments in 2000 was intended to soften the need for protection against criminal sanctions required under the Act. Whether the procedures are effective against the requirements of Article 6 has not been tested, but there must be doubts, especially since the Secretary of State has power to appoint and remove the Chairman, and because of the wider public role that Opra adopts in its press comments and bulletins and because the civil sanctions clearly have penal and criminal effect, regardless of what they are called.

The determination and review procedures, which in particular offer limited rights to oral hearings (in relation to the prohibition of a trustee) and no opportunity for legal aid for hard pressed individuals, must clearly be open to complaint that they breach the Article 6

requirements for a fair and public hearing. And the review procedures, which use different members of the board to hear the case, are clearly suspect.

Opra is of course a prisoner of its governing legislation and is unable without changes to the law to change much of its procedure. Nonetheless, it is clearly concerned about the impact of other protections introduced by the Act. There are several elements of concern, but the most difficult include the need for legal aid to be available, even where the sanctions are supposed to be civil, because even civil sanctions can be perceived as semi-criminal in effect (such as losing the right to employment as a trustee or actuary); and the need to maintain 'equality of arms', that an individual needs similar resources to defend himself as are available to the prosecutor to prosecute him.

Meanwhile the Act continues to influence the conduct of regulatory proceedings across a range of regulators. Primary and secondary legislation, says s1, must be applied consistent with the Convention on Human Rights, and public authorities must comply with the Convention in taking their decisions. A recent case in France indicated the kind of problems that are likely to arise. The French regulator (Commission des Operations de Bourse) (COB) brought a couple of cases against Jean-Marc Oury, a property developer alleged to have published misleading information in his company's 1993 accounts.³⁰ In early 1995 the President of the COB was quoted publicly as referring to Mr Oury's 'accounting acrobatics'.

At the end of 1995 the COB found the allegations against Mr Oury proved and he was fined FF500,000. He appealed claiming that his rights to the presumption of innocence had been violated by the statements made by the President of the COB. Mr Oury

eventually succeeded before the Court de Cassation which confirmed that Article 6.2 the ECHR applied to the administrative proceedings brought by the COB just as it did to criminal proceedings. Mr Oury had been declared publicly to be guilty before competent adjudicators had made their finding. The court also said that even at the initial stage he should have had the opportunity to have had his case heard by an impartial tribunal. Separate administrative action was taken against Mr Oury late in 1995 in relation to three separate misleading statements made in company accounts for 1992 and 1993. A member of the COB was designated as rapporteur to take certain steps in relation to further investigation. Mr Oury was then summonsed to a hearing and the report of the rapporteur was read out. Mr Oury was found guilty and fined. The rapporteur was a member of the COB panel which imposed the punishment. Mr Oury won on appeal and the fines against him were annulled. The appeal court rules that the statements made by the President had again infringed Mr Oury's right to the presumption of innocence in this second set of proceedings and further that the decision of the COB not appear to have been made impartially under a fair process consistent with Article 6. The court drew attention to the fact that Mr Oury had not been given access to the investigation dossier, did not have the assistance of a lawyer and did not have a full opportunity to make oral or written representations. Inadequate explanations had been given for the administrative action taken and insufficient opportunity had been given for Mr Oury to make written representations. The court criticised the failure of the COB to separate the investigation and prosecution functions from the decision making process.

The *Oury* decision has made life more difficult for regulators across Europe, and its influence is yet fully to be felt; but there is no doubt that Opra in particular is considering whether its procedures need to take yet further account of the Act and the Convention.

The courts

The courts are of course also exposed to the obligations of Article 6. The normal, highly developed, court procedures should immunise them from many of the potential charges, but in relation to pension practice there are a few areas of uncertainty. The use of representative beneficiaries to make orders which are binding on parties who are not present may be inconsistent with the right to a fair and public hearing. Although it is difficult to what practical alternative there is without extreme cost, one of the objectives of the new post-Woolf court practice rules being to reduce legal expenses. There is in the Court of Appeal at least an increasing use of judicial assistants, whose documents are not disclosed to the parties, and where it could be argued that their activities are inconsistent with the right to a fair and public hearing. And the increasing propensity of the judiciary to issue extra judicial comments may also be criticised.³¹

Pensions as public law rights

In a dispute concerning a widow's pension arising out of her husband's death following an industrial injury it was held that the classification of pension rights as public law rights in German law was not conclusive for the purposes of art 6(1) of the European Convention on Human Rights. No common European standard existed on the classification of such rights. The dispute, the court held,

had the features of a public law character: the character of the legislation, the compulsory nature of the insurance, the assumption by the state of responsibility for social protection. These were, however, outweighed by features of a private law nature: the personal and economic nature of the right, the close connection with the contract of employment and the affinity with insurance under ordinary law. The right asserted by the applicant was therefore a civil right within the meaning of art 6(1).³²

European Convention, Art 14

No right to receive a pension under the national insurance scheme of a country is as such included among the rights and freedoms guaranteed by the European Convention on Human Rights. In *X v. The Netherlands*³³ members of the Women's Action Committee for Advanced Old Age Pensions, created in May 1962 in order to obtain advanced old age pension rights for unmarried and divorced women, laid a complaint against the Dutch government. The grounds were that the Dutch scheme appeared to discriminate against women, since widows of men who died after the age of 65, and who themselves were under the age of 65, could draw on the old age pension; their unmarried and divorced women colleagues, however, could only draw the pension when they themselves had reached the age of 65. Since the contributions paid by all three types of women, namely married, unmarried and divorced, were the same, it was argued that the benefits paid under the pension scheme discriminated against certain women. In addition, it was argued that women, because of their biological nature, should retire at 60 even though men retired at 65 under the scheme, since they were more prone to

illness and disease at that age and needed, on average, to retire some five years earlier to live a life of comparable ease.

The claim was supported by evidence that the contributions which were paid to the scheme almost wholly financed the benefits paid, with almost no element of government subsidy; it was therefore argued that the rights were a possession', and protected under art 1. The Commission, however, held that in the circumstances, the rates of contribution and benefits were closely tied up with the principle and operation of the taxation system, which is expressly excluded from the ambit of the Convention. In addition, there was no relationship between the contributions made and the pension received, in the sense that the amounts paid by the insured person were accumulated with a view to covering the pension benefits accruing to them when they reached pensionable age, and a beneficiary did not have, at any given time or moment, an identifiable share in the fund claimed by him.

A second argument based on allegations of discrimination, was also declined by the Commission. It found that the 'difference' in the treatment of men and women in the pensions sphere:

'Insofar as it can be said to amount to an inequality, inequality of treatment between married and unmarried and divorced women is justified as being based on the legislator's appreciation of the general family pattern while making allowances for the generally different situation of a married couple in comparison with that of a single person.'³⁴

European Convention, Article 10

In *McGinley and Egan v. UK* (1998)³⁵ Royal Engineers claimed that the UK government had broken Article 10 in failing to disclose records of nuclear tests

on Christmas Island in Pension Appeal Tribunal proceedings. The claim failed since the applicants could have sought disclosure but had failed to do so.

European Convention Article 14

Discrimination is explored in the texts mostly in relation to sex and race discrimination, at great length.³⁶ Article 14 of the Convention provides:

‘The enjoyment of the rights and freedoms set forth in this 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.’

For many years many of these issues have already been explored in the UK courts because of the impact of the various pieces of UK legislation such as the Equal Pay Act 1970 and the Sex Discrimination Act 1986, as well as the former Article 119 of the European Treaty of Rome.

Most of the cases have turned on sex discrimination but the extension of Article 14 may open opportunities for complaints that pension scheme benefits discriminate on the grounds of sexual orientation (ie against unmarried couples, or same sex-couples), or open existing settled matters, for example that state benefits provide benefit at different ages for men and women, or that widows’ pensions cease on remarriage. Additional areas for discussion include whether trustees act in the capacity of public authority when offering different GMPs to men and women, and whether the legislation indicates there may be opening or complaints against ageism.

Some of these issues have been explored in other jurisdictions. Studies of the Canadian experience³⁷ and the New Zealand position (where the New

Zealand Human Rights Commission has issued Superannuation Guidelines, intended to provide guidance on the Commission’s views on the provisions of the NZ Human Rights Act 1993 on pensions)³⁸ can be instructive. In *Coburn*,³⁹ the trustees of the BHP NZ pension scheme sought a declaratory judgment on a range of issues put to the court after widespread industry consultation. Obviously the terms of the New Zealand and the UK legislation differ — but not that much. That litigation explored:

- whether schemes had to equalise benefits (notably death benefits) for those with and without spouses, children or other dependants, to remove marital and family status discrimination
- remove discrimination between legal and *de facto* spouses
- provide for contributions and benefit accruals to continue to at least age 65
- ensure that early retirement benefit reduction factors could be justified on actuarial or statistical grounds

and a series of other questions. Among other decisions of the court, one of the most interesting from the UK’s point of view was that which held that providing secondary pensions exclusively for spouses was unlawful discrimination. Similar developments are taking place in Canada.⁴⁰

European Convention, First Protocol, Art 1

Several cases in the European Court have explored the issue of whether a pension rights is property subject to the protection of the First Protocol. This provides:

‘Every legal or natural person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the condition provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interests or to secure the payment of taxes or other contributions or penalties.'

In most cases the Court and Commission have taken a relaxed view, being reluctant to intervene in pensions matters. Even where the contributions to a state pension scheme bear a relationship to proprietary rights, if for example they are voluntary, the Commission will refuse to intervene.

In *Muller (Christian) v. Austria*⁴¹ the applicant had been employed in Austria by a number of employers and had been a member of the Austrian workers' old age insurance scheme. He was born in 1905 and for 32 years until 1963 he worked in Austria. The period was not sufficient to ensure a full pension, and in 1963 he started working as a locksmith in Liechtenstein while continuing to live in Austria. In order to ensure that he would receive a full pension when he retired in 1970 he continued to make voluntary payments to the Austrian scheme while he was working in Liechtenstein. Throughout the time he worked in Liechtenstein, the Austrian scheme continued to accept his contributions although he was under no obligation to continue paying. In 1969, however, the Austrian and Liechtenstein governments signed a social security convention whereby it was prohibited for anyone compulsorily insured in Liechtenstein to pay voluntary contributions to the Austrian scheme.

The Austria/Liechtenstein social security convention came into force with retrospective effect. Accordingly the

payments made to the Austrian scheme were not regarded as continuing his service in the Austrian scheme, and although a certain amount of credit was given for a supplementary pension this was not as beneficial as if he had been credited with those extra years of service, since such credits were inflation proofed and the supplementary pension was not.

The locksmith appealed to the local social security court and won. The pension authority appealed to the Vienna appeal court and the decision was reversed, the court holding that the applicant's fundamental rights had not been violated. Before the Commission of Human Rights, the Austrian government contended that the rules permitted the expropriation of the property of its own nationals; the requirements of the Convention related only to aliens. In addition, the infringements of the rights of ownership was permitted, provided it was in accordance with the law of the national state. It was not argued that pension rights fell outside the definition of 'property', in the Protocol to the Convention.

Mr Muller argued that discrimination applied because not only had he lost rights to his pension, but he had had to pay a higher rate of tax and other welfare contributions.

In its decision the Commission again refused to accept jurisdiction. However, it distinguished between public and private pension arrangements, and excluded state arrangements from its competence, since because of its public importance the social security system must take account of political considerations, in particular those of financial policy. It was conceivable, for instance, that a deflationary trend could oblige a state to reduce the nominal amount of pensions, and fluctuations of this kind have nothing to do with the guarantee of ownership as a human right.

Finally, a worker could be, and indeed had to be, a member of the scheme of the country in which he worked, so that he was not deprived of the right to a pension, even though the amount of the pension would be affected.

Reduction of state pension

The reduction of a state pension is probably not a ground for complaint under the European Human Rights Convention. In *X v. Sweden*⁴² the applicant was a retired employee of the Swedish Railways, who during his period of employment had subscribed to a pension scheme and as a result when he took early retirement he was granted a state pension in advance, as well as an old age pension, the latter under the social insurance system. As from March 1982, however, when the applicant attained the normal retirement age of 65, his state pension rights were 'co-ordinated' with the social insurance benefits. This meant that his state pension was reduced. His request to the government for 'non-coordination' was rejected with the explanation that without such a 'coordination' the cumulative benefits would exceed what the pensioner had received in salary when he was working, which was true in the applicant's case. The applicant alleged a violation of Protocol No 1, art 1 of the European Convention.

It was held by the Commission:

'The applicant has complained that he does not receive full pension in accordance with the agreement he had with his employer, the Swedish Railways. He alleges a breach of Protocol No 1, article 1. A question may be raised whether the applicant has exhausted domestic remedies in respect of his complaint as required by article 26 of the Convention. However, the Commission does not find it necessary to analyse this question in greater depth since the application is in

any case inadmissible for the following reasons. The Commission recalls its consistent case law, according to which the right to a pension is not as such guaranteed by the Convention. At the same time the Commission has frequently held that the payment of contributions to a pension fund may in certain circumstances create a property right in a portion of such fund and of the pension rights under such a system could therefore in principle raise an issue under Protocol No 1, article 1. The Commission has added, however, that 'even if it is assumed that Protocol No 1, article 1 guarantees persons who have paid contributions to a special insurance system the right to derive a benefit from the system it cannot be interpreted as entitling that person to a pension of a particular amount'.⁴³

The Commission also considers that the right to a pension which is based on employment can in certain circumstances be assimilated to a property right, and this can be the case whether special contributions have been paid or the employer has given a more general undertaking to pay a pension on conditions which can be considered part of the employment contract. The Commission recalls that when the applicant took early retirement from his employment he earned around 6,000 SKr monthly. He then benefited from his state pension and old age pension under the social security system until he attained the age of 65. In February 1982 he received 8,625 SKr. When he reached the age of 65 his state pension was co-ordinated with the social insurance benefits the result being a reduction of his total benefits. As from March 1982 he received 4,945 SKr a month. The applicant in essence asks for full benefits both from social insurance system and from the state pension. It followed from the legal provisions applicable to Swedish state employees that there should be a co-ordination of the benefits under the state pension scheme and those guaranteed under the social security so as to avoid the total pension being too high when compared with the salary which was paid to the employee when he was in active service.

The Commission does not consider that the authorities when applying those rules to the applicant's case, can be considered to have deprived him of a property right which he had previously had. If the applicant's submissions were to be accepted he would be entitled to full social insurance benefits from the state and full state pension from his employer (which was the state through Swedish Railways). The Commission finds it without reproach under Protocol No 1, article 1 that a co-ordination is made between the social benefits and the pension benefits. Having regard to the above considerations the Commission finds that there is no semblance of a violation of Protocol 1 article 1 nor of any other article of the Convention. It follows that the application is manifestly ill-founded within the meaning of article 27(2) of the Convention.'

Dual nature of some state pensions

In October 1997 the European Court looked at *Szrabjer and Clarke v. UK*⁴⁴ where two pensioners stopped receiving their UK SERPS pension while in jail. SERPS stands for State Earnings Related Pension Scheme; the curious feature of it is that it can be provided either by the state (if full social security contributions are paid to the state) or by a private pension scheme. They complained to the European Commission of Human Rights, since they had no remedy in the UK, and suggested that the failure to pay by the government was a breach of Article 1 of Protocol 1 of the European Convention. This provides that everyone is entitled to 'peaceful enjoyment of his possessions'. Normally a person can only be deprived of his possessions where the deprivation is in the public interest or for taxation and related purposes.

By way of contrast, in *Gaygasuz v. Austria*⁴⁵ an advance on a pension was held to constitute a property right; the pension was linked to the payment of contributions.

Other questions are bound to emerge in due course. One will no doubt be whether a forfeiture clause breaches the property rights upheld by the Convention, and such clauses, especially in public sector schemes, are commonly inserted to protect the public (rather than as in private schemes to protect the pensioner).

EU law

The provisions relating to human rights under the European Convention may not necessarily apply to anti-discrimination provisions under EC law.⁴⁶ There is no room here analysis of EU jurisprudence, but to date it has affected the pensions movement largely in the areas of equal treatment, particularly gender discrimination.

Note: Case references PBLR (Pensions Benefits Law Reports) are to be found on the web at www.pensionslaw.com.

References

- 1 Jack Straw, Home Secretary (interior minister): 'The Human Rights Act 1998 is the most significant statement of human rights in domestic law since the 1689 Bill of Rights.' (Foreword, *Blackstone's Guide to the Human Rights Act 1998*, 1999).
- 2 HRA 1998 s7(1)(b); the provisions apply partly in Northern Ireland in Scotland and in Wales before England, because of the devolution legislation. In some ways the provisions of the European Convention for the protection of Human Rights and Fundamental Freedoms have been applicable in the UK for many years, albeit not directly; the Convention was ratified by the UK in 1951 and it came into force on 3rd September, 1953. The right of an individual to petition the European Court of Human Rights was ratified by the UK in 1966; the intermediate procedure of prior screening by the Commission was discontinued on 1st November 1998 (11th protocol to the Convention).
- 3 *Soering v. United Kingdom* (1989) 11 EHRR 439.
- 4 See eg, Robin Ellison, *Pensions Law and Practice*, Chapter 9 Investments on Socially responsible investments; NPI, *Emerging markets and human rights: Global Care position paper*, on www.npi.co.uk.
- 5 See eg, Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, ILO Convention No 118 (1962) ILO

- Official Bulletin, vol XLV. See also, Invalidity Old-Age and Survivors' Benefits Convention, ILO Convention No 128 (1967), ILO Official Bulletin, vol L, Supp 1, no 3, p4; Pensions and Inflation (ILO, Geneva, 1977); Minimum Standards on Social Security, ILO Convention No 102 (19si). ILO Official Bulletin, volume XXXIV, p45; A Zelenka, Les Systemes des Pensions dans les Pays Industrialises, (ILO, Geneva, 1974).
- 6 European Social Charter, Council of Europe (1961) Treaty Series, No 38; (1965) Cmnd 2643.
 - 7 Wilfred C Jenks, Human Rights and International Labour Standards (London, 1960) p108.
 - 8 Ibid.
 - 9 Treaty Series. no 10; (1969) Cmnd 3871; European Treaty Series no 48; European Yearbook, volume XII, p397.
 - 10 OECD, Old Age Pension Schemes (Paris, 1977); it is understood that the OECD is working on a paper regarding 'Pension Provision for the Internationally Transferred Employee'.
 - 11 International Social Security Association ('ISSA'), Complementary Pension Institutes, Geneva, 1973, Implications for Social Security of Research on Ageing and Retirement (ISSA, Geneva, 1977); L Feraud, Les Pensions Complementaires (ISSA, Geneva, 1975); Complementary Pension Institutes (ISSA, Geneva, 1973); Carlo Alberto Masini, General Compulsory Old Age Insurance Schemes for Employees in the Member States in the EEC (ISSA, Geneva, 1974).
 - 12 Art 25.1; and see R. Taubenfield and S. Taubenfield, Sex-Based Discrimination: International Law and Organisation (New York, 1978) vol I. There has been a pensions case (which failed) under the International Convention, see *Kaaber v. Iceland* [1999] 20 PBLR (07) (International Commission on Human Rights — Human rights — Taxation — Deductibility — Discrimination — Industry-wide schemes — Self-employed — Compulsory contributions) where a Reykjavik lawyer complained that the tax reliefs on pension contributions for the self-employed were discriminatory when compared with employed lawyers.
 - 13 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 (date of entry into force 1 November 1998).
 - 14 Human Rights Act 1998; see frequent press articles in the UK in March 1999 and discussions in Parliament during the passage of the Financial Services and Markets Act 2000 which also raise the issues of human rights in regulatory procedures.
 - 15 *X v. Federal Republic of Germany*, Application No 2116/64 (1966) 24 Collection of Decisions of the European Commission of Human Rights 10.
 - 16 See eg, lecture by Giles Orton, Eversheds, to Ark Trustees Conference, 29 June 2000. See also the application in *Outram v. Academy Plastics* [2000] 38 PBLR (008) where it was unsuccessfully argued that there had been a breach of the Convention where the court had held that the complaint showed no prima facie claim. And see APL, Pensions Litigation Committee, *Pensions and Human Rights Act 1998*, a discussion paper, July 2000.
 - 17 Pension Schemes Act 1993 Part X.
 - 18 *Konig v. Germany* (1979–80) 2 EHRR 170.
 - 19 APL Pensions Litigation Committee, *Pensions and Human Rights Act 1998*, a discussion paper, July 2000, p8.
 - 20 *Findlay v. United Kingdom*, 2 January 1997 Reports of Judgments and decisions 1997–I24 221, para 73.
 - 21 Pension Schemes Act s145(2)9 and (3); but see letter between Secretary of State and the Pensions Ombudsman dated [] designed to comply with the Human Rights Act by granting a fixed two year term of appointment, Pensions Ombudsman Annual Report, 1999, p.
 - 22 *Starrs v. Ruxton* 2000 SC 208, High Court of Justiciary (Scotland), sitting as court of criminal appeal at p29: '... appointment by the executive is consistent with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control that is exercised by the means of the one year limit and the discretion of the Lord Advocate detract from independence'.
 - 23 *Findlay v. United Kingdom* (25 February 1997, Reports of judgments and decisions 1997–I 24 EHRR 221 para 73). Cf *Hoekstra v. HM Advocate* (No 2) 2000 SLT 605 where a judge in a criminal appeal had written a newspaper article after the first stage of the trial, critical of the importation of the Convention on Human Rights into Scots law. It was held that because of the hostile tone of the article, the tribunal did not satisfy the objective test of impartiality. This did not prevent judges being entitled to criticise developments of the law in principle however.
 - 24 Cases where the Pensions Ombudsman has been involved in the appeal are numerous; in particular note *Edge v. Pensions Ombudsman*, Court of Appeal (Civil Division), 29 July 1999, [1999] 49 PBLR (37), [1999] 4 All ER 546; [1999] Pens LR 215; (1999) 96(35) LSG 39; (1999) 149 NLJ 1442; Times Law Reports, 19 October 1999.
 - 25 Pension Schemes Act 1993 Part X: Investigations, s145(4(C)).
 - 26 See *Malmstrom v. Sweden* (1983) DR 18 para 30, where the law required arbitration; it was held that unless the arbitration was voluntary, there was a breach of article 6(1).
 - 27 See again, *Edge v. Pensions Ombudsman*, Court of Appeal (Civil Division), 29 July 1999, [1999] 49 PBLR (37), [1999] 4 All ER 546; [1999] Pens LR 215; (1999) 96(35) LSG 39; (1999) 149 NLJ 1442; Times Law Reports, 19 October 1999.
 - 28 See *R v. Ministry of Agriculture Fisheries and Food ex p First City Trading Ltd* [1997] 1 CMLR 250: 'The difference between *Wednesbury* [*Wednesbury Corp v. Ministry of Housing and Local Government* (No 2) (CA) [1966] 2 QB 2751] and European review is that in the former case the legal limits lie further back. I

- think there are two factors. First the limits of domestic review are not, as the law presently stands, constrained by the doctrine of proportionality. Secondly, at least as regards requirement such as that of objective justification in an equal treatment case, the European rule requires the decision maker to provide a fully reasoned case. It is not enough merely to set out the problem and assert that within his jurisdiction the Minister chose this or that solution, constrained only by the requirement that his decision must have been one which a reasonable minister might make. Rather, the court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable and proportional to the aim in view'
- 29 John Hayes, *A Letter to the industry*, OPRA Bulletin, No 9, May 1999; available on the Perspective service or the OPRA website, www.opra.gov.uk. For the right to an oral hearing, see discussion above and *Elliott v. Pensions Ombudsman* [1999] 24 PBLR (17).
 - 30 *Oury No 1*, Cour de Cassation, 1 December 1998. And see Peter Binning, Peters & Peters (UK white-collar crime firm), *The Human Rights Act: The implications for the regulator*, May 1999.
 - 31 See *Hoekstra v. HM Advocate* (No 2) 2000 SLT 605 and the remarks of Lord Woolf (Law Society Gazette 8 June 2000) that 'impractical and far-fetched arguments, with little or no chance of success, would bring the [Human Rights] Act into disrepute and squander court resources'.
 - 32 *Deumeland v. Germany*, Application No 9384/81, 29 May 1986, s EHRR 448. Cf the dissenting opinion (Judge Ryssdal and others): The pension right claimed by Mrs Deumeland was an economic right deriving, not from the private contract between her husband and his employer, but from a collective scheme of protection of the working population set up by the legislature. An allocation of society's resources as generated within the employment context has been decided upon by the domestic legislature; and Mr Deumeland senior as a member of the section of society concerned was compelled to participate in that scheme. Such schemes represent performance of society's duty to protect the health and welfare of its members; they are not merely examples of the State taking on or regulating an insurance activity equally capable of being carried on by the private sector ...'
 - 33 *X v. Netherlands*, Application No 4130/69 (1971) 14 Yearbook of European Convention 224.
 - 34 Cf definition of discrimination under EC law. Note also that the circumstances of another case might justify a finding that the making of compulsory contributions to a pension fund may create rights amounting to possessions within the meaning of article 1 of Protocol 1, *ibid*.
 - 35 *McGinley & Egan v. UK* Case No 21825/93, 23414/94, 9 June, 1998.
 - 36 See eg, Robin Ellison, *Pensions Law and Practice*, Chapter 22.
 - 37 Sheryl Smolkin, 'Human rights in the workplace: a Canadian perspective', IPEBLA Conference, 24–28 May 1999 (Watson Wyatt Worldwide, Toronto).
 - 38 David Cochrane, 'Human rights in the workplace, a New Zealand perspective', IPEBLA Conference, 24–28 May 1999 (Chapman Tripp, Wellington).
 - 39 *Coburn v. Human Rights Commission* [1994] 3 NZLR 323.
 - 40 *Dwyer v. Metropolitan Toronto (Municipality)* [1996] 27 CHRR D/108; *Laesoe v. Air Canada* [1996] 27 CHRR D/1; *Leshner v. Ontario* (No 2) [1992] CHRR D/184; *Rosenberg v. Canada (Attorney General)* [1998] OR (3rd) 577 (Ont CA).
 - 41 *Muller (Christian) v. Austria* (1976) 19 Yearbook of European Convention 994.
 - 42 *X v. Sweden* Application No 10671/83, 8 EHRR 269.
 - 43 See *Muller v. Austria* Application No 5849/72, 3 D&R 25. The only exception seems to be *Schuller-Zraggen v. Switzerland* (1993) The Times, 21 Oct, European Court of Human Rights [1995] 12 PBLR.
 - 44 *Szrabjer & Clarke v. UK* [1998] 18 PBLR (10) (1997 10 23) European Commission of Human Rights: United Kingdom: First Chamber (Definition of a pension — Whether a pension is 'property' — Rights of prisoners to property — European Convention on Human Rights, Article 14 and Protocol No 1 Article 1 — Nature of state pension — Nature of state earnings related pension — Nature of contracted-out state earnings-related pension — Equal treatment — Discrimination — Whether non-payment of pension while in prison is breach of Convention).
 - 45 *Gaygasuz v. Austria* (1996) 23 EHRR 364.
 - 46 See for a fuller treatment Robin Ellison, 'Pensions: Europe and Equality', 2nd ed, 1995. Sweet & Maxwell; an updated word-processor version is available from the author.