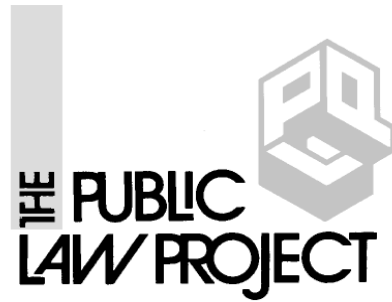


Social Security & The Human Rights Act 1998

By Conrad Haley, Director, PLP

Published in *Law Society Gazette*



The impact of the Human Rights Act 1998, which incorporates much of the European Convention on Human Rights, is likely to be felt in most areas of the law, and social security is no exception. The benefits system is administered by public authorities, and the conditions of entitlement are laid out in statute and regulations. Disputes are resolved in tribunals and ultimately in the ordinary courts.

Sections 2 and 3 of the Act oblige courts and tribunals determining questions which have arisen in connection with Convention rights to take into account the case-law of the European Court of Human Rights, ("ECHR"), and, so far as possible, to read primary and subordinate legislation in a way which is compatible with those rights. Further, section 6 renders it unlawful for a public authority to act in a way which is incompatible with those rights.

These provisions will potentially affect both the adjudication process as well as substantive questions of entitlement.

The adjudication process.

Article 6(1)

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

A decision on a claim for benefit will in the first instance have been taken in circumstances that do not fulfill Article 6 criteria. It will have been an administrative decision, and there will have been no "independent tribunal", and "no public hearing". The Convention requires that a person has access to a court of "full jurisdiction" to determine any dispute that arises on account of an administrative decision concerning their "civil rights and obligations". Such a court is subject to the provisions of Article 6 and the consequent procedural guarantees required. Most commentators agree that in *Salesi -v- Italy (1993) Series A, No 257-E*, the ECHR has now held that the determination of disputes concerning both insurance based benefits and basic "safety net" benefits, are determinations concerning civil rights, thus engaging the Article.

ECHR jurisprudence has developed Article 6 so as to provide:

- A right of access to the court.

This can include a right to legal advice and even to publicly funded representation before a tribunal, or more likely before the Social Security Commissioner, in cases where a litigant in person cannot litigate effectively on account of the complexity of the case, (*Airey -v- Ireland (1979) 2 EHRR*). This has been implicitly recognised by the Lord Chancellor, both in the Access to Justice Act 1999, (Section 6(8)) and within the Funding Code produced by the Legal Services Commission, (see sections 3C-018 - 3C-019), and the first publicly funded hearing before the Commissioners has now taken place.

The time limits in which to bring appeals, and the very tight conditions upon the bringing of late appeals might also be vulnerable to challenge as constituting a barrier to access.

- A right to a hearing within a reasonable time.

The Appeals Service is perhaps less riddled with delays than the Social Security Commissioners, but the delays in both systems might be open to challenge. The general approach to assessing delay is set out in *Deumeland -v- Germany, (1986) 8 EHRR 448*, and requires consideration of the following:

- The complexity of the case,
- The behaviour of the applicant,
- The conduct of the competent courts, (temporary backlogs within the court are permissible so long as the State takes “effective remedial action with the requisite promptness”).
- The nature of the subject matter, and in the instant case - a social security matter - the court said that such cases ought to be shown particular diligence.

- A right to a fair trial.

This includes the right to equality of arms, which means that an applicant must be able to present his case under conditions that do not place him at a substantial disadvantage against the respondent.

The procedural rules contained in the Social Security & Child Support (Decisions and Appeals) Regulations appear far from even-handed in their treatment of the parties to an

appeal. This has already been the subject of comment and speculation by the Social Security Commissioners judicially and extra judicially:

“This is but one example of the way in which the system is structured in favour of the Secretary of State”, (Mr. Commissioner Jacobs *CDLA 4734/99*).

“The implications for a tribunal process in which the Secretary of State who is a party to every appeal also makes the rules, is the paymaster, controls the entire tribunal administration and can even set aside the result (s.13 (3) Social Security Act 1998) are perhaps too obvious to need stating”, (Mr. Commissioner Howell on his web-site).

Such considerations also influenced Mr. Justice Morrison in *Smith –v- Secretary of State (EAT 11th October 1999 unreported)*.

Readers may be aware that the much maligned Housing and Council Tax Benefit Review Boards are already to be scrapped and replaced. These Boards were comprised of councillors from the authority responsible for the decision in dispute, (contrary to Article 6). Such appeals will now be administered by the Appeals Service from April 2001. Earlier Article 6 challenges failed on grounds of prematurity, (*see R-v- LB Hammersmith & Fulham ex parte Tsfayo, (31st January 2000) unreported*), but appear certain to succeed if brought after the 2nd October 2000. Appellants ought to consider whether to request that the proceedings be adjourned until the Appeals Service takes over, balancing the prejudice caused by such a delay against the unfairness that may result from an earlier hearing before a Board.

- A right to a public hearing.

With respect to Appeal Tribunals, this requirement is probably satisfied because, despite the advent of “paper hearings”, the appellant retains the right to opt for an oral hearing, (*see Schuler-Zgraggen –v- Switzerland (1993) EHRR 405*).

The Commissioners invariably determine appeals on the papers, and oral hearings are granted at the discretion of the Commissioner. Arguably, the current position is compatible, where applications are refused only where there are good grounds for believing that nothing will be gained from oral argument.

Finally, a note on the discretionary social fund. There is no provision for oral hearings before the Social Fund Inspector. However, the application of Article 6 is dependent upon whether it can be demonstrated that entitlement to a payment is an “actual right recognised in law”, (*Masson and Van Zon –v- the Netherlands (1996) 22 EHRR 491*), and it may be doubted whether there is a “right” to say, a Community Care Grant.

Substantive entitlement.

Although the Convention cannot be used to argue for the creation of benefits which do not already exist, (*X -v- Germany* (1967) 23 CD 10), a number of Articles might become engaged in relation to the conditions of entitlement to existing benefits.

Article 8.

This provides for the respect for private and family life, and is aimed at preventing arbitrary interference by public authorities. The concept of family life has been held to encompass not simply marriage based relationships, and the concept of respect for private life includes a person's physical and psychological integrity, so as to "ensure the development, without outside interference, of the personality of each individual in his relations with other human beings", (*Botta -v- Italy* (1999) 2 CCLR 61).

It would seem to provide some support in respect of challenges to provisions which might result in family break up, (such as the withdrawal of Child Benefit from Asylum Seekers), or the failure to make provision for same sex couples.

Article 14.

This prohibits arbitrary discrimination by a public authority in relation to matters that fall within the ambit of a Convention right. This was used as the basis of a challenge to the non-availability of Widows Benefit to men, (see *Willis -v- UK* (1999) 5 EHRLR), and see below.

Article 1 of the First Protocol

The Article provides for the peaceful enjoyment of possessions.

In *Muller v Austria* (1975) 3 DR 25, the Commission considered the property rights in a compulsory contributory pension scheme and held that the Article was applicable. However they said that it gave a right to payments from the fund but not to any specific sum.

The Commission and the Court confirmed this approach in *Gaygusuz v Austria* (1996) 23 EHRR 364. A Turkish national who had worked and paid contributions in Austria was refused an advance on his retirement pension because he was not an Austrian national. The Court found a violation of article 14 linked with article 1 of the First Protocol. It appears that the Article has relevance only to insurance-based benefits.

Conclusion.

Whilst at first sight challenges to the conditions of entitlement may appear promising for the claimant, (or potential claimant), Articles 8 and number 1 of the First Protocol are subject to the familiar exceptions of “economic well being”, “the general interest” etc. It remains to be seen as to the way in which the courts will approach the matter, but it is tentatively suggested that Article 6 provides potentially the most fertile territory for litigation.