

THE PENSIONS OMBUDSMAN
AND
ARTICLE 6 OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS

OPINION

INTRODUCTION

1. I am asked to advise the Pensions Ombudsman ("PO") as to the implications of Article 6 of the European Convention on Human Rights ("ECHR") for the carrying out of his functions under Part X of the Pension Schemes Act 1993 (as amended). I am specifically asked to consider:
 - (1) whether Article 6 applies to investigations by the PO;
 - (2) the compatibility with Article 6 of the PO's current practice in relation to the holding of oral hearings;
 - (3) whether the PO can be said to be impartial when a matter is remitted to him after an appeal to the High Court; and
 - (4) any other areas of concern as to compliance with the Human Rights Act 1998.

2. I base my opinion on the information set out in my Instructions and in other documents supplied to me.

SUMMARY OF ADVICE

3. For the reasons given below, I consider that:
 - (1) Article 6 applies to investigations by the PO;
 - (2) the PO's current practice and procedure in relation to the holding of oral hearings and otherwise is broadly compatible with Article 6;

- (3) the PO constitutes an independent and impartial tribunal for the purposes of Article 6; and
- (4) the mere fact that the PO has previously made a determination of a complaint or dispute does not mean that he fails to satisfy the requirement of "impartiality" if that complaint or dispute is remitted to him after an appeal to the High Court.

THE STATUTORY SCHEME

- 4. Before giving detailed consideration to the issues on which I am requested to advise, I will set out the material features of the relevant statutory scheme, and of the PO's practice.

The functions of the PO

- 5. The functions of the PO are to investigate and determine:
 - (a) complaints by beneficiaries of occupational or personal pension schemes of injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of such a scheme (section 146(1)(a) of the Pension Schemes Act 1993: "the Act");
 - (b) complaints by persons responsible for the management of an occupational pension scheme who in connection with any act or omission of another person responsible for the management of the scheme alleges maladministration of the scheme (section 146(1)(b)(i) of the Act);
 - (c) complaints by the trustees or managers of an occupational pension scheme who in connection with any act or omission of any trustee or manager of another such scheme allege maladministration of the other scheme (section 146(1)(b)(ii) of the Act);
 - (d) any dispute of fact or law which arises in relation to an occupational or personal pension scheme between a person responsible for the management of the scheme and a beneficiary of the scheme, and which is referred to him by the beneficiary (section 146(1)(c) of the Act);

- (e) any dispute of fact or law which arises between the trustees or managers of an occupational pension scheme and (i) another person responsible for the management of the scheme, or (ii) any trustee or manager of another such scheme, and which is referred to him by the person referred to in (i) or (ii) (section 146(1)(d) of the Act); and
 - (f) complaints by beneficiaries of personal or occupational pension schemes of injustice in consequence of maladministration in connection with any act or omission of an administrator of such a scheme (Regulation 2(1) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996: "the Regulations")¹.
6. The PO may not investigate or determine a complaint or dispute if before the making of the complaint or reference of the dispute proceedings have been begun in any Court in respect of the matters which would be the subject of the investigation (section 146(6) of the Act).
7. Any function of the PO, other than the determination of complaints or disputes, may be performed by his staff (section 145(4C) of the Act).

Staying of Court proceedings

8. Section 148 of the Act enables the Court to stay legal proceedings that have been commenced in respect of any matters which are the subject of a complaint or dispute before the PO.

Procedure on an investigation

9. By section 149(1) of the Act, where the PO proposes to conduct an investigation into a complaint or dispute, he must give any person responsible for the management of the scheme to which the complaint or reference relates (other than the person by whom the complaint or reference was made), and any other person

¹ Where the PO commences an investigation of such a complaint, the provisions of Part X of the Act apply in relation to an administrator as they apply in relation to a person responsible for the management of the scheme: Regulation 2(2) of the Regulations.

against whom allegations are made in the complaint or reference, an opportunity to comment on any allegations contained in the complaint or reference.

10. By section 149(4) of the Act, subject to any provision made by rules², the procedure for conducting an investigation shall be such as the PO considers appropriate in the circumstances of the case. He may, in particular, obtain information from such persons and in such manner, and make such enquiries, as he sees fit.

11. Pursuant to the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (as amended) ("the Procedure Rules"):
 - (a) Where the PO considers it appropriate for an oral hearing to be held, he is to fix the time and place for any such hearing and, not less than twenty-one days before the date of the hearing, send notice of the hearing to each party (Rule 10(1));

 - (b) If the PO decides to hold an oral hearing, the hearing must be in public except where by reason of the disclosure of any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security, it is just and reasonable for the hearing or any part thereof to be in private (Rule 12(1));

 - (c) The PO may conduct an oral hearing in such manner as he considers appropriate to the clarification of the issues before him and generally to the just handling of the investigation, but the parties to the investigation have a right to give evidence, to call and to question witnesses, and to address the PO on the evidence and generally on the subject matter of the investigation (Rules 15 (2) and (3));

² made under section 149(3) of the Act.

- (d) Any party to an investigation is entitled to be represented at a hearing (Rule 14);
- (e) The PO is, so far as seems appropriate, to avoid formality at the hearing (Rule 15(2));
- (f) The PO may award travel and subsistence expenses, and compensation for lost earnings, to complainants who are beneficiaries of a relevant pension scheme³, or witnesses, upon request (Rule 15A).

Determinations

12. The PO must send a written statement of his determination of a complaint or dispute to the person who made the complaint or reference, and to any person (if different) responsible for the management of the scheme to which the complaint or reference relates. The statement must contain reasons for the determination (section 151(1) of the Act).
13. Where the PO makes a determination, he may direct any person responsible for the management of the scheme to which the complaint or dispute relates to take, or refrain from taking, such steps as he may specify (section 151(2) of the Act).
14. By section 151(3) of the Act, subject to the right of appeal on a point of law, the determination by the PO of a complaint or dispute, and any direction made by him, is final and binding on the person who made the complaint or reference, any person (if different) responsible for the management of the scheme to which the complaint or reference relates, and any person claiming under any such person.
15. By section 151(4) of the Act, there is a right of appeal to the High Court on a point of law from a determination or direction of the PO at the instance of any of the persons mentioned in section 151(3) of the Act.

³ and in certain circumstances their representatives or attendants.

16. Any determination or direction of the PO is enforceable in a County Court as if it were a judgment or order of that Court (section 151(5) of the Act).
17. The PO may publish a report of any investigation and of the result of that investigation if he considers it appropriate to do so in any particular case (section 151(6) of the Act).

Terms of appointment

18. The PO is a commissioner appointed by the Secretary of State, who holds office on such terms and conditions as the Secretary of State may think fit (sections 145(1) and (2) of the Act).
19. By section 145(3)(a) of the Act, the PO may at any time be removed from office by notice in writing given to him by the Secretary of State. The remuneration of the PO is determined by the Secretary of State with the approval of the Treasury (section 145(5)(a) of the Act).
20. On 12 April 2000, a statement of policy and procedure on appointment of the PO, signed by the Secretary of State for Social Security and the Lord Chief Justice, was published. According to this statement, the appointment is for the period of two years ending on 31 August 2001 and is not renewable. Three grounds for removal of the office holder are specified: (1) misbehaviour, (2) incapacity, and (3) bankruptcy or arrangements with creditors.

THE PRACTICE OF THE PO

Oral hearings

21. The PO informs both complainants and respondents⁴ at an early stage in the investigation that the PO has a discretion whether to hold an oral hearing, and that such a hearing may be requested.

⁴ i.e. persons by whom a complaint is made or a dispute referred, persons responsible for the management of a personal or occupational pension scheme, and persons to whom Part X of the Act applies as it applies to persons responsible for the management of such a scheme. See Rule 1 of the Procedure Rules.

22. I am instructed that there are three situations in which an oral hearing will generally be held:

- (a) where there are differing accounts of a particular event and the credibility of witnesses needs to be tested;
- (b) where the honesty or integrity of a party has been questioned and the party concerned has requested a hearing;
- (c) where there are disputed material and primary facts which cannot properly be determined from the papers alone.

There are no published guidelines about the circumstances in which an oral hearing is likely to be held.

23. Oral hearings are held in public, although they are not advertised. However, any member of the public may contact the office and enquire about forthcoming hearings.

24. The PO has on occasion appointed Counsel to represent him at oral hearings.

Costs and expenses

25. There have been occasions when the PO has awarded costs to complainants, pursuant to his power to issue directions under section 151(2) of the Act. This power is, however, rarely exercised. Any direction to pay costs tends not to include the costs of the investigation by the PO. The PO has no power to direct that a complainant pay a respondent's costs.

26. I understand that the PO occasionally awards travel and subsistence expenses, and compensation for lost earnings, under Rule 15A of the Procedure Rules.

Publishing determinations

27. Determinations are available to anyone, upon request.

ARTICLE 6 OF THE ECHR

28. I will deal below with the specific issues arising under Article 6 on which I have been asked to advise, and also address any other relevant issues that appear to me to arise in relation to this provision.

29. Article 6 of the ECHR provides, so far as relevant:

“(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 established 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.”⁵

Whether Article 6(1) applies

30. For Article 6(1) to apply in a non-criminal context, there must be a determination of ‘civil’ rights or obligations. The concept of a civil right is not dependent on the classification of the right under domestic law, but is an ‘autonomous’ concept under the ECHR⁶. Some disputes concerning public, rather than private law, matters (eg. concerning social security) may not be characterised as civil for the purposes of Article 6. But the rights and obligations arising between private persons are always civil rights and obligations, and thus protected by Article 6(1)⁷.

31. However, Article 6(1) only comes into play (in relation to civil rights) where there is a ‘contestation’ or dispute between two private individuals or between an individual and the state⁸: Article 6(1) does not apply if the result of the

⁵ Paragraphs (2) and (3) of Article 6 only apply to persons charged with criminal offences, and are not, therefore, relevant in the present context.

⁶ See, for example, Konig v Federal Republic of Germany (1978) 2 EHRR 170, ECtHR.

⁷ In particular, the ECtHR has held that disputes about ‘pecuniary’ issues concern civil rights or obligations. See Editions Periscope v France (1992) 14 EHRR 597, ECtHR.

⁸ H v Belgium (1987) 10 EHRR 339, ECtHR.

proceedings is not ‘decisive’ for civil rights and obligations. See Fayed v UK⁹, where the European Court of Human Rights held that Article 6(1) did not apply, because the fact that an official investigation by DTI inspectors had made findings detrimental to the applicants did not bring that investigation within the scope of Article 6, as the report was not dispositive of any legal right or obligation.

32. In deciding whether Article 6(1) applies to proceedings before the PO, the position of each party to an investigation should be given separate consideration.

Respondents

33. So far as respondents are concerned, the jurisdiction of the PO is compulsory¹⁰. The PO has power to issue directions to respondents to take or refrain from taking such steps as he may specify¹¹. Such steps may (and, in relation to complaints, often do) include the payment of compensation. Determinations and directions are (subject to the right of appeal) final and binding on respondents, and are enforceable against them. Given the nature of the PO's powers (including, as I have mentioned, the power to direct the payment of compensation), I consider that the PO does determine the civil rights and obligations of respondents.
34. It has been suggested that it might be argued that a determination concerning a complaint of maladministration does not involve the determination of civil rights or obligations, because a finding that there has, or has not, been maladministration does not of itself determine any such legal rights. In my view, however, the fact that the PO has power not only to determine whether there has been maladministration, but to make binding and enforceable directions, means that he determines civil rights and obligations. This is so whether or not he in fact exercises the power to make a direction in any given case¹².

⁹ (1994) 18 EHRR 393, ECtHR.

¹⁰ unless before the making of the complaint or the reference of the dispute, proceedings have been begun in any Court in respect of the matters which would be the subject of the investigation: section 146(6)(a) of the Act.

¹¹ Section 151(2) of the Act.

¹² In other words, a decision not to make a direction is as determinative of civil rights or obligations as a decision to make a direction.

35. It might be argued that there is a relevant distinction between the determination of complaints and the determination of disputes of fact or law, on the basis that the latter will not involve a direction to pay compensation. The power of the PO to make binding determinations and to issue binding directions is, however, the same in relation to disputes as it is in relation to complaints of maladministration, and includes the power to direct the payment of compensation. In any event, the power to make a legally enforceable direction to take any step (not just the payment of compensation) or to refrain from taking any step, in my view means that the PO determines civil rights or obligations for the purposes of Article 6(1). As indicated above, I consider that it is immaterial whether in any given case he in fact exercises that power or not. I do not, therefore, think that an argument that the determination of disputes of fact or law is outside the scope of Article 6(1) would succeed.

Complainants

36. Unlike respondents, complainants¹³ submit voluntarily to the jurisdiction of the PO. It might therefore be argued that they have in some sense waived their entitlement to rely on Article 6(1).

37. In my view, however, such an argument would be unlikely to succeed. Given the power of the PO to issue binding directions, including for the payment of compensation to complainants, I consider that civil rights or obligations of complainants are in issue in proceedings before the PO¹⁴.

38. It would in any event be most unattractive for the PO to adopt an approach whereby he accepted that Article 6(1) applied in relation to respondents, but not in relation to complainants or persons referring disputes of fact or law. Such an approach might fall foul of Article 14 of the ECHR, which prohibits

¹³ including persons who refer disputes to the PO.

¹⁴ Cf. eg. the Legal Services Ombudsman, who (as I understand it) only has power to *recommend* the payment of compensation.

discrimination in relation to the enjoyment of the rights and freedoms set forth in the ECHR.

Other persons

39. I note that section 149(1) of the Act requires the PO to give any person against whom allegations are made in the complaint or reference an opportunity to comment on any allegations contained in the complaint or reference. This provision applies to persons against whom there is no power to issue directions under section 151(2) of the Act.
40. In the light of Fayed v United Kingdom (above), it is strongly arguable that Article 6(1) does not apply to such persons, on the basis that a determination by the PO is not dispositive of any legal right or obligation of such persons.
41. I should add that, in the light of the decision of the Court of Appeal in Edge v Pensions Ombudsman¹⁵, I will not consider the position of persons who are not parties to an investigation, and who are not persons against whom any allegation has been made, but whose interests might be adversely affected by a determination by the PO. The Court of Appeal has made it clear that the PO may not properly investigate a complaint or dispute where those whose interests might be adversely affected by the outcome have not had a fair opportunity to make representations before him (because there is no provision for this in the statutory scheme), and would not therefore be bound by the determination. I understand that provision has been made for such persons to be represented before the PO in the Child Support, Pensions and Social Security Act. Regulations will be made in connection with these provisions, which have not yet been brought into force. I am not instructed to advise in relation to these provisions at this stage.

Criminal charges

42. The right to a fair trial guaranteed by Article 6(1) also applies in the determination of any criminal charge. Additional safeguards which apply only in relation to criminal matters are set out in Article 6(2) and (3). In order to determine whether

¹⁵ [1999] PLR 215, particularly paragraphs 86 and 87.

proceedings are criminal for these purposes, the European Court of Human Rights applies an 'autonomous' approach: it is not bound by the manner of classification in domestic law. In my view, applying this 'autonomous' approach, the jurisdiction of the PO is plainly civil, and would not be regarded as criminal for the purposes of Article 6. The jurisdiction is essentially compensatory, rather than punitive.

Oral hearings

43. Article 6(1) requires an oral hearing, unless exceptional circumstances apply¹⁶. In Allan Jacobsson v Sweden (No 2)¹⁷, for example, the Court found no violation of Article 6(1) in the absence of an oral hearing, where there was no issue of fact or law which required it.

44. The right to an oral hearing may be waived where there is no overriding public interest which requires a hearing, but the waiver must be unequivocal¹⁸. In Hakansson v Sweden¹⁹, for example, a hearing was not normally held in the kind of proceedings in issue. As the applicant did not request a hearing, he was held to have waived his entitlement to a hearing.

45. It is probable that the PO's current practice as to when an oral hearing will be held (see paragraph 22 above) would result in a hearing in most cases when Article 6(1) would require it.

46. There might be cases involving a complex legal point in relation to which Article 6(1) would require a hearing, when in accordance with the PO's current practice, no hearing would be held. However, in such cases, a party could avail himself of the right under section 151(4) of the Act to appeal on a point of law to the High

¹⁶ Eg. Fischer v Austria (1995) 20 EHRR 349, ECtHR; Allan Jacobsson v Sweden (No 2) (judgment of the ECtHR of 19 February 1998; unreported).

¹⁷ judgment of the European Court of Human Rights of 19 February 1998; unreported.

¹⁸ Hakansson v Sweden (1990) 13 EHRR 1, ECtHR; Pauger v Austria (1997) 25 EHRR 105, ECtHR.

¹⁹ (1990) 13 EHRR 1, ECtHR.

Court. The right of appeal should satisfy the requirements of Article 6(1) in a case where the argument is that a party has not had an oral hearing on an issue of law²⁰.

47. It is sensible for the PO to have a policy as to the kind of situations in which an oral hearing is likely to be granted, but he should retain a discretion to refuse a hearing. If no hearing is requested by a party, the PO will be able to argue that he cannot subsequently complain if no hearing is held, because he has waived his entitlement to a hearing.
48. The PO currently notifies the parties to an investigation of their right to request a hearing. This is clearly sensible, because without such express notification it would be much more difficult to argue that a party who failed to request a hearing had waived his entitlement to it.
49. The PO does not, however, currently inform the parties of the circumstances in which an oral hearing is likely to be held. In my view, it would be sensible to do so. I enclose as an Appendix to this Opinion a suggested form of wording which might be used to notify parties to an investigation of their right to request a hearing, and of the policy which the PO will apply in deciding whether to grant a hearing. It will be seen that I have included an express statement to the effect that a party who fails to request a hearing cannot subsequently complain of a failure to hold a hearing.
50. I should also mention the question of whether it would be lawful for a member of the PO's staff to chair an oral hearing, rather than the PO doing so himself. As has been noted above, by section 145(4C) of the Act, any function of the PO other than the determination of complaints and disputes may be performed by his staff. It is arguable in the light of this provision that, so long as the PO himself makes the determination, a prior oral hearing may be conducted by a member of his staff. I am concerned, however, that such an arrangement would be likely to be contrary to Article 6(1) of the ECHR. Save in relation to an appeal to the High Court, it is

²⁰ See eg. Bryan v United Kingdom (1995) 21 EHRR 342, ECtHR, where it was held that an appeal on judicial review principles from a decision of a planning inspector satisfied the requirements of Article 6(1).

the PO himself who is the 'tribunal' for the purposes of Article 6(1). It seems to me that Article 6(1) requires an oral hearing before the relevant tribunal, and that it does not envisage delegation of this function. Even if, therefore, delegation might be possible under section 145(4C) of the Act, I would advise against delegation from the point of view of compliance with Article 6(1).

51. As for the PO's occasional practice of appointing Counsel to represent him at an oral hearing, I do not think that this presents any difficulties in terms of compliance with Article 6(1)

Publicity

52. Article 6(1) generally requires a hearing to be in public, although Article 6(1) itself contains certain exceptions to this principle. These are the only permissible exceptions, and any derogation from the principle should be strictly required by the circumstances²¹. Like the right to an oral hearing, the right to a public hearing may be waived by a party²².

53. Rule 12 of the Procedure Rules generally requires hearings before the PO to be in public. However, it sets out certain circumstances in which the PO has a discretion to exclude the public from a hearing. I am concerned that some of these grounds do not fit easily within the exceptions set out in Article 6(1).

54. In particular, the holding of a hearing in private where it is just and reasonable to do so because disclosure of any matter relates to financial circumstances, or is commercially sensitive, or consists of confidential information, may not be compatible with Article 6(1). In some cases, it may be that the interests of the private life of a party require a hearing (or part of a hearing) to be held in private where intimate financial circumstances, or confidential information, will be disclosed, but this will not inevitably be so. The disclosure of commercially sensitive information is unlikely to fall into this category, although it may be that

²¹ Diennet v France (1995) 21 EHRR 554, ECtHR.

²² Hakansson v Sweden (1990) 13 EHRR 1, ECtHR.

a private hearing could, in certain circumstances, be justified on the ground that the publication of commercially sensitive information would prejudice the interests of justice (eg. because a witness would be inhibited in giving his evidence if the hearing were in public.)

55. There may be cases, therefore, in which the PO would be in breach of Article 6(1) if he decided to hold a hearing in private, although Rule 12 of the Procedure Rules would permit him to do so.

56. I do not think that Article 6(1) requires that public hearings be advertised, so long as it is open to members of the public to obtain details of time and venue of such hearings by contacting or visiting the office of the PO. Any literature published by the PO should state that hearings are ordinarily held in public. There should of course be access to the hearing room for members of the public²³.

57. Article 6(1) also requires public pronouncement of a judgment. This right may, however, be satisfied by the judgment or decision being made available to the public if requested. Decisions do not necessarily have to be pronounced orally in the presence of the public²⁴.

58. This requirement is in my view satisfied by the PO's practice of producing determinations in writing, which are available to anyone on request.

Conduct of investigation/hearing

59. The right to a fair hearing requires that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to a Court or tribunal under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent. This is the principle of 'equality of arms', and involves striking a 'fair balance' between the parties²⁵. The principle generally requires that the parties to

²³ See Storer v British Gas plc [2000] 1 WLR 1237, where the Court of Appeal found that a hearing had not been in public where there was a physical barrier in the shape of a push-button lock which prevented access.

²⁴ Axen v FRG (1983) 6 EHRR 195, ECtHR; Sutter v Switzerland (1984) 6 EHRR 272, ECtHR.

²⁵ Ruiz-Mateos v Spain (1993) 16 EHRR 505, ECtHR.

civil proceedings should be entitled to cross-examine witnesses²⁶, and should be able to comment on the evidence before the Court²⁷.

60. It seems to me that the relevant rules of procedure and the PO's practice as to the conduct of oral hearings, and investigations generally, are broadly in conformity with the requirements of Article 6(1). In particular:

- (1) where there is no oral hearing, it is the PO's practice to invite any other party to comment in writing on the written response he has received from any respondent. He supplies copies of all documents he obtains for the purposes of the investigation to all the parties. It is also his normal practice to notify the parties of his preliminary conclusions, and to invite further comments from them on those conclusions;
- (2) when an oral hearing is held, the parties have a right to give evidence, to call witnesses, to question any party to the investigation and to make submissions to the PO.

61. I note, however, that there are some instances in which the Procedure Rules contain different rules for respondents as compared to complainants. In Rule 6(4) it is provided that a respondent may request further particulars of the complaint or dispute, and may request a determination of any question as a preliminary issue. There is no equivalent provision entitling complainants to request particulars, or a determination of a preliminary issue. A complainant might in certain circumstances have an argument that this difference in treatment is contrary to the requirement of 'equality of arms', on the basis that it puts him at a substantial disadvantage as compared to a respondent. The safer course would, therefore, be for the PO to apply the same rule to all parties: i.e. to permit complainants and persons who have referred a dispute to request further and better particulars, or to request the determination of a preliminary issue. It seems to me that it would be

²⁶ Application 5362/72 X v Austria 42 CD 145 (1972), EComHR.

²⁷ Kamasinski v Austria (1989) 13 EHRR 36, ECtHR,

open to the PO to do so under section 149(4) of the Act, interpreted pursuant to section 3(1) of the Human Rights Act 1998 in a way which is compatible with Convention rights²⁸. I understand that this accords with what is in fact already the PO's practice.

62. So far as costs are concerned, the PO has the power to direct the payment of costs by a respondent under the general power to issue directions in section 151(2) of the Act²⁹, although I understand that in practice he hardly ever makes an award of costs which includes the costs incurred by the complainant in the investigation. There is no equivalent power to award costs in favour of a respondent where a complaint is dismissed or a dispute resolved in his favour. This may enable a respondent to argue that there has been a breach of the principle of 'equality of arms' guaranteed by Article 6. I do not think, however, that this is a problem which the PO can rectify, in the absence of statutory provision to enable him to award costs to a successful respondent³⁰.

63. The position in relation to the power in Rule 15A of the Procedure Rules for the PO to make payments in respect of certain expenses is similar: there is a power to make such payments in relation to complainants and witnesses, but not in relation to respondents. This may enable a respondent to argue that he has been placed at a substantial disadvantage in a particular case, as compared to a complainant. I doubt, however, that the PO can rectify the problem in the absence of an amendment to the statutory scheme.

²⁸ I also note that a respondent is required under the Procedure Rules to provide additional copies of documents to the PO, for the purpose of distribution to other parties (Rules 6(2), 7(2), and 9(2)). This duty does not apply to complainants. It is conceivable that a respondent lacking in financial resources would complain about this difference of treatment between respondents and other parties to an investigation. Such difference in treatment would hardly amount, however, to placing a respondent at a 'substantial disadvantage' vis-à-vis other parties, for the purposes of Article 6(1).

²⁹ This was confirmed by the High Court in Nicol & Andrew Ltd v Brinkley [1996] OPLR 361.

³⁰ Instructing Solicitor has informed me that there is a suggestion from the Lord Chancellor's Department in relation to a proposed power to make a "Beddoes" type pre-emptive costs order in favour of a representative beneficiary that such an order should only be capable of being made by an 'independent' person, and not by the PO. I doubt, however, that the mere fact that a judge, or the PO, has made such an order would give rise to concerns about his impartiality under Article 6(1) of the ECHR. See paragraphs 68 to 69 below.

64. I should add, that Article 6(1) guarantees the right of 'effective' access to a Court, although this is not expressly stated in Article 6³¹. This may require the provision of legal aid in a particular case, even though there is no specific provision for this in Article 6(1)³². There is currently no statutory provision for legal aid in respect of proceedings before the PO. Although the PO takes the view that legal representation should not be necessary for a fair hearing in the majority of cases, in an exceptional case the lack of legal aid may enable a party who lacks the financial resources to obtain legal representation to argue that there has been a violation of Article 6(1).

Independent and impartial tribunal

65. Article 6(1) guarantees the right of access to an independent and impartial tribunal established by law.

66. In order to ascertain whether a tribunal is independent, the European Court of Human Rights has regard to³³ (a) the manner of appointment of a tribunal's members, and their term of office; (b) the existence of guarantees against outside pressures; and (c) the question whether the body presents an appearance of independence. In Starrs v Procurator Fiscal, Linlithgow [2000] HRLR 191, the judicial appointment system for temporary sheriffs (who were appointed for a renewable period of one year and who lacked security of tenure) was held to involve a breach of the Article 6 requirement of independence in a criminal case³⁴.

67. In the light of the unqualified power of removal of the PO contained in section 145(3)(a) of the Act, it would be arguable that the PO's office does not satisfy the requirement of independence under Article 6. However, given the statement of policy and procedure on appointment of the PO published on 12 April 2000 and

³¹ Golder v United Kingdom (1975) 1 EHRR 524, ECtHR; Airey v Ireland (1979) 2 EHRR 305, ECtHR .

³² Airey v Ireland (1979) 2 EHRR 305, ECtHR.

³³ Eg Bryan v United Kingdom (1995) 21 EHRR 342, ECtHR.

³⁴ Cf. Clancy v Caird (The Times, 9 May 2000), where the use of a temporary judge (who had been appointed for three years, and who was not subject to removal) in a civil case was held to be compatible with Article 6.

signed by the Secretary of State and the Lord Chief Justice, which strictly limits the power of removal and provides that the appointment is for two years to end on 31 August 2001 and not renewable, I doubt that any challenge on this ground would succeed³⁵.

68. As to impartiality, the European Court of Human Rights has held that this denotes an absence of prejudice or bias, both (a) subjectively, as to a judge's actual personal convictions; and (b) objectively: the test being whether the judge offered guarantees sufficient to exclude legitimate doubt³⁶. A judge will be presumed impartial until there is proof to the contrary, and the belief of a litigant as to bias will require objective justification³⁷.

69. Subject to the situation where a case is remitted to the PO, which will be considered below, I am not aware of any basis on which it could be argued that the PO is not an impartial tribunal, for the purposes of Article 6(1). (Although circumstances might arise in an individual case where, eg, due to a conflict of interest, this requirement were not satisfied.)

70. The position is less clear-cut where a case is remitted to the PO for reconsideration after a successful appeal to the High Court. If, for example, the PO has found fraud on the part of a respondent, it is perhaps understandable that such a respondent would resist remission of the case to the PO. The European Court of Human Rights has held, however, that there is no breach of impartiality (without more) where a case is remitted for retrial to the same tribunal³⁸. It seems

³⁵ There is of course in any event access to an independent and impartial tribunal through the right of appeal on a point of law to the High Court, provided in section 151(4) of the Act. However, if the PO did not satisfy the requirement of independence and impartiality, the right of appeal on a point of law would be unlikely to satisfy Article 6(1) in a case turning on a dispute of fact.

³⁶ Piersack v Belgium (1982) 5 EHRR 169, ECtHR.

³⁷ Piersack (above); Ferrantelli and Santangelo v Italy (1997) 23 EHRR 288, ECtHR. See also Locabail UK Ltd v Bayfield Properties Ltd [2000] 2 WLR 870.

³⁸ Ringeisen v Austria (1971) 1 EHRR 455., ECtHR See also Thomann v Switzerland (1996) 24 EHRR 553, ECtHR, where there was no violation of Article 6(1) in a case where the a Court which convicted the accused in absentia presided over a retrial of his case. Cf. Hauschildt v Denmark (1989) 12 EHRR 266, ECtHR, where the ECtHR found a violation of Article 6 where a judge trying a criminal case had previously decided a bail application against the defendant on the ground that there was a 'particularly confirmed suspicion of guilt'.

to me that each case will turn on the precise findings of the PO, and the terms in which he has expressed those findings. As the Court of Appeal put it in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] WLR 870:

"...a real danger of bias might well be thought to arise if...there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective element to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection." (p 888E-F).

This statement is in my view consistent with the case law under the ECHR concerning the requirement of impartiality.

CONCLUSION

71. In addition to considering the specific issues raised by Instructing Solicitor in relation to Article 6, I have dealt above with a number of other issues which seem to me to arise in relation to the jurisdiction of the PO and the ECHR. I am not conscious of any other particular area of concern as to compliance by the PO with the ECHR or the HRA.
72. Should Instructing Solicitor have any other queries or want to discuss any of the above, I shall be very happy to be of assistance.

MONICA CARSS-FRISK

15 September 2000
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APPENDIX

"You have the right to request the Pensions Ombudsman to hold an oral hearing before making his determination. If you do not request an oral hearing, you may not later complain if no hearing is held.

If you do request an oral hearing, the Pensions Ombudsman may or may not accede to your request. It is for the Pensions Ombudsman to decide whether it is an appropriate case in which to hold a hearing. He may decide to hold a hearing even if this has not been requested by you or any other party to an investigation.

It is the policy of the Pensions Ombudsman to hold an oral hearing in the following circumstances:

- (1) where there are differing accounts of a particular event and the credibility of witnesses needs to be tested;
- (2) where the honesty or integrity of a party has been questioned and the party concerned has requested a hearing;
- (3) where there are disputed material and primary facts which cannot properly be determined from the papers alone.

The Pensions Ombudsman may, however, decide that it is appropriate to hold a hearing in cases which do not fall into any of these categories."

**THE PENSIONS
OMBUDSMAN**

AND

**ARTICLE 6 OF THE
EUROPEAN
CONVENTION ON
HUMAN RIGHTS**

OPINION

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**Solicitor for the
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