

ADDITIONAL MATERIAL

ARTICLE 6 – RIGHT TO A FAIR HEARING

- For Article 6 to apply there must be a dispute or 'contestation' and there must be a decisive determination.

Johns v Ann v Bracknell Forest BC [2001] EWCA Civ 1510. Review procedure whereby an introductory tenant may seek a review of LA's decision to seek possession is 'a determination' of the tenant's rights. The court had to grant possession if review properly carried out.

St Brice v Southwark LBC [2001] EWCA Civ 1139 – Enforcing a possession order does not call for another determination. The original trial was the determination. If tenant breaches order made at court onus on him/her to bring matter back to court.

CG/2119/2001 No determination of a civil right or obligation ("contestation") within the scope of Article 6 until the claimant challenged the recoverability decision by appealing to a tribunal. CI/2087/00 and CI/2088/00 - Initial decision-making on claims to benefit, e.g. reconsideration, does not fall within Article 6.

- Matter must concern 'civil rights and obligations'

Adjudication of social security disputes involves determination of civil rights and obligations to which procedural guarantees of Art 6(1) apply. See SS Legislation 2002 Vol 111 - Para 4.55-56 for analysis of Strasbourg case law.

Article 6 guarantees

- An independent and impartial tribunal.
 - Access to a court and equality of arms
 - A public hearing
 - A hearing within a reasonable time.
- Independent and impartial tribunal

Bodies who make administrative decisions such as LA or DWP are not sufficiently independent to comply with Article 6. The individual must be able to challenge the decision of an administrative body before a judicial body with 'full jurisdiction' providing the full guarantees of Article 6. The question arose whether the type of control the

Administrative Court exercises through judicial review was sufficient to cure any defects at the administrative stage.

Bewry v Norwich CC [2001] EWHC Admin 657 – HBRB incompatible, councillors not independent of the council, which is one of the parties

McLellan & Another v Bracknell Forest BC [2001] EWCA Civ 1150 – Procedure for terminating introductory tenancies is Article 6 compliant even though court must make an order for outright possession unless LA has failed to comply with review procedures.

CF/3565/01 – No right of appeal against SofS decision whether education provided at home should be recognised. Exclusion of appeal rights did not infringe art 6 because of the availability of JR, Alconbury applied.

CIS/540/2002 - Regulations excluding right of appeal against decisions on whether a claim had validly been made. Availability of JR is not a sufficient remedy as the decision making process is predominately fact finding rather than consisting of judgement and discretion. [SofS's appeal under SofS v Dutton withdrawn 20/7/03.]

- Objective bias and HRA impartiality

The impartiality of the tribunal members will be presumed until there is proof to the contrary. It is for the person alleging bias to put forward the facts on which they intend to rely to show real or apparent bias. The test for objective (apparent) bias is whether a fair-minded observer having considered the facts would have a reasonable apprehension that the tribunal was biased. The common law test for bias overlaps with the Convention test of impartiality: Magill v Weeks [2002] HRLR 16, see commentary in SS Leg Vol 111 para 4.62

CSDLA/1019/1999(*80/01) (Gillies) - What raised an objective bias was a situation where a medical member sitting on a tribunal is also an EMP and where the report of another EMP is part of the evidence in the case. [SofS v James Gillies listed in Court of Session (Inner House) 28, 29 & 30 Oct 03.]

CSDLA/91/2000 – Commenting on Gillies above, held it gave no support to the argument that EMPs are intrinsically not independent of the Department. Therefore disagreed with what was said at page 732 of Volume II of the Social Security Legislation 2002 that the mere

presence of EMP on a tribunal compromised the appearance of independence and impartiality

CSDLA/444/2002 - A tribunal considered three reports from different EMPs. One of the EMPs, a Dr B, sat regularly as a member of the tribunal and regularly provided EMP considered by tribunals. The tribunal said it preferred Dr B's report to the others, as he was experienced and disinterested in the outcome. Dr B had sat with the chairman 22 times, the lay member 14 times, and with both on 3 occasions. There was a danger that the members' knowledge of Dr B would influence the weight given to his evidence as against the other reports. *Lawal v Northern Spirit Ltd* [2002] WECA Civ 327 considered (see comments on part-time members appearing as counsel before EAT in [2003] UKHL 35). [Appeal pending in Court of Session (Inner House) *SofS v Cunningham*.]

- Access to a Court

This should include a proper opportunity to present one's case, to be given a reasoned decision and to have equality of arms with one's opponent, i.e. under conditions that do not place one party at a substantial disadvantage vis-à-vis his or her opponents [*Feldbrugge v The Netherlands* (1986) 8 E.H.R.R. 425. see SS Leg 2002 Vol 111 para 4.57.]

Convention language

Mr Commissioner Williams observed that the ECHR and natural justice often interact to provide the same safeguard (CIB/2308/2001) but generally the Commissioners have been willing to adopt Convention language in place of domestic concepts of natural justice. CJSA/5100/2001 - Introduction of HRA 1998 was an opportunity for Commissioners to rebase decisions on procedural fairness in fresh terms. In CIB/2751/2002 - The Strasbourg case law more specific and accessible to representatives.

- Legal aid

CJSA/5100/2001 - No inherent right to legal representation before a social security tribunal under Article 6, *Airey v Ireland* considered.

[See also Jarrett v LSC and the Lord Chancellor [2001] EWHC Admin 389 - Discretion to grant public funding outside the normal scope of Legal Aid, *X UK* [1984] 6 EHRR 136 considered, and *R(on the*

application of Reiner) v LSC (LAT Nov 2002) – Legal Aid scheme discriminated against persons with large families.]

- Access to court

CDLA/3432/2001 – Leave to appeal refused by a commissioner. Not deprived of any rights under Art 6 by being required to apply for permission.

CCS/1018/2002 – Claimant delayed in applying for a revision of a tribunal's decision after unsuccessful appeal to the CA. No breach of Article 6, extension of appeal rights not justified in human rights terms. Procedures are complex but the way to initiate them is not.

Equality of Arms

CDLA/5413/1999 (*07/00) – Tribunal proceeded in absence of claimant who had asked for an oral hearing but did not receive letter. Operation of notice rule did not strike a 'fair balance' between claimant and SofS; tribunal should have adjourned.

CIB/2308/2001 Must ensure equality of arms between the parties when dealing with evidence.

CIB/4137/2001 - Decision maker had asked the EMP a question about the PCA report. Fairness required that the claimant should also be able to question the EMP about the report. If a point can only be answer by PO but PO not present then tribunal may draw conclusion adverse to SofS.

CIS/4218/2001 – BA became aware of undeclared student grant in 1996 but no decision issued until 2000. Claimant not been disadvantaged by the destruction of documents or the natural fading of memory as this would equally disadvantage the Secretary of State on whom the burden of proof lay.

- Delay

CIS/4220/2002 - Possible overpayment in 1996 not decided until 2000. Time under Article 6 did not run until case referred to DM. The delay in CG/2119/2001 was from October 1987 to November 1999.

- Remedies

- + Other suggestions made in the commentary to SS Legislation 2002 Vol 111 para 4.61-62 include. (a) Whether paper hearing should have been adjourned because paper hearing more appropriate, e.g. overpayment; (b) Delaying in final decision due to backlogs e.g. can be years where case remitted after an appeal to a commissioner; (c) Entitlement to an oral hearing before a commissioner.

Reference Material

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Starmer - European Human Rights Law - LAG (1999)
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Sally Robertson and Stewart Wright - Recent Developments in Social Security Law; LAG August 2003
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