Memorandum to the Joint Committee on Human Rights
The Armed Forces (Service Complaints and Financial Assistance) Bill 2014

Introduction

1. The Armed Forces (Service Complaints and Financial Assistance) Bill ("the Bill") repeals those provisions of Part 14 of the Armed Forces Act 2006 ("AFA 2006") which set out the system for redress of individual grievances for members of the armed forces. It also repeals section 366 of Part 18 of AFA 2006 which makes provision for the office of the Service Complaints Commissioner.

2. The Bill inserts new Part 14A into AFA 2006, which makes provision for the framework of a reformed system for the redress of service complaints. The Bill also makes provision for the creation of the office of Service Complaints Ombudsman and sets out the powers and functions of the Ombudsman. They will be greater than those of the Service Complaints Commissioner. Some of the new sections allow or require the making of subordinate legislation to set out the detail of the processes and procedures governing the reformed system and some substantive matters such as the definition of those complaints that fall to be considered within the new system.

Article 6 ECHR right to a fair trial

3. This memorandum focuses principally on Article 6 of the Convention. That Article goes to the fair determination of civil rights and accordingly is the Article which in litigation has been in issue in considering the ECHR compliance of the redress of complaints system.

4. Members of the armed forces have no contract of employment and no system of collective bargaining. Pay, allowances and other benefits are determined and altered unilaterally. The armed forces do not have access to employment tribunals except with respect to equal pay and discrimination. It has therefore long been recognised that members of the armed forces should have some other effective way of obtaining redress of

grievances. This is currently provided for in Part 14 AFA 2006 as amended by the Armed Forces Act 2011 ("AFA 2011"). The process under AFA 2006 is essentially internal to the armed forces, subject to judicial review. Before AFA 2006 was introduced into Parliament the process was considered in relation to Article 6. It was concluded on the basis of *Pellegrin v France (1999)*[1] that Article 6 did not apply to members of the armed forces in relation to the determination of civil rights, at least in relation to disputes akin to employment disputes, because the armed forces are bound by a special bond of trust and loyalty towards the State.

5. Subsequently the European Court of Human Rights ('the ECtHR') held in *Eskelinen v Finland*[2] that, for Article 6 to be included in relation to civil rights:
   (a) the State in question must have expressly excluded access to a court for the post or category of staff in question;
   (b) the exclusion must be justified on objective grounds in the State's interest.

6. The ECtHR explained that the special bond of trust and loyalty referred to in *Pellegrin* was not sufficient to determine whether there were sufficient grounds for the exclusion. The State had also to show that the subject matter of the dispute was related to the exercise of state power or called into question the special bond. The ECtHR made it clear that there was a presumption that Article 6 applied to ordinary employment disputes such as ones relating to pay.

7. In the case of *Crompton v UK*[3] which considered the system for redress preceding that contained in AFA 2006 (under the Army Act 1955), the complainant was in a very special category within the armed forces; the permanent staff of the Territorial Army. Most of these staff look after stores or provide clerical support. Moreover Mr Crompton's post had so

[1] Application no. 28541/95, judgment 8 December 1999.
[2] Application no. 63235/00, judgment 19 April 2007.
[3] Application no. 42509/05, judgment 27 October 2009.

little of the military about it in that it was civilianised and he was made redundant. He brought a complaint about the process by which he was made redundant. While not conceding that Article 6 applied generally to the determination of civil rights between members of the armed forces and the State, the Ministry of Defence ('the MoD') accepted that Article 6 was applicable to the very special facts of the case. The MoD did not assert that the internal redress system that then existed was independent and impartial within the meaning of Article 6. Instead the MoD argued that the availability of judicial review of the Defence Council's decision on his complaint was sufficient to render the redress of complaints process compliant.

8. The ECtHR held that, on the facts of the case, judicial review was sufficient. The ECtHR however made it clear that this would not always be the case. Broadly speaking the ECtHR's view was that Article 6 was not excluded wherever a matter went to the determination of civil rights between members of the armed forces and the State. Article 6 applied because:
   (a) a civil right was in issue (and it is considered this is likely to be the case in a straightforward employment case, such as non-payment of pay or discharge from the armed forces);
   (b) the dispute did not call into question the special duty of trust and loyalty which States may expect from their armed forces;
   (c) the dispute was not one for which there were compelling reasons for the decision to be made by the chain of command.

9. Where these circumstances applied, **and** the proper resolution of the dispute turned entirely on a question of fact, judicial review would not be sufficient to provide compliance with Article 6. Instead an independent and impartial tribunal appropriate to deciding questions of fact would be required by Article 6.

10. Following the judgment in *Crompton*, the MoD took the view that in cases where:

(a) Article 6 applies (as explained in paragraph 8(a) to (c) above),

(b) there is no access to an employment tribunal, and

(c) a question of fact is central to the dispute,

the risk of a finding of incompatibility with Article 6 would be much reduced by ensuring that an independent, quasi-judicial body makes the finding of fact and that the MoD be bound by that finding.

11. As a consequence appropriate amendment was made in section 20 of AFA 2011 to sections 335 and 336 of AFA 2006. The amendments empowered the Defence Council to appoint panels composed of, or including, independent members. The amendments also empowered the Secretary of State to make regulations (subject to affirmative resolution procedure) requiring, in respect of a prescribed description of complaint, the delegation of functions to a panel composed of a prescribed number of independent members[4] or a requirement that all or a majority of the members be independent members and/or a requirement for prescribed functions to be exercised by independent members of a service complaints panel.

12. The purpose of the AFA 2011 amendments was to allow decisions to be taken on a case by case basis, but also to allow general rules to be laid down as the application of Article 6 became clearer; as it was and continues to be, considered that there are a number of aspects of the case law that remain uncertain, including;

(a) what issues, which may be the subject of a complaint, relate to "civil rights" within the meaning of Article 6;

(b) what sort of complaints call into question the "special bond of trust and loyalty"[5], so as to justify an exclusion of access to an independent and impartial tribunal; and

(c) in respect of what sort of disputes there can be a "compelling reason" for the decision to be by the Defence Council.[6].

[4] "independent members" meaning a person appointed by the Secretary of State who is neither a member of the regular or reserve forces nor a civil servant (section 336(7) of the Armed Forces Act 2006 (as amended)).

[5] Reference is made to paragraph 62 of the judgement in *Eskelinen*.

13. The only other case of note that has considered the application of Article 6 to the redress system for the armed forces since *Crompton,* is *Crosbie v Secretary of State for Defence*.[7] In this case, the Claimant, who had held a short service commission in the Army as a chaplain, sought to challenge the decision of the Army Board, under the redress system in the Army Act 1955[8], not to uphold his complaint that two applications to have his commission extended were refused unfairly and that he should receive redress. The claim in *Crosbie* was unsuccessful in every respect.

14. In *Crosbie*, the Claimant sought to argue that three infringements of 'civil rights' had not been considered by an independent tribunal; these infringements were:
(a) that his right to practise his profession of Army Chaplain was curtailed;
(b) that the Army refused to provide the documentation which would have been necessary for him to act as a priest outside the Army, thus curtailing his ability to practise more generally;
(c) that he had a right for his applications for an extension of his commission to be considered fairly.
The Claimant argued that the Army Board was incapable of adjudicating on these rights for the purposes of Article 6 owing to a lack of independence (all Board members were senior Army officers). Moreover, he argued that judicial review would not correct the wrong because of an inability to conduct the required factual investigations into the complaints.

15. The Court rejected the Claimant's arguments that the complaint required determination of civil rights of the Claimant. The Court also held that the redress proceedings substantially affect any such rights. Consequently, the proceedings before the Board were outside the scope of Article 6.

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[6] Reference is made to paragraph 77 of the judgement in *Crompton*.
[7] [2011] EWHC 879 (Admin); this decision has been applied in *Clayton v the Army Board(Case No: CO/7536/2013; judgment 22 May 2014).*
[8] At the time the case was before the court, AFA 2006 was in force and the Act, along with material relating to what was then the Armed Forces Bill 2010 was put before the court in respect of the amendments since made by AFA 2011.

16. The Court further decided that, even if the proceedings had been within the scope of Article 6, the fundamental issue of whether the Claimant's commission should have been extended was a matter of judgement; the factual issues were "staging posts" which informed that exercise of judgement. Accordingly there was no key issue of fact which required decision by an independent tribunal of fact.

17. Moreover, the decision whether the Claimant was suitable to be given an extended commission was also entirely concerned with whether he should remain in a post "which had that special bond of trust and loyalty"[9]. This exercise of judgement was then amenable to judicial review.

18. In light of all the above, it is the MoD's view that examples of the types of matters that are likely to result in the engagement of a civil right are disputes in relation to pay, pensions and allowances entitlements, and allegations of discrimination prohibited under equality legislation. However, given that there has been limited development in the case law on *Crompton* there has been insufficient guidance to allow the legal requirements to be set out in detail in subordinate legislation by the Secretary of State. The Defence Council still has to consider complaints on a case by case basis (or perhaps by reference to categories of case such as exemplified here), as to whether to appoint a panel including independent members.

Clauses 1 and 2 of the Bill

19. Clause 1 inserts section 365B into the AFA 2006 and creates the office of Service Complaints Ombudsman. It is specified that the Ombudsman cannot be a member of the armed forces or employed in the civil service.

20. Clause 2 inserts new Part 14A into AFA 2006. Part 14A provides the framework for the new system for dealing with the redress of service complaints in new sections 340A to 340O. Much of the detail will, as now,

[9] At para 113.

be contained in regulations. Some of these are to be made by the Defence Council, others by the Secretary of State. Broadly speaking, as now, it is the Defence Council who, as the highest level of military command and administration under Her Majesty, will lay down the procedures for the new internal redress system. The Secretary of State will have the powers to lay down requirements as to when there must be an independent element in the internal process.

21. Under section 340C Defence Council regulations will have to provide for it to appoint a person, a panel of persons, or the Defence Council itself, to decide a complaint and to grant any redress (within the Defence Council's authority) which is appropriate. The Defence Council will have to ensure that any person or panel appointed has authority to grant such appropriate redress. Regulations under section 340D will provide on a broadly similar basis for the handling of any appeal stage.

22. Under the existing provisions (under AFA 2006 as amended by AFA 2011), the starting point is that persons appointed must be officers, but the Defence Council has power to appoint independent members and may be required to do so by regulations made by the Secretary of State[10]. Under the new provisions there will be no presumption that a person deciding a complaint will be an officer, except on the question of initial admissibility of a complaint referred to above. Accordingly, the new provisions do not refer to appointing officers and exceptionally independent persons. Instead, the new provisions simply refer to regulations requiring the Defence Council to appoint those who will decide[11]. Failure by the Defence Council to appointment independent members where required by the case-law will render them open to challenge.

23. Under new section 340E(1) the Secretary of State will have power by regulations to impose a requirement for independent members for a minimum number of independent persons or for specified functions in

[10] See especially section 334(4), 336(1) and (4A) and section 336(5) of AFA 2006 (as amended).
[11] See especially, new section 340C(1) and 340D(2)(d).

deciding a complaint to be exercised by independent persons. Under this power the Defence Council's discretion as to whether to appoint independent decision-makers to decide a complaint or appeal will be constrained by Secretary of State regulations requiring total or partial independence in specified circumstances.

24. Sections 340H to 340M set out the powers of the Service Complaints Ombudsman in respect of applications by complainants who allege maladministration in connection with the handling by the internal process of a service complaint. The term "maladministration" is not defined in the Bill and nor is it defined in other Ombudsman legislation,[12] but the MoD considers that amongst other things it would cover any failure by the Defence Council to take account of Article 6 in respect of the appointment of a person or panel under section 340C or 340D where that was required, if the Ombudsman is of the opinion that the Defence Council should have done so in the particular circumstances at hand. This is because, since the Human Rights Act 1998 came into force in 2000, all public bodies,

Are obliged not only as a matter of good practice, but also as a matter of law, to consider the possible bearing of the Convention rights on their decisions. Failure to do so will constitute maladministration.[13]

How clause 1 and 2 of the Bill are compatible with Article 6

25. The broad effect of the amendments made to the system of redress by AFA 2011 to enable the use of independent person to decide complaints are to be maintained and extended in the reformed system. The new framework for the redress of service complaints will allow the Secretary of State to specify by regulations when disputes must be determined by an independent tribunal.

[12] See, for example, s.34(3) Local Government Act 1974 and s.146(1)(a) of the Pension Schemes Act 1993.
[13] M. Seneviratne, *Ombudsmen: Public Service and Administrative Justice* (2002) at p.44.

26. It is still not yet easy to be sure how the ECtHR's approach in *Crompton* would apply to different cases, or to formulate confidently precise rules as to when an independent fact-finding tribunal would be required. For example, there is no still no clear guidance on what will constitute a "civil right" within the meaning of Article 6 for members of the armed forces. Therefore, at the outset, Secretary of State regulations will not be made to prescribe the types of matters where there should always be an independent panel as the case law is insufficiently developed. Should case law develop in this area regulations will be made and in our opinion, the absence of regulations at this stage does not render the redress framework Article 6 incompatible.

27. This is because, until such time, the Defence Council's discretion to set up an independent tribunal will not be a broad one; any such decision will be reviewable by the Ombudsman who can then make a recommendation to the Defence Council as to the appointment of an independent person or persons to reconsider the complaint. Should the Defence Council reject a recommendation of this nature, it will be amenable to judicial review. This could lead to a quashing order requiring the Defence Council to retake the decision compatibly with Article 6 and this will ensure that all disputes where Article 6 is engaged will be heard by an independent tribunal. This means the system as a whole is Human Rights Act compatible.

Clause 4 of the Bill

28. Clause 4 creates a power for the Secretary of State to give financial assistance in respect of activities which benefit the armed forces community wherever they might be (and to specify certain conditions in relation thereto) and is included as a consequence of the 1926 PAC Concordat. Therefore it is not considered that this clause raises any Convention issues.

Other provisions

29. It is not considered that any other provision of the Bill raises issues in relation to the Convention or other human rights instruments.

30. It is on this basis that the Bill is considered to be compatible with the Convention, and Ministers were advised that they make a statement of compatibility under section 19 of the Human Rights Act 1998.