

ENTERPRISE BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Enterprise Bill (“the Bill”). The memorandum has been prepared by the Department for Business, Innovation and Skills, with input from other government departments.
2. Baroness Neville-Rolfe DBE, Parliamentary Under-Secretary of State for Business, Innovation and Skills and Minister for Intellectual Property has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
3. This memorandum deals only with those provisions of the Bill which raise ECHR issues.
4. Since the Bill deals with diverse subject areas, each measure which does or may engage a Convention right does so for its own individual reasons. Accordingly, the memorandum addresses each relevant measure individually.
5. The memorandum is ordered to address each Convention right that is relevant in turn, and within each section follows the structure of the Bill.
6. This memorandum reflects the Bill as at its introduction into the House of Lords on 16 September 2015.

Overview of the Bill

7. The Enterprise Bill (“the Bill”) contains provisions to improve the business environment, reduce regulation, expand the primary authority scheme, promote apprenticeships and improve workforce skills, and cap exit payments for public sector workers.

8. Part 1 of the Bill (The Small Business Commissioner) creates a statutory office holder, the Small Business Commissioner (the “Commissioner”), who will have functions of: giving general advice and information to small businesses, considering complaints brought by small business suppliers against larger businesses concerning payment issues, and making reports and recommendations to government.
9. Part 2 (Regulators) contains provisions requiring regulators to report on their compliance with the Regulators Code and the Growth Duty, and extending the Business Impact Target.
10. Part 3 (Primary Authority) makes provision for the extension of the existing “Primary Authority Scheme” under Part 2 of the Regulatory Enforcement and Sanctions Act 2009 (co-ordination of regulatory enforcement).
11. Part 4 (Apprenticeships) contains provisions that are intended to promote and support the government’s policy of expanding approved apprenticeships to improve the skills of the workforce and provide vocational training attracting the same high regard as a university education.
12. Part 5 (Late payment of insurance claims) makes amendments to the Insurance Act 2015 that imply into contracts of insurance provision to the effect that, if the insured makes a claim under the contract of insurance, the insurer must pay any sums due within a reasonable time.
13. Part 6 (Non-domestic rating) makes changes to the non-domestic rating system that enable the Valuation Office Agency to share HMRC data with local authorities who operate the rating system, their contractors, the Secretary of State and other prescribed persons, and to appeals in England relating to non-domestic rating.
14. Part 7 (Industrial development) amends the Industrial Development Act 1982 to increase the maximum level of the financial support government can give projects under that Act.
15. Part 8 (Public sector employment: restrictions on exit payments) provides a power to make regulations capping the total costs of ‘exit payments’ made to public sector employees or post holders as a consequence of them leaving that employment or post.
16. Part 9 (Final provisions) contains general and supplementary provisions.

Key ECHR Issues

17. The table below shows where ECHR issues are discussed in relation to each clause. It does not indicate that the article is engaged.

Measures	Art 6	Art 8	Art 10	A1P1	Art 14
Part 1 (The Small Business Commissioner)	•	•		•	
Clause 19 (Only statutory apprenticeships to be described as apprenticeships)	•		•		
Part 5 (Late payment of insurance claims)				•	
Clause 22 (Disclosure of HMRC information in connection with non-domestic rating)	•	•			
Clause 23 (Alteration of non-domestic rating lists)	•				
Clause 26 (Restriction on public sector exit payments)				•	•

Article 6: Right to a fair trial

Clauses 4 to 8 – Commissioner (complaints function)

18. The Commissioner is given functions concerning dispute and complaint resolution with respect to payment issues between small business suppliers and larger business customers.

Interference

19. The Department does not consider that Article 6 is engaged by the provisions of Part 1. These paragraphs are included by way of explanation.

20. The Department considers that the Commissioner's functions concerning complaints handling do not amount to a determination of civil rights or obligations. The Bill expressly provides that the Commissioner's determinations are not legally binding. Following the reasoning in *Whyte and Mackay Ltd v Blyth & Blyth*

Consulting Engineers Ltd [2013] ScotsCS CSOH 54 Article 6 does not apply because the Commissioner's functions do not provide final determination. The Bill further provides that the Commissioner cannot consider a complaint if it is the subject matter of court proceedings. Finally, through the complaints handling function the Commissioner will provide his/her opinion on the complaint, which may include recommendations as to how a complaint may be resolved. The complaints handling function is therefore a tool for assisting with dispute resolution but does not definitively decide parties' rights or obligations.

21. Nevertheless, the Department considers the spirit of Article 6 is complied with in respect of the Commissioner's functions. The Bill requires the Commissioner to make arrangements to address conflicts of interest, in order to protect the independence of the Commissioner from the businesses which may bring, or be the subject of, complaints. The Bill provides that the Commissioner must give parties the opportunity to make representations before making a decision on a complaint and must make its decision by reference to what is fair and reasonable in the circumstances. The Commissioner must also give a respondent an opportunity to make representations if the Commissioner proposes to publish a report about, or which would identify, the respondent. A small or larger business may challenge a decision of the Commissioner by way of judicial review.

Assessed to be compatible with the ECHR?

22. Yes

Clause 19 – Only statutory apprenticeships to be described as apprenticeships

23. This clause provides for a strict liability criminal offence for a person to provide or offer a course or training as an apprenticeship if it is not a statutory apprenticeship. Similarly, the offence includes describing a person who undertakes such a course or training as an apprentice.

Interference

24. Article 6 is engaged by these provisions, as there is an established presumption that intent to commit an offence is required for an offence to be committed.
25. It is well established that a strict liability offence does not necessarily amount to a violation of the principles of Article 6(2) (see e.g. *Barnfather v Islington Education Authority* [2003] 1 W.L.R. 2318 QBD, DC.) There is, though, a presumption that

intent to commit an offence is required. The more serious the offence, the greater the weight to be attached to the presumption, and conversely, the less serious the offence, the less weight to be attached (*R v Muhamad* [2003] 2 W.L.R. 1050, 1054 per Dyson L.J.).

26. In this case a strict liability offence is justified and appropriate because: (1) it is not a serious offence (summary only, maximum penalty is a fine); (2) the offence is regulatory in nature and will have less stigma attached than a serious criminal offence would; (3) the offence seeks to address an issue of social concern, namely ensuring that a low quality course or training is not presented as apprenticeship training, and therefore a strict liability offence promotes the purpose by encouraging potential offenders to take extra precautions against committing the prohibited act.
27. The offence is carefully targeted so as not to apply to employers in relation to their employees. There are also additional safeguards for officers of corporate bodies who can only commit the offence if the action of the body corporate is done with their consent or connivance or is as a result of their neglect.

Assessed to be compatible with the ECHR?

28. Yes

Clause 22 – Disclosure of Revenue and Customs information in connection with non-domestic rating

29. This clause inserts section 63B into the Local Government Finance Act 1988 which provides for a criminal offence for the wrongful disclosure of revenue and customs information relating to a person whose identity is specified in or can be deduced from the disclosure.

Interference

30. Article 6(2) provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law”. Although Article 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse burdens of proof, but states are required to confine them within reasonable limits¹. Domestic case law has confirmed that the European Convention on Human Rights does not prohibit presumptions of fact or law but requires that they are kept within

¹ *Salabiaku v France* (1988) 13 EHRR 379 (at para 28).

reasonable limits and are not arbitrary and that the government is entitled to pass laws defining criminal offences excluding *mens rea* requirements but these must be justified, reasonable and proportionate². Section 63B provides a statutory defence whereby the defendant can prove that he or she reasonably believed that disclosure of information was lawful or it was information that had already been lawfully disclosed. This mirrors the defence to other similar offences such as that in section 19 of the Commissioners for Revenue and Customs Act 2005. .

31. DCLG considers the provision to be compatible with Article 6(2). The prosecution must prove the essential part of the offence, namely a disclosure in breach of section 63B(1) and (2). DCLG also considers that it is proportionate and reasonable, especially given the legitimate objective of protecting taxpayer information from unlawful disclosure, to impose the burden of proof on the defendant to establish whether or not he or she reasonably believed that it was lawful to disclose the information or that it had already lawfully been made public since these are matters falling entirely within the knowledge of the defendant that it would be difficult for the prosecution to prove and the defendant is much better placed to prove these matters on the balance of probabilities than the prosecution is to prove them beyond reasonable doubt.

Assessed to be compatible with the ECHR?

32. Yes.

Clause 23 – Alteration of non-domestic rating lists

33. The non-domestic rates appeals provisions extend the scope of the enabling powers allowing the Secretary of State to make provision about appeals against the Valuation Office Agency's valuation of the rateable value (an element for calculating a ratepayer's liability for the tax) of an individual's property. The amendments will enable the Secretary of State to reform the appeal process in regulations.
34. Article 6 is not engaged because of the distinction that is made in relation to Article 6 between criminal and civil matters and the determination of whether a matter arising between the state and a private person is indeed of a civil character. The ECtHR held in *Ferrazzini v Italy* ((2001) 34 EHRR 1068) that disputes arising out of the obligation to pay taxes to the state are not determinative of a person's civil

² See *Sheldrake v DPP* [2004] UKHL 43.

obligations because of the public law nature of paying taxes. The ECtHR in their judgment (see para 29) discuss the position of tax in its wider context and “observes that A1P1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes. Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations...”. As such as the law currently stands business rates, as a form of tax would not be caught by Art 6.

35. There is a further potential Article 6 point in relation to the penalty provision being introduced. It is important to note that criminal sanctions, even those in the field of taxation would be caught by Art 6. However, since the penalty which is to be introduced is civil, this aspect of the new provisions equally does not engage Art 6.

Assessed to be compatible with the ECHR?

36. Yes

Article 8: Right to private and family life

Clauses 6 and 9 – Commissioner (reports on complaints and annual report)

37. Clauses 4 to 8 address the Commissioner’s complaints handling function. Clause 6 provides that where the Commissioner considers a complaint, the Commissioner may publish a report of the complaint, and may name the respondent in the report.
38. Clause 9 provides that the Commissioner must publish an annual report in respect of its work for the year. This would cover high level information rather than detailed reporting of individual cases, but could include the identity of a party or other aspects of a complaint if this did not breach the confidentiality restriction under clause 8, for example if already published.

Interference

39. To the extent that publication of reports may affect a respondent business’s reputation, or the reputation of an individual within that business, this may engage Article 8(1) and may potentially amount to an interference with private life³. The Bill provides that the Commissioner must give the respondent party a reasonable opportunity to make representations before publishing a report about them or which

³ In *Niemietz v Germany* [1993] 16 EHRR 97 37, the ECHR held that “private life” can include professional or business activities.

identifies them. The Bill also requires scheme regulations to set out factors to be considered when deciding whether to publish a report identifying the respondent. The Department considers these factors mitigate the extent of the interference.

40. The Bill provides that a report of a complaint may only identify the small business complainant where the complainant consents. Publishing a decision concerning, or which names, a small business may include personal information, particularly in relation to sole traders. The Department therefore considers that these provisions are likely to engage and could potentially interfere with the rights protected by Article 8(1), to the extent they provide for the publication of that personal data. However, the Department considers the extent of interference to be limited because the small business would have consented to being identified.

41. Article 8 is a qualified right and therefore any interference may be justified.

Justification

42. The Department considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country.

43. Small businesses are responsible for 48% of UK private sector employment. They are responsible for around a third of private sector turnover. However, there is often a power imbalance between small business suppliers and larger business which contract for the products supplied by small businesses. The Department has commissioned survey research and consulted on the proposals⁴ and one of the major problems affecting small businesses and their ability to grow and thrive is certain payment practices undertaken by larger businesses.

44. The Commissioner is intended to encourage payment of suppliers on time and greater transparency for small businesses as to the effect of payment terms and arrangements; and to discourage payment practices which may be particularly detrimental in some circumstances.

45. Reporting on, and identifying, parties publicly is likely to make the respondent party (the larger business) improve its payment performance in respect of small businesses. A further purpose of publishing decisions and naming parties to

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450695/BIS-15-438-a-small-business-commissioner.pdf

complaints is to highlight businesses which have conducted particularly detrimental payment practices in the past, in order that other businesses who may engage in similar practices will change their behaviour. This in turn will enable both smaller and larger businesses to expand and thrive.

46. Naming parties in appropriate cases also enables other businesses which may deal with the named party to be alert to its payment practices, and can also provide greater context and clarity for the Commissioner's decisions which will relate to matters of public interest.

Assessed to be compatible with the ECHR?

47. Yes

Clause 22 – Disclosure of Revenue and Customs information in connection with non-domestic rating

48. This clause inserts section 63A into the Local Government Finance Act 1988 which provides for a power for the Valuation Office Agency to disclose information held in connection with its functions to qualifying persons for qualifying purposes. The qualifying persons are billing authorities, major precepting authorities, persons authorised by authorities to exercise functions relating to non-domestic rating, persons providing services relating to non-domestic rating to authorities, the Secretary of State or Welsh Ministers, but only in connection with their central non-domestic rating list functions, and other prescribed persons. The qualifying purposes are enabling or assisting a qualifying person with their non-domestic rating functions under Part 3 of the Local Government Finance Act 1988, enabling or assisting the Secretary of State or Welsh Ministers with functions relating to the central non-domestic rating list or other prescribed purposes.

Interference

49. There may potentially be an interference with Article 8 where information provided by the Valuation Office Agency to qualifying persons includes the personal data of non-domestic ratepayers, for example the names and addresses of ratepayers.

Justification

50. DCLG's view is that to the extent that there is any potential for interference with Article 8, it is justifiable under Article 8(2) on the basis that it is necessary and

proportionate in the interests of the economic well-being of the country. The powers are based on well-established precedents for the circumstances in which information held by Her Majesty's Revenue and Customs may be shared with other bodies performing public functions⁵. Firstly, any disclosures would be in accordance with the law as sections 63A and 63B of the Local Government Finance Act 1988 will provide the statutory underpinning for the supply of information only in the circumstances specified in those provisions. Secondly, information may only be disclosed for the legitimate purpose of enabling or assisting the recipient to discharge functions relating to non-domestic rating such as the proper, efficient, cost effective collection and enforcement of non-domestic rates and the determination of public revenues for local government. Further the legislation is permissive, so the Valuation Office Agency, which is itself a public authority, will not be obliged to disclose information if there would be a breach of Article 8. Generally the data shared by the Valuation Office Agency would consist of aggregate non-identifying information and only in rare circumstances would it include identifying information. Identifying information would only be disclosed where it was considered by the Valuation Office Agency that it would be necessary and proportionate to the purpose for the disclosure to share personal information and only the minimum personal information would be shared. The interference will be proportionate as the information may only be disclosed, used and stored for purposes relating to non-domestic rating. In *MS v Sweden*⁶ the European Court of Human Rights took account of the legislative limitations applicable to a measure that allowed personal information to be shared in determining that the measure was proportionate. The new sections 63A and 63B provide that disclosure is to be subject to safeguards, for instance, restricting the circumstances in which information may be subject to onward disclosure and it shall be a criminal offence to disclose identifiable personal data other than in accordance with this provision.

51. In addition, where the Valuation Office Agency in disclosing personal information and the recipient in using the information are processing personal data within the meaning of the Data Protection Act 1998, they will need to ensure that such processing is fair and lawful and compliant with the data protection principles set out in the Act. For example, information must be accurate, stored securely and not kept for longer than necessary. The protections enshrined by the Data Protection

⁵ For example under sections 18 and 19 of the Commissioners for Revenue and Customs Act 2005; paragraphs 15A and 15B of Schedule 2 to the Local Government Finance Act 1992.

⁶ 28 EHRR 313.

Act 1998 are underpinned by section 6 of the Human Rights Act 1998, which requires public bodies to exercise their functions compatibly with Article 8 of the ECHR.

Assessed to be compatible with the ECHR?

52. Yes

Article 10: Right to freedom of expression

Clause 19 – Only statutory apprenticeships to be described as apprenticeships

53. This clause prohibits a person from providing or offering a course or training as an apprenticeship if it is not a statutory apprenticeship.

Interference

54. It is considered that Article 10 does not apply, since statements describing a course or training as apprenticeships if they are not statutory apprenticeships will be false, and Article 10 does not protect the right to publish false statements. If an argument is made that Article 10 is engaged – for example by restricting the freedom of a person who wishes to hold the opinion and impart the idea, in the course of business, that a training programme is related to an apprenticeship even though it is not related to a statutory apprenticeship – the following justification will apply to ensure that any interference is justified and proportionate by reference to a legitimate aim.

Justification

55. That, if (contrary to our primary case) Article 10 is engaged, interference is justified under Article 10(2) on the basis that the legislation is necessary in a democratic society for the protection of the reputation or rights of others and is a proportionate means to achieve that aim. The measure ensures that learners and employers are not misled into paying for and joining schemes, thinking that they are or are of the same standard as training suitable for a statutory apprenticeships, where that is not so. The measure protects the reputation and economic rights of training providers by ensuring that all apprenticeship training they offer is of the standard required by a statutory apprenticeship and will not be confused with poorer quality training which does not meet the necessary standard. The restriction also protects the reputation of employers who offer statutory apprenticeships and apprentices who join those apprenticeships, by maintaining their standards and ensuring that

statutory apprenticeships are not confused with lower quality training. It also ensures a “level playing field” and fairness in the market to the benefit of training providers, employers and individuals.

Assessed to be compatible with the ECHR?

56. Yes

Article 14: Prohibition of discrimination

Clause 26 – Restriction on public sector exit payments

57. The clause relating to public sector exit payments allows the Government to legislate so as to provide a “cap” on the maximum payment which can be made to an individual public sector worker/office holder on leaving public sector employment. The “exit payments” which will be subject to the cap will be prescribed by regulation but may include redundancy payments, voluntary exit payments, payments made to buy out actuarial reductions in pensions, and a range of other related kinds of payment. Exit payments in the public sector can be very high, both by comparison with legally required minima, and by comparison with the private sector, and there are also wide-ranging variations between different types of public sector worker. The objectives of the cap are to promote fairness, and value for money, in light of these concerns.

58. As regards Article 14, the cap will likely impact in particular on two groups of people: high earners and those with longest continuous service. In the application of the cap to older workers and to pension “top-up” payments (made by some employers to buy out the reduction in the pension of a person retiring before normal pension age, enabling them to take an immediate unreduced pension), there is an impact on those close to retirement who statistically are less likely than others to find new employment. Full-time workers are likely to lose a higher proportion of their possible pay-out, as a result of the cap, than part-time workers who may have the same length of service but lower overall pay. To the extent that women are more likely to work part-time than men, there is a greater chance of male workers being affected by the cap and receiving less on their departure than they would without it.

Interference

59. On balance, it is considered that the provision does not discriminate on the grounds of age or gender, even though the groups who currently qualify for the highest exit payments in the public sector are most likely to be caught by the

provision and to lose proportionately more of what they could have expected in the absence of a cap.

Justification

60. If, however, there is any discrimination, this is considered justifiable on the same basis as is set out below in relation to Article 1 of the First Protocol. In relation to the standard of justification, the Supreme Court has adopted the “manifestly without reasonable foundation” requirement in the context of social security benefits (see *Humphreys v HMRC* [2012] 1 WLR 1545), and that has been applied also in the pensions context: *Ratcliffe v SSD* [2009] EWCA Civ 39. The issues lie in the area of macro-economic and fiscal decision making, on which the court is ill-equipped to judge. In those circumstances it seems likely that discrimination on grounds of age can be justified on the same basis as any interference with property rights. It may be noted that the issue under Article 14 is not identical to that under Article 1 of the First Protocol, since under Article 14 it is the discriminatory effect of the measure, rather than its overall effect, which must be justified, but in practice that is unlikely to make a difference in this context, since the justification for the measure is that large payments do not offer value for money and are unfair. In so far as older employees are more likely to receive such payments, therefore, it is difficult to see how the aims of the cap could be achieved without a greater impact on such persons.
61. It is possible that a status might be found in other characteristics, such as length of service in the public sector, but the same arguments on justification are likely to be relevant as to age. It seems likely that the impact of the cap on women will be less than on men, on the basis that women are generally more likely to be in part-time work and / or have lower pay. However, bearing in mind the historical advantages enjoyed by men in the labour market and that the justification for the cap is in part the promotion of fairness and value for money, the Government considers that any greater impact on men compared with women would be capable of justification.

Assessed to be compatible with the ECHR?

62. Yes

Article 1 of the First Protocol: freedom to enjoy property (“A1 P1”)

Clauses 4 to 7 – Commissioner (complaints handling including publication of reports)

63. Through its complaints handling function, the Commissioner will be able to consider complaints about payment issues including contractual terms agreed

between the parties, such as terms requiring small business suppliers to give discounts for matters such as paying on time, or requiring payments from small businesses for matters such as remaining on a supplier list. The Commissioner's consideration of these payments could be considered to affect contracting parties' obligation to make, or right to receive, payments or discounts; or their contractual freedom to agree to certain payment terms. A1 P1 protects against interferences with the peaceful enjoyment of possessions by the State; and "possessions" is interpreted broadly, and includes contractual rights. For these reasons, the complaints handling function could be considered to engage A1 P1.

64. However, the Commissioner's complaints handling function will not apply to a complaint about an act or omission which occurred before the Commissioner was established, nor about an act or omission which is allowed by a contractual term agreed before the Commissioner was established. Therefore, in many cases, the function will not affect existing contractual rights of small or larger businesses, so it will not engage A1 P1.
65. Further, the Commissioner will only be able to consider information provided by the parties and then decide and make recommendations as to how a complaint may be resolved, taking account of the particular context and circumstances. The decisions and recommendations will not have any binding effect and the parties are not bound to follow any recommendation made by the Commissioner.

Assessed to be compatible with the ECHR?

66. Yes

Clause 26 – Late payment of insurance claims

67. This clause introduces into every contract of insurance an implied obligation on the insurer to pay sums due within a reasonable time, breach of which obligation will give rise to the usual remedies for breach of contract, including damages.
68. The clause gives guidance as to factors which may be relevant when determining what constitutes a "reasonable time" for payment. An insurer who makes a reasonable but ultimately wrong decision to refuse or challenge a valid claim is not liable for late payment damages without other evidence of unreasonableness.

Interference

69. It might be argued that the Bill engages A1 P1 in respect of the property of the insurer because it has the potential to impact upon claims against insurance companies' capital reserves. Such reserves are likely to be regarded as a "possession" for the purposes of that Article, as may be the contractual right to resist any such claim. The contractual right of the insurer to include certain terms in an insurance policy may also be argued to be a possession. As to the policyholder, a well-founded insurance claim (and also the contractual right to such a claim) for late payment might be regarded as a possession.
70. However, A1 P1 confers no right to acquire property, and the expectation of future property is not a possession (although A1 P1 can include a legitimate expectation of obtaining effective enjoyment of property⁷). As the measure applies only to insurance contracts entered into after the measure comes into force, it will not affect existing contractual rights of insurers or policyholders. HM Treasury's primary position therefore is that A1 P1 is not engaged by the provisions.
71. Further and in the alternative, the measure merely modifies, expands or delimits a policyholder's claim against the insurer's reserves; it does not therefore affect property rights in any way that is sufficiently substantive to amount to control or interference with property rights. However, even if it is considered that A1 P1 is engaged on the basis that the measure controls or interferes with the claims of policyholders and the property reserves of insurers, HM Treasury considers that such interference is justified in the public or general interest (in the interests of the economic well-being of the country), and meets the requirements of necessity and proportionality. The measure brings the law of insurance contracts into line with general contract law. Any remedies are limited to generally available contractual remedies and, in particular, and damages payable by the insurer will be limited by the usual common law requirements that the loss was caused by the breach of the obligation, the loss was foreseeable and the policyholder has taken steps to mitigate that loss. Accordingly, to the extent that the measure interferes with property rights, it does so in ways that are measured, proportionate and carefully considered.

Assessed to be compatible with the ECHR?

72. Yes

⁷ See, for example, *Kopecky v Slovakia* (App no 44912/98) [2003] ECHR 44912/98, where it was held that, for the purposes of art 1 of the First Protocol, possessions included assets or claims in respect of which the applicant could argue that he had at least a legitimate expectation of obtaining effective enjoyment of a property right.

Clause 33 – Restriction on public sector exit payments

73. This clause (discussed above at paragraph 56 to 61) will provide a power to make regulations capping the total costs of ‘exit payments’ made to public sector employees or post holders as a consequence of them leaving that employment or post at an initial maximum of £95,000 irrespective of the amount that an individual would expect or would be entitled to if there was no cap.
74. It is arguable that removing a contractual right to an exit payment in the event of a redundancy, or an established right to an exit payment under a statutory scheme, engages A1 P1. A1 P1 will be engaged if the right to receive an exit payment in excess of a cap is a ‘possession’ within the meaning of that Article.
75. An entitlement to receive an exit payment under a statutory scheme or a contract is a right to acquire property in the future that is contingent on an individual being made redundant, and therefore there is a good argument to suggest that they should not be considered a ‘possession’ within the meaning of A1 P1. However, given the wide range of different exit payment arrangements across the public sector it is possible that some aspects of the provisions may be found to give rise to issues under A1 P1.
76. It should also be noted that the right to receive an exit payment under the Civil Service Compensation Scheme was found by the Courts to amount to a ‘possession’ within the meaning of A1 P1 (*R (Public and Commercial Services Union) v Minister for the Civil Service (No 2)* [2011] EWHC 20141 (Admin)). However, that case was considering the Civil Service Compensation Scheme prior to an amendment to s2(3) of the Superannuation Act 1972 which removed the requirement that any amendment to the scheme required the consent of those who would be affected by that change. The statutory schemes for civil servants, NHS staff, teachers, firefighters and local government workers no longer contain such a requirement for consent (although there may be smaller schemes in the wider public sector that do contain such a requirement) and there is a good argument to say that the Court’s decision in that case can be distinguished by virtue of the removal of the requirement for those affected by changes to consent to those changes.

Interference

77. If a right to an exit payment in excess of the cap is a 'possession' within the meaning of Article 1 Protocol 1 then it is accepted that the provisions interfere with the peaceful enjoyment of that possession by limiting the exit payment to the value of the cap.

Justification

78. HMT considers that the interference, if present, is justified as necessary and proportionate in the public interest. The current exit arrangements, where exit payments can exceed £95,000, do not deliver value for money and may be inconsistent with wider reforms to public sector remuneration and conditions. As well as providing a saving to the public purse, the provisions ensure:

- Fairness: Current arrangements vary between public sector workforces and can be more generous than private sector equivalents and can lead to excessive payments in individual circumstances; and
- Value for money: Current arrangements enable payments over and above what is required to meet legally required minima or to incentivise voluntary redundancy, or are unreasonable with regard to wider remuneration, and as a result offer poor value for money.

Assessed to be compatible with the ECHR?

79. Yes

BIS

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