



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Evidence to the Committee for Finance and Personnel on the Damages (Asbestos-Related Conditions) Bill**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including advising on whether a Bill is compatible with human rights.<sup>1</sup>

### **Background**

1. The Assembly Committee for Finance and Personnel has requested the Commission's views in relation to the compatibility of the Damages (Asbestos-Related Conditions) Bill with the European Convention on Human Rights (ECHR).<sup>2</sup> The Committee has provided the Commission with copies of the Department of Finance and Personnel analysis of consultation responses on a draft of the Bill along with correspondence and a written submission from the Association of British Insurers (ABI), containing representations querying the ECHR compatibility of the Bill.<sup>3</sup> This advice will focus specifically on addressing these matters.
2. The purpose of the Bill is to legislate to allow an asbestos-related condition (symptomless pleural plaques) to be considered a personal injury for the purposes of allowing compensation claims against employers. In relation to a

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<sup>1</sup> Northern Ireland Act 1998 s.69(4).

<sup>2</sup> Correspondence of Chairperson, Jennifer McCann MLA to Chief Commissioner, Prof. Monica McWilliams, 14 January 2011.

<sup>3</sup> Analysis of Responses to the Consultation on the Draft Damages (Asbestos – related) Conditions Bill 2010, Department of Finance and Personnel, 2010; Correspondence to Committee Chairperson from Director of General Insurance and Health, ABI-10 January 2011; Written Evidence from the Association of British Insurers to the Damages (Asbestos-related Conditions) Bill 2010, ABI, 13 January 2011.

number of English test cases the House of Lords, in 2007, interpreted the law as not providing for such claims.<sup>4</sup> This Bill is intended to remove the legal barrier to claims.

3. For a Bill to be within the legislative competence of the Assembly it must be compatible with the ECHR.<sup>5</sup> The Minister has stated the Bill is within the legislative competence of the Assembly and indicated that he may have sought the views of the Attorney General and Departmental Solicitors Office in arriving at that view.<sup>6</sup> The Bill mirrors legislation which was introduced (with a similar requirement of ECHR compatibility) and progressed through the Scottish Parliament to become law on 17 June 2009.<sup>7</sup> The Scottish legislation was subsequently subject to a failed legal challenge by insurance companies. This judicial review also dealt with the compatibility of the legislation with the ECHR.<sup>8</sup> The insurance companies have lodged an appeal.

### **Representations by insurers**

4. The principal challenge set out by insurers' representatives to ECHR compatibility relates to the 'right to property' provided for in Article 1 Protocol 1.<sup>9</sup>
5. Attention is drawn to the retrospective impact of the Bill in the AIB submission. It is worth highlighting that there is no absolute prohibition on any retrospective legislation within the ECHR. Article 7 provides that no one should be held guilty of a *criminal offence* which was not an offence at the time it was committed, and is therefore not relevant to civil claims.<sup>10</sup> The

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<sup>4</sup> *Johnston v NEI International Combustion Ltd* [2007] UKHL 39 <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns.pdf> [accessed 21 January 2011] (also referred as the Rothwell decision).

<sup>5</sup> Northern Ireland Act 1998 s.6(2)(c).

<sup>6</sup> The Damages (Asbestos-Related Conditions) Bill: Explanatory Notes and Financial Memorandum, paragraph 22; Hansard 17 January 2011, Minister for Finance and Personnel, Sammy Wilson MLA, Second Stage, 5.30pm.

<sup>7</sup> The Damages (Asbestos-related Conditions) (Scotland) Act 2009.

<sup>8</sup> *AXA General Insurance Ltd and Others*, Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 [2010] CSOH 2 <http://www.scotcourts.gov.uk/opinions/2010CSOH02.html>.

<sup>9</sup> The 10 January 2011 correspondence to the Committee from the Association of British Insurers argues that the Bill "may breach Articles 1 and 4" of the ECHR. Article 1 is an introductory Article and Article 4 deals with prohibition of slavery, hence there is no relevance to the matter at hand. This assertion may therefore indicate a misunderstanding of the ECHR, may simply be a typographical error, or may have intended make some reference to section 1 (ECHR rights) and section 4 (on declarations of incompatibility of legislation) of the Human Rights Act 1998.

<sup>10</sup> This does not include matters considered an offence under international law (treaties, war crimes etc.) in the absence of domestic accountability.

retrospective element can be considered however among other matters in assessing whether any impact on property rights under Article 1 Protocol 1 is proportionate.

6. The ABI submission also argues that the Bill may breach rights to a fair trial protected under ECHR Article 6, in that, by

...introducing legislation that overrules a judgment that has progressed through the legal system and has been finally decided in the highest UK court, the Northern Ireland Executive would arguably be removing employers' and insurers' rights to have a decision impacting their business decided finally by an independent and impartial tribunal.<sup>11</sup>

7. In certain circumstances the European Court of Human Rights has held that Article 6 would protect against a direct intervention by the legislature in the administration of justice which would prejudice the judicial determination of a case, unless there was a compelling ground of general interest for the legislature to do so. This in itself does not debar the legislature from ever introducing new legislation to change general policy in the future (providing the legislation itself is ECHR compatible):

The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.<sup>12</sup>

8. The 2007 House of Lords judgment interpreted English law as it stood, and provided a determination of the specific cases at issue. To demonstrate an Article 6 interference in this judgment, insurers would have to demonstrate a specific engagement with their civil rights and obligations in relation to an ongoing case to which they were party.

### **Protection of property: ECHR Article 1 Protocol 1**

9. Most of the ABI arguments focus on whether the Bill will constitute a violation of their right to the peaceful enjoyment

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<sup>11</sup> Paragraph 2.4, AIB Written Evidence 13 January 2011.

<sup>12</sup> *Zielinski and Pradal & González and Others v France* (app. nos. 24846/94; 34165/96; 34173/96) 2001 31 EHRR 19 paragraph 57.

of possessions protected under Article 1 of Protocol 1 of the ECHR (often termed the 'right to property'). This reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

10. Human rights provisions often only protect individuals but the above provision explicitly includes 'legal persons' and hence includes companies. The right to property is not absolute and, as is apparent in the text, the restrictions permitted are broad in scope. In order for a violation to be found it would first be necessary to establish whether the matter in question constitutes "possessions". It would then need to be determined whether the state action constituted interference in the "possessions" (amounting to "deprivation", "control" or otherwise). Finally it would be necessary to consider if this interference was permitted under the Article. These stages are dealt with in turn below.

### **Nature of "possessions"**

11. The term "possessions" in the Article refers not only to physical objects (e.g. land, buildings, primary materials) but also certain other rights and interests constituting assets.<sup>13</sup> Insurance companies can argue that the resources which they would potentially have to surrender to meet successful claims constitute "possessions" for the purposes of the Article.<sup>14</sup>

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<sup>13</sup> See *Gasus Sosier- und Fördertechnik GmbH v the Netherlands* (app no. 15375/89) judgement of 23 February 1995; *Gratzinger and Gratzingerova v Czech Republic* (app. No. 39794/98) admissibility decision of 10 July 2002.

<sup>14</sup> More tenuous and difficult to establish however would be an argument that an effective 'immunity' from claims constitutes a ring fenced "possession" in its own right. This was unsuccessfully argued in the Judicial Review in Scotland. There are a number of cases relating to legal claims to monies that have been awarded or of which there is a 'legitimate expectation' (see for example *Ryabykh v Russia* (App. No. 52854/99) judgment of 24 July 2003). The consideration of awards resulting from legal claims (or legitimate expectations thereof) does not in itself mean that a theoretical 'immunity' from a particular type of claim by an insurer should or would be treated in the same way in relation to ECHR compliance.

## Nature of “interference”

12. The second question is whether there has been a “deprivation”, “control” or other interference in the possessions under the terms of the Article.<sup>15</sup>
13. “Deprivations” of property can be characterised as the extinction of the property rights of the owner through for example the expropriation or destruction of property. ECHR case law has characterised deprivation as when the state ‘lays hands’ on property - or allows a third party to do so.<sup>16</sup> Consideration can be given to a *de facto* expropriation having taken place (in the absence of an explicit transfer of ownership). But for this there should be an extinction of property rights, rather than just an adverse impact.<sup>17</sup> Deprivations of property are permitted provided that they are adequately set out in law and fall within, and are proportionate to, a legitimate public interest. It is usually expected that compensation should be paid for deprivations as part of the assessment of the proportionality of the intervention.
14. The types of measures held to constitute “control” (rather than a deprivation) of property have encompassed a broad range of matters including rent controls, the temporary seizure of property in criminal and customs proceedings, limitations on fishing rights, planning controls, prohibition of construction, obliging landowners to allow others to hunt on their land, policy postponing the enforcement of evictions of tenants in private housing, and refusals to provide

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<sup>15</sup> The Court has consistently set out as three rules in relation to the test it applied for engagement of the right to peacefully enjoy possessions: “[Article 1 of Protocol No. 1] comprises three distinct rules. The first rule, which is of a general nature, [enunciates] the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.” This was originally set out in *Sporrong and Lönnroth v Sweden* case A52 (1982) (paragraph 61) and has reappeared in subsequent jurisprudence.

<sup>16</sup> See *Bramelid and Malmström v Sweden* (1982) 29 DR 76, page 82.

<sup>17</sup> For example in *Papamichalopoulos v Greece* where a *de facto* deprivation was found when the Navy took over land without any formal transfer of ownership (judgment of 24 June 1993, EHRR 440). By contrast *Mellacher v Austria* (judgment of 19 December 1989, 12 EHRR 391 (para. 44), relating to rent controls); and *Bramelid and Malmström v Sweden* (1982) (App. Nos. 8588/79 and 8589/79; minority shareholders obliged to sell to majority shareholders at fixed price) no deprivation was found.

professional accreditation. Controlling property is set out as a right that a state has, provided it is done so in accordance with law and in the general interest.<sup>18</sup>

15. In any challenge to the present Bill the question would need to be addressed as to whether it constitutes any interference in the property rights of insurers. Notably no assets of insurers will automatically be directly transferred to affected persons as a result of the Bill. Rather, the law would allow affected persons to bring claims for negligence against former employers, and such actions must be successfully pursued; only then might they impact on insurers. It would appear from this that it would be difficult to establish that a 'deprivation' of property would directly result from a measure that merely opens the way for a claim to be made, subject to judicial determination. It is therefore more likely that any challenge to the Bill may focus on whether the legislation constitutes a "control" (or other interference) in the insurers' property rights. In the Scottish Judicial Review it was held, among other matters, that the potential impact of the legislation on insurers' resources was too remote a link to constitute any interference in property rights.

### **Permitted interference in the right to property**

16. Should a court determine that there has been 'control' or some other interference in relation to the insurer's or employer's property rights, the focus is then on whether the interference is permitted under the terms of the Article. The state is entitled to legislate to control the use of property provided it is doing so within the general interest. In practice the test for the legitimacy of all categories of interference with property rights is similar; the state must demonstrate that:
  - the interference has a basis in law, and
  - is in the general or public interest, and
  - is proportionate to that interest striking a fair balance with competing needs.
17. The requirement of a basis in law requires any interference not to be arbitrary and to be clearly set out in law. The law

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<sup>18</sup> There has also been a third residual category of 'interference' which neither constitutes control or deprivation but has been considered implicit in the first sentence of the Article that everyone has the right to peaceful enjoyment of possessions. As jurisprudence has developed, in particular that of "control", few cases are considered under this heading. When considering other interferences the same public/general interest and proportionality tests tend to be applied.

itself must be sufficiently precise in order for its consequences to be clear. In the present matter the intervention would be set out in law in the Act itself.

18. The second requirement is that the interference be in the 'general interest' (or 'public interest' in relation to a deprivation). It should be noted that states have generally been granted significant discretion ('a wide margin of appreciation') in respect of the determination of what constitutes the general or public interest. It is usually a matter for states to determine what constitutes a legitimate aim of public policy, unless this determination is 'manifestly without reasonable foundation':

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest"...The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.<sup>19</sup>

19. The third requirement is that of proportionality. This means that the measure must strike a fair balance between the general interest and individual property rights. The state enjoys significant discretion in making this determination, provided that it does not impose on affected parties an individual and excessive burden. In relation to measures which constitute 'control' of property the European Court of Human Rights has stated:

It is well-established case-law that the second paragraph of Article 1 of Protocol No. 1 [relating to 'control' of property] must be construed in the light of the principle laid down in the first sentence of the Article [the right to the peaceful enjoyment of possessions]. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.  
...[T]here must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences

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<sup>19</sup> *James and others v UK* (App. no. 8793/79), judgment of 21 February 1986 8 EHRR 123, paragraph 46.

of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.<sup>20</sup>

20. There are instances of states having legislated in a manner that has a significant financial impact on third parties and it has been held to be legitimate.<sup>21</sup> It is also worth noting that the issue of compensation may arise in a proportionality test in relation to all types of interference, but a presumption for compensation is only made in relation to 'deprivations'.<sup>22</sup> The Court has also considered circumstances where there has been a change in policy or legislation, including where there has been a retrospective impact.<sup>23</sup>

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<sup>20</sup> *Chassagnou and Others v France* (App. nos. 25088/94, 28331/95 and 28443/95), judgment of 29 April 1999 29 EHRR 615, paragraph 75.

<sup>21</sup> See for example the recent decision by the European Court of Human Rights in relation to a challenge to the ban on hunting with dogs in England and Wales. The *Countryside Alliance and others v UK* applicants had argued, among other matters, that the ban interfered with their property rights. The Court, dismissing the challenge as manifestly unfounded, and whilst not conceding that the ban did constitute a 'control' or other interference in property, stated that even if it had been, the ban could be justified as proportionate to the general interest: "...the Court considers it unnecessary to establish the extent to which Article 1 of Protocol No. 1 is engaged in the present case since, even assuming that the ban in England and Wales interfered with the property rights of the second applicants in each of the ways they alleged, it considers that the hunting ban served a legitimate aim and was proportionate for the purpose of that Article. [...] [The Court] also observes that the 2004 Act was preceded by extensive public debate... It was enacted by the House of Commons after equally extensive debate in Parliament where various proposals were considered before an outright ban was accepted. In those circumstances, the Court is unable to accept that the House of Commons was not entitled to legislate as it did." *Countryside Alliance and others v the UK and Friend v the UK* (Applications nos. 27809/08 and 16072/06), admissibility decision of 24 November 2009, paragraphs 55-56.

<sup>22</sup> The *Countryside Alliance v UK* decision dealt with the issue of compensation in relation to 'control' of possessions, reiterating that there is generally no right to compensation in this instance. The Court accepted that "a ban on an activity which is introduced by legislation will inevitably have an adverse financial impact on those whose businesses or jobs are dependent on the prohibited activity" but stated that nevertheless: "...the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made. As stated in *C.E.M. Firearms Limited* 'the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable'. This applies, *a fortiori*, to cases where the interference concerns control of the use of property under the second paragraph of Article 1 rather than deprivation of possessions under the first paragraph of the Article. There is normally an inherent right to compensation in respect of the latter but not the former... The Court does not find the absence of compensation in the 2004 Act to be arbitrary or unreasonable. Nor does it find that, in reaching the judgment it did, the United Kingdom upset the fair balance between the demands of the general interest and the requirements of the protection of the applicants' property rights by imposing on the applicants an individual and excessive burden" (Paragraph 57).

<sup>23</sup> For example the *Pine Valley and others v Ireland* case dealt with the impact of revocation of previously-granted planning permission. The Court, noting that the



21. The Commission hopes that this appraisal of the requirements of Article 1 Protocol 1 is of assistance to the Committee in its considerations of the Bill. The ECHR jurisprudence continues to develop over time, and there has been a considerable number of cases following the accession of Central and Eastern European states to the ECHR. The Commission can provide further information on these matters if that would assist the Committee. Given the complexities in this area of human rights the Committee may wish to seek a detailed legal opinion in relation to the Bill.

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"applicants were engaged on a commercial venture which, by its very nature, involved an element of risk", found no violation of Article 1 Protocol 1 (App. no. 12742/87, judgment of 29 November 1991 14 EHRR 319 paragraph 59). In *Provincial Building Society and others v the UK* the Court upheld retrospective legislation which prevented the exploitation of a tax loophole (resultant from legislation being invalidated in the UK courts due to technicalities). Whilst this was considered an interference amounting to 'control' of property rights, the Court held it to be legitimate and proportionate (App. nos. 117/1996/736/933-935, judgment of 23 October 1997 25 EHRR 127). By contrast in *Lecarpentier v France* the Court found that retrospective changes to the French consumer code which had the impact of obliging the repayment by an individual of a previous court award made before the changes (to a mortgage lender who had appealed the verdict), did constitute a violation of Article 1 Protocol 1. The Court regarded the measure as not having been justified by pressing reasons of general interest and found it to be disproportionate having constituted an "abnormal and excessive burden" on the claimants (App. no 67847/01, judgment of 14 February 2006).