Neutral Citation Number: [2011] EWHC 2041 (QB)

Case No: CO/2014/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2011

Before :

The Honourable Mr. Justice McCOMBE

- -

Between :

Public and Commercial Services Union and others	**Claimants**
- and -	
The Minister for the Civil Service	**Defendant**

- -
- -

Mr Nigel GIFFIN QC & Mr Nick RANDALL (instructed by **Thompsons Solicitors**) for the **Claimant**
Miss Ingrid SIMLER QC & Mr Clive SHELDON QC (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 20th-22nd July 2011

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

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The Honourable Mr. Justice McCombe:

(A) Introduction

1. This is an application for judicial review of a decision by the Defendant of 22 December 2010 whereby he introduced a scheme under section 1 of the Superannuation Act 1972 amending the Civil Service Compensation Scheme ("CSCS"), and thereby reducing the benefits paid to scheme members on redundancy and early retirement. The Claimants also apply for a declaration of incompatibility under the Human Rights Act 1998 and/or a quashing order in respect of certain provisions of the Superannuation Act 2010. The relevant provisions of the 2010 Act which are under attack are those applying a statutory cap to the benefits payable under the CSCS.

2. The CSCS is a statutory scheme made under the 1972 Act, applying to more than 600,000 public servants. The principal features of the scheme, as it existed up to December 2010, date from 1987. The First Claimant is the largest of the Civil Service trade unions. The Second Claimant is the largest trade union representing uniformed grades of prison staff and staff working in the field of secure psychiatric care. The First Claimant has about 270,000 members; the Second Claimant's membership is about 35,000, some of whom are employed in the private sector. The individual Claimants were at the start of the proceedings representative members of the public service, although (as I was told) the Fourth Claimant has left the service since that time.

3. The Claimants allege that the changes to the CSCS effected by the Defendant through the new scheme and by the 2010 Act constitute unlawful interferences by the Defendant and/or by the Act, contrary to the rights of civil servants under Article 1 of Protocol 1 ("*A1P1*") to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). That Article provides:

> "Article 1. Protection of property. 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."

Further, it is argued that the new arrangements unlawfully breached the legitimate expectations of civil servants under domestic law. In addition, it is said that the steps taken constitute a breach of Article 11 of the ECHR ("Freedom of Assembly and Association") by the annulment of arrangements made under a collective bargaining agreement with trade unions. Finally, it is said the new arrangements are *ultra vires* the statutory powers in the 2010 Act because they make non-consensual changes to benefits which are not "compensation benefits" within the meaning of that expression as defined by the Act.

(B) The Old Scheme and the New Scheme Compared

4. For this purpose it is necessary to understand that the Principal Civil Service Pension Scheme ("PCSPS"), from which CSCS was hived off in 1994, has three separate sections called respectively the "classic", "premium" and "nuvos" sections making provision in differing ways for different classes of civil servants depending upon an individual's entry date into the service. With this in mind the Old Scheme can be summarised as follows, as set out in the Defendant's skeleton argument:

(i) The Old Scheme terms provided power for government employers to make payments on:

a. Early termination of contract of permanent staff (sections 2, 2A, 3, 3A, 4 and 7)
b. Early termination of contract of fixed-term workers (section 8)
c. Compensation in lieu of notice (section 9)
d. Personal injury (section 10)
e. Dismissal for inefficiency - poor performance or poor attendance (section 11).

(ii) Under rule 1.4 of the scheme, benefits under all these sections were expressly described as discretionary save for compensation in lieu of notice and payments made under rule 1.14. Rule 1.14 provided an underpin for compensation benefits so that redundancy payments could not be less than the statutory scheme would require. These payments were not covered by the discretion of rule 1.4.

(iii) Sections 2 and 2A set out benefits payable under the Compulsory and Redundancy category. Section 2A applied to members of the premium section and, while the shape of the benefits were slightly different from those provided for in section 2, the intention was that they should be of essentially the same value as follows: people aged under 50 (or aged between 50 and pension age (60) and with less than 5 years' service) could be eligible for a Compulsory Early Severance (CES) lump sum payment. The CES terms applied on redundancy and could be used by employers for certain categories of voluntary exit. CES compensation payments were calculated as:

- One month's pay per year of service; plus
- One month's pay per year of service given after the later of (a) age 30 and (b) attaining 5 years' service; plus
- One month's pay per year of service given after the age of 35.

(iv) CES payments could not generally exceed three years' pay other than where an individual was covered by "reserved rights". In these cases the terms were set out in section 7. Where staff left on CES terms, their pension benefits were treated as if they had resigned – that is, provided the individual had at least 2 years' service, preserved in the scheme for payment at pension age (typically 60). People aged between 50 and 60 (with a minimum of 5 years' service) could be eligible for Compulsory Early Retirement (CER) terms. These comprised:

- Immediate payment of pension (and pension lump sum) without actuarial reduction for early payment; plus

- Pensionable service enhanced by up to 6⅔ years (subject to the resulting pension not exceeding that which would have been earned if the person had carried on working until pension age); plus
- A lump sum compensation payment of up to 6 months' pay.

(v) Sections 3 and 3A set out the benefits that could be payable under the Flexible category. Section 3A applied to members of the premium category and were of essentially the same value as those provided for in section 3: People aged under 50 (or aged between 50 and pension age (60) and with less than 5 years' service) could be eligible for a Flexible Early Severance (FES) lump sum payment. The FES scheme was to be used in circumstances where the individual was not under any compulsion to leave. FES compensation payments are calculated as:

- Two weeks' pay per year of service; plus
- One week's pay per year of service given after the first 5; plus
- One week's pay per year of service given after the first 10; plus.
- Two weeks' pay per year of service given after age 40.

FES benefits could not exceed 2 years' pay.

(vi) People aged between 50 and 60 (and with a minimum of 5 years' service) could be eligible for Flexible Early Retirement (FER) terms. These were calculated in the same way as CER terms but without the lump sum compensation payment.

(vii) A further option open to employers, in respect of employees aged over 50, was Approved Early Retirement (AER). As with the Flexible terms, this could only be used where the individual was under no compulsion to leave. This provided immediate payment of pension (plus associated pension commencement lump sum) without the normal reduction for early payment.

(viii) While sections 2A and 3A applied to premium members, there were no equivalent provisions for nuvos members prior to the introduction of the February 2010 scheme, which was quashed. The practice under the Old Scheme rules was that, where departments wished to provide CSCS-equivalent benefits to people who were pensioned under nuvos, they applied to the Cabinet Office. Cabinet Office then calculated the benefits and, having secured Treasury agreement to these benefits being paid *ex-gratia*, advised the employer department accordingly. The New Scheme, which took effect from 22 December 2010 applies to nuvos members in the same way as to others.

5. In contrast, the principal features of the New Scheme are these:

1. A standard "tariff" of 1 month's salary per year of service;

2. The ability to vary that tariff between the statutory minimum and twice the standard tariff for voluntary departures with no crystallised risk of redundancies;

3. By way of instructions issued by the Minister, a commitment that staff would always have at least one

opportunity to apply for a voluntary scheme offering the standard tariff and all other optional items before being made compulsorily redundant, but after being told that they are at risk of compulsory redundancy;

4. A cap of 12 months for compulsory redundancies and 21 months for voluntary departures;

5. The ability to treat all staff below a certain salary level (initially £23,000 but set as 90% of the Private Sector Median Earnings) as being at that salary level for purposes of the calculation;

6. Setting a cap (currently £149,820 and linked to 6 times the Private Sector Median Earnings) on the amount of salary that will count for compensation purposes;

7. The ability for staff who have reached their minimum pension age to draw an unreduced pension based on their service to date in return for surrendering some or all of their compensation payment. In voluntary redundancy (and where the employer so agrees, voluntary exit) cases, where the whole payment does not meet the cost the employer will pay the difference;

8. Payments above the 'caps' for the 'reserved rights' category of civil servants (see paragraph 4(v) Summary Grounds of Resistance) on voluntary and compulsory redundancy (but not voluntary exit)."

6. I was told by Miss Simler QC (with whom Mr Sheldon QC appeared) for the defendant that the New Scheme (broadly) gave to the departing civil servant earning in excess of £23,000 per annum (with an entitlement to payment of 3 years' salary) approximately 58.3% of the compensation payment that he or she would have received under the Old Scheme. I do not believe that that information was contentious.

(C) Legal Background

7. The legal status of civil servants and the terms on which their salaries, pensions and other benefits become payable, in historical context, are dealt with fully in paragraphs 10 to 49 of the judgment of Sales J in *R (on the application of the Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin) (hereafter "*PCSU I*"). I do not intend to traverse that ground again. I confine myself to a summary of the legal position as it stood at the time of that judgment and then to bring this aspect of the case up to date. In doing so, I shall try to summarise the evidence as to the political considerations that underlay the changes.

8. Originally, civil servants had no formal legal entitlement to compensation on dismissal. That rule was mitigated by statutes passed in the 19th and 20th centuries, beginning with the Superannuation Act 1834. The Acts provided for "entitlements" to receive such benefits, but what one hand appeared to give another took away. Section 30 of the 1834 Act provided as follows:

> "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments, of their power and authority to dismiss any person from the public service without compensation."

This provision remained in force until consolidation, in the Act of 1965, in the form of section 79 of that Act which provided as follows:

> "Nothing in this Act shall extend or be construed to extend to give any person an absolute right to any allowance or gratuity under Part I or Part II of this Act or to deprive the Treasury or the head or principal officer of any department of their or his power and authority to dismiss any person from the public service without compensation."

9. The effect of the 1834 provisions was considered by the Court of Appeal and by the House of Lords in *Nixon v A-G.* [1930] 1 Ch 566 and [1931] AC 184 where it was held that "entitlement" to payments meant no more in these Acts than that the relevant person was "entitled to expect" or "qualified to receive" them and that the Acts were to be regarded as primarily setting out a code providing *authorisation* for payments to civil servants without creating any *rights* on the part of any individual to receive them: see per Sales J in *PCSU 1* paragraph 17. However, long before 1965, the regular practice had developed whereby full payments of pensions and other benefits were made to departing and retiring civil servants under the statutory scheme terms. In 1972 a high level review of civil service pension and benefit arrangements recommended that civil service pensions, properly so called, should become payable as of right but that, for tax reasons, death benefits, compensation payments on departure and some other benefits should continue to be discretionary. Again, pursuant to the recommendations made, the new schemes were removed from primary legislation and were promulgated by administrative act of the relevant Minister. From the beginning of the new schemes, therefore, they continued to provide that payments on premature retirement from the service would be paid by way of discretion rather than by right. The effect of that express provision was (as Sales J held) that the language of entitlement used in respect of other rights under the scheme (such as pensions) was effective to confer a true legal right to the relevant sums: see paragraph 48 of the judgment in *PCSU 1*.

10. The 1972 Act, giving effect to these changes, also conferred further protections upon civil servants. First, there was enacted a statutory obligation to consult with (in effect) the trade unions before changing the scheme: s. 1(3) of the Act. Secondly, it was provided that payments calculated by reference to service (in short "accrued rights")

could not be reduced without the consent of the unions. In this respect, section 2(3) of the 1972 Act as originally passed was in these terms:

> "No scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is calculated by reference to service rendered before the coming into operation of the scheme, or of reducing the length of any service so rendered, unless the persons consulted in accordance with section 1(3) of this Act have agreed to the inclusion of that provision."

As Sales J held, section 2(3) applied to payments that remained technically discretionary. Upon that provision the proposals made in February 2010 by the last administration to revise the scheme foundered because consent of all the unions was not forthcoming. Of the six relevant trade unions, five had agreed to the changes, but one, the First Claimant in the present proceedings, had refused its consent. The Minister had argued before Sales J that the reference in section 2(3) to "rights which have accrued" applied only to benefits to which there was a full legal entitlement. That argument was rejected by the learned judge: see paragraphs 50 to 56 of the judgment.

11. Sales J found (paragraph 44) that both staff and management in the Civil Service regarded the detailed rules under the 1965 Act as creating what was in substance a set of accrued rights based on length of service. The judge said:

> "... although at the time the 1972 Act came into force the relevant scheme (i.e. that contained in the 1965 Act) did not contain any legal entitlements on the part of civil servants to receive the pension and lump sum payments which it was expected would be paid, it did set out a regime by reference to which any civil servant could invite the Minister to exercise his discretion to make such payments in his favour. In relation to a decision in that regard, the civil servant might have public law claims against the Minister if he did not exercise his discretion in a fair and proper manner. Those claims would be likely to be improved if the Minister continued, despite amendment of the scheme, to be subject to an administrative practice or policy of making payments calculated by reference to length of reckonable service in accordance with the scheme prior to its amendment. In particular, it might well be difficult in public law terms for the Minister to fail to recognise existing administrative entitlements as set out in the scheme in individual cases. "

12. The hearing of the arguments in *PCSU 1* occurred before the General Election of 2010; judgment was delivered after it. As is well known, on assuming office, the present government took the view that the reduction of the country's budget deficit was the most urgent issue to be faced and that part of the process of achieving such reduction required the urgent need to cut the budgets of government departments. It imposed a two year pay freeze on public sector pay and began a comprehensive public

spending review to identify savings. The government's view was that the size of the civil service would have to be cut and the cost of severance terms for departing civil servants would have to be reduced. The government adopted the election manifesto pledge of one of its constituent political parties to "reform the [CSCS] to bring it more into line with practice in the private sector". The government considered that the terms of the Old Scheme were "unaffordable". In broad terms the assessment was made that under that scheme 25,000 civil servants would receive on departure more than 5 times annual salary and 6,000 more than 6 times that under compulsory redundancy terms. Under the flexible early retirement terms 12,000 individuals could count on benefits worth 5 times salary. A further 100,000 could receive packages or payments worth three times salary.

13. The political view was that the Old Scheme was "... way out of kilter both with the wider public sector and with the private sector. As a result there are very many surplus staff within the civil service who are being paid to do nothing because this is cheaper than making them redundant...": see the Defendant's letter to the Prime Minister of 29 June 2010, core bundle 2/195. The same letter characterised the scheme as "absurdly generous". It was considered, therefore, that if the government could not reduce the size of the Civil Service, because of the cost of redundancy, savings would have to be made elsewhere in spending programmes and in services to the public.

14. In his evidence and in written argument, the Defendant has been at pains to demonstrate the generosity of the Old Scheme in comparison with redundancy schemes under statute and otherwise in the private and wider public sectors. It is, I think, common ground that the Old Scheme was very substantially more beneficial to members than such comparator schemes, but it is not necessary to set out in detail the relevant material. It is summarised in paragraphs 48 to 52 of the Defendant's written argument before me.

15. In the government's view, even the February 2010 scheme that had failed before Sales J, was unaffordable. However, it was clear as a matter of reality that the First Claimant would not agree to any further reduction of "entitlements" under the CSCS and that section 2(3) of the 1972 Act enabled it to veto any new proposals having that effect. To force the First Claimant into negotiation for a revised scheme, the government resolved to legislate to impose a straightforward statutory cap on any payments to individuals under the Old Scheme. The proposal was to cap the payments at 12 months' salary for compulsory severance and 15 months for voluntary severance, although it always envisaged that a more generous overall scheme would be achieved once the First Claimant and the other unions came into negotiation. On 6 July 2010 the Defendant announced the intention to legislate to impose the caps and at the same time invited the unions to begin negotiations for a new scheme. On 15 July 2010, the Bill was introduced into Parliament. In the course of its legislative passage the Bill was amended to remove the requirement of union consent (under section 2(3) of the 1972 Act) to changes reducing compensation payments on which the previous administration's February 2010 scheme had foundered in the earlier proceedings.

16. Negotiations then took place with the unions, including the First and Second Claimants. These were confidential and were conducted on a largely "without prejudice" basis, although some of the features of those negotiations have now emerged in the course of the proceedings. The government's initial proposals had

three features: it was desired to provide some protection for lower paid staff by bringing in a deemed lower limit of pay for the calculation of severance payments at £21,000, whereas s significant number of scheme members affected in fact earned less than this; secondly, there was to be a cap on the upper limit of earnings at £200,000; and thirdly, there would be an increased cap for voluntary exit terms to be agreed. In the end, as summarised above, the upper limit on voluntary redundancy payments was increased to 21 months, the deemed salary for the lower paid went up to £23,000 and there was a reduction to £149,820 for the upper limit of salary for compensation purposes.

17. It will be necessary to consider a little further below the evolution of these proposals but the features set out above give a sufficient overview for present purposes. In the end the negotiating teams of five of the unions, including that of the Second Claimant, agreed the proposals which turned into the New Scheme. However, on a ballot, the membership of the First and Second Claimants rejected them.

18. In the meantime the Bill had been proceeding through Parliament and received the Royal Assent on 16 December 2010. For present purposes, the salient provisions of the new Act are these. Section 2(3) of the 1972 Act was amended to add at the beginning the words, "Subject to subsection (3A) below…". The Act then inserted a new subsection (3A) in these terms:

> "Subsection (3) above does not apply to a provision which would have the effect of reducing the amount of a compensation benefit except in so far as the compensation benefit is one provided in respect of a loss of office or employment which is the consequence of-
>
> > (a) a notice of dismissal given before the coming onto operation of the scheme which would have that effect,
> >
> > or
> >
> > (b) an agreement made before the coming into operation of that scheme."

"Compensation benefits" were then defined by a new subsection (3B) as follows:

> "In this section-
>
> > "compensation benefit" means so much of any pension, allowance or gratuity as is provided under the civil service compensation scheme by way of compensation to or in respect of a person by reason only of the person's having suffered loss of office or employment."

19. Section 3 of the Act provided this:

> "(1) The civil service compensation scheme is to have effect subject to the following limitations.

> (2) The aggregate amount of compensation benefits provided to or in respect of a person under the scheme is not to exceed-
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> (a) in the case of a compulsory severance, an amount equal to that person's pensionable earnings for 12 months;
>
> (b) in the case of a voluntary severance, an amount equal to that person's pensionable earnings for 15 months."

20. However, by statutory instrument made on the same day under the Act, section 3 was repealed with respect to any schemes made after the commencement of the Act: see the Superannuation Act 2010 (Repeal of Limits on Compensation) Order 2010. The effect is, however, that the caps imposed by Section 3 would still apply if the New Scheme were to be quashed by the Court leaving the Old Scheme in place.

21. Section 2(3D) of the 1972 Act, introduced by the 2010 Act, places a positive obligation on the Minister for the future to consult on any new scheme "with a view to reaching agreement with the persons consulted". This provision came into force on 16 February 2011. However, in the meantime, on 21 December 2010, the Minister had promulgated the New Scheme.

22. I can now turn in more detail to the Claimants' grounds of challenge to the New Scheme and to the legislation.

(D) A1P1

23. I have set out the terms of this Convention provision above. The Defendant submits that this argument fails at the first hurdle because the "rights" of civil servants under CSCS are not "possessions" for the purposes of *A1P1*.

24. Mr Giffin QC (with whom Mr Randall appeared) for the Claimants cited the passages in the judgment of Sales J which I have already quoted and others, referring to the expectations of civil servants as (variously) "entitlements in all but legal theory", "treated in substance as entitlements", "an expectation closely analogous to a legal right" and "entitlements as a matter of established and declared administrative practice". He also referred to the real protection of those entitlements provided by the unamended version of section 2(3) of the 1972 Act.

25. Mr Giffin submitted that these features of the rights arising under the CSCS were sufficiently analogous to rights already held by the European Court of Human Rights to be possessions within *A1P1*. He relied primarily upon the decisions in Strasbourg in *Kopecky v Slovakia* (2005) 41 EHRR 43 and *Broniowski v Poland* (2005) 40 EHRR 21.

26. *Broniowski* concerned arrangements made by Poland to compensate persons for the loss of private land on the repatriation of Polish citizens after the re-drawing of Polish frontiers following the Second World War. The scheme originally allowed the relevant persons to buy land from the Polish state and to have the value of the abandoned property set off against the purchase price. The applicant's mother was a person entitled to the benefit of such arrangements. Her claim had been satisfied in part by a purchase in 1981 but a substantial part remained unsatisfied on her death in

1989. In practice, however, the claim could only be realised upon the state making available land for purchase and upon an applicant bidding successfully in the resultant sale by auction. There was a chronic shortage of land to satisfy the claims. In 2004 the legislation was enacted by which persons who had received some compensation for their claims were deemed to have had their claims discharged and others who had had no satisfaction of their claims were awarded 15% of their original entitlement. The applicant who had been held to have inherited his mother's claims argued that his rights under *A1P1* had been infringed. His claim was upheld by the Court. It set out certain considerations for determining the concept of "possessions" in the following passage:

> "The concept of "possessions" in the first part of Art.1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Art. 1 of Protocol No. 1".

27. The court then recited the findings of the national court as to the nature of the right concerned as "a debt chargeable to the State Treasury" with "a pecuniary and inheritable character". A later decision characterised the right as a "right to credit" of a "special nature as an independent property right" and a "special property right of a public law nature". The national court had accepted that the materialisation of the right depended upon action by an entitled person but rejected the idea that the right did not exist until its realisation through a successful bid at auction. That court had no doubt that the right in question was a possession within *A1P1*. A still further decision of the Polish courts spoke of the applicant's right as a "particular proprietary right" of a "pecuniary value", which was "inheritable and transferable in a specific manner". The Strasbourg court stated its agreement with this analysis. The right to credit was recognised by s.81 of the Polish Land Administration Act 1985 as to which the Court said,

> "While that right was created in a kind of inchoate form, as its materialisation was to be effected by an administrative decision allocating state property...s.81 clearly constituted a legal basis for the State's obligation to implement it".[1]

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[1] Section 81 of the 1985 Polish Act was in the following terms:

> " 1. Persons who, in connection with the war that began in 1939 abandoned real property in territories which at present do not belong to the Polish State and who, by virtue of international treaties concluded by the State, are to obtain equivalent compensation for the property they abandoned

28. Miss Simler for the Defendant was at pains to emphasise the inheritable and transferable nature of the right in question, which had a specific value, which could not be said of the right in the instant case before me. Mr Giffen argued that the salient comparable features of comparison in the *Broniowsi* case for present purposes were the inchoate and contingent nature of the right which might never be satisfied in the case of any individual while still in the service.

29. In *Kopecky* the Strasbourg court (three months later) said this about the concept of possessions:

> "An applicant can allege a violation of Art. 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Art. 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition."

30. As for "legitimate expectation" in this context the court referred to two of its earlier decisions also relied upon by Mr Giffin which it is convenient to summarise in the Court's own judgment in the *Kopecky* case as follows:[2]

> "The notion of "legitimate expectation" within the context of Art. 1 of Protocol No. 1 was first developed by the Court in the case of *Pine Valley Developments Ltd v Ireland.* In that case the Court found that a "legitimate expectation" arose when outline planning permission had been granted, in reliance on which the

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> abroad, shall have the value of the real property that has been abandoned offset either against the fee for the right of perpetual use of land or against the price of a building plot and any houses, buildings or premises situated thereon.
>
> ...
>
> 4. In the event of the death of an owner of real property abandoned abroad, the entitlement referred to in subsection 1 shall be conferred jointly on all his heirs in law or on the one [heir] designated by the entitled persons.
>
> 5. The offspring of the value of real property abandoned abroad, as defined in subsection 1, shall be effected upon an application from a person entitled to it."

[2] The second case referred to in this passage was *Stretch v United Kingdom* (2004) 38 EHRR 12 where the grant of the option to renew was in excess of the local authority's powers.

> applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was "a component part of the applicant companies' property.[3]
>
> In a more recent case, the applicant had leased land from a local authority for a period of 22 years on payment of an annual ground rent with an option to renew the lease for a further period at the expiry of the term and, in accordance with the terms of the lease, had erected at his own expense a number of buildings for light industrial use which he had sub-let for rent. The Court found that the applicant had to be regarded as having at least a "legitimate expectation" of exercising the option to renew and this had to be regarded for the purposes of Art. 1 of Protocol No. 1, as "attached to the property rights granted to him…under the lease".

31. In addition, Mr Giffin relies on recognition that an entitlement to a future pension under an employer's scheme may amount to a possession, even if non-contributory, "where it can be considered part of the employment contract", because it amounts to deferred remuneration: see e.g. *T v Sweden* (Application No. 10671/83, 4 March 1985); *Stigson v Sweden* (Application No. 12264/86, 13 July 1988) and *Azinas v Cyprus* (Application No. 56679/00, 20 June 2002).

32. Miss Simler objects that in no case in Strasbourg has it been held that a right such as the present constitutes a possession for the purposes of *A1P1*. She reminds me of the passage from the speech of Lord Bingham of Cornhill in *R(Ullah) v Special Adjudicator* [2004] 2 AC 323, at paragraph 20 where he said:

> "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. *The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*". (Emphasis added)

Reference was also made to the statement of Maurice Kay LJ to the same effect in *IR (Sri Lanka) v SSHD* [2011] EWCA Civ 704. In contrast, Mr Giffin cited the extra-judicial remark of Lord Phillips of Worth Matravers in the foreword to the current edition of Lester & Pannick's Human Rights Law:

> "where our legislation creates novel areas in which human rights implications have to be considered…, of necessity we have to lead."

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[3] In this case the Irish Supreme Court had held that the original grant of outline permission had been *ultra vires* and was a nullity.

33. Miss Simler submitted that the European jurisprudence required a distinction to be drawn between legitimate expectation arising in what she called "property cases" (like *Stretch* and *Pine Valley*) and in "claims cases" such as *Pressos Compania Naviera SA v Belgium* (1996) EHRR 302 (where the government had legislated to remove the established right of ship owners to be compensated by the state for the tortious negligence of maritime pilots). In "claims cases", she argued, the claim only became a "possession" if it was currently enforceable: see paragraph 79 of the skeleton argument. In the property cases by contrast, as the court said in *Kopecky* (paragraphs 49-52),

> "In a line of cases the Court has found that the applicants did not have a "legitimate expectation" where it could not be said that they had a currently enforceable claim that was sufficiently established... There was a difference, so the Court held, between a mere hope of restitution, however understandable that hope may be, and a "legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision.
>
> Similarly, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts...
>
> In the light of the foregoing it can be concluded that the Court's case law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Art. 1 of Protocol No. 1. The Court is therefore unable to follow the reasoning of the Chamber's majority on this point. On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it."

34. Neither counsel referred expressly to paragraph 48 of the *Kopecky* judgment where the following was said,

> "Another aspect of the notion of "legitimate expectation" was illustrated in *Pressos Compania Naviera SA v Belgium.* The case concerned claims for damages arising out of accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the domestic rules of tort such claims came into existence as soon as the damage occurred. The Court classified the claims as "assets" attracting the protection of Art. 1 of Protocol No. 1. It then went on to note that, on the basis of a series of decisions of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.

> The Court did not expressly state that the "legitimate expectation" was a component of, or attached to, a property right as had done in *Pine Valley developments Ltd* and was to do in *Stretch. It was however implicit that no such expectation could come into play in the absence of an "asset" falling within the ambit of Art. 1 of Protocol No. 1, in this instance the claim in tort.* The "legitimate expectation" identified in *Pressos Compania Naviera SA* was not in itself constitutive of a proprietary interest; related to the way in which the claim qualifying as an "asset" would be treated under domestic law and in particular to reliance on the fact that the established case law of the national courts would continue to be applied in respect of damage which had already occurred." (Emphasis added)

35. Further, although mentioned in a footnote in the Defendant's skeleton argument, I was not taken to the meticulous analysis of the case law made by David Richards J in *Re TN Ltd.* [2005] EWHC 2870 (Ch), the case concerning the status in insolvency law of future claims to damages for injuries caused by asbestos. David Richards J held that the potential claimants, who had (hypothetically) suffered exposure but no material damage as they had not developed "compensatable conditions" at the relevant date, did not have *A1P1* possessions. Any claim form issued by them would be struck out: see paragraphs 153-4 of the judgment. Given the decision in *PCSU 1*, it seems to me that an individual civil servant, in contrast, would at least have public law claims enforceable in the courts, while the Old Scheme and the original section 2(3) existed, if it was sought to deprive him (even prospectively) of his expectations under that scheme.

36. I am not confident that the Strasbourg cases are capable of true logical cohesion one with the other. However, it is clear from *Broniowski* that some "inchoate rights" or "contingent rights", not capable of immediate enforcement by a claim leading to a money judgment in the domestic civil courts, can be "possessions" within *A1P1*. Pensions can also be possessions where they are "part of the employment contract". Claims to compensation for torts under established case law can also be "possessions": see *Pressos*. The question seems to turn upon the "the way in which the claim qualifying as an "asset" would be treated in domestic law": *Kopecky* paragraph 48. The claimant's "hope" has "to be based on a legal provision or a legal act such as a judicial decision": Loc. Cit. paragraph 49.

37. Without (I think) trespassing beyond the bounds of Lord Bingham's warning in the *Ullah* case, it seems to me that the "rights" under the CSCS, as they stood before the events under challenge and as analysed by Sales J, did constitute "possessions" for the purposes of *A1P1*. Sales J held that individual civil servants had an administrative expectation that the Old Scheme would be operated to the full extent of its terms and a statutory right to expect that the scheme would not be changed to his/her detriment without the consent of his/her trade union. It seems clear that Sales J's view was that these were substantive expectations enforceable in domestic public law. Indeed, he struck down a scheme that failed to respect the requirement of trade union consent to adverse changes. In such circumstances, in my view, such hope as civil servants had

was based upon a "legal provision" and a "judicial decision", hopelessly woolly though those terms are for the purposes of deciding any specific case under *A1P1*.

38. I conclude, therefore, that the benefits under the Old Scheme were possessions within the meaning of *A1P1*.

(E) Interference

39. The next logical step is to decide whether what has occurred amounts to an interference with possessions for the purposes of *A1P1*. Save in one respect, it is agreed that there is a relevant interference.

40. At this stage a short point arises. Miss Simler submits that no such interference can occur when an individual civil servant leaves the service voluntarily on agreed terms. Accordingly, as I understand it, she says that the changes producing differences in terms for voluntary departures cannot amount to a relevant interference with possessions.

41. I disagree. In my judgment, it is necessary to have regard to the two schemes as a whole. The interference occurs when the benefit terms are changed; that is before it is known whether any individual will leave the service at all before normal retirement or whether he or she will depart on voluntary or compulsory terms. Changes for the worse in voluntary redundancy terms remain interferences with pre-existing expectations. It may be that, in the end, an individual departs the service voluntarily, but his entitlements as a whole have already been interfered with and the acceptance of voluntary terms may in practice, as Mr Giffin submits, be dictated by a fear of worse to come on compulsory redundancy.

(F) Justification

42. The right to possessions is qualified as appears from the provisions of *A1P1* itself. In a series of decisions the Strasbourg court has adopted a number of criteria by which the interference with possessions may be justified. First, the interference must be in accordance with law which itself must be accessible, precise and foreseeable in application. Secondly, the interference must be in pursuit of a legitimate aim in the public interest and, thirdly, it must strike a fair balance between the persons affected and the community as a whole. The individuals affected must not be required to bear a disproportionate or excessive burden. The notion of public interest is recognised to be extensive; the court put it this way in *Bronowski*:

> "Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property or affording publicly funded compensation for expropriated property will commonly involve consideration of political, economic and social issues. The Court has declared that, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, it will respect the legislature's judgment as to what is "in the pubic interest" unless that judgment is manifestly without reasonable foundation..."

43. To similar effect are the following passages from the court's judgment in *Hutten-Czapska v Poland* (2007) 45 EHRR 35, paragraphs 165-6:

> "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 "general" or "public" interest. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a margin of appreciation.
>
> The notion of "public" or "general" interest is necessarily extensive. ...
>
> Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless judgment is manifestly without reasonable foundation. These principles apply equally, if not a fortiori, to the measures adopted in the course of the fundamental reform of the country's political, legal and economic system in the transition from a totalitarian regime to a democratic state."

44. The objective of reduction of the national budget deficit as a "legitimate aim", to which the New Scheme was to play a part, was not disputed by the Claimants.

45. In his opening submissions, Mr Giffin submitted (quoting my note) that the court had to ask,

> "Has the defendant persuaded the court not only that he was pursuing a legitimate aim, but also that the interference with accrued rights was the least intrusive method consistent with achieving the object of affordability. A way of doing that is to show that the defendant went about it by looking at accrued rights and spending parameters and asking, "What can we do by way of interfering as little as possible consistent with affordability?" ".

46. Miss Simler submitted, and I accept, that this is not the test that emerges from the Strasbourg case law. In *James v UK* (1986) 8 EHRR 123, a case concerning this country's leasehold enfranchisement legislation, the court plainly rejected a "strict necessity" test for the concept of "justification". In that case, the court said:

> "It is, so the applicants argued, only if there was no other less drastic remedy for the perceived injustice that the extreme

> remedy of expropriation could satisfy the requirements of Article 1.
>
> This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way."

In considering this and other cases, Maurice Kay LJ in *R (Clays Lane Housing Co-Operative Ltd.) v Housing Corporation* [2004] EWCA Civ 1658 said this (at paragraph 25):

> "I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive."

47. In reply, I think Mr Giffin accepted that, in the light of these cases, his opening submission had put the hurdle of justification rather too high.

48. The argument for the Claimants, however, identified what were submitted to be four key aspects of the matter: (1) retrospective deprivation of rights, which were (2) not gratuitous benefits, but which had been earned through service, and which (3) had been produced as the product of agreement with the trade unions, and (4) the loss of which would have a substantial financial effect on a large number of individuals. Mr Giffin submitted that these features required the Defendant (1) to recognise the accrued rights and the legitimate expectations arising, (2) to give a reasoned justification for the anticipated redundancies and the level of acceptable expenditure, with (3) some analysis of how "headcount" reductions would be achieved through natural wastage and voluntary and compulsory redundancy respectively, and (4) with an analysis of how different permutations of a new scheme would impact on accrued rights.

49. In contrast, Mr Giffin argued, the materials disclosed by the Defendant showed that the Defendant had failed properly to have regard to these features of the case. He argued that the papers showed that there had been little concern for accrued rights. Headline figures had been applied based upon unreliable assumptions as to the numbers of civil servants departing owing to natural wastage and on compulsory rather than voluntary redundancy terms.

50. While it will be necessary a little later to engage to some limited extent with the specifics of some possible alternatives to the New Scheme and of the Defendant's assessment of the cost of future redundancies which appear to have emerged at the time of the negotiations, I think that Miss Simler was correct in her argument that the Claimants' case tended to descend into a criticism of the decision making *process* rather than mounting a convincing attack on the result of the new arrangements as an unlawful interference with the claimants' rights under *A1P1* in *objective* terms. I was referred in this respect to a number of passages in the speeches in the House of Lords in *Belfast City Council v Miss Behavin' Ltd.* [2007] UKHL 19. The passages were as follows; it is not necessary to set any of them out in full: Lord Hoffmann, paragraphs 12-15; Lord Rodger of Earlsferry, paragraph 24; Baroness Hale of Richmond, paragraph 31; Lord Mance, paragraph 44; and Lord Neuberger of Abbotsbury, paragraphs 88-90. The effect of them is summarised however by Lord Mance, citing Lord Bingham of Cornhill, in the earlier decision of the House in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, "what matters in any case is the practical outcome, not the quality of the decision making process that led to it".

51. In assessing the "practical outcome" in this case, it is also necessary, in my judgment, to recognise that the decisions under challenge in this case lie in that area in which the state is afforded the widest margin of appreciation, namely the area of economic and social policy. It would be utterly impossible for the court to embark upon a strictly arithmetic analysis of the processes by which central government might properly reduce compensation payments to meet the objectives of government spending policy. As Lord Bingham said in *R v Secretary of State for Environment Transport and the Regions* [2001] 2 AC 349, 395: "[The] allocation of public resources is a matter for ministers, not courts".

52. I return to the issue of whether the Claimants (in effect representing the body of scheme members) have been required to endure what goes beyond "a reasonable and commensurate reduction" in entitlements. This was the standard set by the ECHR in *Kjartan Asmundsson v Iceland* (2005) 41 EHRR 42, a case relied upon heavily by the Defendant. This case concerned an Icelandic fisherman who had been invalided out of the fishing fleet by injury in 1978. His disability (as a seaman) was assessed at 100%. He had, however, been able to obtain office work. In 1992, in view of financial difficulties in the pension fund, legislation was introduced changing the manner in which his disability was assessed; thereafter it took account not merely of his disability as a seaman, but disability with regard to all work. This new disability was assessed at 25%. As 35% disability was the new entry threshold for the scheme all payments to him ceased after nearly 20 years of previous entitlement. Not surprisingly, it was held that his rights had been infringed; the measure was unjustified under Article 14 of the Convention which was said to carry great weight in the assessment of the proportionality issue under *A1P1*. He was one of a group of 54 pensioners (out of 689) who had all benefits removed. The court recognised the

legitimate concerns about the need to resolve the fund's financial difficulty. However, the court concluded:

> "Against this background, the Court finds that, as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements."

53. Miss Simler submitted that what has occurred in the present case is merely a "reasonable and commensurate reduction" in the benefits payable. She argued that, as opposed to retirement pension, we are here dealing with payment designed to bridge the gap between departure from the service and either re-employment, by a different employer, or arrival at normal pension age. Further, even under the new scheme the severance payments envisaged compare favourably with comparable schemes in the private and the wider public sectors.

54. The only significant alternative arrangements that were touched upon in argument (and, it appears, in negotiations) as alternatives to the Old Scheme arrangements were (a) the possibility of transitional arrangements in a new scheme and (b) preserving the Old Scheme arrangements but with a cap of £75,000 being paid to any individual. In my judgment, it is not necessary to enter into the detail of these alternatives, save to a limited extent. The important point is that they were carefully considered and costed by the Defendant, in consultation with the unions and with HM Treasury, and the decision was taken to reject them.

55. The papers produced in response to an Order for specific disclosure shortly before the hearing reveal the consideration in September 2010 of certain transitional arrangements that were discussed with the unions in the early stages of negotiations and were considered with the Treasury: see Bundle 6 pp. 1804-6, 1813-4, 1828-32 and 1840-1. It appears that those proposals were rejected on "affordability" grounds. In late September 2010, other proposals were presented to the unions which included transitional arrangements for up to 5 years, giving continued access to Old Scheme benefits for a proportion of staff or up to a defined proportion of the value of compensation: see the first witness statement of Mr Mike Watkins for the Defendant paragraphs 26 and 27. It seems that this alternative was rejected in the end by both sides and it was decided that it was better to allocate the limited funds to all made redundant rather than to concentrate larger payments on a smaller number.

56. An alternative of a £75,000 payment cap (which emerged during negotiations) was also considered. It was appreciated that this would have very different effects, in terms of proportion of benefit lost, depending on salary levels. It appears, for example, that everyone on a salary of up to £25,000 would get 100% of the Old Scheme award of 3 times annual salary (on CER terms), whereas those earning £60,000 would receive £75,000 or 41.66% of the Old Scheme payment. There would be comparable decreases in the percentage as the salary level increased. Under the

New Scheme, with a salary underpin of £23,000, most leavers would achieve a payment of 58.33% of the old level of award.

57. The Claimants object that the approach taken under the New Scheme prefers an expenditure on the salary underpin (which was not a feature of the Old Scheme) to "accrued rights". The Defendant's response was that the protection of the lower paid was also a legitimate aim in the scheme overall in circumstances where funds were seriously limited.

58. The Claimants argue that the approach taken by the Defendant would have been appropriate if he was permitted simply to implement a new scheme on a "clean slate" basis, i.e. ignoring the obligation to protect the *A1P1* rights of all civil servant members of the Old Scheme. It is submitted that the Defendant has simply failed to demonstrate how the "affordability" "costs envelope" was constructed, how the anticipated departures from the service were calculated, how many would depart on compulsory or voluntary terms respectively. It also failed to make any analysis of options to preserve accrued rights.

59. In the end, I consider that the Claimants' submissions tended to draw the court into areas of impermissible scrutiny: first, into the "quality of the decision making process" (c.f. the *Miss Behavin'* case), and secondly, into areas of macro-economics which the court is not equipped to judge and which fall well inside the area of the state's margin of appreciation. In so stating I am aware that the European Court has identified the margin of appreciation as arising at the first stage of the process, namely the identification of public interest. The law still requires the further examination of the proportionality of the action taken to achieve the public interest aim. However, even at the further stages, there will be some questions that the courts are not equipped to judge in the context of a short public law assessment, where evidence is considered in the round and where, for example, detailed calculations cannot be probed with those that made them and those that criticise them.

60. It seems to me that the Defendant was well aware of the potential impact of *A1P1* rights. They featured prominently in the report of the House of Commons committee on the Bill that was to become the 2010 Act and the desire to protect "accrued rights" so far as possible was at the forefront of the unions' negotiating stance. The negotiating process clearly involved a consideration of how transitional arrangements might be operated and considered in detail the implications of the alternative of the £75,000 cap proposed from the union side. It is impossible for the court to "second guess" the government's assessment of what is affordable. Nor can it be for the court to interfere with the government's assessment of spending priorities, requiring government to take money from one spending area and to allot it to this one. The only question is whether the Defendant has shown that the interference with scheme members' rights was a proportionate one within the limits of what can be afforded.

61. Drawing such assistance as I can from the Strasbourg cases, I bear in mind that the scheme and payments made under it are designed to plug a gap between employments or between leaving the service and full retirement. To this extent, they are "weaker" than pension rights which afford financial protection for many years and into old age and have a transfer value (e.g on divorce). Salary and pension benefits remain unaffected. The rights of scheme members have not been eliminated by the New Scheme; they have been reduced in a manner designed to spread the burden fairly

among all civil servants. There is no discrimination argument such as that raised successfully in the *Kjarten Asmundsson* case. Past service is still recognised in the calculations. The decision was taken by the Defendant having considered the unions' objections and after assessing in detail the alternative proposed by them. While I recognise that each union has a different membership "profile", it is not, I think, without relevance that four unions accepted the New Scheme and five union negotiating teams did so. It is also not seriously contested that the New Scheme is still relatively favourable to departing employees when compared with statutory terms and the terms customarily on offer in the private sector and other public sector employments. Nor is it a case where some alternative is obviously available. Helpful though Counsels' arguments have been in enabling me to see how the Defendant and his ministerial colleagues and officials went about the problem, it is quite impossible in the context of a 2 ½ day hearing to make a full assessment of the quality of the calculations that underlay the Defendant's decision.

62. In their written argument the Claimants said,

> " 'If the authority can be seen to have thought carefully about the relative costs of one course of action against another, and made a sensible assessment of what those costs are, and the budgetary implications of meeting them, then the court will understandably be reluctant to interfere.' "

I agree with Miss Simler and Mr Sheldon's response that this is precisely what was done. In my judgment, the reduction in benefits was "reasonable and commensurate" and the interference with *A1P1* rights did not go beyond what was "reasonably necessary" to achieve the legitimate aim recognised on both sides of this case.

63. In reaching this conclusion I have not ignored one further point made by the Claimants in evidence and in their arguments. It is this. Mr Lanning's second witness statement on behalf of the Claimants criticised the Defendant's approach to reducing costs and affordability of the various options because it seemed to be based upon 100,000 staff departing the service on compulsory terms under the Old Scheme. It was argued that this failed to take proper account of natural wastage and departures on "flexible" or "AER" terms. However, the evidence revealed that when later calculations were made in late summer and early autumn 2010 the costing model was based upon 80,000 redundancies in the years 2011/2 and 2012/3, having taken account of natural wastage. The overall costs figure had been taken from redundancies that had actually happened in 2005 to 2008. It was not possible to foresee the precise make-up of the total future departures nor was it possible to be sure of the precise terms that would be settled upon. I agree with the Defendant's argument that assessments of costs could reasonably err on the side of conservative prudence. In my judgment, it seems clear that the Defendant and the Treasury endeavoured to make sensible calculations of prospective costs of the Old Scheme and of possible alternative solutions. The detailed spreadsheets produced at the time and disclosed pursuant to the court's order demonstrate this.

(F) The 2010 Act and *A1P1*

64. In view of my decision that the New Scheme is valid, it is not necessary to consider the arguments raised in objection to the 2010 Act. The capping provisions have no

continuing effect save in relation to compensation for departures on "inefficiency" grounds which are not the subject of the present claim.

(G) "Compensation Benefits"

65. I have set out above the new section 2(3B) of the 1972 Act, introduced by section 1(3) of the 2010 Act.

66. The power which the Defendant exercised to amend the Old Scheme without union consent was exercisable only in respect of "compensation benefits" as defined in section 2(3B). There are three features of compensation in play: the simple lump sum, the addition of added years of deemed pensionable service and the immediate payment of pension in circumstances in which it would otherwise have been payable only at some later date. This third class of benefit, it is argued by the Claimants, is not a "compensation benefit" as defined because it is not made "by reason *only* of...loss of office or employment" (emphasis added). It is argued that the pension is no more and no less than the result of the application of the normal formulae of length of service and pensionable salary. While the loss of employment may have caused the pension to be paid earlier than otherwise, none of it is properly characterised as compensation only for loss of employment.

67. I prefer the Defendant's argument on this point. It seems to me that it is correct that early access to pension on an unreduced basis, as available under parts of the Old Scheme, meant that an individual would receive more pension on early departure than otherwise. Normal pension is not paid by reason of loss of office or employment but the additional benefit paid on an unreduced basis was. This early payment was not received because of past contributions and service as the Claimants contend. I agree with the Defendant that nothing in the 2010 Act interferes with or removes accrued pension rights.

(H) Legitimate Expectation at Common Law

68. In addition to its claims based upon *A1P1*, the Claimants argue that the making of the New Scheme was unlawful in that it was made in breach of a legitimate expectation that the Old Scheme benefits would be paid in respect of service accrued at that date, unless the unions consented.

69. Miss Simler submits that there is a short answer to this point, namely that once the 2010 Act was passed no one could have expected that the Old Scheme would be followed. The statutory caps would apply without the Minister taking any further action. Mr Giffin replies that the statute did not *prevent* the Defendant honouring the expectation; he could still have made a scheme preserving the accrued benefits of the Old Scheme and could thereby have fulfilled it. He argues that the Act, with the power to suspend the capping provisions, did not compel the removal of Old Scheme Rights.

70. Mr Giffin may be strictly correct in so construing the 2010 Act. However, it is a rather strange breed of legitimate expectation that can survive the clear implicit parliamentary intention that, subject to the making of a new scheme reducing benefits to the Minister's satisfaction, clear statutory caps should apply. I do not need to decide the point, however, as I have reached the clear conclusion that this is a case

where justification for overriding such expectation as there was has been shown. Part of that justification is, in my view, the clear will of Parliament. Parliament expected significant savings in compensation payments to be achieved, but left the Minister the possibility of making a scheme agreed with the unions. It removed the union veto from section 2(3) of the Act. In my judgment, the success of Mr Giffen's argument in this respect would reintroduce that veto.

71. The justification in general terms is precisely that which governed the justification of interference with *A1P1* rights. Again, the assertion of the expectation would require the court to go behind a government decision in the macro-political/macro-economic sphere. It is not necessary to refer to much in the previous authorities on this point. It suffices to cite two short passages from the judgment of Laws LJ in *R (Begbie) v Department of Education and Employment* [1999] EWCA Civ 2100 as follows:

> "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear. ...
>
> ...The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

72. Mr Giffin relied strongly upon the judgment of the Privy Council, given by Sir John Dyson, SCJ (as he was then properly called) in *Paponette & ors. v A.-G. for Trinidad and Tobago.* [2010] UKPC 32 at paragraph 42 as follows:

> "It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must

> give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court." "

Further, after citing (at paragraph 45) a further passage from Schiemann LJ's judgment in *Bibi*, his lordship said,

> "Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account".

73. Mr Giffen submits that the decision making process revealed by the disclosed documents does not demonstrate that any account was taken of the breach of legitimate expectation. However, making much the same point as I did with regard to the interference with *A1P1* rights, I agree with Miss Simler that the very processes of consultation and negotiation with the unions involved recognition of the history of service of civil servants and their expectations as explained in pellucid terms by Sales J in *PCSU 1*. The Defendant was grappling with the implications of that judgment. Moreover, Mr Watmore says as much in his evidence: see paragraph 100 of his first witness statement. I do not understand that it is necessary for a decision-maker to identify by any particular label the expectation or understanding that his proposed course of action will traverse. It must surely be sufficient that he recognises that such is the effect of what is proposed and why he considers nonetheless that that course of action is justified. In my judgment, that is done time and time again in the evidence and in the documents that have been disclosed.

(I) Article 11 of the Convention

74. The Claimants further argue that the making of the old scheme constituted an unlawful interference with rights under Article 11 of the Convention. This article reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or the administration of the State."

75. At first blush, this is a surprising submission. However, its principal features are these. It is said that the Old Scheme represented the product of collective bargaining. By amending section 2(3) and using the amended Act to set aside the Old Scheme, the Defendant nullified the collective agreement that it represented. Such nullification, absent justification, amounts to a violation of Article 11 as interpreted in *Demir v Turkey* [2009] IRLR 766. It is argued that the case established that the right to bargain collectively with an employer was one of the essential elements of trade union freedom and that the annulment of a collective agreement *ab initio* was a breach of that freedom.

76. In my judgment, the *Demir* case goes nowhere near as far as the Claimants' argument would take it. In that case, the very existence of the union as a legal personality and its ability to enter into collective bargains at all had been denied by the national law. The collective agreement in issue in the case affected all aspects of the employees' working conditions and, moreover, the effect of the national decision appeared to be that members who had received increased benefits pursuant to the agreement were going to have to reimburse them to the employer. Not surprisingly, the Strasbourg court held that there had been a breach of Article 11.

77. In the present case, the unions remain fully active and recognised in representing their members' interests in negotiations with the employer. Collective bargaining continues. Even with regard to this scheme there was negotiation with all unions and agreement with the majority of them. This case simply gets nowhere close to a situation where the right to freedom of assembly and association is infringed.

(J) Conclusion

78. In the result, this claim for judicial review must be dismissed, notwithstanding the customary cogency with which it was argued by Mr Giffin and Mr Randall.