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Human rights, the Constitution and payment of old age pensions to persons in prison: P.C. v Minister for Social Protection

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Human rights, the Constitution and payment of old age pensions to persons in prison: *P.C. v Minister for Social Protection*[1]

In this case, the plaintiff challenged a provision of social welfare law which disallowed entitlement to a State Pension (formerly known as old age pension) while he was in prison. The relevant provision was challenged both under the European Convention on Human Rights (or, more correctly, the European Convention on Human Rights Act, 2003) and the Irish Constitution. The High Court (Binchy J.) rejected the challenge on all grounds. While the Court was correct as to the outcome, it is arguable that some aspects of its reasoning are flawed. The Supreme Court has (perhaps surprisingly) recently allowed a direct appeal to that Court by the plaintiff. This initial note provides an overview of the decision and will be replaced in due course by a more detailed analysis.

1. The facts

The plaintiff was entitled to a State Pension (Contributory) (hereafter SPC) on the basis of social insurance contributions paid during his working life. In 2011, he was convicted of 60 counts of sexual assault against a family member contrary to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 as amended, and 14 counts of rape of the family member contrary to s. 48 of the Offences Against the Person Act 1861 and s.2 of the Criminal Law (Rape) Act 1981 as amended. He was sentenced to a period of ten years imprisonment in respect of the sexual assaults and to fifteen years imprisonment in respect of the rapes.[2] Once he commenced the sentence of imprisonment he was disqualified for receiving SPC under s. 249(1) of the Social Welfare (Consolidation) Act, 2003 (the Act).

Section 249(1) provides that

> Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person –
>
> (a) is absent from the State, or
>
> (b) is undergoing imprisonment or detention in legal custody.

Part 2 of the Act covers social insurance benefits including SPC. There were no mitigating regulations relevant to this case.

In short the plaintiff argued that s. 249(1) of the Act was

i) incompatible with Articles 34, 38, 40.1, 40.3 and/or 43 of the Constitution; and/or

[1] [2016] IEHC 315.

[2] The final three years of the latter sentence were suspended, and both sentences were to run concurrently.

ii) in breach of his rights under Articles 3,5,6, 8, 13, 14 and Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter "the Convention").[3]

2. The ruling

The plaintiff made a number of arguments in relation to both the Constitution and the Convention on Human Rights. We will outline how Binchy J. dealt with each of these in turn looking first at the arguments in relation to the European Convention on Human Rights Act, 2003.[4]

European Convention on Human Rights Act

Property rights

The plaintiff argued that s. 249(1) was incompatible with the Convention by reason of interference with his property rights under Article 1 of Protocol 1 (P1-1) of the Convention. This 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.

Binchy J's consideration of this issue is unfortunately confused. He holds that the 'the plaintiff does not have a property right in the SPC, in the context of either the Constitution or the Convention'.[5] However, in the very next paragraph he correctly states that the ECtHR has recognised that

> 'individuals do have a pecuniary right in welfare benefits, once they satisfy the requirements of the legislation, and that right is protected by Article 1 of Protocol No. 1 of the Convention'.[6]

The ECHR does not specifically use the term 'property right' although (as noted above) P1-1 concerns the protection of property. Nonetheless the protection of property under the Convention (the right to peaceful enjoyment of one's possessions) is frequently referred to

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[3] At [2] as summarised by Binchy J. It is noteworthy that Binchy J. consistently refers to 'the Convention'. There is only one reference in the body of the judgement to the European Convention on Human Rights Act, 2003, a fact we return to below.

[4] The plaintiff also launched some rather unclear argument in relation to the European Prison Rules (see [41]-[42]) which was shortly rejected by the Court (at [126]).

[5] At [87]. See also his statement (at [125]) that the 'authorities stop short of holding that a citizen has a property right in such [pension] benefits, arising by reason of contributions made'

[6] At [88]

in the literature as a property right[7] and, indeed, one can cite many cases concerning pensions where the Court itself has used this terminology. The European Commission on Human Rights, many years ago, assimilated the right to social-security benefits to a property right within the meaning of P1-1 where a person has made contributions to a social-security system from which he would later derive a pension.[8] More recently, the Court has, on several occasions, held that 'the making of contributions to a pension fund may, in certain circumstances, create a property right'.[9]

Thus, there may indeed be a right to welfare benefits protected by Article 1 of Protocol No. 1 of the Convention which may also be referred to as a property right. It is clear from the case law of the Court that such a right would exist in this case. However, this right is subject to the power of the State to interfere with property rights in the public interest.

The ECtHR has adopted a standard approach to the interpretation of Article 1 of Protocol 1 (P1-1) and has stated on many occasions that

> Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule.[10]

Where there is an interference with a property right – as there clearly is in the current case – the courts have to decide whether this interference is in accordance with the public interest and subject to conditions provided by law. The ECtHR has stated that to be objectively justified a measure (i) must pursue a legitimate aim and (ii) there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court has further stated that to be proportionate

> a 'fair balance' must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.[11]

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[7] See, for example, A.R. Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate, 2004).

[8] See, for example, *Müller v. Austria*, no. 5849/72, 1 October 1975, Decisions and Reports (DR) 3, p. 25, and *G. v. Austria*, no. 10094/82, 14 May 1984, DR 38, p. 84. This was noted by the ECtHR in *Willis v United Kingdom*, at [32].

[9] *Kjartan Ásmundsson v. Iceland* at [39]; *Belane Nagy v Hungary* at [36]. See also *Moskal v Poland* at [45].

[10] For example *James and Others v. United Kingdom*, 8795/79, 21 February 1986, Series A no. 98, (1986) 8 EHRR 123.

[11] *James v United Kingdom* (1986) 8 EHRR 123 at [52].

The State had argued that the purpose of the SPC is to make provision for the needs of elderly former workers as part of a wider system of social security for social need, and that the purpose of the disqualification under s. 249(1) is to ensure that payment of State benefits are not made to persons whose needs are otherwise being provided by the State. It further argued that the disqualification provisions were objectively justified on the basis that they ensure that those who are imprisoned are not unjustly enriched while imprisoned, by accumulating substantial cash sums while having their needs provided for in State care.[12]

Since he (incorrectly) found that there is no property right under the ECHR, Binchy J does not specifically address the issue of justification in this context. However, he later provides such a justification when he say that

> The SPC forms part of what the defendants have referred to in their submissions as a scheme of single maintenance meaning that the State should not pay more than once for the maintenance of an individual. The purpose of the SPC is to maintain or to assist in the maintenance of an individual in his/her years of retirement. The fact that the benefit is not needs based is not relevant or determinative of the issues raised in these proceedings.
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> Section 249(1) does no more than suspend payment of the benefit in certain circumstances, including a period during which a person who is otherwise eligible to receive the benefit is maintained at the cost of the State while imprisoned. Since the purpose of the benefit in the first place is to assist in the maintenance of the individual, it is perfectly rational that the benefit should not be paid when that person is otherwise being maintained by the State. Moreover if the benefit were paid during a period of incarceration, a person would have the ability to accumulate a lump sum which he would not accumulate but for his incarceration. The section therefore has a rational and objective basis, and equivalent United Kingdom legislation has been acknowledged as such by the ECtHR.[13]

The Court also took the view that in considering the impact of the disqualification on the plaintiff

> regard must be had to the costs that he would incur in maintaining himself, but for his imprisonment and when that cost is taken into consideration, it can be seen that the impact upon the plaintiff is reduced very significantly.[14]

In summary, the Court concluded that

> The objectives of avoiding double maintenance and the accumulation of a lump sum that would not be accumulated, but for a person's imprisonment (and the consequent maintenance of that person at the expense of the State) in my view meet [the] requirements [that 'provisions which disqualify persons from receiving benefits to which they would otherwise be entitled must be rational, objective and in pursuit of a legitimate objective'].[15]

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[12] At [24].

[13] At [129]-[130].

[14] At [131].

[15] At [133].

Personal and family rights

The plaintiff also argued that the disqualification was in breach of his right to respect for his personal and family life under Article 8(1) of the Convention, This provides that

> Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8 in very broadly worded and the ECtHR has been reluctant to define clearly the scope of the Article. However, the recent *de Trizio* case is a precedent which would support an interpretation of Article 8 as covering the plaintiff's claim to SPC.[16] Binchy J did not consider whether SPC fell within the ambit of Article 8. He rejected the claim on the basis that this argument

> depends upon the plaintiff establishing that he has an antecedent property right in the SPC, and that as a result of the breach of that right, his rights under Article 8 of the Convention have been breached.[17]

This is simply incorrect. Article 8 (unlike Article 14 below) is a stand-alone Article and a breach of the rights it protects is not dependent on showing a breach of another provision of the Convention. Assuming (for present purposes) that the plaintiff's entitlement to SPC is protected by Article 8, the correct answer would be that any interference with that entitlement is justified as in the case of P1-1 above.

Equality

The plaintiff further argued that the provision was in breach of his right to non-discrimination under Article 8 and/or P1-1 taken with Article 14. This provides that

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is not stand-alone and in order for this provision to be applicable, the issue must otherwise fall within the ambit of the Convention. Although Binchy J. adverted to this, he does not, in fact, clearly rule as to how he considered that the Article 14 claim could be considered. However, he went on to the merits of the claim. Having referred to the ECHR case law, including the *Szrabjer* case in which the European Commission on Human Rights had rejected a similar case from the UK (see section 000 below),[18] he took the view that in the case at hand, the plaintiff's argument that the overlapping provision did not apply to those who have a private pension, to other sources of income or to a semi-state pension, was 'not comparing like with like'.[19]

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[16] See also *Aldeguer Tomás v. Spain*, 35214/09, 14 June 2016.

[17] At [115].

[18] See below.

[19] At [124].

The Court stated that there is

> a fundamental difference between a private pension or a public service pension … and the SPC and so the comparison advanced by the plaintiff is one of two different factual situations that does not give rise to discrimination for the purposes of Article 14 of the Convention.[20]

The Court held that if, contrary to its view, there had been any difference in treatment of the plaintiff with others in analogous situations, this did not give rise to a breach of Article 14 where there was a reasonable and objective justification for section 249(1).[21] Presumably the Court had in mind here the objective justification cited above in relation to property rights.[22]

Although *Szrabjer* is indeed a precedent for the approach adopted by the Court, it would arguably be better to reject the claim on the basis of a lack of justification as this (unlike comparability) allows for explicit consideration of issues of proportionality.[23]

Miscellaneous Convention arguments

Finally, the plaintiff advanced a number of less viable arguments under the Convention including that the disqualification was in breach of his right to freedom from degrading and humiliating treatment (Article 3) and/or his right to liberty (Article 5) and or his right to a trial in accordance with law (Article 6) and/or his right to an effective remedy (Article 13). These were all correctly rejected albeit that in some cases the Court's rationale for doing so is either obscure or arguably incorrect.

Constitution

Presumption of Constitutionality

Counsel for the plaintiff argued that the normal presumption of constitutionality should be limited given that the disqualification in question dated back originally to the Old Age Pension Act, 1908. Unsurprisingly, Binchy J. rejected this imaginative suggestion pointing out that it

> would be more persuasive were it not for the fact that the disqualification provisions have been repeated on at least four occasions post-1937 … .[24]

[20] At [132].

[21] At [124]. One of the confusing points of the judgement is that it addresses the same arguments in a number of different places.

[22] Text at fn [12]. Judgement at paras [129]-[133].

[23] See generally Baker, A. (2006) 'Comparison tainted by Justification: Against a 'compendious question' in Art. 14 discrimination', *Public Law*, 3, 476-497.

[24] At [64]. He might also have pointed out that the wording of the current provision is also entirely different to that of the 1908 Act.

Property right

It was argued that a disqualification from entitlement to SPC in respect of which the plaintiff had made social insurance contributions was an interference with his property rights and/or his right to earn a livelihood contrary to Articles 40.3 and/or 43 of Bunreacht na hÉireann. However, the Court held, as noted above, that the plaintiff did not have a property right in the SPC in the context of the Constitution.[25] This would appear to be the correct view unless and until the Supreme Court decides otherwise.

Despite rejecting the argument that SPC represented a property right for the purposes of Article 43, Binchy J appears to suggest that the Irish Constitution recognises some more limited form of 'due process' in relation to the protection of statutory claims. It would appear that this is derived from US Constitutional law but the Court does not clearly cite any Irish authority for this proposition. The Court states that

> In both the Irish constitutional context and in the context of established convention law, the Oireachtas has a wide margin of appreciation in establishing criteria for eligibility of any social welfare benefit, but must ensure that such criteria are rational, objective and in pursuit of a legitimate aim, and that they are in no way arbitrary or discriminatory.[26]

However, Binchy J was satisfied that the section had 'a rational and objective basis'.

Additional punishment

It was further argued that the disqualification amounted to an additional punishment to that imposed by a Court contrary to Articles 34 and/or 38 and/or 40.3 of the Constitution. Binchy J dismissed the argument holding that

> The section is not punitive in its intent, and this is demonstrated by the fact that it applies also to persons who are resident outside of the jurisdiction as well as by the fact that payment of the benefit resumes upon release from prison. While deprivation of the benefit during imprisonment may have well adverse consequences, this does not mean that the section itself constitutes a punishment which may only be administered by a court. It is well established that convictions may have many indirect consequences and vary in the significance of their impact upon those convicted, but it does not follow that because a consequence for an individual is severe, that that consequence is a punishment.[27]

The Court might have pointed to the fact that, unlike the provisions in the cases relied on[28] (and indeed the original disqualification in the 1908 Act), s. 249 is not dependent on *conviction* or *sentencing* but rather on committal to prison.

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[25] At [87].

[26] At [128]. See also at [88] and [123].

[27] At [131].

[28] *Conroy v. Attorney General* [1965] I.R. 411; *State (Pheasantry Ltd.) v. Donnelly* [1982] I.R.L.M. 512 and *Enright v. Ireland* [2003] 2 I.R. 321.

Equality

It was also argued that the provision was in breach of the equality provision of the Constitution in that by reason of s. 249(1), the plaintiff was not treated equally before the law by reason of his status as an older prisoner in receipt of the State Pension Contributory as the section does not apply to others who are in receipt of a private pension or are otherwise in receipt of other income or are of private means.

Here the Court referred to O'Donnell's J's statement in *M.R.*to the effect that

> Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement.[29]

Binchy J conclude that the plaintiff was not 'the same' as the mooted comparator, i.e. a prisoner in receipt of a private pension or other income. Whether or not this analysis is strictly correct, there can be little doubt that a claim under Article 40.1 would not succeed.

Miscellaneous Constitutional arguments

The plaintiff also advanced a number of somewhat weaker arguments and suggested that section 249(1) was unconstitutional by reason of being an interference with the independence of the judiciary, his right to trial in due course of law, his right to fair procedures, his right to respect for his private life and his right to personal autonomy. Perhaps unsurprisingly, Binchy J rejected these claims.

3. Comparative case law

European Court of Human Rights

There has been surprisingly little case law before the European Court of Human Rights in relation to this issue. In the *Szrabjer* case, the applicant who was imprisoned disputed the fact that the earnings related element of his state pension (SERPS), based on his contributions, was suspended while he was undergoing imprisonment.[30] He argued that this was a vested property right and that there was no basis to deprive him of this right while in prison. The Commission of Human Rights took the view that the effect of the domestic legislation did constitute an interference with the applicant's property rights. The question then arose as to whether such deprivation was in the public interest. The Commission noted that the pension was merely suspended during imprisonment and became payable

[29] *M.R. & D.R. (suing by their father and next friend O.R.) and others v. An t-Ard-Chláraitheoir* [2014] IESC 60 at [36].

[30] *Szrajber and Clarke v United Kingdom*, 27004/95 and 27011/95, 23 October 1997. This decision was followed in *Carlin v. United Kingdom*, 3 December 1997 (1998) 25 EHRR CD 73 which concerned the UK Industrial Injuries Disablement Benefit.

again on the person's release. In addition the applicant's wife continued to receive a "dependent benefit" while her husband was in prison. The Commission considered that it was in the public interest that during a period of imprisonment, when prisoners are kept at the expense of the state, a state pension, including an earnings related element of the pension, should be suspended. To do otherwise would leave the prisoner in an advantageous situation of benefiting from accumulating a lump sum by receiving a regular pension, without having any ongoing living expenses.

The applicants also complained under Article 14 that they were (i) being discriminated against on the grounds of their status as prisoners; and (ii) being treated differently form persons in receipt of an occupational pension and (ii). The Commission, however, ruled that

> a comparison of prisoners with non-prisoners is a comparison of two different factual situations and as such discloses no discrimination under Article 14.

With regard to the complaint that the applicants were treated less favourably than prisoners who had paid into an occupational pensions scheme, the Commission considered that the differences between the SERPS and an occupational pension meant that, again, the comparison involved two different factual situations and that there was, therefore, no discrimination.

UK courts

There does not appear to have been any recent ruling directly on this issue in the UK but in a number of cases, ECHR arguments concerning non-payment of benefits to persons in civil institutions (such as hospital patients) have been considered by the courts in the United Kingdom. In two cases, the Social Security Commissioners held that reduction in retirement pension while claimants were in hospital was not in breach of Article 1 of Protocol 1 and Article 14.[31] In *Obrey v Secretary of State for Work and Pensions* the Court of Appeal rejected a similar challenge in relation to housing benefit.[32]

More recently, however, the UK Supreme Court came to a different decision in relation to the specific case of a disabled child.[33] The issue in this case was whether the suspension of payment to a boy aged three, of Disability Living Allowance (DLA) on the ground that he had been an in-patient in an NHS hospital for more than 84 days was a breach of his human rights. The Secretary of State argued that the suspension was pursuant to the rule against overlapping provision. As in-patients' disability-related needs were met by the National Health Service, it was argued that the suspension of disability cash benefits was justified. However, the Court was satisfied on the evidence that almost all parents provided more or the same level of care when their child is in hospital compared to when their child is at home and the vast majority had increased costs relating to their child's disability when they are staying in hospital.[34] Accordingly the Court concluded that there was, in effect, no basis

[31] CP/5084/2001 (8 August 2002); and CP/518/2003 (18 November 2005).

[32] [2013] EWCA Civ 1584.

[33] *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

[34] We do not discuss here the rather unusual nature of this evidence which was based on a statistically unrepresentative study by an organisation campaigning for the removal of the DLA suspension, a report which

for the justification advanced and held that there was a breach of human rights. Lord Mance, with whom Lord Clarke and Lord Reed agreed, agreed with this outcome. However, Lord Mance stated that

> Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily upon lines drawn broadly between situations which can be distinguished relatively easily and objectively.[35]

However, he agreed that the justification advanced failed 'to reflect the modern emphasis on the importance of parents, in particular, continuing to provide assistance in connection with bodily functions while their child is undergoing long-term hospitalisation'.[36]

The Supreme Court appears to have applied a heightened standard of review in this case but without explaining why it did so (other than that all the members of the Court felt that the disqualification was inappropriate). However, the lower courts have continued to uphold disqualifications for benefits to persons in institutions, distinguishing *Mathieson*.[37] In a recent case, the Upper Tribunal accepted that avoiding double provision for the same contingency out of public funds is a legitimate aim.[38] The evidence indicated that in the great majority of cases the care needs of disabled adults in care homes were met adequately and, therefore, continued payment of the DLA care component would result in double provision.

USA

The US Federal courts have consistently taken the view that the non-payment of benefits to persons in prison is not unconstitutional on Federal equal protection grounds. The US courts have held that rational-basis review applies and that the rule satisfies that standard.[39] For example, in *Buccheri-Bianca*, the Tenth circuit court of appeals held that the goal of social security was to replace a worker's lost earnings. Because a prisoner was maintained at public expense, he or she had no need for a continuing source of social security income and so there was a rational basis for the denial of benefits.[40] The US courts have also ruled that the non-payment of benefits does not constitute an additional punishment which might be in breach of prohibitions against bills of attainder and ex post facto laws in the US

had not been before the Upper Tribunal and which the Court of Appeals considered 'adds little': [2014] EWCA Civ 286 at [38].

[35] At [51].

[36] At [55].

[37] See, for example, *ML v Secretary of State for Work and Pensions* [2016] UKUT 323 in which Judge Markus held that non-payment of the care component of DLA to an adult in a residential care home

[38] Ibid.

[39] To refer to only some of the cases: *Cobb v Secretary of Health and Human Services,* 81-60224*,* (ED Mich. 1982); *Washington v. Secretary of Health & Human Services*, 718 F. 2d 608 (3rd Circuit 1983); *Buccheri-Bianca v Heckler*, 768 F.2d 1152*,* (10th Circuit 1985); *Zipkin v* Heckler, 790 F.2d 15 (2nd. Circuit 1986); *Davis v. Bowen,* 825 F.2d 799, 801 (4th Cir.1987); *Butler v Apfel*, 144 F.3d 622, (9th. Circuit 1998).

[40] *Buccheri-Bianca v Heckler*, 768 F.2d 1152*,* (10th Circuit 1985).

Constitution.[41] The court found that the legislative history did 'not reflect a punitive intent'.[42]

In contrast to social security benefits (which are a Federal responsibility) workers' compensation benefits in the USA are generally a State responsibility.[43] A number of State courts have tended to apply a more stringent standard of review to disqualifications for workers' compensation benefits either under the Federal Constitution or under State Constitutions. However, even in this type of case, the Montana Supreme Court has recently ruled that a provision which denied such benefits to an incarcerated person was not in breach of his constitutional rights to equal protection as it was rationally related to the legitimate objective of providing wage-loss benefits that bear a reasonable relationship to actual wages lost as a result of a work-related injury.[44] The Court also ruled that there was no breach of the constitutional right to due process and that the provision was not in breach of the Excessive Fines Clause of the Montana Constitution.[45]

4. Analysis

In this section we examine a number of issues arising from the ruling including the Court's approach to the analysis of the European Convention of Human Rights *vis-à-vis* the Irish Constitution and its approach to a number of key issues including property rights, Article 8 of the Convention and equality.

Convention-Constitution

The Supreme Court (per Murray CJ) has, of course, pointed out in *McD v L* that

> The European Convention may only be made part of domestic law through the portal of Article 29.6 and then only to the extent determined by the Oireachtas and subject to the Constitution.[46]

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[41] See U.S. Const. Art. I, § 9. An ex post facto law is the imposition of punishment for past acts while a bill of attainder involves a statute imposing punishment without the benefit of trial.

[42] *Butler v Apfel*, 144 F.3d 622, 626 (9th. Circuit 1998). See also *Peeler v. Heckler,* 781 F.2d 649 (8th Cir.1986); *Jones v. Heckler,* 774 F.2d 997 (10th Cir.1985); *Jensen v. Heckler,* 766 F.2d 383 (8th Cir.), *cert. denied,* 474 U.S. 945, 106 S.Ct. 311, 88 L.Ed.2d 288 (1985); *Andujar v. Bowen,* 802 F.2d 404, 405 (11th Cir.1986); *Wiley v. Bowen,* 824 F.2d 1120, 1122 (D.C.Cir.1987) .

[43] This is for historical reasons as the workers' compensation system was established before the Federal social security system.

[44] *Goble v. Montana State Fund*, 325 P.3d 1211; 2014 MT 99; 374 Mont. 453 (Mont., 2014). See also *Wood v. Beatrice Foods Co.,* 813 P.2d 821, 823 (Colo. App. 1991). See contra *Willoughby v*. *Dep't of Labor* and *Industries*, 147 Wash.2d 725, 57 P.3d 611 (Wash. 2002) though this case involved a payment to compensate persons for industrial injuries which the court ruled was 'unrelated to wage compensation'.

[45] Article II, Section 22 of the Montana Constitution prohibits the imposition of excessive fines.

[46] [2009] IESC 81.

The Court in that case also highlighted the limited nature of the implementation effected by way of the European Convention on Human Rights Act 2003.[47]

Second, the Supreme Court in *Carmody* has considered the order in which claims should be considered.[48] It is well accepted that

> the question involving any validity of a statute or a section thereof should be postponed until consideration has been given to any other question of law the resolution of which could determine the issues between the parties. If a decision on such questions of law does determine such issues then, in principle, it is not necessary for the Court to address the constitutional question.[49]

The Court stated that

> the nature of the remedy, such as it is, provided by s. 5 of the Act of 2003 is both limited and sui generis. It does not accord to a plaintiff any direct or enforceable judicial remedy. There are extra-judicial consequences whereby the Taoiseach is obliged to lay a copy of the order containing a declaration before each House of the Oireachtas within 21 days. That is the only step which is required to be taken under national law in relation to the provisions concerned.

Therefore, Murray CJ concluded that a declaration of incompatibility under s.5 was not a remedy which would resolve the issue between the parties and even if such a declaration was granted it would not affect the Mr. Carmody's position with regard to his claimed constitutional right in that case. The Court concluded that

> when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.[50]

The Supreme Court has also stated that a claim that a provision is "in breach of" the Convention is not an acceptable formulation as it treated the Convention as if it had direct effect and presumes that the Court has the power to grant a declaration that a section is in breach of the Convention.[51] The Court recalled it was 'clear from the judgments of this Court in *McD v L* that the European Convention on Human Rights Act 2003 did not give direct effect in Irish law to the European Convention on Human Rights'.

An academic commentator might well be somewhat critical of the Supreme Court's narrow approach to the incorporation of the Convention – particularly when compared to the rather more expansive approach of the UK Supreme Court to a very similar incorporation.

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[47] For example, Murray CJ referred to Section 2 as providing 'a rather fluid and imprecise mode of determining the manner in which the Convention should be used to interpret national law'.

[48] *Carmody v Minister for Justice*, *Equality and Law Reform* [2009] IESC 71.

[49] *Carmody* per Murray CJ.

[50] *Carmody*. This approach would not appear to apply where the claim was that the legislation (or rule of law) should be construed in manner compatible with the Convention under s. 2 of the 2003 Act. However, that clearly does not apply in this case.

[51] *M.D. (Minor) v Ireland AG & DPP* [2012] IESC 10 at [59].

Nonetheless the High Court is clearly bound by its rulings. But, in the instant case, Binchy J took a rather undifferentiated approach to the Convention and the Constitution sometimes considering related claims together. There is little indication that the Supreme Court's directions (above) were followed. The High Court referred frequently to the Convention but only once to the 2003 Act; it referred on several occasions to 'a breach of' the Convention; and there is no sign of a correct sequential approach to the Constitutional and Convention claims.

Even without the Supreme Court's instructions to distinguish between the Convention and the Constitution in a particular manner, it clearly makes sense that a claim concerning protection of property under the Convention should be considered separately to a claim for protection of property under the Constitution. But again, the High Court was inclined to consider issues together.

Property rights

As we have seen, the High Court rather misread the ECHR law on property rights. The correct reading would have been that the claim for SPC was a possession protected by Article 1 of Protocol 1 of the Convention but that the interference with that right was justified. In that regard this was not a particularly difficult case. However, the approach to justification is a much debated one and, for example, there have been a number of important recent cases in the UK concerning this issue.[52] For example, the UK courts have suggested that the term 'margin of appreciation' in relation to the scope which a Contracting State may have in relation to its implementation of the Convention, while appropriate at European level is not appropriate when it comes to assessment by the national courts.[53]

Article 8 of the Convention

Although the Court did not explicitly consider the issue, it is clear that the ECtHR jurisprudence, as it stands, provides support for the view that a payment such as SPC may fall within the scope of Article 8. However, the Court assumption that in order to show a breach of Article 8 one needs to show a prior breach of Article 1 of Protocol 1 of the Convention must be considered to be *per incuriam*. The correct view would be that, assuming SPC does fall within the scope of Article 8, any interference with the right to respect for private and/or family life is justified for the same reasons that apply to the claimant's property rights.

[52] See, for example, *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales*, [2015] UKSC 3 and *R (MA and others) v Secretary of State for Work and Pensions* (pending at the time of writing).

[53] Binchy J. also referred to a 'margin of appreciation' in relation to the Irish Constitution. It is not clear that it would be useful to import this particular form of words into Irish Constitutional jurisprudence.

Equality

In relation to Article 14 of the Convention, the *Szrabjer* case does indeed provide a basis for rejecting the claim on the basis that, as a prisoner, the applicant is not in a comparable position to a non-prisoner or a prisoner in receipt of an occupational pension. *Szrabjer* is a rather dated case but the ECtHR has continued to reject equality claims under Article 14 on the basis of non-comparability.[54] As Baker has cogently argued, it would perhaps be preferable for the Court to consider such cases on the basis of justification as this (unlike comparability) allows for explicit consideration of issues of proportionality.[55] However, one cannot criticise the approach adopted by the High Court in this case given the existing precedent. Even if justification was to be considered, the difference in treatment would be justified for the reasons discussed above. Indeed, Binchy J did hold that, in the alternative, any difference in treatment was justified.[56]

5. Overview

This is the first major case concerning the right to social welfare payments under the ECHR. As such it is somewhat disappointing that the Court's analysis was arguably incorrect in a number of areas. Nonetheless, any failings did not affect the outcome of the case. Indeed, the plaintiff does not appear to have identified any case in which a similar claim for a pension (under any binding human rights provision) has been successful. Despite the very limited approach adopted by the Supreme Court to the role of the ECHR in Irish law, it seems inevitable that the number of cases which include claims under the 2003 Act will increase in the future. In the UK, for example, it is now somewhat unusual for a case concerning social security which reaches the higher courts *not* to involve a claim under the ECHR. Hopefully cases such as this one will lead to an improved interpretation of such claims over time.

Postscript: Supreme Court appeal

The Supreme Court has recently allowed a direct appeal to that Court from this decision.[57] Article 34.5.4° provides:

> … the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court, if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:
>
> (i) the decision involves a matter of general public importance;
>
> (ii) the interests of justice."

[54] See, for example, *Carson v United Kingdom*, (2010) 51 EHRR 13.

[55] See generally Baker, A. (2006) 'Comparison tainted by Justification: Against a 'compendious question' in Art. 14 discrimination', *Public Law*, 3, 476-497.

[56] At [124].

[57] *C. -v- The Minister for Social Protection*, [2016] IESCDET 111.

The Court set out its general approach to such applications noting that

> the constitutional function of this Court is no longer that of an appeal court designed to correct alleged errors by the trial court. Where it is said that the High Court has simply been in error in some material respect the constitutional regime now in place confers jurisdiction to correct any such error as may be established on the Court of Appeal. Rather the text of the Constitution now in place makes clear that an appeal to this Court, whether directly from the High Court under Art. 34.5.4 or from the Court of Appeal under Art. 34.5.3, requires that it be established that the decision sought to be appealed against involves a matter of general public importance or that it otherwise is in the interest of justice necessary to allow an appeal to this Court. It will rarely be necessary in the interest of justice to permit an appeal to this Court simply because it is said that the lower court was in error. An appeal to the Court of Appeal provides the appropriate remedy for any error made by the High Court. Likewise a party which has had the opportunity to have the decision of the High Court reviewed by the Court of Appeal will have had the benefit of having been able to put its case both at trial and on appeal. Without more the interests of justice will not require a further review on appeal to this Court.[58]

In the instant case, the Court was satisfied that it did raise an issue of general public importance. It was satisfied that there was 'a stateable case' for the appeal and that the issue raised applied in principle to any person who is undergoing a period of imprisonment at a time when they would otherwise qualify for a SPC. The Court stated that 'provided that the potential appeal truly does raise a stateable issue which can properly be characterised as one of general public importance, the strength or weakness of the potential case for the appellant is not a particularly important aspect of the Court's assessment'.[59]

The Court concluded that

> The issues raised, therefore, are both important in themselves (touching on the extent to which persons who have paid for contributory pensions can legitimately be deprived of those pensions) and extend beyond the circumstances of Mr. C.'s own case. In those circumstances the Court is satisfied that the underlying constitutional threshold is met.

The Court went on to say that as this was an application for 'leapfrog leave' it was also necessary for the Court to consider whether the exceptional circumstances justifying a direct appeal to this Court are made out.[60] On the basis of those principles set out in earlier determinations, the Court was satisfied that there were exceptional circumstances justifying the grant of leapfrog leave. It held that

> While there are a number of different constitutional and ECHR arguments put forward, the ultimate question in this case involves a relatively net issue which is as to whether the exclusion of prisoners from benefiting from a contributory old age

[58] The recent Constitutional amendment unfortunately did not make the use of numbered paragraphs mandatory by the Court.

[59] Perhaps a rather strange approach for a Court which refers on a number of occasions to 'the efficient use of court time'.

[60] See, for example, *Persona Digital Telephony Limited -v- Minister for Public Enterprise*, [2016] IESCDET 106.

> pension is consistent with rights guaranteed in either or both of the Constitution and the ECHR. This is a case which is likely to "look the same" whether coming to this Court on appeal directly from the High Court or on appeal from the Court of Appeal. It is also a case where it is, in the Court's view, important that clarity be brought to this issue within a reasonable period of time. Furthermore, the Court is satisfied that the efficient use of court time would not be aided by creating the likelihood of two appeals involving almost identical arguments.

One might express some surprise that any (let alone all) of the criteria for appeal were considered to be met given that the plaintiff appears to have been unable to cite any case directly in support of his claims; that the provision at issue has been in place for over 100 years; and that, given the age of the prison population, it is likely to affect very few persons. Of course, it must be noted that the Court prefaced its determination by warning that

> a determination of the Court on an application for leave, while it is final and conclusive so far as the parties are concerned, is a decision in relation to that application only. The issue is whether the questions raised, and the facts underpinning them, meet the constitutional criteria for leave. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, any issue canvassed in the application will in due course be disposed of in the substantive decision of the Court.