THE FINANCIAL SERVICES AND MARKETS BILL AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Introduction

1. In view of the priority which the present Government has given to the European Convention on Human Rights, one might expect its own legislative proposals to accord with the Convention. It may, therefore, surprise some people to discover that its draft Financial Services and Markets Bill ("the Bill"), if enacted in its present form, would seem likely to establish procedures which conflict with the Convention. Even more surprisingly, some of the conflicts would be in respects where the UK has previously been in compliance.

2. These potential conflicts would exist even without the incorporation of the Convention into domestic law by the Human Rights Bill. However, when the Human Rights Bill has been fully enacted and brought into force, there will be more convenient domestic procedures for a challenge than exist at present.

3. There are two principal areas in which the Financial Services and Markets Bill may create conflicts with the Convention:-
   a. relations between the Financial Services Authority ("FSA") and practitioners in the financial services industry;
   b. claims by investors against practitioners in the financial services industry.

Relevant provisions of the Convention

4. Article 6 of the European Convention on Human Rights ("the Convention") provides:-

   "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....."

5. The 1st Protocol Article 1 provides:-

   "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 conditions provided for by law ..."

6. Limited companies and corporate persons have the same rights as individuals under the Convention.

Does the Convention apply to relations between the Financial Services Authority and practitioners?

7. The short answer is 'Yes'.

8. The precise scope of the expression "civil right" in Article 6 is not obvious to a Briton; nor, indeed, has it been found easy by lawyers trained in civil law jurisdictions. However, the European Court of Human Rights ("the Court") and the European Commission of Human Rights ("the Commission") have held that the right to practice a profession or engage in commercial activity is a "civil right" within Article 6 in the following cases:-

a. medicine[1]
b. law[2]
c. architecture[3]
d. business agent or property manger[4]
e. public service transport license for a private passenger carrier[5]
f. taxi license[6]
g. license for a petroleum gas installation[7]

9. Therefore, the right to practice in the regulated financial services fields is almost certainly a right to which Article 6 applies[8]. Article 6 has been held to apply both to the original grant of a license to undertake commercial activity and to its withdrawal[9].

10. Therefore, Article 6 would apply to the following decisions under the Bill:-

a. refusal by FSA of application for authorisation (cl.26)
b. withdrawal of authorisation by FSA (cl.27)
c. refusal by FSA of permission to carry on a regulated activity (cl.35)
d. cancellation by FSA of permission to carry on a regulated activity (cl.37)
e. direction by FSA that an individual is not a fit and proper person to be employed in connection with any kind of regulated activity (cl.40)
f. refusal by FSA of approval of a person for the purpose of employment by an authorised person to perform a regulated function (cl.43)

g. withdrawal by FSA of approval of a person for the purpose of employment by an authorised person to perform a regulated function (cl.47)

11. It has been held that Article 6 does not apply to professional disciplinary action for minor misdemeanours. But it might apply to major disciplinary action, the practical effect of which was to imperil a person's professional future, even though in form the sanction did not prohibit continuing to practice. Therefore, depending on the circumstances, Article 6 ***might*** be held to apply to the following disciplinary functions of FSA:-

a. imposition of a fine on an approved person (cl.50)
b. publication of a statement of misconduct by an approved person (cl.50)
c. imposition of a fine for market abuse (cl.58)
d. imposition of requirements under FSA powers of intervention (cl.124)
e. publication of a statement of public censure on an authorised person (cl.135)
f. imposition on an authorised person of a financial penalty (cl.136)

Will the Bill ensure that the requirements of the Convention are met in respect of relations between the FSA and practitioners?

12. The short answer is 'No'.

13. The requirements of Article 6, as developed by the Court and the Commission, as to a hearing include:-

a. An oral hearing.
b. A public hearing. There are inconsistent decisions from the Court as to whether this right is infringed in a situation where the person concerned has not requested that the hearing be in public[10].
c. The right to be represented by a lawyer or other spokesman.
d. The right to be present at any hearing if conduct or personal character are at issue.
e. "Equality of arms": this means that every party must have an opportunity to put his case.
f. The right to cross-examine witnesses[11].
g. The procedure must be completed within a reasonable time.
h. Reasons must be given for a decision

i. The hearing must in all other respects be fair. The scope of this residual category is of its nature somewhat open-ended.

14. The requirements of Article 6 as to the tribunal which carries out the hearing include:-

a. It must be independent of the parties. Factors tending to weaken independence would include:-

i The tribunal being appointed by one of the parties.
ii Members of the tribunal being appointed for short periods only.
iii Members of the tribunal being able to be removed during period of office.
iv Exposure to other outside pressures.

b. It must be impartial.

c. It must be established by law, and function in accordance with the particular rules which govern it.

15. Where decisions concerning right to practice are taken by a body which is not an adequate tribunal in the Article 6 sense, the requirements of Article 6 may still be satisfied if there is a right of appeal to a body which does provide the guarantees of article 6. It has generally been believed on the basis of *Albert and Le Compte v Belgium*[12] that for an appeal to be an adequate substitute for a defective original decision the appeal body must be able to review all the merits. In that case a medical disciplinary tribunal sat in private, and the appeal body could consider only law, and not the merits: so it was held that there was a breach of article 6. But some doubt is cast by the recent case *Wickramsinghe v. UK* (1997)[13] where proceedings before the Professional Conduct Committee of the General Medical Council, whose procedure is laid down by the Medical Act 1983, were held by the Commission to fall short of what was necessary to ensure the required appearance of independence, since:

a. no attempt had been made to ensure that members of the Conduct Committee determined cases independently of the GMC's general policies;

b. members of the Conduct Committee generally served for only a limited period of 1 year;

c. the President of the GMC both played an extensive role in the investigation and sat on the committee.

However, there was no violation of article 6(1) because there was a right of appeal on points of law to the Privy Council.

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16. The FSA will not satisfy the requirements of Article 6 in respect of any of its decisions in the matters listed above. The FSA will be both prosecutor and judge. It cannot possibly be an independent tribunal.

17. Therefore, Article 6 will be satisfied only if there is an adequate appeal system.

18. The Bill goes to some lengths in an attempt to create such an appeal system. The Bill would create an entirely new statutory tribunal to be called the Financial Services and Markets Tribunal ("the Appeal Tribunal"). The independence and impartiality of the Appeal Tribunal is reasonably well catered for: the members will be appointed, as judges are, by the Lord Chancellor.

19. It is, therefore, strange to find that in two respects the Bill fails to ensure that the Appeal Tribunal will meet Article 6 requirements, namely:-

a. as to right to a hearing;

b. to a public hearing.

Right to a hearing

20. Clause 68(3) gives the Appeal Tribunal a discretionary power to consider evidence and arguments, but does not require it to do so:

> *"(3) On an appeal under this Act, the Appeal Tribunal may ..."*
> (emphasis supplied)

Thus the Appeal Tribunal has a discretion to decline to hear evidence, and to decline to hear argument: in fact, the Appeal Tribunal does not have to consider an appeal at all.

21. Only in the one limited case of an urgent exercise of a power of intervention by the FSA is there a requirement on the Appeal Tribunal to do anything:

> *"... the Appeal Tribunal must determine whether the decision to exercise powers, or to impose a requirement, was (at the time it was made) reasonable in all the circumstances"* (cl.125(9)) (emphasis supplied)

The explanation for singling out this one situation for a mandatory determination by the Appeal Tribunal seems to be that in this one case the FSA, by reason of the

urgency, will have omitted the normally required step of giving a decision before giving a warning notice to persons concerned. This rationale would be justifiable if FSA procedures in the normal case, that is including the warning notice step, satisfied Article 6. But, as already explained, they cannot do so.

22. Even in cases where the Appeal Tribunal exercises its discretion in favour of an Appellant to the maximum extent, there will be areas where it is forbidden to go, specifically:-

a. It cannot consider evidence not placed before the FSA, unless conditions to be specified in rules (not yet drafted) are satisfied. Whenever such restrictions on evidence on appeal are encountered they generally mirror the Court of Appeal requirement that "fresh evidence" should be admitted only where it could not have been obtained with reasonable diligence for use at the original hearing [14]. This is a high threshold. Such restrictions are reasonable where the original hearing has been fair. But a prosecutor-cum-judge hearing by FSA is so far removed from normal conceptions of fairness that there surely ought to be a right to a full rehearing of the facts before the Appeal Tribunal. By analogy, a person convicted in a Magistrates Court has a right to a full rehearing in the Crown Court, where there is complete freedom to fresh or different evidence.

b. It cannot consider arguments not raised before FSA in circumstances to be specified in the (not yet drafted) rules. Again there should be a full and unfettered right to present all arguments before the Appeal Tribunal, which will be the first fair hearing the appellant will have had.

23. The Convention creates a right: "*everyone is entitled to a ... hearing*". The Bill conspicuously chooses not to provide that.

Public hearing

24. The Convention is unusually specific as to the limited circumstances in which there may be a derogation from the normal principle of a right to a public hearing:-

> "*... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*" (Article 6(1))

25. Few of the scenarios justifying a closed trial are likely to arise in a financial services case. But for the rare occasions when one might arise, it would have been simple enough for the Bill to adopt the wording of the Convention.

26. Oddly, the Bill gives an open-ended invitation to permit closed hearings in situations outside the Convention:-

> *"Rules made by the Lord Chancellor ... may, in particular, include provision --*
> ...
> *(b) for the holding of hearings in private in such circumstances as may be specified in the rules"* (Schedule 10 paragraph 7)

Does the Convention apply to relations between investors and practitioners?

27. The short answer is 'Yes'.

28. A dispute between an investor and a practitioner as a claim by the investor for compensation for an inadequate service would involve a determination of the practitioner's "civil rights" within Article 6.

29. The practitioner's money is a species of "possessions". He should be deprived of it only subject to the conditions provided for by law.

Will the Bill ensure that the requirements of the Convention are met in respect of relations between investors and practitioners?

30. The short answer is 'No'.

31. The Bill creates a new animal, the Financial Services Ombudsman. Unlike existing Ombudsmen, who are identified and respected individuals, this "Ombudsman" will be a corporate body and a quango in itself.

32. The Ombudsman will be a dispute-resolver whose jurisdiction is compulsory for authorised persons, but in two senses voluntary for investors:-

a. The investor does not have to go to the Ombudsman at all: if he wishes he can sue instead. But the practitioner has no right to litigation in preference to the Ombudsman.

b. The investor can ignore the Ombudsman's decision if he does not like it. In that case the investor can have a second bite at the cherry in court or elsewhere. But the practitioner is bound by the decision, whether he likes it or not.

33. The unevenness of the scales in this forum is underlined by the fact that if a complaint is resolved in favour of the investor he may be awarded costs against the practitioner; but if the complaint is resolved in favour of the practitioner, costs may be awarded in his favour only if the complainant has been guilty of improper or unreasonable conduct. It may be arguable that such discriminatory rules are in themselves in breach of the fairness requirement of Article 6 or the non-discrimination requirement of Article 14.

34. The Ombudsman will operate two parallel jurisdictions:-

a. According to law.

b. Outside of the law, according to what he thinks "fair and reasonable". There is authority from a Lord Chancellor that an arbitration clause which permitted arbitrators to disregard the law would render them 'arbitrary in their dealings with the parties'[15].

35. The existence of the arbitrary jurisdiction is emphasised three-fold in the Bill, as to:

a. liability;

b. financial compensation;

c. non-monetary directions.

36. As to liability, clause 155(2) provides:-

> *"A complaint is to be determined in favour of the complainant if the ombudsman considers that the matter complained of --*
>
> *(a) was contrary to law, or*
>
> *(b) was not fair and reasonable in the circumstances"*

37. As to financial compensation, clause 156(3) provides:-

> *"A money award may compensate for any loss or damage --*
>
> *(a) of a kind for which a court has power to award damages for breach of contract; or*
>
> *(b) of any other specified kind."*

38. As to a non-monetary direction, clause 156(2) provides:-

> *"The determination may include*
>
> .....
>
> *(b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and reasonable (whether or not a court could order those steps to be taken)"*

39. The Bill provides for an appeal to the High Court on a point of law (cl.155(8)). But if the ombudsman makes a decision under the arbitrary jurisdiction, rather than the law jurisdiction, then ex hypothesi no point of law could arise. So in the field where the ombudsman's power is arbitrary it is also unappeallable.

40. Money awards of the ombudsman can be enforced as if a money judgment of a court (schedule 8 para 17). Non-monetary directions can be enforced by a court injunction (clause 156(9)).

41. No procedure for the ombudsman is indicated in the Bill. Therefore, it remains at present an open question whether the procedure would accord with the fair trial requirements of Article 6.

42. The seriousness of these shortcomings is highlighted by the proposal of the FSA that the Ombudsman be able to make awards of as much as £100,000[16] - the quantum of a substantial High Court action.

43. Even if fair procedures could be devised in a form in which the scales of justice appear from the outset to be unbalanced, it must be strongly arguable that the creation under statute of an authority with compulsory powers to order the payment of money quite expressly in circumstances where there exists no liability in law is in conflict to the right to peaceful enjoyment of possessions in the Convention.

44. Furthermore, this would seem to be an unprecedented departure from the English Common law tradition that we are a society free from the sway of arbitrary power and governed subject to law. Magna Carta – which is still on the statute book – provides:

> No freeman shall be …disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed…but by the lawful judgment of his peers, or by the law of the land".

Notes

1. Konig v. Germany (1978)

2. H v Belgium (1987) 10 EHRR 339

3. Guchez v. Belgium (1984)

4. Jaxel v. France (1987)

5. Pudas v. Sweden (1987)

6. Axelsson v Sweden (1989)

7. Benthem v Netherlands (1985) 8 EHRR 1

8. In Van Marle v Netherlands (1986) the Court left open the question whether the right to practice as an accountant was a "civil right", but that was in the context of a case about the marking of an accountancy examination.

9. Benthem

10. In Hakansson v Sweden the applicant was held to have waived his right to a public hearing because he did not ask for it. On the other hand, in H v Belgium (1987), which concerned professional disciplinary proceedings against an advocate, it was held there was no waiver of this right: no request for a public hearing was made, because the applicant believed there was little prospect of it being granted.

11. X v Austria (1972)

12. 5 EHRR 533

13. [1998] EHRLR 338

14. Ladd v Marshall [1954] 1 WLR 1489

15. The Earl of Selborne LC in Rolland v Cassidy (1883) 13 App Cas770 at p.772

16. Consumer Complaints: The New Financial Services Ombudsman Scheme published by the Financial Services Authority (August 1998) paragraph 1.19.

17. The Great Charter 25 Edw 1 in Halsbury's Statutes vol 10 page 16

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