Human Rights Abuse

In recent years, I have become concerned at a form of human rights abuse in the financial services industry. The abuse is of the Human Rights Act and the European Convention on Human Rights which the legislation incorporates into English law.

The claims made

The Financial Services and Markets Act itself is a breach of the Convention. Nope.

The fact that the FSA has disapplied the 15 year Limitation Act long-stop for making complaints contained in the Limitation Act to the Financial Ombudsman Service breaches Article 1 of the First Protocol and Article 6 of the Convention. Not true again.

The Financial Ombudsman Service's refusal to allow cross-examination of complainants by firms and the absence of appeal breaks Article 6 - another wrong call.

Treating customers fairly breaches the Convention. Now, that is wild.

Even the one that is true, about the need for FOS to hold a hearing at the firm's request where there is a serious matter in dispute that could usefully be resolved in this way is not quite as true as it is sometimes claimed to be.

The detail

The European Court of Human Rights construes the Convention with an eye on the origins of the Convention. It does not like the state seizure of property or inappropriate interference with private life. Its civil litigation caselaw on Article 6 has been notably restrained.

FSMA is legislation passed by a democratically-elected Parliament. Its enforcement mechanism involves a full public re-hearing before the state's Financial Services and Markets Tribunal. Anyone who followed the Legal & General saga will know that the Tribunal will hear every scrap of evidence and reach its own independent view.

Somebody argued recently that the difference in resources between the regulator and the firms makes this hearing a breach of the Convention. Inequality of legal resource has never been accepted by the European Court of Human Rights as making a hearing unfair. There is a financial assistance scheme anyway at least for market abuse cases. In others, the Tribunal can call on pro bono lawyers if it thinks this is necessary.

Another person suggested that the Roy Meadow's case showed doctors being better protected than financial services practitioners. The appeal processes

are identical. Actually, the High Court generally defers more to the GMC than the Tribunal does to the FSA.

The person who suggested that Treating Customers Fairly was a breach of the Convention never referred to any treaty article. Principles-based regulation is vague. However, for hundreds of years, European legal systems have invalidated contracts on public policy grounds - a much woollier concept. Anyway, adequate quality, meeting customers' reasonable expectations and complying with a string of detailed rules about promotions, complaint handling and a variety of other topics make up the core content. In practice, the regulator will always rely on rules to supplement any TCF assault. It does not want the Tribunal to take a different view of Principle 6's content. Saying aloud "treating customers fairly is a breach of the European Convention on Human Rights" indicates its ludicrousness.

For the Financial Ombudsman Service, we need the Convention's Article 6(1):

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly….."

This contains no reference to cross-examination or appeals The right to "examine" only appears in Article 6(3)(d which covers people charged with a criminal offence.

In a civil case, everyone bound by a decision appears to be entitled to a public hearing unless they waive it. PIA Ombudsman, Sir Anthony Holland, the PIA Ombudsman during FOS's creation, argued that Article 6 was a major problem in that the Ombudsman could not dispense with the right to a hearing. He equally worried at the resource implications for the new scheme. If the High Court or European Court ever ruled against FOS on this point, the levy and case fee would rocket. Consequently, the FSA and the FOS seem to have "parked" the issue. It would be better for a court to find subsequently that the process infringed the Convention than for FOS to hold a thousand public hearings a year.

However, the Strasbourg Court has also ruled that no hearing is necessary where there is no arguable point of fact or law - open-and-shut cases. In *Heather Moor & Edgecomb*, the Court of Appeal extended this a little to a case where a hearing would serve no practical purpose:

> 64. The Convention requirement of a public hearing was subsequently considered by the European Court of Human Rights in *Jussila v Finland* (Application no. 73053/01). The case concerned proceedings that had resulted in a tax surcharge being imposed on the applicant, who complained that the proceedings were unfair because he was not given an oral hearing. The following passages in the judgment are relevant:

40. An oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1….

41. That said, the obligation to hold a hearing is not absolute (see *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, § 66). There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, for example, *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *cf. Lundevall v. Sweden*, no. 38629/97, § 39, 12 November 2002 and *Salomonsson v. Sweden*, no. 38978/97, § 39, 12 November 2002, and see also *Göç v. Turkey* [GC], no. 36590/97, § 51, ECHR 2002-V, where the applicant should have been heard on elements of personal suffering relevant to levels of compensation).

42. The Court has further acknowledged that the national authorities may have regard to the demands of efficiency and economy and found, for example, that the systematic holding of hearings could be an obstacle to the particular diligence required in social security cases and ultimately prevent compliance with the reasonable time requirement of Article 6 § 1 (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 58 and the cases cited therein). Although the earlier cases emphasised that a hearing must be held before a court of first and only instance unless there were exceptional circumstances that justified dispensing with one (see, for instance, *Håkansson and Sturesson v. Sweden*, cited above, p. 20, § 64; *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Allan Jacobsson v. Sweden (no. 2)* judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46), the Court has clarified that the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases (see *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005). The overarching principle of fairness embodied in Article 6 is, as always, the key consideration (see, *mutatis mutandis*, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II; *Sejdovic v. Italy* [GC], no. 56581/00, § 90, ECHR 2006-...).

…

65. In my judgment, the principles applied in *Jussila v Finland* are no different from those applied in *Thompson*. There are a number of similarities between *Jussila v Finland* and the present case. As in that case, the purpose of the request for an oral hearing was cross-examination, which in that case and in this the tribunal reasonably

found to be unnecessary. The Court accepted that "demands of efficiency and economy" may justify a lack of a public hearing; in the present case, the Court is concerned with a scheme "under which … disputes may be resolved quickly and with minimum formality", a consideration that justifies holding a public oral hearing only when that is necessary fairly to determine the dispute in question.

66. For the reasons I have given, I see no unfairness in the present case in the Ombudsman's decision that the evidence should be entirely written.

67. So far as the requirement under Article 6 of a public hearing is concerned, there has been a public hearing before this Court, and a public hearing in judicial review proceedings is available to any complainant or respondent who considers that the ombudsman has made an unlawful decision. More generally, where, as in the present case, a complaint can fairly be determined on written evidence and without oral submissions, *Jussila v Finland* shows that, given the nature of the jurisdiction and the desirability of speedy decision at minimum cost and with minimum formality, it is normally not necessary for the ombudsman to hold a public hearing.

Essentially, the firm has to show that the case cannot be fairly disposed of without a hearing, at least according to the Court of Appeal. Anybody seeking to find that FOS or the FSA has broken the Convention has to either win in the High Court or exhaust all English Court remedies before they can even “sniff” the European Commission case filter. If it passes that, the file will be considered by the Court. Only the wealthy “need apply”.

The hearing and judgement under Article 6 must be in public. The Court in *Scarth* concluded that our private arbitration sessions for small claims disputes infringed Article 6. Do firms want to air their dirty linen this way?

Finally, the disapplication of the 15 year time limit contained in the Limitation Act is not a breach of Article 1 of the First Protocol. Nor has Article 6 anything to do with this subject.

> “… 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 Limitation Act 1980 only applies to “actions”. FSMA 2000 talks of “complaints” not “actions”. The Limitation Act is not public policy and parties to litigation or arbitration can always exclude it. Here, Parliament clearly intended to disapply the Limitation Act to FOS by its use of “complaint”. Moreover, in 2000, the FSA had already started its consultation on what became the original DISP 2.3. That clearly omitted the 15 year time-limit in the Limitation Act. Any FOS award meets the conditions provided for by law.

The reliance on Article 6 to attack the absence of a 15 year backstop caught me out completely. It is based on the *Stubbings* case where people who

alleged that they had been sexually abused claimed that their right to a fair trial had been infringed by the application of the Limitation Act. This argument was rejected. The Court concluded that the use of a Limitation Act was not contrary to Article 6. It did not conclude that states had to apply the English legislation in order not to contravene Article 6. It is noticeable that the House of Lords judgement time-barring the case on which the *Stubbings* decision was based was recently overruled by the House of Lords.

The bigger picture

There is a bigger picture. Everyone is entitled to their views on regulation and the interpretation of the Convention. However, the random use of human rights arguments divorced from the Convention's wording is offensive. The Treaty was designed to prevent the horrors of fascism – not awards on forward mortgage endowment sales.