Case numbers: JR/1/2015, JR/4/2015, JR/5/2015

IN THE SENIOR JUDGES' COURT
OF THE SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA

SITTING REMOTELY

Coram: THE HON. MR JUSTICE OCKELTON, ACTING SENIOR JUDGE

Between

(1) MR ANTONIADES AND OTHERS (Case JR/1/2015)
(2) MR HADJILOUCAS AND OTHERS (Case JR/4/2015)
(3) MR MICHAEL AND OTHERS (Case JR/5/2015)

Claimants

- v -

THE ADMINISTRATOR OF THE SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA

Defendant

Representation:

Dr C. Clerides and Mr Clerides Jr, of Pheobus, Christos, Clerides & Associates for the Claimants in Case JR/1/2015.

Mr R Vrahimis, of R Vrahimis & Associates, for the Claimants in Case JR/4/2015.

Mr A. Demetriades and Ms M Iacovou, of Lellos P. Demetriades Law Office LLC, for the Claimants in Case JR/5/2015.

Ms C Patry and Mr M Fraser for the Defendant.

HEARING DATES: 29 and 30 November 2021

THE HON. MR JUSTICE OCKELTON, ACTING SENIOR JUDGE:

1. This is the substantive determination of three judicial review claims. They have a lengthy procedural history, further prolonged by an interlocutory appeal and difficulties arising from the Covid-19 pandemic. By consent, and by direction of the Court by virtue of s 38B of the Courts (Constitution and Jurisdiction) Ordinance 2007, the substantive hearing took place by remote means, using the Microsoft Teams application. The Claimants' representatives were within the Sovereign Base areas, as was the Defendant's legal advisor; the Defendant's counsel were in London, and the Court sat in a different building in London. At the end of the hearing all parties indicated that no problems had arisen from conducting the hearing in this way. At my request, the Defendant addressed two individual matters by a note after the hearing. The Claimants replied. In the light of the decisions I reach in this judgment, however, neither of those matters is material.

2. Permission to apply for judicial review was granted on limited grounds in my judgment of 11 October 2017. The Claimants' appeal against that decision was dismissed, and it accordingly stands. I shall begin this judgment by repeating some of it, in order to enable this judgment to be read without reference to it.

INTRODUCTION

3. These three claims challenge the Crown Employees (Pay and Allowances) Ordinance 2015 (Ordinance 7/2015). Case 1/2015, Antoniades and Others v The Administrator, is brought by employees of the SBAs. Case 4/2015, Hadjiloucas and Others, is brought by officers of the SBA Police. Case 5/2015 is brought by civilian employees of British Forces Cyprus (BFC). All the Claimants challenge the Ordinance on public law and human rights grounds.

4. The reason for the challenge is that the provisions of the Ordinance were aimed at making reductions, in some cases very substantial reductions, to the pay and allowances of the Claimants (and, indeed, others). The Ordinance under challenge follows an earlier Ordinance, the Increments of Pay and Cost of Living Allowance (Crown Employees and Pensioners) Ordinance 2012, which, as then amended, had the effect of suspending for four years pay increments and rises in the cost of living allowance. That Ordinance was

challenged in Case 2/2013 Antoniades and Others v The Administrator ("A1"). Permission to proceed was granted, but the substantive claim was dismissed by myself as Acting Senior Judge. That decision was upheld, essentially for the same reasons as I had given, by the Senior Judges' Court in their decision on appeal, given on 2 June 2016. An appeal to the Privy Council was not pursued.

5. Many of the facts that form the background to the present proceedings, and many of the relevant legal issues, are described, discussed, and to an extent settled in that litigation. It is therefore not necessary to set out again here the history of the deep financial crisis into which a number of countries in the Euro zone were plunged in the years after 2008, or the austerity measures that some of them adopted. Suffice it to say for present purposes that in the Republic of Cyprus the measures included first, the freezing, and then the reduction, of the salaries and other benefits paid to civil servants and others.

6. Among the legal propositions that can be derived from A1 at various stages are the following. 1. The Administrator is the primary legislator for the SBAs. He has plenary power subject only to the process for annulling an ordinance. 2. An Ordinance can, however, be challenged on ordinary public law grounds; and an Ordinance can be challenged on human rights grounds. 3. Although the ECHR applies in the SBAs, a human rights challenge directly by invocation of the ECHR is not available as the Convention is not part of the domestic law of the SBAs. The substantive rights protected by the Convention can, however, be invoked by an action under the Human Rights Ordinance 2004 or the Protection of Property Ordinance 2004, which bring into domestic law the substantive provisions of the Convention itself and of Article 1 of Protocol 1 respectively.

7. The status of the SBAs and their administration is defined by the Treaty of Establishment and the Order in Council of 1960. Appendix B to the Treaty provides, amongst other things, that the SBAs may recruit local labour; shall utilise local labour save where it would not be practicable to do so; and shall ensure that the terms of employment of local labour shall be generally

equivalent to the terms of similar employment in the RoC ("the Principal of General Equivalence").

8. I do not need to set out at this point the procedures leading up to the making of Ordinance 7/2015, although I shall have to look at some of them later in this judgment. The Ordinance itself was made on 1 July 2015, and it was to come into force on 1 September 2015. Its principal provision applies a reduction to the total pay and allowances of all those affected by it. The reduction is on a graduated scale. There is no reduction on the first €1500 per month of income. Above that amount, the reduction is the same as in the RoC legislation applicable to civil servants. There are supplementary provisions applying to promotions and the resultant pay; the calculation of maternity, sickness and other benefits and tax; and pensions. During September, the Ordinance was amended by inserting a new section, 11A, allowing the Administrator to suspend its effect, including retrospective suspension. That power was used immediately, so that the Ordinance did not in the end come into effect on 1 September (or rather, was deemed not to have done). On 23 October 2015 the Ordinance was amended again, with the effect that retirement pensions and other similar benefits were not to be affected, that is to say, were to be calculated on the pay before reduction. Following the period of suspension, the Ordinance, as amended, came into force.

9. As noted in the permission decision, a feature of the principal provisions of the Ordinance is that, although pay is to be reduced in accordance with the table in s 5, the pay as unreduced continues to be a relevant feature of the employee's financial identity (because, amongst other things, his pension is based on it). Further, the unreduced pay is the starting point of each month's calculation. The income before reduction is calculated and then the reduction is calculated from it and subtracted. Deductions such as tax and pension contributions are then taken from the reduced pay.

10. The original claims raised a large number of issues. The Claimants have permission now to argue that the reductions imposed by the Ordinance were an impermissible interference with property rights protected by Article 1 Protocol 1 to the European Convention on Human Rights. In addition, the Claimants in

Case 5/2015 ("the Michael Claimants") have permission to argue that, in their case, the Administrator erred in a public law sense in applying the principle of general equivalence to them as though they were civil servants.

11. A further issue raised in Case 4/2015 was the subject of a later decision refusing permission. This matter has not been pursued. I am thus now concerned with one human rights challenge, pursued by all the Claimants; and one public law challenge, pursued only by the Michael Claimants. It is convenient to deal with the challenges in that order.

THE HUMAN RIGHTS CHALLENGE

12. The starting point is s 3 of the Protection of Property Ordinance 2004, which provides as follows:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
> (2) No one shall be deprived of his possessions except –
> (a) where such deprivation is in the public interest; and
> (b) it is subject to the conditions provided for by law and by the general principles of international law.
> (3) Subsections (1) and (2) shall not in any way impair the right of the Administrator to enforce such laws as he 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."

13. It is accepted that there is no material difference between s 3 of the Protection of Property Ordinance and Article 1 of the First Protocol to the European Convention on Human Rights: see also in A1 at [49]. The Claimants' position is expressed perhaps most lucidly in writing by Mr Vrahimis on behalf of his clients, as follows:

> "Reduction, interference or deprivation of any or all of the [financial benefits of employment] violates the property rights of the Claimants:
> 2.1. As those are guaranteed and secured by the ECHR which is incorporated in the SBA by Ordinance 35/2004 (Property) s 3(1) .... Also under UK constitutional law an act of parliament can only take away property upon compensation (e.g. for expropriation purposes).
> 2.2. Contractual rights, future income, legitimate expectations, claims, rights under retirement annuity contract or even non-contributory benefits are also a form of property.
> 2.3. Thus the reduction of salaries is a deprivation or unjustified control or interference to property. Such interference can only be justified if a fair balance has been struck between the private and public interest.

2.4. However, for the sub-judice Ordinance there is no such justification and this decision is based on confused and contradictory legal or factual basis e.g. the TOE equivalent provision verses VS. The economic situation prevailing in England/budgetary constraints."

14. Dr Clerides puts the matter more succinctly as follows:

"Our submission is that salary is property."

15. Mr Demetriades asserts that "the pay and allowances that the Ordinance deprives the Michael Claimants of part thereof, fall within the definition of "possessions" and thus the examination of whether the Ordinance is compatible with the Protection of Property Ordinance 2004 must be made". The primary question is whether the Ordinance amounts to interference with a "possession". If, but only if, it does, the questions of proportionality and legal authority may arise.

16. The oral argument showed that the Claimants seek to establish that there is an interference with their "possessions" in two ways. The first is that their position as salaried employees gives them a legitimate expectation that they will be paid in accordance with their contracts. The second is that they have, at all relevant times, a right of action on their contracts of employment, which is itself a possession. Mr Demetriades, in replying to the Defendant's skeleton argument put the matter in a slightly different way. He said that there is an expectation that "the possession in issue, namely the full salary, would be paid in full."

17. There is extensive jurisprudence on this issue. Dr Clerides drew attention in his argument to the helpful compendium in the European Court of Human Rights' Guide. In essence all three groups of Claimants rely on the same authorities. Those authorities appear to me to establish the following general principles. First, "possessions" in Article 1 of Protocol 1 has an autonomous meaning. That meaning is in principle independent of the concepts of property, things, ownership and possession in national law. Secondly, "possessions" are not limited to physical things, but include rights. These principles were summarised, with reference to previous authorities, in Anheuser-Busch Inc. v Portugal no. 73049/01, a decision of the Grand Chamber, at [63] – [65], in

terms which already demonstrate the problem the Claimants have in the present cases:

> "63. The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see Iatridis, § 54, Beyeler, § 100, both cited above, and Broniowski v. Poland [GC], no. 31443/96, § 129, ECHR 2004-V).
>
> 64. Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (see Gratzinger and Gratzingerova v. the Czech Republic (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII).
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> 65. However, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see Kopecký v. Slovakia [GC], no. 44912/98, § 52, ECHR 2004-IX). However, 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 (see Kopecký, cited above, § 50)."

18. There is no doubt that the provisions of Article 1 of Protocol 1 can apply to existing property in what may be thought of as a "classical" sense. That is apparent from J A Pye (Oxford) Ltd and Another v UK no. 44302/02, where the applicants complained about the effect of the doctrine of adverse possession in English law, which had caused them to lose title to a plot of land. The Grand Chamber dismissed the claim, but regarded it as "inescapable" that Article 1 of Protocol 1 was applicable, because the applicants had lost the ownership of their land.

19. The concept of a possession arising from "legitimate expectation" (the phrase is being used in the sense different from that which it bears in English public law)

appears to find its origin in Pine Valley Developments Ltd and Others v Ireland (judgment of 29 November 1991, Series A no. 222, p.23, § 51): see Kopecký v. Slovakia, above, at [45]. Pine Valley Developments was a case where the grant of planning permission, in reliance on which certain property transactions had taken place, was "a component part of the applicant's property" because of the legitimate expectation arising from it. Stretch v UK no. 44277/98 also related to expenditure on land. In that case the expenditure was made on the faith of the terms of an option to renew a lease granted by the predecessor of the current local authority landlord. In the domestic courts the decision was that the local authority had not had the statutory power to grant the option. It followed that the applicant had no right to exercise it. Peter Gibson LJ expressed his concerns as follows in the Court of Appeal in Stretch v West Dorset District Council (1998) 77 P & Cr 342:

> "It seems to me unjust that when public bodies misconstrue their own powers to enter into commercial transactions with unsuspecting members of the public, those bodies should be allowed to take advantage of their own errors to escape from the unlawful bargains which they have made. For a local authority to assert the illegality of its own action is an unattractive stance for it to adopt. It is the more striking when, as in this case, the transaction in question is as mundane as a building lease; and the local authority, by taking the point against the member of the public with whom it or its predecessor contracted, thereby robs that member of the public of part of the consideration for entering into the lease."

20. The ECtHR decided that the applicant had a legitimate expectation of being able to exercise the option and that the frustration of that expectation was a disproportionate interference with his "possessions". This may be regarded as of some interest in the light of the use of the word "legitimate", because the "possession" recognised by the ECtHR was a right which could not have been lawfully been created, as the Court appears to have recognised in considering whether the interference was justified, at [38] – [40]. In Kopecký v. Slovakia at [47], however, Pine Valley Developments and Stretch were summarised in the following way:

> "In the above cases, the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case, the "legitimate expectation" is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights"

21. A different aspect of the notion of the possession arising by way of "legitimate expectation" had been developed in Pressos Compania Naviera S.A. and Others v Belgium no 17849/91. That was a challenge to a Belgian statute. The applicants were owners and others interested in ships which had been damaged, allegedly by the negligence of Belgian pilots. From 17 September 1988, a new statute came into force exempting the Belgian state and other pilot services from liability for negligent acts. The statute expressly had retrospective effect, with the result that actions being brought by the applicants were dismissed. The Court held that the claim to compensation from negligence arose at the date of the collisions and amounted to a possession. There was accordingly an interference with "possessions" by the retrospective removal of the claim by the statute.

22. Kopecký originated in a claim to restitution of property confiscated under the predecessor regime. Whatever the underlying justice of the applicant's claim, the national courts held that he had failed to establish those rights according to the procedures available to him. For the ECtHR, citing Jantner v Slovakia no. 39050/97 at [29] – [33], it was not sufficient for the applicant to have a claim that might have been arguable in the national courts, but had been dismissed. The Court emphasised at [51] – [52] that the task was to determine on the facts whether the Claimant had an established proprietary interest to which a "legitimate expectation" could be attached; 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 natural law, for example where there is settled case law of the domestic courts confirming it.

23. Thus the Court identified two classes of case: those where "a concrete proprietary interest has suffered as the result of … reliance on a specific legal act"; and other cases not attached to a proprietary right, where there is a sufficient legal basis in support of an applicant's claim to warrant its being regarded as an asset in the Pressos Compania Naviera sense.

24. The nature of a "possession" is seen by the ECtHR as different from a mere right to property. Article 1 of Protocol 1 does not create or protect a right to acquire property. The authorities supporting that proposition are, for the most

part, on future income, including emoluments from employment or other activities. In Denisov v Ukraine no. 76639/11 the applicant was appointed in February 2009 as President of the Kyiv Administrative Court of Appeal. All being well, he would have held that post until his retirement in July 2013. Following an inquiry into the functioning of the Court he was dismissed in June 2011.

25. In its decision the Grand Chamber upheld the applicant's claim that the process of his dismissal violated Article 6, but rejected a claim based on Article 8. In relation to Article 1 of Protocol 1, the Court said this at [137], referring to previous decisions including Anheuser-Busch, the relevant paragraph of which is cited above:

> "As to the applicant's complaint under Article 1 of Protocol No. 1, this Article applies only to a person's existing possessions and does not create a right to acquire property (see Stummer v. Austria [GC], no. 37452/02, § 82, ECHR 2011). Future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable (see Erkan v. Turkey (dec.), no. 29840/03, 24 March 2005, and Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01, § 64, ECHR 2007-I). The applicant's dismissal from the post of court president precluded him from receiving a higher salary in that position and applying for higher retirement benefits at a later stage. However, this additional income has not actually been earned. Neither can it be argued that it was definitely payable."

26. Amongst admissibility decisions on this topic are Ian Edgar (Liverpool) Ltd v UK no 37683/97 ("the element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No. 1"); Wendenburg v Germany no 71630/01 ("insofar as it concerns a loss of future income, the applicants' complaint falls outside the scope of Article 1 of Protocol No. 1, which is not applicable to future earnings, but only to existing possessions, that is to say income once it has been earned or where an enforceable claim to it exists"); and Levänen v Finland no. 34600/03 (the caselaw is that "goodwill may be an element in the valuation of a professional practice, but that future income itself is only a "possession" once it has been earned, or an enforceable claim to it exists ... . In the present case, the Court considers that the applicants are complaining in substance of a possible loss of future income and a diminution in value of their business

assets. They have made no assertion that the value of their business has been affected. The Court concludes that the complaint thus falls outside the scope of Article 1 of Protocol No. 1").

27. More recently, and, it may be thought, relevantly, is Mihăieș v Romania no.44232/11, where the applicants challenged the reduction of their salaries by 25% for six months in order to balance the budget of their employer, a local authority. The Court held at [15] that if their salaries had been fixed by statute and they had met the requirements for payment, the authorities could not have refused to pay the statutory amount while the statute was in force; but that was not the case here: on the contrary, the reduction had been the implementation of a statute. The general rule therefore applied that:

> "la Convention ne confère pas de droit à continuer à percevoir un salaire d'un montant spécifique" (at [14]).

28. Both Dr Clerides and Mr Vrahimis placed great weight on Koufaki v Greece 57665/12 and 57657/12. Mr Vrahimis submitted that that decision "clearly says" that salaries, including future salaries, are "possessions".

29. It does not. It is an admissibility decision, arising from similar, but more draconian, measures to those in the Ordinance. The burden of the decision is that even if the claims had fallen within Article 1 of Protocol 1, they were inadmissible. No point is recorded as being taken on whether the claims did fall within Article 1 of Protocol 1. At paragraph [32] – [33] the Court said this:

> "32. According to the Court's well-established case-law, the principles which apply generally in cases concerning Article 1 of Protocol No. 1 are equally relevant when it comes to salaries or welfare benefits (see, mutatis mutandis, Stummer v. Austria [GC], no. 37452/02, § 82, ECHR 2011). The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim "in the public interest". Any interference must also be reasonably proportionate to the aim sought to be realised. In other words, 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 ... . (see Khoniakina v. Georgia, no. 17767/08, § 70, 19 June 2012).

> 33. Furthermore, Article 1 of Protocol No. 1 cannot be interpreted as giving an individual a right to a pension of a particular amount [citing authorities] or to a salary of a particular amount {citing authority]."

30. The reference to Stummer takes the matter no further. That was a case examining the applicant's entitlement to a pension that he claimed to have qualified for already. Stummer itself, therefore, is about entitlement to something already earned; and Koufaki is authority neither for nor against the Claimants.

31. As appears from the authorities cited above, although in principle the notion of what is a "possession" for the purposes of Article 1 of Protocol 1 has an autonomous meaning independent of national law, national law is relevant in determining whether an applicant has a "possession" arising from a legitimate expectation. It follows that in the present case I need to examine whether the Claimants' claim that they have an entitlement to the future payment of salaries and other benefits could be established under English law. Although the Claimants all cited the principal authorities on legitimate expectation, including Kopecký, none of them pointed to authority that the right they assert is one which has any legitimate basis in national law.

32. The position in my judgment is that, as Ms Patry submitted, the national authorities are to the opposite effect. Indeed, she was able to point to two cases where the question has been specifically discussed in the context of a claim under Article 1 of Protocol 1. In Waltham Forest NHS Primary Care Trust v Malik [2007] EWCA Civ 265, the respondent was a doctor who had been suspended from NHS work pursuant to a series of decisions that were subsequently determined to have been unlawful. During his suspension he was unable to undertake, and receive payment for, NHS work. He claimed that the suspension was an interference with his possessions protected by Article 1 of Protocol 1. In rejecting the argument that future income might be a "possession" for the purposes of Article 1 of Protocol 1, Auld LJ (with whom Rix LJ and Moses LJ agreed), said this:

> "21. ... we reject the breadth of the claims as to the loss of their "livelihood". Strasbourg case law, while stating that a professional man's clientele may form part of his possessions, as may the goodwill of his business, has very clearly ruled that any element of a claim that relates to loss of future income does not

> qualify in this respect, unless an enforceable claim to future income already exists. The Divisional Court set out the relevant Strasbourg case law in paras 170-172 of its judgment. We agree with their approach, including their unwillingness to follow the judgment of the Inner House of the Court of Sessions in Adams at para 97, in so far as it may have been suggested that the livelihood of a self-employed person occupies some middle position between marketable goodwill and future income. …."

33. The Court of Appeal's decision in that case was endorsed by Lord Bingham in his judgment in the House of Lords on appeal in The Countryside Alliance case [2007] UKHL52 at [21]. (Dr Malik's claim was rejected by the ECtHR (Malik v UK no. 23780/08, but by then his case relied solely on interference with existing goodwill, as distinct from a right to future income). In R (Manchester Airports Holdings Ltd) v SST and Others [2021] EWHC 2031 (Admin), the Divisional Court (Lewis LJ and Swift J) rejected a claim that restrictions on persons entering England, imposed pursuant to the Covid-19 pandemic affected the Claimant's "possessions". AT [57] the Court observed that in Breyer Group plc v Department of Energy and Climate Change [2015] EWCA Civ 408, the Court of Appeal had restated the "well established case law that Article 1 of Protocol 1 does not extend to protect "rights" to the prospect of income in the future, save to the extent that such prospect might be an aspect of the good will attaching to a business (that good will being an existing and present asset). In Breyer, Lord Dyson had said at [43] that:

> "The well-established distinction between good will and future income is fundamental to the Strasburg jurisprudence. The consistent line taken by the ECtHR is that the good will of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1 P1, but the right to a future income stream does not."

34. Analysing the evidence in the case before it, the Divisional Court said at [58] that "all these matters fall squarely into the category regarded as future income for the purposes of Article 1 of Protocol 1. It is not property that is protected under the Convention".

DISCUSSION AND CONCLUSION

35. I must begin with a procedural issue. The Claimants all submit that the Defendant conceded at the permission stage that they have rights to future income which amount to "possessions" within the meaning of Article 1 Protocol

1 and hence of the Protection of Property Ordinance. That is not correct. The submission misunderstands the nature of permission in judicial review cases. As the Defendant made clear at the permission hearing, and as the judgment also makes clear, what the Defendant conceded was not that the Claimants had "possessions", but that their claim that they had "possessions" was arguable. In other words, the concession was that the matter needed looking at, not that the claim was established. The purpose of these, substantive proceedings, following he grant of permission, is, amongst other things, to resolve that arguable issue. There is no basis in procedure, concession or estoppel for the Claimants to succeed on this basis. They can succeed only if the law is in their favour.

36. The law quite clearly is that the concept of "possessions" within the meaning of Article 1 of Protocol 1 does not extend to salary of wages for future work. The authorities are all to the same effect: future income is not a "possession".

37. It is possible to note trends in the expansion of the notion of possessions from the simple starting point of Pye. It does appear that claims relating to land are easier to establish as possessions than other claims. In particular, where there has been expenditure on land under the expectation that it would increase the value of the land, the Court has been very ready to recognise that Article 1 of Protocol 1 is in play. When the focus moves away from land, even to such valuable chattels to ships, the same principles are less apparent.

38. The Pressos Compania Naviera case is of some considerable interest in this context. It is clear from that case, first, that the date on which the damage to the individual vessels took place was of importance. The protected right was one which arose on that date, that is to say prior to the passing of the statute which purported to abolish it. There was, it needs to be noted, no suggestion in the judgment that there was any reason why the law should not be changed prospectively. Secondly, there is no suggestion that the ship owners and other applicants had a "possession" in the unamended law itself: they had a possession only when they needed to call upon the law, because their ships had been damaged. Thirdly, the right that they did have was not itself a right to compensation: the possession attaching to the ships or their owners was solely

an expectation that any claim would continue to be dealt with under the laws of delict as they had been at the time of the damage.

39. Each of these features of the Pressos Compania Naviera case points against the Claimants' claims. The Claimants' legitimate expectation within the meaning of the jurisprudence on Article 1 of Protocol 1 did not give them the right in the nature of a "possession" to expect that the law would not change in general, nor that it would not change in relation to future events (for example, work not yet undertaken). All that they could expect was that any claim for salary and other emoluments that they might have, would be properly determined by reference to the law at the time the obligation to pay them arose.

40. The Claimants attempted to raise a larger view of legitimate expectation in this context. As Dr Clerides put it, his position is that the Claimants have a legitimate expectation arising from their contract of employment. He submitted, somewhat surprisingly, that no case says that salary is not property. He said that it was "reasonable to expect" that a contract for an indefinite period would be honoured for an indefinite period. That expectation has a value and so, he concluded, it must be property.

41. Mr Vrahimis put the same point in a slightly different way. He submitted that the Claimants have an expectation arising not only from their contracts but from the Ordinance relating to employment and the general law. Of course an employee might be dismissed, so terminating any expectation of continued pay, but otherwise each employee has what he called "an ascertainable contract right in employment law". There is an expectation that it will continue and that any breaches will be determined according to the law the benefit of the contract has a value which, for example, a banker would lend on.

42. Mr Demetriades adopted the arguments of his colleagues, but he attempts to draw particular significance from the continued calculation of the unreduced salary, which he describes as "accrued". He cites in this context, as he does also in relation to the public law argument, the particular terms of the contracts of the Michael Claimants.

43. That last point adds nothing to the claim. The Michael Claimants' rights were rights arising out of their contract of employment, just as the SBAA employees were. And the Ordinance does not interfere with any rights that had actually been accrued. The truth of the matter is that the Claimants' submissions based on a legitimate expectation arising from their contract cannot stand with the jurisprudence. There is no hint in any of the decisions that a contractual right, without more, is a "possession". Even if such a right has a value; even if it is, as Mr Vrahimis pointed out, correctly described as a chose in action (that is to say, a thing), that is not sufficient to qualify it as a "possession" for the purposes of Article 1 of Protocol 1. If it were sufficient merely to identify a valuable contractual right, many or most of the decided cases would have said so, and many of them would not have needed to say very much else. I cannot accept the Claimants' invitation to extend the notion of legitimate expectation for these purposes as they suggest.

44. The cases that I have cited relating to other aspects of pay, remuneration, pensions, and other emoluments show that there is no perceptible difference in the Court's treatment of any such benefits if they arise from future work or future employment. There is a distinction for pension already earned, which is a vested right, but that is not in contention here. Further, as Ms Patry pointed out, the Court reached the decision that it did in Denisov despite the fact that the applicant's employment was for a fixed period, which would make the claim to future income firmer than in many other contracts of employment.

45. I began this discussion by setting out the principle that "possessions" has an autonomous meaning, not derived from national law. However, it is clear from the trend of the authorities, possibly excluding Stretch, but following Kopecký in particular, that, especially in relation to a claim not based on rights in land, a legitimate expectation can only arise if the relevant claim could be established in domestic law. If not, the expectation could not be legitimate and there is no "possession". As I have shown, no such claim as the present one could be established in domestic law.

46. I accept Ms Patry's submission that Mihăieș is indistinguishable in the present case. It may be partly as a response to that decision that the Claimants point

to the fact that the Ordinance provides that their original, unreduced salary is preserved in the Ordinance as the basis from which calculations are made. That does not mean that the original salary is fixed by statue within the meaning of the Mihăieș judgment. The effect of the Ordinance taken as a whole is that the statute provides for the reductions.

47. For these reasons, the Claimants' future entitlements to the benefits under their contract of employment are not "possessions" to which Article 1 of Protocol 1 applies. The changing of them by the Ordinance is therefore not a deprivation of their possessions and no further question arises under the human rights aspect of the present claims. In particular I do not need to consider whether, if the Claimants had relevant rights protected by Article 1 of Protocol 1, the Ordinance was proportionate and in the public interest.

THE PUBLIC LAW CHALLENGE

48. As indicated above, permission was granted in relation to one challenge on general public law grounds. It applies only to the Michael Claimants. The Michael Claimants rely on their employment status to show that they should have been treated differently from the SBAA employees who comprise the Claimants in the other two cases. As set out at paragraph [7] above, the principle of general equivalence provides that the terms of employment of local labour should be generally equivalence to the terms of similar employment in the RoC. As the Michael Claimants are not civil servants, the comparator is not that of civil servants in the RoC. The essence of the Michael Claimants' claim is that, first, they were treated as though the appropriate comparator was that of RoC civil servants; secondly, that they should not have been so treated, but, instead, should have had a different comparator applied to their case; and, thirdly, if that had happened, they would have benefitted from the process. The first two elements of that claim amount to an assertion that the administrator, in making the ordinance, either failed to exclude irrelevant considerations, or failed to take relevant considerations into account. The third element only arises if at least one of the others is made out.

49. I accept, as does the Defendant, that the contracts of employment are between BFC and the individual employee. Most, if not all, of the contracts incorporate by reference the Civilian Employment Regulations ("CERs"). The CERs are a sort of staff handbook, making provision on a very large number of issues. In Annex A of the CERs there is a list of "nine local good employers" for the purposes of "benchmarking", that is to say applying the principle of general equivalence to BFC employees. I set out here the nine local good employers. Ms Patry on behalf of the Defendant has indicated the status of each one in brackets after its name: Mr Demetriades on behalf of the Michael Claimants has not dissented from those descriptions.

(a) The Ministry of Finance (a governmental body);
(b) The Electricity Authority of Cyprus (semi-governmental body);
(c) CYTA, a mobile telephone network company (semi-governmental body);
(d) Cyprus Airways Ltd (government owned company);
(e) The Cyprus Bankers Employers' Association (private company);
(f) BP Cyprus Ltd (private company);
(g) Insurance Association of Cyprus (private company);
(h) Grain Commission (semi-governmental body);
(i) Cyprus Petroleum Refinery (semi-governmental body).

50. Mr Demetriades' arguments are complex and he pursued them with vigour, ability, and courtesy during the hearing. They are arguments that are in all essential respects arguments of fact. In order to do justice to them, it is, I think, best to set out the relevant part of his written skeleton argument.

> "17. It is common ground that the Ordinance reflects Republic of Cyprus ("RoC") law for the public sector and thus cannot be applicable to the Michael Claimants who are employed by the BFC and are part of the MoD As such, CERs apply to them and the fact that both BFC and SBAA employees are paid out of public funds does not suffice to remedy this error.
>
> ...
>
> 21. The following from the Defendant's presented evidence are also relevant, and in particular the following admissions are striking:
>
> a) Admission that the appropriate comparator for BFC employees is the 9 Local Good Employers and that BFC employees are comparable to employees of the private sector in the ROC;
> (see, inter alia, pages 803-813 of the Administrator's Evidence Bundle (AEB) - especially page 811 (Annex B) where it is noted that " The remainder are BFC and other contract TACOS and regarded as aligned with private sector and arms length public bodies such as the electricity and telephone companies." , we also note the confirmation (in page 804 and Annex A and B (pages 807-813)) of the obligation to check and

confirm with the Ministry that any measure is in conformity with the Treaty of Establishment.
It is interesting to note that information was redacted on the abovementioned evidence, without any explanation for same)

b) Admission that they have not been properly informed and familiar with the rule of the 9 Local Good Employers and its origins (see Steven Allison's Affidavit and in particular paragraphs 63-68). which however cannot absolve them from the relevant obligations.

c) Admission that they have not received concrete information in relation to any reduction in salaries in the private sector and definitely no information for the employers of the private sector in the List of the 9 Local Good Employers and have additionally abandoned the intention/practice to produce another GAD report (see, inter alia, paragraphs 19, 34 and 36 (b) of the Administrator's Consolidated Detailed Grounds of Resistance, and Steven Allison's Affidavit, inter alia, paragraphs 83 and 86);

d) Admission of a decision to depart in this case from the said Comparator without consulting the MOD or the UK Government despite the fact that this is an obligation derived from the Treaty of Establishment (see Steven Allison's Affidavit and in particular paragraphs 17 (2) +(5) and 52-62).

22. Extension of the Ordinance to the Michael Claimants was also not possible, nor reasonable or justified, because, being a different category of employees, they had, in the past, been burdened with measures which had not been applied to the SBAA employees, with the alleged aim to respond to financial constraints.

23. In relation to the latter, we also refer to the Michael Claimants' evidence submitted by way of the Affidavit dd 27.11.2017, and in particular to paragraphs 7 - 9 of same, with the respective Appendices, according to which:

"(7) The said reference is repeated in the next BFC Civilian Instruction with no. 28 of 2008, attached hereto as Appendix B whereby the Claimants had been reassured that BFC will continue to ensure that they are compared favorably with the other benchmark organizations in Cyprus, It is also obvious in the further relevant Instructions with no 42 of 2008 and 38 of 2009, which are attached as Appendices C and D respectively. They confirm that changes had been effected on the pay of the BFC employees during the said period, and had not been implemented in the case of the SBAA employees. a matter which was not taken into account by. the Administrator (as he should), before deciding on the Ordinance in issue.
(8) As can be seen in the said Appendices, the BFC management negotiated and implemented (without the consent of the BFC LECs Tus) certain measures to respond to the non-payment of COLA, due under the employees' contracts and the benchmark organizations in the Republic of Cyprus RoC. According to these, they would give to the BFC employees certain amounts which were non-consolidated and thus not considered

part of the salary, which remained at a lower lever, because of the freeze of the COLA, since 2006.
(9) The above are also enlightening on the fact that different negotiations were made with the different categories of employees, namely the BFC and SBAA employees, and apparently on a different budget. This is so because the considerations and negotiations on the need to proceed with reductions and amendments on the a were only made in relation to the BFC LECs while or the same period the SBAA employees were continuously receiving increases on their salaries and the COLA, as defined by the RoC."

24. As per the Michael Claimants' Affidavit dd 27.11.2017, it is their position (see para 15) that while the previous Command Secretary applied the proper procedure as per the CERs and had taken into account the benchmark organizations, (regardless of whether the measures were justified), the current Administrator has simply failed to do so.

25. According to the same Affidavit (see para 22 — 24). the content of which is copied below for easy reference, one of the private companies, Employer no 6 of the List of 9 Good Employers, offered increase of the salaries, For Employers no 7 and 8 of the List, there was no information of cuts other than the freezing of the salaries.

> *"(22) As further evidence in relation to the failure of the Administrator to take into account the conditions of employment of the 9 Good Employers in Cyprus,*
>
> *I attach hereto copies of the Collective Agreement Q/ the BP Cyprus Limited, Employer no, 6 of the List of 9 Local Good Employers, as Appendix P respectively. I wonder when reading same whether it would be correct to assume that we will also be offered increase of 0, 5% as of I. 1.2016?*
> *(23) In relation to the Grain Commission, Employer no. 8 of [he List of 9 Local Good Employers, I note that other than the freezing ofthe salaries, I am not aware Q/any cuts.*
> *(24) Furthermore, as I am informed, the Insurance Association Q/ Cyprus, Employer no. 7 of the List of 9 Local Good Employers, has not implemented any reductions on their employees ' salaries. It is noted that they had decided on the freezing of the salaries but not reductions as can be seen by the attached*
> *Appendix Q, which is a letter to the Claimants ' advocates."*

26. Apparently, there was available information about the terms and conditions of employment for the Employers in the List of the 9 Local Good Employers, and such information could have been found through the Trade Unions with whom the Administrator was in negotiations, on the assumption that there was really the intention to receive such information. Thus, the position of the Defendant that it was difficult to find information about the practice in the private sector cannot be considered convincing, and in any event is additional proof of the Administrator's failure to take into account relevant information and act accordingly.

27. It is also noted that the reference by the Defendant to evidence relating to correspondence with the Employers' Federation (OEB), allegedly being

unable or unwilling to provide concrete information about the private sector, cannot possibly be accepted.

28. In any event there is no evidence that the Administrator looked for information or that the Administration did any relevant research as to the practice of the Employers in the List of 9 Local Good Employers. On the contrary there is evidence of a decision not to apply the said comparator, in total disregard to the CERs and the Treaty if Establishment.
29. As it will be also analysed further below, the reduction in the salaries of the Michael Claimants further to the Ordinance, has not been proved to be necessary. This is supported by the fact that the Administrator was flexible and managed to negotiate and limit the initial need for cuts from E5 M to El .3 M, in a few months-time and additionally the Ordinance was amended in relation to the pension rights of the Michael Claimants without any justification as to the impact of this on the allegedly necessary cuts."

51. The heart of these submissions is that the Administrator could and should have made a complete analysis of relevant conditions in relation to the nine local good employers, and failed to do so. Each element of that assertion is factually incorrect, as is demonstrated by looking at the evidence as whole.

52. From the Administrator's side, the key evidence is that contained in the witness statement of Steven Allison. There is simply no reason to doubt the factual accuracy of that statement. There is no relevant internal contradiction, and there was no application to cross-examine. The presumption of acceptance applies: see R (Saffer) v SSHD [2018] EWCA Civ 2518 at [19]. Although, in the result, the Michael Claimants were treated in the same way as the SBAA Employees, it is absolutely clear that that did not result from failure to take into account the relevant fact that the comparator for them was different.

53. The use of the nine good employers as a comparator at the time of the introduction of the Ordinance was highly problematic. Cyprus Airways Ltd had ceased trading, and all its staff had been made redundant, following an attempt to economise by reducing pay and benefits. Some of the other companies had reduced benefits of a sort which were not applicable to BFC employees. It proved impossible to obtain information about other companies. There is no evidence in support of Mr Demetriades' claim that material of this sort could in fact have been obtained, by the Administrator or by anybody else, given that it was commercially sensitive and the times were of particular economic tension. The calling these features of the evidence "admissions", as Mr Demetriades does at paragraph 21 of his written submissions, mischaracterises them. If

anything, they are justification for departure from a decision based on an analysis of the nine good employers. There has never been any suggestion in the CERs that the comparator was some subset of the nine. The efforts made to obtain information from all nine, in order to provide the benchmark, showed beyond any shadow of doubt that that benchmark could not be used. In oral argument Mr Demetriades insisted that the Administrator had a duty to obtain all the relevant figures from the nine good employers. If such a duty existed, impossibility was certainly a good reason for failure; and no principle of public law requires performance of the impossible.

54. What then was to be done? The Michael Claimants appear to attempt to argue that it was unlawful for the Administrator to depart from the express benchmarking terms of the CERs. That, however, is tantamount to an argument that the Michael Claimants had a legitimate expectation that the CERs would not be changed or departed from. Such a claim was rejected as unarguable in the permission decision, and is not before me now.

55. Contrary to what Mr Demetriades asserts, there has never been any understanding that the nine good employers reflected only non-governmental concerns, nor, in particular, so far as I can see, has it ever been agreed that the benchmarking for the BFC employees was, in its effect, so different from the benchmarking for SBAA employees that it would be inappropriate to use the latter as a substitute for the former. On the contrary, as Mr Allison points out, many of the nine good employers had strong links with the government and were essentially responsible for the use of taxpayers' money, directly or indirectly. The emoluments of employees of companies of this sort might be somewhat different from those of civil servants, but the economic realities were highly likely to be very similar.

56. Drawing all these threads together, the position is that, although the CERs set out a benchmarking process, it was impossible to use that process; there was no legal reason preventing departure from it; and there was good reason for substituting equality with government employees. The evidence does not show a failure to recognise and apply the difference: on the contrary, it shows an

attempt to apply the different benchmarking process, and a decision, lawful in the circumstances, not to employ it.

57. As well as the difficulty in making out his allegations on the evidence, Mr Demetriades' claim is substantially undermined by two further factors. The first is that the BFC employees were treated in the same way as the SBAA employees in the pay freeze Ordinance. That would not of itself be damaging to their claim now, but as it happens, there was discussion of the matter in the judgment of the Senior Judges' Court on Appeal against the pay freeze decision at first instance. Before me, the then single BFC employee had not raised the issue now raised by the Michael Claimants, but he sought to raise it on appeal. At paragraphs [41] and [42] of their judgment, the Court on appeal determined that it was impossible to challenge on any judicial review basis the actual comparator exercise carried out for the purposes of the 2003 Ordinance. It does not appear to me that the exercise carried out for the Ordinance under challenge now differed in any relevant respect.

58. The other factor undermining the Michael Claimants' claim is that nothing in the material before me gives any reason to suppose that they would have been in any respect better off if a different comparator had been applied to them. The evidence of investigations previously undertaken into pay and conditions in the nine local good employers had revealed that, as an employer, BFC was very much towards the top end in terms of the total emoluments that it offered its employees. Indeed Mr Allison refers to a fear that if it had been possible to obtain full details at the time of the preparation for the ordinances, the process of comparison would have shown that the BFC employees' benefits exceeded those of the comparator, which might have led to a larger reduction than in fact took place. Whether or not that is right, there is no ground for saying that the Michael Claimants have suffered by the use of the RoC civil service, rather than the nine good local employers, as the comparator.

59. The Michael Claimants' claim in public law thus has neither fact nor law behind it, and, in any event, would not have justified any remedy which would have been any advantage to them.

60. For the foregoing reasons, the Claimant's claims are dismissed.

C. M. G. Ockelton

C. M. G. OCKELTON
ACTING SENIOR JUDGE

Date: 22 June 2022

HER MAJESTY'S
COURT OF THE
SOVEREIGN BASE AREA

OF
AKROTIRI
AND
DHEKELIA