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Article One of the First Protocol to the European Convention on Human Rights: the Evolution of a Right in Europe and the United Kingdom

Frankie McCarthy, LL.B, Dip L.P.



UNIVERSITY
of
GLASGOW

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ABSTRACT

Article one of the First Protocol to the European Convention on Human Rights (“P1-1”) states that every person is entitled to peaceful enjoyment of his possessions. The role of property interests in allowing political participation had been highlighted during the Second World War, where the Third Reich had weakened political opponents through arbitrary deprivation of possessions. The drafters of the Convention sought to prevent a repeat of this political abuse. However, the political element of property is often secondary to its economic role, in which intervention by the state is necessary and sometimes desirable to allow a national economy to function. How can this inherent conflict in the right to peaceful enjoyment of possessions be resolved?

This thesis aims to demonstrate the development of the role of the property right in Europe and the United Kingdom through a critical analysis of the jurisprudence of the European Court of Human Rights and the domestic courts of the United Kingdom. The central thesis of this research is that, although a framework has been determined within which P1-1 decisions can be taken, there is considerable work to be done in strengthening the parameters of that framework in order to create a protection that, whilst sufficiently flexible to deal with changes in law and society, offers a clearly defined and meaningful safeguard against unnecessary intervention by the state in every context.

The conclusion is that a clear decision-making process has been articulated through the European jurisprudence and subsequently adopted with qualified success in the United Kingdom. This process allows for the P1-1 implications of current and foreseeable events to be explored with some degree of certainty. However, the margin of appreciation afforded to states by the judiciary at certain steps of the process, particularly as regards the purported aim of state intervention and the necessity of avoiding payment of compensation in certain situations, compromises the strength of the protection as a whole.

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Frankie McCarthy

December 2009

AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signed:

Date:

INTRODUCTION

Article one of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms¹ reads as follows:

Every natural or legal person is entitled to 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 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.

Often referred to as "the property right", P1-1 occupies an unusual position in human rights law. The ECHR was conceived by Western European politicians substantially in response to the damage inflicted on and by western nations during the course of the First and Second World Wars. With the United States of America emerging as a uniquely powerful force in the world and the accelerated development of the technology of war, there was a sense that European nations should gather together to create a basis for peaceful co-existence and co-operation. The European Movement was founded to promote this agenda. Creating a benchmark human rights document setting out minimum standards to which all member nations would adhere was one of the key aims of that Movement, and the ECHR represented the actualisation of that aim.

Placed in context, it can be seen why the ECHR was designed predominantly to protect civil and political rights. The substantive articles of the Convention begin with the right to life, and go on through the right to liberty, the right to freedom from inhuman and degrading treatment, the right to a fair trial, to freedom of expression and freedom of assembly amongst a range of other protections. The accord was designed to stand in the way of totalitarianism

¹ Hereinafter referred to as P1-1

and prevent the rise to power of another dictatorship in the mould of Hitler and the Third Reich.

Protection of property was considered to have a role to play in achieving this broader aim. Ownership of property was seen to be a key element of political and social freedom. It should not be possible for a political regime with aspirations of power to diminish or silence dissenting voices by confiscating land or other possessions, leaving them in a position where they are unable to speak. From that point of view, it was agreed that the privileges of ownership required to be safeguarded.

However, a right of this kind is not directly analogous with the other protections offered by the Convention. It is possible to argue that ownership of property is, first and foremost, an economic interest. The part it plays in permitting civil and political participation is secondary to its key role in the finances of the owner and in the larger society. In a westernised free market economy, economic rights are not and cannot be upheld to the same absolute standards as civil and political protections.

The issue could be framed as one of morality. By the standards of the new Europe, an exception to the right to life could be justified only in the case of the death penalty. The right to a fair trial is an absolute guarantee with no exceptions. The right of ownership, on the other hand, is subject to any number of restrictions and qualifications on a daily basis, from the imposition of tax to planning regulations to the enforcement of the laws of succession. Tax is not a moral issue. State intervention is not only possible, it is necessary for society to function.

Accordingly, there is a fundamental conflict at the heart of P1-1. The right must exist to prevent "bad" governments from obtaining too much power. Conversely, it must not prevent "good" governments from exercising their power in such a way as to facilitate the existence of an economic and social community in promotion of the political will of their electorate.

Aims and methodology

The aim of this thesis is to analyse how the inherent conflict in P1-1 has been understood and negotiated over time to develop P1-1 into the protection it represents in the present day, with a particular interest in its application in the United Kingdom context. The argument will be made that, over time, the initial ambiguity of P1-1 has come to be resolved through the gradual identification by the courts of the critical elements of the protection. It will be submitted that a five step process has emerged through which it can be understood how state action has impacted on the property rights of an individual and determined whether this interference can be justified in the interests of the wider community. It will be recognised, however, that this process is still evolving: ambiguity surrounding key elements of the protection continues to exist and progress must be made in ensuring the right is imbued with sufficient strength for it to be a meaningful protection of the type envisaged by the authors of the ECHR.

The central thesis of this research is that, although a framework has been established within which determination of P1-1 applications will be made, there is considerable work to be done in strengthening the parameters of that framework in order to create a protection that, whilst sufficiently flexible to deal with changes in law and society, offers a clearly defined and meaningful safeguard against unnecessary intervention by the state in every context.

The analysis will focus on the judicial approach to the property right throughout the last five decades. The voluminous case law of the European Court of Human Rights² and the former European Commission of Human Rights³ has, over time, provided guidance as to what interests will fall within the protection of P1-1, to what extent that protection will be extended and in what ways interference by a signatory state with that protection can be

² Referred to as the ECtHR.

³ Referred to as the Commission. The Convention initially envisaged two judicial institutions. The Commission would hear applications from parties who claimed a rights violation. If it decided the application was well-founded, the Commission would refer the case to the Court for a judgment on the merits and any available remedy. The Commission was abolished by the 11th protocol, which came into force in 1998, and subsequent to which parties have made applications directly to the Court.

justified. The domestic courts in the United Kingdom have made use of the Strasbourg jurisprudence and their own approach to the domestic legislation to define and apply the property protection within a United Kingdom context. In this research, an analysis of the jurisprudence will be undertaken in order to extrapolate the principles on which an application in respect of a violation of P1-1 will be determined. These principles will then be used as a basis on which to investigate the probable P1-1 implications of issues of current importance within Scotland or the United Kingdom more generally.

It may also be of use at this initial stage to clarify certain issues which will not be dealt with in the course of this research. It is recognised that the development of P1-1 has not taken place entirely within the confines of the courts of Strasbourg and the United Kingdom. In particular it is recognised that the national courts of all signatory states have contributed through discussion and opinion to the evolution of the principles outlined in this thesis. Constraints of time and space, however, make it impossible for a review of all relevant jurisprudence to be undertaken here. The focus of this work is ultimately the United Kingdom, and it is hoped that the thorough analysis of the Strasbourg case law will serve to lessen the impact of the absence of other comparative material. Similarly, it is apparent that jurisprudence relating to other articles of the Convention has played a part in the evolution of P1-1. The interplay of the property right with the right to a fair trial contained in article six, the right to private and family life contained in article eight and the freedom from discrimination set out in article 14 is complex. Several of these articles are often argued together – indeed, with some considerable degree of crossover – in both the Strasbourg and domestic jurisprudence. Similarly, the evolution of the other economic and social rights contained within the Convention, particularly the right to marry set out in article 12 and the right to education given in article two of the First Protocol, offer some parallels with the development of P1-1. Unfortunately, however, it would be impossible to treat these issues with anything close to the level of depth that would be required for the analysis to be meaningful within the constraints of this piece of work. For that reason, the decision was taken to focus on P1-1 to the exclusion of the other articles of the Convention.

Separately it may be useful to clarify that the underlying question of whether a property protection should exist in the first place will not be considered herein. Although there are valuable issues to be explored surrounding the purpose that could be ascribed to such a right and the normative role it could or should play, it was recognised that the legal theory underpinning the property right could not be properly explored without adequate space and time, neither of which was available in the course of this research. Instead, it is accepted that the right exists in the wording of the Convention and that the aim of the right is essentially that expressed by the authors of the Convention, as explored in the first chapter of the thesis.

Structure

As indicated above, the foundation of this thesis is the existing jurisprudence of both the Strasbourg institutions and the domestic courts, and analysis of that case law forms the backbone of the discussion carried out in this work. The thesis is split into five chapters divided to facilitate this analysis.

Chapter one deals with the background to the property right. Following a brief description of the context in which the Convention came to be drafted, this chapter goes on to set out the lengthy and somewhat torturous process through which the property protection came to be realised in its current form. Through a review of the debates surrounding the property right at each of the various committee stages necessitated by the drafting procedure, it will be seen that the protection was recognised from the beginning to create a number of political, ideological and practical difficulties. The extent of the disagreement between the negotiating states made it impossible for a form of wording to be agreed upon in time for the right to be included in the Convention itself, hence the reason it became the first article in the First Protocol to the ECHR. This chapter explores the compromises that were necessary in order for agreement to be reached, and the ambiguity which these compromises created in the text of the article which is now known as

P1-1. The mechanism by which the right has been incorporated into both UK and Scots law is also outlined.

Chapter two is the first stage of analysis of the jurisprudence of the former European Commission and the European Court of Human Rights. The aim of this chapter is to use the case law as a basis from which definitions of each of the key terms of P1-1 can be constructed. The article contains many words or phrases which may either have a specific meaning in terms of domestic law (for example, "possessions") or alternatively may not have any specific legal definition domestically (for example, "control".) Before a determination can be made of the decision-making framework created by the judiciary, it is necessary to have an understanding of precisely how the language of the article has been used and interpreted. This chapter attempts to set out definitions of the terms *natural or legal person, possession, peaceful enjoyment, deprivation, control and public/general interest*. It will be seen that the use of some of these terms is very broad and varies widely from the definitions which might be expected based on the use of the words in domestic law. It will also be observed that the jurisprudence is of more assistance in permitting the construction of a definition of some terms than it is of others.

Chapter three continues the investigation of the Strasbourg case law, building upon the definitions set out in chapter two and extrapolating from the jurisprudence to produce an outline of the process through which an application made in respect of P1-1 will be decided. It will be posited that a period of development commencing with the keynote decision of *Sporrong and Lönnroth v Sweden* in 1983 and continuing to the present day has resulted in essentially a five step process through which every P1-1 application will be taken by the Strasbourg court. It will be argued that the framework of P1-1 decision-making, in a much distilled form, is as follows:

1. The Court ascertains whether the applicant holds a "possession" in the sense of the autonomous meaning given to this term by the Strasbourg jurisprudence.

2. If such a possession is held by the applicant, the Court ascertains whether the state action giving rise to the application amounts to an interference with P1-1. This is done through determination of whether the action can be characterised as either a "deprivation", a "control of use" or a more general "interference with the peaceful enjoyment of possessions", as each of these categories has been defined by *Sporrong and Lönnroth*.
3. If such an interference has taken place, did it have a clear basis in domestic law?
4. If such an interference has taken place, did it pursue a legitimate aim in the public or general interest?
5. Did the action taken by the state strike a fair balance between the needs of the community to be served by the interference and the burden placed on the individual applicant? (In other words, has the proportionality test been met?)

Again it will be discussed that, although interpretation of case law allows for an account of the gradual evolution of this framework, there are certain areas within the jurisprudence which seem to deviate from this norm and leave some doubt as to the coherency of the Strasbourg dicta in connection with certain types of state action. Additionally, it will be observed that the manner in which the Strasbourg court allows these questions to be answered, particularly as regards the need for state action to pursue a legitimate aim in the public or general interest, may ultimately suggest a weakness in the supposedly objective standard which is intended to be imposed by the property right. This concludes the analysis of the European jurisprudence.

Chapter four deals in detail with the domestic case law. P1-1 has been incorporated into domestic legislation by the Human Rights Act 1998. This statute applies throughout the United Kingdom, and accordingly decisions of both the Scottish and English courts as well as judgements issued by the House of Lords will be taken into account in this chapter. Consideration will be given to the domestic understanding of the terminology of the article, with particular reference to the definitions of the key terms set out in chapter two of the thesis. It will be noted that the domestic case law on these issues remains

somewhat limited. To date, however, it can be seen that the domestic courts have made reasonable attempts to work within the definitions used by the European judiciary in determining P1-1 applications. The limitations and ambiguities in the Strasbourg definitions are, naturally, replicated domestically. The chapter then goes on to consider the extent to which the framework outlined in chapter three has been incorporated into domestic decision-making surrounding P1-1. Again, the shortcomings of the European case law have created difficulties for the domestic judiciary. In addition, the domestic courts have in some cases failed to apply or ignored the key rules set out by the Strasbourg court, particularly as regards their conception and application of the test of proportionality. It will be argued that such incompatibilities serve to further weaken the protection offered by P1-1 and that future domestic jurisprudence in this area must seek to adhere more closely to the principles encapsulated in the Strasbourg case law, where such principles do exist.

The fifth and final chapter will seek to use the conclusions reached in the first four chapters of the thesis to analyse current issues in domestic law from a P1-1 point of view. Looking first at matters which have repercussions throughout the United Kingdom, the chapter opens with a discussion of the new banking legislation introduced as a result of the "credit crunch" and the collapse of several high street banks in late 2007 and 2008. It will be argued that the power afforded to the government to restructure bank capital or transfer ownership of shares as a result of the Banking Act 2009 may constitute a violation of P1-1 through a lack of proportionality. Consideration will be given to the recent decision of *R (SRM Global Master Fund and Ors) v HM Treasury*,⁴ litigation which arose from the government bail-out of Northern Rock. The chapter then looks at the new anti-terrorist financing measures introduced by the Terrorism Act 2008, noting that the width of the provisions justified a freeze on the assets of an Icelandic bank (Landsbanki) which was on the verge of insolvency, and discussing whether any question of P1-1 implications could really arise here.

⁴ [2009] EWCA 788

The chapter then moves on to analyse more specifically Scottish innovations, dealing firstly with the newly passed Climate Change Act and its repercussions on the property rights of owners of environmentally sensitive areas of lands, amongst others. It will also be considered whether the Scottish government may be under a more general duty to negate the impact of climate change in order to allow all Scottish property owners to continue in the peaceful enjoyment of their possessions. Finally, a review will be undertaken on the proposed reforms to the Scottish system of land registration with a discussion of the P1-1 implications of the change to a negative system of registration and a broader analysis of the compliance of the Scots law of prescription with the property right.

The findings of the thesis will be drawn together in a conclusion which supports the main argument of the thesis as outlined above.

CHAPTER ONE: THE GENESIS OF THE PROPERTY RIGHT

"Begin at the beginning," the King said, gravely, "and go till you come to the end; then stop."⁵

1.1 Introduction

A useful place to begin an analysis of article one of the First Protocol to the European Convention on Human Rights is with an examination of its origins. Many of the criticisms most frequently made of the property right – particularly as regards uncertainty in its meaning and extent – can be traced back to the discussion that took place between members of the newly formed Institutions of Europe at the time when the Convention was drafted. This chapter will accordingly chart the life the property right from those initial discussions through to its current position as an integral part of UK law.

The chapter will begin with a review of the materials contemporaneous with the drafting of the property right. These materials evidence the dissensus between European states as to what the nature and extent of the property right should be, and demonstrate that this disagreement could not be resolved in time for a protection of property to be contained within the Convention itself. It will also be seen that overcoming these issues meant the final wording of P1-1 represented a compromise which was recognised to be ambiguous from its adoption. P1-1 was always known to be a right which would require development through jurisprudence.

The chapter will then consider the place occupied by the property right within our domestic legal framework. A brief overview will be given of the extended period between the ratification of the First Protocol and the coming into force of the Human Rights Act 1998. The way in which that legislation operates to bring Convention rights into UK domestic law will be explained, and it will be noted that the provisions of the Scotland Act 1998 create a somewhat different regime in that regard north of the border.

⁵ *Alice in Wonderland*, p105

It is hoped that the analysis contained within this chapter will give a clear grounding as to the aims and intentions of the drafters in including a property protection in the ECHR. The background set out here should also operate as a starting point for the discussion of how the role of the property right came to be developed through jurisprudence on the basis of somewhat shaky foundations.

1.2 Drafting the Convention

Even a cursory inspection of materials which chart the drafting of the ECHR will show that the key impetus towards its inception was not nobility of spirit or a shift towards worldwide equality at the end of the age of empires, but rather fear of both the past and the future. Europe was taking the first difficult steps on the long road of recovery from the horrors of the Second World War, brought about by the extreme right wing thirst for power of Hitler and the Third Reich. Ahead loomed a new and potentially more terrifying spectre, that of Communism and its threat to the dominance of Western capitalism.

The Convention was designed to safeguard the fundamental rights and freedoms of citizens hailing from each of the contracting states. Draft Bills of Rights had begun appearing in various forms since the closing days of the Second World War, and the desire to construct a definitive version of the same was one of the principal reasons for the foundation of the European Movement. In May of 1949, the statute of the Council of Europe was signed, with the commitment of the European Movement to human rights plainly stated at article three.⁶ These words were backed up by action shortly afterwards, when the Consultative Assembly asked their Committee on Legal and Administrative Questions (CoLAQ) to put together a draft Convention on human rights for consideration by the Council of Ministers.

The committee, headed by its *rapporteur* M Pierre-Henri Teitgen, and made up by political and legal delegates from each of the member states, worked to

⁶ Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms.

produce a report which did not set out detailed provisions in legislative language, but rather sketched out a basic outline of the rights to be included for further discussion. In the preamble of the Teitgen Report, as it came to be known, it was suggested that:

...‘professional’ liberties and ‘social’ rights, which have themselves an intrinsic value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union⁷ and then to co-ordinate our economies before undertaking the generalisation of social democracy.⁸

Even from this initial statement, it can be seen that the inclusion of a right to protection of ownership of property was likely to be something of an ill fit with the broader aims of the Convention. However, the Universal Declaration of Human Rights had been signed in 1948, and it was decided that this should be the model from which Europe worked when it began drafting its own charter. The Universal Declaration did include protection of one economic interest, at article 17.

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of property.

Accordingly, the property right was on the table from the very beginning of the discussion. The deliberations over article 17 by CoLAQ during their drafting sessions serve as a useful illustration of the various arguments surrounding the nature and extent of the property right which echo through the jurisprudence even to the present day.

The arguments against inclusion of a right to property were in various forms. Most fundamentally, there was an ideological difficulty with the insertion of an economic and social interest in a Convention designed to protect civil and political rights. As noted by Edberg, a Swedish delegate belonging to domestic socialist party, ideological difficulties also arose taking into account

⁷ This is not a reference to the EU as it exists in the present day, but rather a more loose collective term for the nations forming part of the European Movement.

⁸ TP, vol 1, p194

the differing legal systems of the various member states. Finding a wording that would sit easily in each of the jurisdictions would not be a straightforward task.

If it is not possible for men to secure a generally accepted definition of the right of property; if such a definition cannot be made, then this point is nothing but pure nonsense; and if that is so then it cannot be regarded as anything but a formula for political action.⁹

Eamon de Valera, then leader of the Irish Republican party Fianna Fáil, approached the same issue from a different angle, focussing on the differences in fact between the various jurisdictions.

While you may own something, that does not give you the right to use it as you please to the detriment of other people...The difference between the ownership of something and the use that is made of it is vital if we are to have any agreement on matters of this kind.¹⁰

Practicality was the final argument in the canon against inclusion. Delegates not opposed to the right on grounds of principle were concerned as to its workability in practice. The point was put succinctly by the Belgian delegate, M. de la Vallée-Poussin:

The right to own property as it is applied nowadays by different European nations is an undeniable right, considered by everyone as a relative right. No longer does any party defend the absolute right to own property, as it was understood by Roman law, and I do not think there is anyone either who is in favour of the completeness of the communist theory.

Consequently, this right being a relative right, we can guarantee it in an effective manner, but we must examine the extent to which we consider it essential.

This work has not been done; ideologically, even, it has not been done. In these circumstances it would be useless to try to protect the right to own property in so vague a manner.¹¹

⁹ TP, vol 2, p86

¹⁰ TP vol 2, p104

¹¹ TP, vol 2, p 62

On the other hand, many delegates felt that the property right was essential to safeguard the idea of the person as an independent individual. This right of a citizen to a home or family life, for example, could not be properly protected unless he was allowed to own that home. Again, de Valera:

I believe that it is a fundamental right necessary to the full development of the human being.¹²

An alternative approach was suggested as an attempt to marry the two points of view. It had been noted that expropriation of property was often one of the first steps taken by totalitarian governments to weaken their political opponents.¹³ Freedom from arbitrary deprivation of property would be sufficient to prevent that type of abuse without going as far as to require an absolute right of ownership. Not all members were satisfied, however, that property was a “relative” right designed purely to prevent the state from growing too powerful. The use of the word arbitrary was also considered to be problematic, since the parameters in the kind of political situations in which the right was likely to be invoked were impossible to define with any certainty.

The argument was made more difficult by the political divisions that were evident amongst the delegates. An example comes from one of the UK delegates, Mr Nally, a member of the socialist Labour government:

It would be a bad thing if...we had referred to property and had used the right of the average man to have little possessions of his own in order to defend a property structure in which a tiny handful of people own the means by which millions of others live.¹⁴

The level of political rhetoric used overall was perhaps unhelpful in allowing the discussion to reach the root of the difficulties, both ideological and practical, which had to be worked through if a solution were to be achieved.

¹² TP, vol2, p104

¹³ TP, vol 2, p70. This proposal was put forward by the Norwegian delegate, M. Sundt.

¹⁴ TP, vol 2, p80

The extremes of view along those lines are, perhaps surprisingly, both illustrated by delegates from the same country, Ireland.

First, Sean MacEntee of Fianna Fáil:

I think if we accept Lord Layton's amendment [to exclude the property right], we shall in fact seal the triumph of the totalitarian ideologies...we are declaring that the Nazis were justified in everything they did to prevent some human beings from perpetuating their race and name.¹⁵

On the opposite end of the political spectrum, James Crosbie of Fine Gael, the United Ireland party :

I regard M Philip's proposed amendment to the paragraph dealing with the ownership of property as the thin end of the Moscow wedge.¹⁶

In reporting back to the Consultative Assembly, the *rappporteur* attempted to define the root of the problem.

When it is a question of freedom of assembly, of association, of the press, of thought, of individual security, these are easy to control, because in the laws of all civilized countries there are common principles which the judge could easily discern, formulate and expound.

When, on the contrary, it is a question of nationalisation, of the financial system, of the right of succession, it is much more difficult at the present time to discover the general principles of law recognized by civilized nations and who, in the different national laws, are the persons to resolve this problem.¹⁷

The combination of the difficulties in principle and the difficulties in practice were not reconciled by CoLAQ at that stage, but it is clear from the report that they believed a compromise should and could be reached.

¹⁵ TP, vol 2, p90

¹⁶ TP, vol 2, p 106

¹⁷ TP vol 2, p126. The "general principles" referred to here are international law principles governing the subject matter mentioned: nationalisation, succession and so forth.

Progress with the Convention as a whole continued swiftly, but perhaps due to its controversial nature, the property right came to be rather overlooked. The Teitgen Report was adopted by the Consultative Assembly in August 1949 and submitted to the Council of Ministers with Recommendation No. 38: that a draft Convention be drawn up. In November, the Ministers appointed a Committee of Experts, made up of one “eminent jurist” from each of the member states. The Experts met in March and April of 1950. This committee was of the view that its remit was purely administrative, and accordingly that any political decisions were a matter for the Ministers. This led to the production of a choice of texts for certain articles, dependent on the eventual political line to be adopted by the Ministers. The question of whether the property right should be included and in what form, having been specifically reserved by the Assembly, was considered to be beyond the remit of the committee. In their report, however, the Experts made it clear that they felt it important that right should be included in any finalised bill.

[The Committee of Experts] did call the attention of the Committee of Ministers to the...right in question. It was felt that totalitarian regimes had a tendency to interfere with the right to own property as a means of exercising illegitimate pressure on its nationals.¹⁸

In April 1950, the Ministers considered the report of the Committee of Experts and convened a conference of senior officials to deal with the political issues it highlighted. A further draft of the Convention was prepared in light of those discussions. The property right was not included.

CoLAQ met again in June 1950, under the chairmanship of Sir David Maxwell-Fyfe, a British conservative politician and former Attorney General. On the agenda were both the report of the conference of senior officials and the draft Convention, as settled by the officials, which had been referred to the Assembly. CoLAQ were critical of the decision taken by the conference simply to omit any reference to the property right in their drafts. It was decided that a

¹⁸ TP, vol 4, 18-21

Drafting Sub Committee should be set up to prepare a definition.¹⁹ The following text was produced and, on return to CoLAQ, approved unanimously:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present measures shall not however be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.²⁰

No report on the discussions of the drafting sub committee is available. It is impossible to say what thought, if any, was given to the use of individual words, such as "possessions" or "ownership," which are terms of art in many jurisdictions. It should be remembered, however, that the approach taken to the drafting of the Convention as a whole was purposive. The intention was to capture the meaning of the protection to be afforded to citizens, and on that basis, it is perhaps unlikely that technical terms may have been scrutinised in the way that would be expected in the case of regular legislation. From the wording used it can be surmised that the previous arguments had been taken into account and a compromise agreed upon. The basic right was subjected to qualifications with the aim of protecting individuals from arbitrary confiscation of property, whilst still enabling states to, for example, nationalise industry where that was politically and/or economically desirable.

After further discussion by CoLAQ, the proposed amendment to include the property right in the text suggested by the drafting sub committee was adopted by 15 votes to 4, with one abstention.²¹ In the committee's report to the Assembly, it was noted that the draft:

Represents an attempt to define the right as requested by the Assembly in September 1949, and endeavours to make the distinction between arbitrary confiscation and social conception of property which allows it to be used by regular legislation for the public good.²²

¹⁹ TP, vol 5, p26

²⁰ TP, vol 6, p10

²¹ TP, vol 6, p20

²² TP, vol 6, p62

In recommending the draft to the Assembly, Sir David Maxwell-Fyfe again attempted a summary of the debate:

I think that the arguments against the insertion [of property rights] may be summarised as three. The first is the difficulty...of judicial interpretation and enforcement of those rights. The second is the fact that...social and economic rights are not usually expressed in a Constitution in such a way as to give judicial remedies. The third is the broader point that once one enters the third category of rights – that is social and economic rights – it is very difficult to know where to halt, and it is therefore safer to keep out of that territory altogether.

But on the other hand, it is urged that these rights are the very basis of freedom, and there is a widely held view that personal and political freedom is impaired, if not rendered merely nominal, unless its enjoyment is made practical by a reasonable guarantee of these rights.²³

On return to the Assembly, more detailed consideration was given to the wording of the text and what its implications were likely to be from a practical standpoint. In the exchange of views which follows, the arguments put forward on either side may have the ring of familiarity, not only from the CoLAQ discussions, but also from the extensive commentary on P1-1 as introduced in the jurisprudence and elsewhere.

The first UK delegate to speak in the debate was Mr Roberts:

I certainly think it desirable for everyone to have some property and to be protected in respect of his personal belongings, but it is almost impossible to define briefly in general terms a right to property.

The word “possessions”, used in the English text, is not really a satisfactory word...[it] would not be found in a British Act of Parliament or any other legal document.

Furthermore, by bringing in property we open up the field for specifying other social benefits and advantages – the right to work, the right to leisure, the right to an adequate standard of living...we do not wish to lay the draft Convention open to the charge that the Assembly considers property the most important of the social rights.²⁴

²³ TP, vol 5, p224

²⁴ TP, vol 6, p88

These criticisms were answered by M. Pernot of France. As to the imprecision of the drafting, he noted:

I think, actually, one may always say of any definition that it lacks clarity. But...side by side with texts, there is a thing called jurisprudence, and we may rely on the European Court of Justice to discriminate, when the time comes, between what would be an arbitrary act and what would be a legitimate act.²⁵

As to the argument that property, as a social right, should not be included in the Convention:

No proposal has been submitted either to the Committee by one of its members or to the Assembly today to include in our Convention the right to leisure or the right to work, while, on the contrary...what is likely to be the state of public opinion in European countries if it is suddenly learned that the Assembly had set aside the right to own property, after the Committee had adopted a Motion by a large majority with a view to its being included among the recognized rights?²⁶

It is interesting to note that the conduct of the UK during the course of the Convention negotiations more generally was viewed at this time in an unfavourable light by many of the delegates of other member states, with regard particularly to the UK's reticence over relinquishing colonial rights. That background may have had a bearing on the decision of another of the UK delegates, Mr Mitchison, to take a softer line on the property right:

On the right of property...I have come to the conclusion...that my objections were fundamentally those of a lawyer.

I feel that if this legal objection were to be pressed now and I were to put myself in the position of raising again the kind of question that was raised here last year, and did so on juristic grounds, we might expose what is really a remarkable achievement to quite unnecessary criticism. After all, we are only making proposals to the Committee of Ministers, and accordingly I propose to smother any juristic difficulties I may feel

²⁵ TP vol 6, p106

²⁶ TP, vol 6, p108

and equally to smother any minor questions of the wording of the clause; and instead to welcome and accept the [clause] in the spirit in which I believe it was drafted.²⁷

A more emotive approach was taken by another of the French delegates, M. Bastid:

Property is an extension of the man, and man cannot feel safe if he is exposed to arbitrary dispossession...I do not know if there is any right more ancient or more firmly established than the right to own property. In all civilised nations, there are rules to protect individuals against arbitrary confiscation. There are also enactments which, with certain reservations and in certain circumstances, permit expropriation in the public interest. I think that the legislative material which will be at the disposal of a commission or a court, for reference, is abundant. Consequently I am in no way anxious regarding any hesitation which the commission or the court may have.²⁸

Following a lengthy debate, a vote was taken on the amendment to include the property right in the form of wording proposed by CoLAQ. The amendment was carried by 97 votes, there being 11 abstentions.²⁹ The new draft Convention overall was carried unanimously.

The views of the Assembly were made known to the Ministers, who convened again in November 1950. Sir David Maxwell-Fyfe impressed upon them the importance of the amendments adopted by the Assembly, indicating them to be:

Much more modest than the Assembly would have desired, and represented what the Assembly considered to be the bare minimum.³⁰

Regardless of this imprecation on the part of Maxwell-Fyfe, the Ministers were not prepared to accept the property right. It was agreed, on the motion of the British delegate Ernest Davies, with little reported discussion, that the matter should be referred to a Committee of Experts for further consideration, with a

²⁷ TP vol 6, pp97-98

²⁸ TP, vol 6, p120

²⁹ TP, vol 6, p156

³⁰ TP, vol 7, p226-7.

protocol envisaged at some later stage.³¹ (It will be recalled that, on their previous consideration of the draft, the Committee of Experts had not looked at the property right since no agreement had been reached on it by the Assembly.) The remainder of the draft was agreed with some minor revisions, and formed the basis of the European Convention on Human Rights as we know it. The Convention was signed in Rome on 4th November 1950.

Deliberation over the property right continued. The ire of the Assembly had been provoked by the Ministers in returning the matter to the Experts, and the pressure was on to reach some compromise. The Secretariat-General observed:

It appears necessary to define as accurately as possible what is meant by the right of property, what is meant by “arbitrary confiscation” and what exceptions are to be permitted in the general interest to the individual rights of enjoyment of one’s possessions.

The preparation of definitions on these points will presumably need to take account of the national legislation in different countries on such matters as nationalisation, requisition in time of war, expropriation for public use, agrarian reform, confiscation in criminal law, death duties and reversion to the State on intestacy.³²

The Committee of Experts met again in February 1951. It had before it the draft of the property right adopted by the Assembly, together with an alternate version submitted by the British government,³³ and a further alternative proposed by the Belgian government.³⁴ The consensus, as at the previous meeting of the experts where the matter was not technically even on the table for discussion, was that the property right should be included. However, as

³¹ TP, vol 7, p34

³² TP, vol 7, p128

³³ Every natural or legal person is entitled to the peaceful enjoyment of his possessions. This provision, however, shall not be considered as infringing in any way the right of a state to enforce such laws as it deems necessary either to serve the ends of justice or to secure the payment of monies due whether by way of taxes or otherwise, or to ensure the acquisition or use of property in accordance with the general interest – TP, vol 7, p186

³⁴ 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, in such cases and by such procedure as may be established by law and subject to fair compensation which shall be fixed in advance. The penalty of total confiscation of property shall not be permitted.

The present measures shall not however infringe, in any way, the right of a State to pass legislation to control the use of property accordance with the general interest or to impose taxes or other contributions – TP, vol 7, p 194

with CoLAQ, the exact wording proved less easy for the experts to agree upon.

The majority of the experts were of the view that the right to compensation should be expressly enshrined in the text. However, the British delegation was under strict instruction to withhold support from any version of the text that included such an entitlement. Other delegates suggested that there be no reference to “fair” compensation, in order that the amount awarded by member states to their nationals would not be capable of review at European level.

Ultimately it became apparent that no consensus could be reached, and the committee concluded it would be premature to draft the protocol. It was decided that suggested texts should be proposed by the individual delegations to their national governments for approval before returning to the Ministers.³⁵ This breakdown carried with it the implication that there was no shared ideology on property rights amongst the member states, an implication which was unwelcome in the post-war political climate of consensus.

Despite the pressure growing on all parties to reach a compromise, at the subsequent meetings of the experts in April and then in June of the same year, compensation was once again at the centre of the dispute. The British government were at the eye of the storm, and despite having secured the agreement of the majority of the committee to exclude express use of the word “compensation” in the text, still the article could not be finalised.³⁶

With pressure on the British government to reach a compromise, a further amended text was produced by them prior to a hastily convened meeting of the experts in July 1951.³⁷ The text was altered slightly to remove the

³⁵ TP, vol 7, p200-205

³⁶ The text at this stage read: 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 present measures [preceding provisions] shall not, however, infringe in any way the right of a State to pass legislation to control the use of property in accordance with the general interest or to impose taxes or other contributions.

³⁷ 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

reference to courts, in order that other public authority orders, such as confiscation by customs authorities, would also be excluded from protection.³⁸

Finally, more than two years after discussions were begun by CoLAQ and eight months after the Convention itself had been signed, a form of wording in respect of the right to protection of property had been agreed.

The Convention is authentic in two languages. The English text reads as follows:

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 infringe 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.³⁹

The French text:

Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'il jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.

It may be helpful to note that the vocabulary used in the English version does not appear to be identical to that in the French. The English text, in the first sentence, protects peaceful enjoyment of "possessions", confirming in the second sentence that no one shall be deprived of his "possessions" except in

principles of international law.

The preceding provisions shall not, however, in any way infringe 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 of penalties imposed by courts.

³⁸ TP, vol 7, p 312 *et seq.*

³⁹ TP, vol 7, p338

certain circumstances. By contrast, the first sentence of the French text refers to respect for “biens,” while the second talks of deprivation of “propriété.” In the second paragraph, the English version deals with “the use of property” where the French text refers to “l’usage des biens.” The rules on interpretation of treaties contained in the Vienna Convention apply to assist in reconciling any potential difference in meaning between the two authentic language versions of the text.⁴⁰

The text was approved by the Ministers days later and sent to the Assembly for their comments. In its lengthy commentary on the draft, the Secretariat-General noted that it represented “the greatest measure of agreement possible” amongst the member states, whilst being a compromise.⁴¹ The commentary goes on to explain certain of the alterations. The reference to “arbitrary confiscation” had been changed as it was considered too imprecise in a legal text. No express right to compensation was included, although it was felt this was adequately covered by the reference to the principles of international law.

Despite continued disagreement over other articles of the protocol, the Assembly were prepared to approve the text on the property right in the form proposed by the Ministers. The First Protocol was signed in the Salon d’Horloge in Paris on 20 March 1952.

Britain was one of the few signatories to ratify the ECHR on the first possible day to do so, 8 March 1951. The UK general election in October of the same year saw Clement Attlee’s Labour government, with its radical programme of nationalisation, replaced by a Conservative government under Winston Churchill. This change in political direction meant many of the reservations argued so vehemently by the UK delegation, particularly in regard to the payment of compensation for compulsory nationalisation, lost their force, and the First Protocol was ratified without difficulty on 3rd November 1952. The

⁴⁰ See further discussion at p44 below

⁴¹ TP, vol 8, p6

protocol, including the property right, finally came into force on 18th May 1954 after ten ratifications had been deposited.

1.3 From ratification to the Human Rights Act 1998

From a domestic point of view, the progress of the ECHR then falls into something of a black hole. It took almost five decades for the rights and freedoms encapsulated by the Convention, including the all-important First Protocol, to become part of UK domestic law, a result finally achieved by the Human Rights Act and the Scotland Act, both in 1998. During that time frame, the parameters of P1-1 were explored in a series of important judgments by the European Court of Human Rights, which will be considered in chapters two and three below. Property law in Scotland was also undergoing a major programme of reform during the latter part of this period. Why did it take so long for the Human Rights Act to come into existence?

A full answer to that question is beyond the scope of this thesis, but a brief overview of the key factors may be of some assistance in understanding the context in which P1-1 cases have been decided domestically. The key to the status of the ECHR throughout this time period was the firmly held belief in Britain's unwritten constitution and its ability to protect human rights without the need for incorporation of the Convention. Britain considered itself to have a "long and proud" tradition in respect of civil liberties and the consensus amongst the states involved in drafting the ECHR accorded with that view.⁴² Legislation was introduced from time to time to ensure certain areas of the law were consonant with the principles of the Convention, and beyond that, the internal system of checks and balances on the legislature by the judiciary and the universal suffrage enjoyed by the British public in electing that legislature were considered to be enough.

⁴² In reporting back from the meeting of Ministers in August 1950, where Britain had blocked various suggested amendments to the Convention overall, Ernest Davies noted that "many of my continental colleagues found it difficult to understand why Britain, which they look upon as the cradle of Parliamentary democracy, should oppose the article on political liberty".

This view was reinforced by the difficulties incorporation was thought likely to cause to the constitution which had been an effective guardian of human rights for so long. The supremacy of Parliament was the paramount consideration. Parliament, made up of representatives elected by the country, was seen to be the key instrument of democracy, and there seemed something counterintuitive about compromising the powers of that institution in the name of advancing human rights. The argument was that if the Convention was expressly incorporated into domestic law, it would have to be entrenched, meaning it could not be undone by the decision of a future Parliament. Tying the hands of future governments in this way would mean removing the “unfettered” power to take decisions that was seen to be so important.

The sovereignty point tied into further concern over the role of the judiciary in interpreting an entrenched ECHR. If judges were able to rule on the compliance of legislation with Convention rights, then the final say on the meaning of Britain’s laws fell to the bench rather than to the Commons. It would be undemocratic for this power to be removed from the elected officials in the Houses of Parliament. Additionally, it was unclear how the judiciary would be able to cope with “open textured” legislation such as the ECHR when they were accustomed to working with the (reputedly) tightly-drafted technical legislation which emanates from Westminster draftsmen. An additional worry was whether the justice system in this country was really equipped to deal with the pressures of the potential increased caseload an incorporated ECHR might give rise to. Commentators expressed the view that the judiciary was already overworked.⁴³

Despite the lack of incorporation, the Convention increasingly influenced the development of domestic civil rights law. In 1966, the government accepted the jurisdiction of the Court of Human Rights in Strasbourg and allowed the right of individual petition as a means of access to justice there. This provision had formed an optional part of the ECHR since its inception, but had not been accepted by the UK at the time of signature or ratification..

⁴³ Although perhaps only judicial commentators

Some applications were made to Strasbourg as a result. In terms of the property right, two important cases challenging major legislative reform projects were determined by the ECtHR⁴⁴ and P1-1 points were raised in some other applications.⁴⁵ However, all possible routes of appeal domestically had to be exhausted before an application could be made to the former European Commission on Human Rights,⁴⁶ who would then make an admissibility decision as to whether the case was suitable to be heard by the ECtHR. The process was complicated and time consuming, with the estimated average length of time taken for a case to come before the bench in Strasbourg approaching six years. More pertinently, from the point of view of effective protection of human rights, such an application was “fearsomely expensive,”⁴⁷ and no legal aid was available.

The status of jurisprudence emanating from Strasbourg became progressively more uncertain. In a series of leading cases in England and Wales,⁴⁸ the courts seemed increasingly willing to deal with questions surrounding the Convention and to refer to its tenets in their decisions. The position in Scotland was quite different, with Lord Ross declaring:

So far as Scotland is concerned, I am of the opinion that the court is not entitled to have regard to the Convention either as an aid to construction or otherwise...a convention is irrelevant to legal proceedings unless and until its provisions have been incorporated or given effect to in legislation.⁴⁹

Although this remark was *obiter*, it demonstrates the lack of clarity surrounding the implications of the Convention for the domestic courts.

⁴⁴ *Lithgow v United Kingdom* (1986) 8 EHRR 329; *James v United Kingdom* (1984) 6 EHRR CD 475

⁴⁵ See, for example, *Handyside v UK* (1976) 1 EHRR 737

⁴⁶ The Commission was abolished by the 11th protocol to the ECHR. Since its coming into force in 1998, applications are made directly to the Court.

⁴⁷ Dworkin, p 18

⁴⁸ For example *R v Secretary of State for the Home Dept, ex parte Brind* [1991] 1 AC 696 (statutory interpretation), *Observer Ltd and Guardian Newspapers Ltd v United Kingdom* (1992) 14 EHRR 153 and 229 ((the *Spycatcher* cases on freedom of expression), *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (judicial review)

⁴⁹ *Kaur v Lord Advocate* 1981 SLT 322 at 330.

Pressure built both nationally and internationally for incorporation to be effected. The claims that Britain's conventional constitution was able to protect human rights as robustly as the ECHR became unconvincing in the face of the evidence stuttering through from the UK applications which did eventually reach Strasbourg. As the then Lord Chancellor, Lord Irvine of Lairg, noted in his opening speech at the second reading of the Human Rights Bill:

Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation of the Convention by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990.⁵⁰

By 1990, of the 22 signatories to the ECHR, the UK was the only one not to have a written Bill of Rights, and one of a handful not to have incorporated the ECHR.⁵¹ The European Parliament were by that stage looking on to “second generation” economic and social rights (embodied in the European Charter of Fundamental and Social Rights), and even discussing “third generation” or “green” rights.⁵² From being a frontrunner in the field of civil liberties, Britain was beginning to lag behind.

The keys to incorporation lay, of course, in the hands of the politicians. There, too, opinions were beginning to shift. In June 1976, the Labour government under James Callaghan published a discussion document on human rights in general and the ECHR in particular.⁵³ That paper served to highlight some of the issues outlined above, and in the ensuing debate, there were indicators of a move towards incorporation.⁵⁴ In 1977, Lady Thatcher indicated that she was in favour of incorporation, although no movement was made to effect such a result during her time in office.

⁵⁰ OR, House of Lords, 3 November 1997, vol. 582, col.1228

⁵¹ IPPR Constitution Paper No 1: A British Bill of Rights, p 9

⁵² *ibid.*, p 9

⁵³ Legislation on Human Rights with particular reference to the European Convention – A Discussion Document (1976)

⁵⁴ In 1977, the Standing Advisory Committee on Human Rights in Northern Ireland recommended that the Convention be incorporated. In 1978 the House of Lords Select Committee on a Bill of Rights again recommended that the Convention should be incorporated.

The turning point came in 1993 when John Smith, then leader of the opposition Labour party, pledged himself and his party to the principle of incorporating the ECHR. A party consultation paper, *Bringing Rights Home*, was published in November 1996, and its findings resulted in a commitment to incorporation appearing in the 1997 Labour election manifesto.

Following success in the general election that year, the Human Rights Bill became a flagship piece of legislation for the new Labour government. The Bill was published in October 1997 alongside a Home Office white paper entitled *Rights Brought Home*. The white paper outlined the various arguments in favour of the incorporation of the ECHR as considered above, concluding:

Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention.⁵⁵

The white paper outlined the rights protected by the Convention and explained the mechanism of incorporation envisaged by the Bill. The Bill was introduced into Parliament shortly thereafter and received Royal Assent in August 1998. Heated debates over the Bill took place at each of its Parliamentary stages – however, they focused on the way in which the Convention was to operate within domestic law. It does not appear that detailed consideration was given to the substantive convention rights at all, and indeed, the merits or otherwise of the property right do not appear to have been discussed at any point. Perhaps this should be obvious – the legislation was marketed simply as an exercise in enabling British citizens to use rights of which they already had the benefit, but with the advantage of greater accessibility.

The Human Rights Act came into force in October 2000.

1.4 The Effect of the Human Rights Act 1998 and the Scotland Act 1998

⁵⁵ Para 1.18

It may be helpful at this stage to give an outline of the various ways in which the rights encapsulated in the ECHR are given effect as a matter of domestic law, as this provides the necessary grounding for the analysis of the jurisprudence which will follow in the subsequent chapters of this thesis. It is important to note that the position in Scotland varies somewhat from that in the other parts of the United Kingdom.

Convention rights form part of domestic law under the Human Rights Act 1998. This legislation provides that the Convention rights – which are listed, and include, at s1(1)(b), articles one to three of the First Protocol – are to take effect in a variety of ways enumerated in the Act. Briefly put, these are as follows:

- Primary and subordinate legislation must be given effect to in a way which is compatible with Convention rights. There is no need for there to be an ambiguity before reference to the Convention will be required – legislation *must* be interpreted in such a way unless it is impossible to do so.⁵⁶
- Where a rights-friendly interpretation cannot be made, the Court can make a “declaration of incompatibility”.⁵⁷ The incompatible legislation remains fully in force despite such a declaration having been issued. It is for Parliament to decide how such an incompatibility is to be rectified, if at all. The sovereignty of Parliament is therefore maintained, although it might be wondered why anyone would wish to undertake what would inevitably be a lengthy litigation process simply to achieve this result. The Act also provides a locus for the Crown to be joined to a case where it looks as though a declaration of incompatibility is a possibility, presumably to argue the government line, if that would be appropriate.⁵⁸
- In the case of proposed new legislation, a Minister of the Crown in charge of a Bill must make a statement as to the compatibility of the Bill with Convention rights.⁵⁹

⁵⁶ s3

⁵⁷ s4

⁵⁸ s5

⁵⁹ s19

- An act of a public authority which is not compatible with the Convention rights will be unlawful. "Act" here includes omission. Some specification is given as to the meaning of "public authority" in the statute,⁶⁰ although no doubt there will be further jurisprudence to follow on this point. The Act also provides that such a public authority act will *not* be unlawful if the authority could not have acted otherwise owing to the existence of incompatible primary legislation. The intent here is obviously to prevent the provisions regarding declarations of incompatibility being circumvented by challenging the subsidiary actions rather than the incompatible statute.
- The court has the power to award a judicial remedy such as it deems appropriate in any given case. This includes damages.⁶¹
- The Act specifies that the Convention rights are intended to exist in conjunction with existing human rights, rather than as a replacement for the same. Specific provisions regarding freedom of expression and freedom of thought, conscience and religion are also made.

Additionally, the Act provides that:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.⁶²

The wording of the obligation on the courts to "take account of" the Strasbourg jurisprudence suggests some degree of discretion, although the

⁶⁰ s6

⁶¹ s8

⁶² s2(1)

House of Lords has indicated that a Strasbourg precedent should normally be followed unless there is a strong reason to deviate from it.⁶³

The Scotland Act adopts a different approach in respect of the human rights implications for devolved matters.

- An Act of the Scottish Parliament may not include provisions which are incompatible with Convention rights as defined in the HRA. Any Act which is incompatible with Convention rights is *ultra vires* the competence of the Scottish Parliament. Essentially, purported legislation which contravenes Convention rights will not be law.⁶⁴
- A member of the Scottish Executive in charge of a bill must make a statement as to whether it is within the legislative competence of the Parliament, which will include compliance with Convention rights, before the bill is introduced.⁶⁵ The Presiding Officer must also scrutinise the competence of the Bill at the same stage.⁶⁶ If there is doubt over compliance, a reference can be made to the Judicial Committee of the Privy Council (soon to be replaced by the Supreme Court⁶⁷) for a final determination.⁶⁸ In practice, the human rights implications of proposals for legislative reform will often be scrutinised prior to the introduction of the Bill in Parliament. For example, the Scottish Law Commission now invariably include a statement on Convention compliance in any Report proposing new legislation. As yet, no Act of the Scottish Parliament has been found to be incompetent as a result of conflict with human rights.
- A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, which would be incompatible with Convention rights.⁶⁹ A member of the Scottish Executive will include Scottish Ministers, junior Scottish Ministers and civil servants.

⁶³ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. An interesting discussion of some potential difficulties with this approach where domestic precedent conflicts with Strasbourg judgments can be found in *Kay v Lambeth Borough Council* [2006] 2 AC 465.

⁶⁴ Scotland Act 1998, s29

⁶⁵ Scotland Act 1998, ss31(1) and (2)

⁶⁶ Scotland Act 1998, s19

⁶⁷ Constitutional Reform Act 2005, sched 9

⁶⁸ Scotland Act 1998, s33

⁶⁹ Scotland Act 1998, s57(2)

The term "act" has been given a wide construction, although there is some doubt over whether an omission can fall within this definition.⁷⁰

Since compliance with Convention rights is a pre-requisite for competence of acts of the Scottish Executive in the form of legislation or otherwise, challenges to such acts must be raised as a devolution issue.⁷¹

One practical impact of the different approach taken to Convention rights in the Scotland Act is that the final say on the legitimacy of legislation, when it comes to matters of Convention compatibility, will no longer lie with the legislature or the executive, but rather with the judiciary. In some senses, this puts judges in rather an exposed position.

The question of title to raise an action in respect of non-compliance with Convention rights has the same answer both north and south of the border. Proceedings cannot be brought in the United Kingdom unless the party seeking to raise the action would be a victim in the meaning of article 34 of the ECHR were he to make an application to the ECtHR.⁷²

1.5 Conclusion

Protection of property had been envisaged as a part of the new European bill of rights from the very beginning. However, a combination of ideological and political differences amongst the member states had the result that the nature of the right was furiously debated at every stage of drafting. These conflict lines were so pronounced that no agreement could be reached in time for the signature of the Convention itself, with the First Protocol not appearing until a further eight months had passed.

A review of the materials recording the drafting of the ECHR gives some useful insight into the way P1-1 was finally put together. The delegates were under pressure to reach some form of accord. The points of view held by

⁷⁰ See *R v HMA* 2003 SC (PC) 21

⁷¹ See Scotland Act 1998, sched 6

⁷² Human Rights Act 1998, s7(7) and Scotland Act 1998, s100(1)

various member states were in some cases in direct opposition to one another, a situation in which no compromise was really possible, and yet a compromise was sought. The property right ultimately represented what might reasonably be called an attempt to please all parties but which, in reality, pleased none. The ambiguity in the wording of P1-1 was even recognised at the time, but the view was taken by some that jurisprudence was the appropriate route for clarification.

That jurisprudence has been produced at a rapid pace by the former European Commission and the European Court of Human Rights from the 1950s onwards. The UK courts have also had occasion to deliberate over P1-1, with increasing frequency since the Convention rights were given effect in domestic law through the Human Rights Act 1998 and the Scotland Act 1998. The question to be asked is whether this case law has provided the clarity in respect of P1-1 which the drafters intended it to, whilst still remaining true to the original spirit in which the right was conceived. It is to this question that the thesis will now turn.

CHAPTER TWO: WHAT DOES IT MEAN?

"Speak English!" said the Eaglet. "I don't know the meaning of half those long words, and I don't believe you do either!"⁷³

2.1 Introduction

The discussion in the first chapter of this thesis highlights certain key concepts in the genesis of P1-1 which should inform the subsequent analysis of the jurisprudence. It is useful to remember that the property protection was always intended to form part of the new European bill of rights. It seemed clear to the authors of the Convention that some elements of property ownership were political, and that those interests required to be protected. However, beyond that initial idea, there was little in the way of universal consensus surrounding the property right. Differences in political and legal ideology left the ambit of the protection almost impossible to determine. The final wording of the right was recognised to be a compromise, containing a certain level of ambiguity which could be resolved through judicial interpretation. The extent of the right was never certain. The parameters of legitimate state interference were not made clear.

Against that background, it is perhaps not surprising to find that the evolution of P1-1 through the jurisprudence has been somewhat faltering. It is certainly far from complete. The following chapters of the thesis will attempt to chart that evolutionary process, drawing out conclusions as to the current understanding of P1-1.

Chapters two and three will begin this analysis through a detailed consideration of the case law of the European Court of Human Rights (the Court) and the former European Commission of Human Rights (the Commission). Chapter two will focus on the wording of the article, seeking to systematically define each of the key terms with a view to setting out the parameters of the right. Chapter three will then examine how the former Commission and the Court developed an approach to examining these

⁷³ *Alice in Wonderland*, p25

parameters with a view to establishing whether a violation of P1-1 has occurred in a given application.

In this chapter, then, the focus will be on the wording of the article with a view to answering the question posed in the chapter title: what does P1-1 *mean*?

It may be helpful here to give a brief outline of the broad principles adopted in the Strasbourg jurisprudence as to interpretation of the Convention. In the first place, the customary international law rules on interpretation of treaties contained within Part 3 of the Vienna Convention on the Law of Treaties 1969 apply to the ECHR. Article 31 of the Vienna Treaty provides generally that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In respect of treaties authenticated in more than one language, such as the ECHR, Article 33 provides that the text is equally authoritative in each language. It also states that:

when a comparison of the authentic texts discloses a difference of meaning ...the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

These rules have a clear application in the interpretation of P1-1 since, as noted previously,⁷⁴ the English and French versions of the text of the article do not appear to be identical.

Against the background of the Vienna Convention, the aim of the Court is to interpret the ECHR in a way that will make the protections it contains meaningful. The intention is to protect rights which are “real and effective.” Accordingly, the Court will not be bound by purely formal or semantic questions as to when a violation may have occurred, but will look directly at the action taken by the state and the actual impact on the applicant. This can be seen in relation to questions of deprivation of possessions in the P1-1

⁷⁴ p32 above

jurisprudence, where a *de facto* deprivation of property will still be considered an interference with P1-1 notwithstanding that formal title remains with the applicant.⁷⁵ The emphasis is on effectiveness, and this principle resonates throughout the jurisprudence.

One tool used in the case law to bring about the desired effectiveness is the notion of autonomous concepts. The Convention applies to an increasing number of states with no unifying law or set of legal principles. Accordingly, in determining Convention applications, the Court does not bind itself by the definitions given in national legislation as to particular terms, preferring rather to build its own meanings which can be applied in the Convention context. In the P1-1 jurisprudence, this is demonstrated most clearly in relation to the term “possessions,” which has been very widely interpreted in the Strasbourg case law so as to ensure the protection can be as far reaching as it was designed to be.

It is also helpful to bear in mind the Court’s own description of the ECHR as:

a living instrument which...must be interpreted in the light of present day conditions.⁷⁶

For rights to be effectively protected, account must be taken of the changing norms and values of the European society with which the Convention is concerned. Interpretation of the Convention should not be fixed, but must continue to evolve over time.

Arguably the Strasbourg approach to interpretation of the Convention causes particular difficulty in the context of P1-1. Ownership of property and the rights which attend to it is, traditionally, the domain of private lawyers. The autonomous, adaptive terminology of the Convention sits in sharp contrast to the stark and formalistic language which is most often seen in domestic legislation regulating the law of property. In Scotland in particular, the focus on defined principle and certainty in application is considered to be one of the key strengths of property law. The potential for conflict here is obvious.

⁷⁵ See, *inter alia*, *Bramelid and Malmström v Sweden* (8588/79) 12 December 1983.

⁷⁶ *Tyrer v United Kingdom* (1978) 2 EHRR 1

In this chapter, an attempt will be made to bridge the gap between these two modes of legal construction. P1-1 contains six terms which are fundamental to any understanding of its application. The Court and the former Commission have given consideration in an overwhelming number of cases to the exact meanings intended to be captured by the wording of P1-1. Through a review of this key jurisprudence, this chapter will seek to formulate a concrete definition for the terms *natural or legal person*, *possession*, *peaceful enjoyment*, *deprivation*, *control* and *public/general interest*.

2.2 Every natural or legal person

The first article of the Convention confirms that every juristic person is intended to enjoy the protection offered by the ECHR. The opening of P1-1 reinforces this blanket protection, making it clear that bodies corporate are capable of benefiting from property rights in the same way as individuals. Although bodies corporate are subject to the same rules as natural persons when it comes to determining whether an interference has taken place and, if so, whether it was justified, applications by companies do raise some particular questions when it comes to determining the identity of the “victim” of such an interference.

2.2.1 Shareholders and "special connection"

From what has been said in the preceding paragraph, it is evident that where a company's property rights have been violated, the company is the victim and is entitled to make an application under P1-1 in its own name. However, in certain circumstances, shareholders of the company may also have victim status. In *X v Austria*,⁷⁷ the applicant individual ran a company which produced superphosphate. The state owned a factory manufacturing the same product, and the applicant complained that his company was subjected to a string of interferences from the government, including the withholding of promised state funding for economic development, in order that his company would go out of business, thereby removing any competition to the state-run factory. Although the majority of allegations made by the applicant concerned

⁷⁷ (1706/62) 4 October 1966

interference with the property rights of the company, the Commission was of the view that the applicant as an individual was nonetheless a victim in terms of article 25 (now article 34) of the Convention.⁷⁸ Particular regard was had to the fact the applicant held 91% of the shares in the Company. The Commission considered it irrelevant that, under Austrian domestic law, only the company would be entitled to make a claim. Similarly, in *Kaplan v UK*,⁷⁹ restrictions were imposed on a company on the basis of the applicant individual's alleged personal unfitness to act as a controller. Although the interference was with the company's rights, the applicant had a direct personal interest in the subject matter of the complaint.

It appears that a close connection between the company and its shareholders will be required before the shareholders will be considered as "victims". Some idea of these limitations is given in *Yarrow v UK*.⁸⁰ Here, a wholly owned subsidiary company of Yarrow was nationalised, impacting on the value of Yarrow's shares. The company itself, together with three of its shareholders, complained that their rights under P1-1 had been violated by the manifest inequality of the statutory compensation scheme. The shareholders argued that they had locus to make a claim based on *X v Austria* and *Kaplan v UK*. However, the Commission distinguished the earlier cases. It considered that the shareholders had only been indirectly affected by the alleged violation.

In previous cases where a shareholding in a company was enough to give an applicant "victim" status, the individual concerned held a substantial majority shareholding in the company. In effect they were carrying on their own business through the medium of the company and had a direct personal interest in the subject matter of the complaint. The circumstances here are not comparable.⁸¹

⁷⁸ The relevant part of article 25 read: "The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions." The amended wording in article 34 states that: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

⁷⁹ (1982) 4 EHRR 64

⁸⁰ (1983) 5 EHRR 498

⁸¹ *ibid.*, at p.185

That being the case, it was for the company to make a complaint (as it had done) rather than the shareholders.

It seems, then, that two factors must be present before a shareholder will be considered a victim of an interference with the rights of the company in which he or she holds shares. In the first place, the shareholder will have to hold a controlling interest in the shares of the company. Secondly, there must be a “special relationship” between the shareholder and the company. If both these criteria are met, as in *X v Austria* and *Kaplan v UK*, it will be competent for the shareholder to make an application directly. If, however, one or both of these conditions is unfulfilled, as in *Yarrow v UK*, it will be for the company to make an application directly to protect its own rights.

But what if the company is prevented from making its own application? This is the issue which arose in *Agrotexim v Greece*.⁸² Here, the applicants were companies who held shares in an associated company, a brewery. The brewery wished to develop land on two of its sites, but the land was earmarked by the Athens council for expropriation, with signs to that effect being placed on the sites. The brewery business was failing, and had become subject to a special liquidation procedure, in which the liquidators were appointed by the state. The applicant companies argued that the liquidators worked for the government and were under no obligation to take account of the shareholders’ views. This effectively prevented the brewery from making its own application under the Convention.

In its judgment, the Court clarified that a majority shareholding in itself would not be enough to justify granting victim status to shareholders. Special circumstances would have to exist. The Court seemed to agree that, were the company prevented from making its own application, this could amount to such special circumstances. In the event, the Court was not satisfied on the evidence that the shareholders had made any attempt to interact with the liquidators or to have them replaced, and accordingly did not find it established that the brewery was incapable of making its own application.

⁸² (1996) 21 EHRR 250

The Court's reasoning here seems to significantly expand the scope of "special circumstances." The situation is not comparable to *X v Austria*, where the shareholder effectively *was* the company, or even to *Kaplan*, where the identity of the shareholder was closely tied to the interference in the company's rights. In *Agrotexim*, the shareholders held only a secondary interest in the company's property rights. The shares were not themselves being expropriated; the impact on the shareholders would simply be a reduction of the value of their shares, or a loss of dividend at a later stage.

However, the expansion is perhaps justified in view of the particular complaint made by *Agrotexim*. The liquidators appointed in the case had a direct connection to the state. If they had refused to listen to the pleas of the shareholders for an application under P1-1, then in a sense, the omission of the liquidators to act is an omission by the state which interferes with the shareholders' rights under P1-1. Arguably it is the shareholders' rights themselves, rather than the property held by the company, which is being interfered with.

Where this leaves the issue of "special connection" is unclear. The difficulty may be that insufficient jurisprudence exists as yet from which a definitive definition of this term can be extrapolated. In any event, there is probably some sense in arguing that such a definition should be argued on a case-by-case basis, as cases concerning "piercing the corporate veil" are often considered to do.

2.2.2 Conclusion

Bodies corporate benefit from the protection of P1-1 in the same way as natural persons. Shareholders will also be entitled to make an application under P1-1 where there has been an interference with the possessions of a company provided that (a) they hold a majority of shares in the company and (b) they have a special connection with that company. What will qualify as such a "special connection" is unclear, and it may be a question most correctly answered on a case by case basis.

2.3 Possessions

Of all the key terms in P1-1, "possessions" is perhaps the one which demands the most flexibility. It is not possible to give an exhaustive definition of the term, and it is arguable that doing so would be undesirable in any event; the property right should not be so rigid as to be unable to cope with new developments in technology and law which allow new types of rights and things to come into existence at a rapid pace. At the same time, if the protection offered by P1-1 is to be real and effective, there must be a degree of certainty as to how this term will be understood by the Court.

A huge amount of case law has built up around the meaning of "possessions", and it is not always easy to reconcile the opinions expressed by the Court in different judgments. The jurisprudence does, however, illustrate that the Court will not be bound by traditional private law views of what constitutes a "possession." The word has an autonomous meaning for the purposes of P1-1 and the parameters of the definition are set by the Court in that context. It also shows us the key factors taken into account by the Court in determining what falls within the definition. Understanding the approach taken by the Court should offer some guidance for jurists attempting to anticipate whether a given thing will fall within the definition of "possessions" in novel cases.

2.3.1 Freedom of definition

The Court has stated that "possessions" is to be treated as having an autonomous meaning for the purposes of the Convention.⁸³ The boundary lines of the domestic law of individual states will therefore not delineate the extent of the protection afforded by P1-1.

This point is illustrated by the tragic case of *Oneryildiz v Turkey*.⁸⁴ The applicant lived in a makeshift dwelling bordering on a refuse tip in Kazim Karabekir, near Istanbul. As a result of negligence on the part of the local

⁸³ *Beyeler v Italy* (2001) 33 EHRR 52

⁸⁴ (2005) 41 EHRR 20

authority, a build up of methane gas caused an explosion in the tip. The applicant's dwelling was engulfed in a landslide of waste and several of his close relatives were killed. Although it was clear that the applicant had no ownership over the land on which the dwelling was situated, and indeed the dwelling had been erected in contravention of local planning laws, the Court recognised that the applicant had a proprietary interest in the place where he lived. The local authority had known of the dwelling and acquiesced to its presence for almost five years, which the Court took to be a *de facto* acknowledgment of the applicant's proprietary interest. The dwelling was his possession.

A more complex illustration of the dichotomy between domestically-defined property rights and "possessions" in the Convention sense is found in *Matos E Silva LDA v Portugal*.⁸⁵ The dispute centred round land acquired by the applicants' predecessors by way of Royal Concession one hundred years or so previously. The government sought to transform part of the land into a nature reserve, and argued *inter alia* that there could be no violation of P1-1 because there was a dispute at national level as to whether the Concession had transferred ownership to the applicants in the first place. The Court agreed that it could not make a determination of whether the right of ownership belonged to the applicants in Portuguese law. However, it noted that the applicants had had unchallenged use of the disputed land for almost a century and obtained their revenue by working it, and considered that these interests might qualify as possessions for the purpose of P1-1.⁸⁶ A similar view was adopted by the Commission in their admissibility decision in *Holy Monasteries v Greece*.⁸⁷ Here, the disputed area of land had been granted to several monasteries several hundred years previously, before the separation of the Greek Orthodox Church and the state. The titles had never been registered in the names of the various monasteries and the government again argued that P1-1 could not be relied upon where the existence of the property right was disputed in domestic law. The Commission noted that the government decrees purporting to regain ownership of the land in question

⁸⁵ (1997) 24 EHRR 573

⁸⁶ *ibid.*, para 75

⁸⁷ (1995) 20 EHRR 1

referred to the “monastic patrimony” and “transfer of ownership” of the estates, and concluded that these rights could be possessions even though they did not derive from duly registered legal titles.⁸⁸ The point does not appear to have been argued further before the Court.⁸⁹

The Court may also infer the existence of a possession from the actions of the state, even where there is a dispute under the domestic legislation. This happened in *Zwierzynski v Poland*,⁹⁰ where the applicant had an expropriation decision against his land set aside in 1992. The Polish government had been attempting to evade the effect of that decision through a series of litigations continuing for eight years subsequent to the original verdict. The Court, clearly unimpressed by the actions of the government, looked at the inconsistency in the treatment of the applicant by various authorities in order to find that his right of ownership to the land was recognised by the state since the 1992 judgement.

[T]he Court observes that on June 21, 1994, the Olsztyn district court acknowledged [the applicant] as being the owner of the property when the estate of his parents was split up, a decision which was confirmed by the Olsztyn district court on July 8, 1998, despite the attempts made by the regional police department to challenge this right. It also finds that by entering into negotiations with a view to the sale or lease of the property after the entry of the applicant in the land register and while the action to acquire the property by usucaption⁹¹ was pending, the authorities treated him as the owner of the property. It notes that the proceedings instituted subsequently did not dispute the applicant's status as owner within the meaning of the Convention.

Finally, the Court finds that the applicant regularly pays land taxes and duties on the property in dispute.⁹²

The applicant's right of ownership was therefore found to be established.

⁸⁸ *ibid.*, para 71

⁸⁹ Mr J A Frowein annexed an additional speech, concurring with the Commission's finding that there had been no violation of P1-1 but offering alternative reasons why he had reached this conclusion. In his view, the interest in the land had been transferred to the Monasteries at a period when they exercised functions belonging to the Greek state. P1-1 does not protect the property of public institutions. In his view, public property was the subject of the discussion in this case. Accordingly there could be no violation, since P1-1 did not apply.

⁹⁰ (2004) 38 EHRR 6

⁹¹ Similar to the Scots law doctrine of prescription.

⁹² Paras 64 and 65

So, neither the Court nor the Commission will be restrained by the definitions of domestic law. What is more, it appears that the Court does not need any definition of what is being protected at all for it to qualify as a “possession”. The keynote case of *Gasus Dosier und Fördertechnik GmbH v Netherlands*⁹³ will be considered in more detail below.⁹⁴ In summary however, it dealt with a machine sold by the applicants to a Dutch company who had agreed to pay the price in instalments over time. The credit agreement contained a standard retention of title clause, and when the Dutch company became insolvent, a dispute arose over whether the machine in question belonged to the applicants as a result of that clause. The Court was of the view that various rights and interests could constitute “possessions”. The applicants’ right in this case could be categorised as ownership or as some form of security right. In the Court’s view, it was “immaterial” which of these was, in fact, the correct categorisation, since P1-1 would apply in either case.⁹⁵

It is not disputed that there is a certain common sense about the Court’s approach here – if a thing is either A or B, and both A and B are possessions, it follows that the thing in question must be a possession. However, once a possession is found to exist, a P1-1 application will have to deal with a number of subsequent issues – has there been interference with the rights which flow from the possession? What form does that interference take? Can the interference be justified? In *Gasus Dosier*, the Court provided answers to all these questions, which resolved the issue as far as that particular application was concerned. However, it is impossible to say whether or how the reasoning in the case will apply to future applications when it is not clear what the possession in the case was. Such uncertainty is clearly undesirable, and may lead to litigation in future cases which might have been avoided if the ruling in *Gasus* had been clearer.

2.3.2 Key factors

Having established that “possessions” has a unique definition for the purposes of P1-1, the jurisprudence can be used as a tool to uncover the key

⁹³ (1995) 20 EHRR 403

⁹⁴ See p125 et seq.

⁹⁵ *ibid*, para 53

factors the Court will take into account when making a determination of this definition. An analysis suggests there are two principal criteria which come into play in a variety of ways – economic value and legitimate expectation.

Economic value

Economic value is at the core of any determination of what can be defined a possession. The Court and the Commission have issued a series of opinions detailing specific examples of what will fall within the definition and what will not. Traditional heritable property will naturally be included, as in *Akdivar v Turkey*,⁹⁶ where the possession in question was a house owned by the applicant. Usufruct over land was also considered to qualify in *Wittek v Germany*.⁹⁷ In the admissibility decision in *Bramelid and Malmström v Sweden*,⁹⁸ the Commission noted that the company shares concerned in the dispute certainly had an economic value and must therefore be possessions for the purposes of P1-1. In *Nerva v UK*,⁹⁹ the Commission concurred with the view of the domestic courts that tips left to waiting staff by customers through credit and debit card payments were possessions, but of the owner of the restaurant, rather than the employees for whom the tips had been left. *Gussenbauer v Austria*¹⁰⁰ dealt with two complaints of a criminal defence advocate that his obligation to provide services *pro bono* in certain cases was an interference with his property rights. Although the applications were declared inadmissible by the Commission for other reasons, it seemed to be conceded by the Austrian government, and accepted by the Commission, that the applicant's right to remuneration had been established as a possession. The right to a tax refund merits the protection of P1-1, as in *Intersplav v Ukraine*.¹⁰¹ Intellectual property is also included in the definition: *Smith Kline and French Laboratories v the Netherlands*¹⁰² found that a patent was a possession,¹⁰³ and *Melnychuk v Ukraine*¹⁰⁴ confirmed that P1-1 applied to

⁹⁶ (1996) 23 EHRR 143

⁹⁷ (2005) 41 EHRR 46

⁹⁸ (8588/79), 12 December 1983

⁹⁹ (42295/98) 24 September 2002

¹⁰⁰ (4897/71), 9 January 2007

¹⁰¹ (803/02) 9 January 2007

¹⁰² (12633/87) 4 October 1990

¹⁰³ In making this finding the Commission referred to the fact that under Dutch law, the owner of a patent is considered as its "proprietor", and rights under the patent are transferable and assignable.

¹⁰⁴ (2006) 42 EHRR 39

copyright. Even an application for an intellectual property right will be a possession, since such an application carries with it proprietary rights such as the ability to licence or assign the application, per *Anheuser Busch v Portugal*¹⁰⁵ which dealt with an application to trademark "Budweiser". Similar reasoning was set out in the "cybersquatting" case of *Paeffgen GmbH v Germany*¹⁰⁶ where the Court found that a registered domain name constituted a possession.¹⁰⁷

On the other hand, *RC, AWA and Ors v United Kingdom*¹⁰⁸ confirmed that the right to pursue a hobby (in this case, firing handguns) could not constitute a possession. *X v Federal Republic of Germany*¹⁰⁹ concerned a German citizen convicted of drunk driving, who sought compensation under P1-1 for the continuing loss of his driving licence during the period in which he appealed against the original confiscation. The Commission did not consider ownership of a driving licence to be a possession in this context. In *Durini v Italy*,¹¹⁰ ownership of the ancestral home of the Durini family had been bequeathed to a charitable trust. However, the first born son in each generation was to be given a form of life interest right to occupy the home notwithstanding his lack of ownership. Female descendants of the family argued that this was a breach of their rights under P1-1. The Commission was of the view that the life interest described did not constitute a possession for the purposes of P1-1. In *M v Austria*,¹¹¹ the application concerned the use of common pasture and forestry lands (*allmende*) owned by the city of Bludenz but reserved for the exclusive use of the agricultural community in that area. The city wished to alter the nature of the use to which the land could be put, which caused several of those who benefited from the rights to claim an interference under P1-1. The national courts had established that the land was owned by the city, but that it was subject to a public law easement in favour of the agricultural community. The Commission was of the view that since the shared use of the common

¹⁰⁵ (2007) 45 EHRR 36

¹⁰⁶ (25379/04) 18 September 2007

¹⁰⁷ The domain names in question were *freundin-online.de*, *ad-acta.de*, *Eltern-online.de* and *duck.de*.

¹⁰⁸ (1998) 26 EHRR CD 10

¹⁰⁹ (9177/80) 6 October 1981

¹¹⁰ (19217/91) 12 January 1994

¹¹¹ (9465/81) 4 October 1984

was not an individual right separate and independent from the agricultural community's own rights, it could not constitute a possession.

The cases in which the Court is not prepared to find that the interest concerned amounts to a possession for the purposes of P1-1 are perhaps the most illustrative. By definition a hobby does not involve the pursuit of a financial goal, and the applicants' driving licence in *X v FRG* was not being used for the purposes of employment. The liferent in *Durini* could not, it appears, be transferred or assigned, and therefore had no realisable financial worth.¹¹² The same logic applies to the agricultural community's rights in *M v Austria*. The interests at issue, although no doubt of value to the applicants, had no objective economic value, and therefore the protection of P1-1 did not extend to them.

The emphasis on the *objective* economic value which must attach to property before it can be categorised as a possession in the P1-1 sense seems to produce certain results which are difficult to accept. It seems the Court has aligned the objective value of an interest with the value it would produce on transfer. The inverse proposition, that if the interest cannot be transferred, it has no objective economic value, seems also to be accepted. In the case of, for example, a hobby, both propositions are true: a personal interest in a leisure pursuit cannot be transferred, and nor can the market place a value on its worth to the individual pursuing it. However, both propositions do not universally apply. In *Durini*, the liferent could not be transferred. However, that does not mean to say it would not be possible for the market to place a value on the worth of that interest to the liferenter through consultation of property prices and actuarial tables, much as, for example, pension entitlement is routinely valued in divorce cases. Given the extremely wide definition of "possession" generally employed by the Court, this limitation is not easy to understand.

Acquisition of economic value

¹¹² Compare this with the usufruct in *Wittek v Germany*, discussed above, which was capable of transfer and actually had been transferred in the circumstances of the case.

If it can be established that the putative possession under discussion has an objective economic value, the next question the Court will consider is whether that value has been acquired by the applicant at the time of application. In the majority of cases, this question will not be difficult to answer, but more complex examples do arise. In *Inze v Austria*,¹¹³ P1-1 was relied upon in conjunction with Article 14 of the Convention.¹¹⁴ The deceased had left no will, and her property, including her farm, was to be split between her two sons. By a rule of Austrian law, working farms could not be split apart on intestacy, and instead one of the heirs was obliged to take over the running of the farm, paying compensation to the others. In this situation, legitimate children were to be given preference over illegitimate children. The applicant was the elder of the sons, but had been born out of wedlock. He contended that his rights under P1-1 had been violated by the rules as to distribution of the estate. The government argued that the case did not fall within the ambit of P1-1 because it applied only to existing possessions, and did not guarantee the right to acquire possessions either on intestacy or through voluntary dispositions. The Court disagreed, finding that the complaint did not concern a potential future right. Rather, the applicant had acquired by inheritance a right to a share of his deceased mother's estate, including the farm, subject to a distribution of the assets in accordance with domestic law. P1-1 was therefore engaged. Effectively, the Court took the view that the right of the applicant to his inheritance had vested on the date of his mother's death. The economic interest had already been acquired. Such an approach to acquisition of an interest fits well with systems of succession, such as that in Scots law, where issue of the deceased will always be entitled to a specific share in the estate, with the precise value of that share determined by other claims on the estate.¹¹⁵ Even with alternative systems of succession, the very wide definition of possessions adopted in connection with P1-1 seems to allow quite readily for an interpretation of acquisition such as that put forward in *Inze*.

¹¹³ (1987) 10 EHRR 394

¹¹⁴ Article 14 reads: "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."

¹¹⁵ In Scotland, issue are entitled to equal shares in *legitim* worth one half of the total moveable estate if the deceased is not survived by a spouse or civil partner, or one third of the estate otherwise.

One area in which the determination of when a property right is acquired has proved troublesome is that of welfare benefits. When this issue first arose in *X v Federal Republic of Germany*,¹¹⁶ the position seemed quite clear. In this case, a former miner sought the increase in the state pension applicable to those suffering from silicosis. The Commission stated in broad terms that the right to a pension was not one of the fundamental rights and freedoms guaranteed by the Convention, and that no circumstances had been shown to exist which called for an examination of issues under P1-1 in the particular case. Although the decision of the Commission is very shortly put, it must be presumed that there was no question of the right to a state pension qualifying as a possession for the purposes of P1-1.

In subsequent cases, however, pension rights have been analysed in more detail, and with different results. The discussion was re-opened in *X v Netherlands*,¹¹⁷ an application made jointly by several female pensioners to the effect that the old age pension system operated in the Netherlands was discriminatory to divorced and unmarried women, who were not entitled to a pension until age 65, despite the fact they paid the same pension contributions as married women, who were entitled to receipt of a pension when their husbands reached 65. The Commission considered that:

while it is clear that no right to a pension is as such included in the Convention, the making of compulsory contributions to a pension fund may, in certain circumstances, create a property right in a portion of such fund and that such right may be affected by the manner in which the fund is distributed.¹¹⁸

The Commission referred to the principle of solidarity which underpinned the Dutch national insurance system. Younger members of the community made contributions for the ongoing support of the aged members; in effect, the contributions paid in by the young were paid out to the old. The pensions paid reflected the wage index *at the time of payment* rather than at the time contributions were being paid in by those now in receipt of a pension.

¹¹⁶ (2116/64) 30 March 1996

¹¹⁷ (4130/69) 20 July 1971

¹¹⁸ *ibid.*, p224

Accordingly, there was no direct correlation between contributions paid and the pension benefit received.

Consequently, a person does not have, at any given moment, an identifiable share in the fund claimable by him but he has an expectancy of receiving old-age or survivors pension benefits subject to the contributions envisaged by the Acts concerned.¹¹⁹

Since the pension scheme in *X v Netherlands* was based on the solidarity principle, there was no possession to be protected under P1-1 in this case. There was no right to payment of a particular type or level, (at least, not prior to the commencement of payments, discussed further below) and so changes to the pension scheme in this manner could not be contested by contributors to the scheme prior to pensionable age. The only possession held by the applicants was the right to payment of a pension at all, and this right had not been engaged by the actions of the state since there was no question that a pension of some type would eventually be paid.

This rule was also seen to apply beyond the specific context of social security contributions. *G v Austria*¹²⁰ concerned a civil service pension fund, where pensions were payable by the state on the retirement of its employees. The Commission noted that the pension scheme operated on the basis of “support”, where the amount received was dependent on a variety of factors including the salary of the civil servant whilst employed and their financial needs at the time of retirement. Again, since there was no direct correlation between the contributions made and the payments received, there could be no right of property to a specific share of the pension fund.

That the right to receive a payment from a scheme into which contributions have been paid constitutes a possession which can be interfered with was clearly recognised in *Müller v Austria*.¹²¹ The applicant was a locksmith who had worked in Austria and Liechtenstein, paying contributions into the state pension schemes of both countries. The two countries then concluded a Convention which prohibited such dual contributions. The Convention was to

¹¹⁹ *Ibid.*, p240

¹²⁰ (10094/82) 14 May 1984

¹²¹ (5849/72) 1 October 1975

have retrospective effect, meaning the pension entitlement of the applicant to one of the funds was extinguished, notwithstanding the contributions he had already paid. The Commission considered *X v FRG* and *X v Netherlands*, stating that it intended to "extend the line of reasoning" there developed, before going on to state that the applicant in this case *did* have a possession, that possession being the right, as a beneficiary, to receive any payments made by the fund, regardless of their exact value. This approach was confirmed by a Grand Chamber in *Stec v United Kingdom*,¹²² an application concerning "reduced earnings allowance," an earnings-related benefit paid in certain circumstances to persons who had suffered an occupational accident or disease. The Court accepted that the applicants held a right to payment of the benefit which constituted a possession in terms of P1-1.

Support for this analysis is also found in jurisprudence suggesting that a significant reduction in entitlement to eventual benefits will constitute a violation of P1-1. *Banfield v United Kingdom*¹²³ concerned a police officer who had been convicted of several counts of rape and sexual assault of detainees and complainers in his care. In addition to a custodial sentence, he was subject to disciplinary proceedings within the police force which resulted in an order for dismissal from the force and forfeiture of 75% of his pension entitlement. He argued that the forfeiture order violated his rights under P1-1. It was accepted by both the government and the Court that such a significant reduction amounted to an interference with his right to receive payment of a pension, which was considered to be a possession. The interference was, however, found to be justified in the circumstances of the case.¹²⁴

Not all benefit schemes are based on the principle of solidarity, however. The concept of benefits accrued on the alternative basis of "coverage" was explored in the case of *Gaygusuz v Austria*.¹²⁵ The applicant in this case was a Turkish national who had lived and worked in Austria for 10 years, paying

¹²² (2006) 43 EHRR 47

¹²³ (6223/04) 18 October 2005

¹²⁴ See also *Azinas v Cyprus* (2005) 40 EHRR 8, where a disgraced civil servant similarly had his pension declared forfeit. The case was declared inadmissible for non-exhaustion of domestic remedies, although the fact a possession existed in the form of the applicant's pension entitlement was not disputed.

¹²⁵ (17371/90) 16 September 1996

contributions into the social security scheme. He became unwell, and sought emergency assistance from the state in the form of an advance on a pension. He was refused on the basis that he was not an Austrian national and therefore did not fall into the category of those entitled to emergency assistance. The Commission and Court both noted that entitlement to emergency assistance was based on a certain number of “credits” having been paid into the social insurance system. There was a direct link between the credits paid and the assistance received – in other words, the benefit was founded on the principle of “coverage”. Accordingly, a property right in the benefits fund had been created in favour of the applicant, and P1-1 was engaged.

What does seem clear is that a benefit will constitute a possession once the claimant begins to receive payments, and a change in the level of benefit at that stage will engage P1-1.¹²⁶ A useful recent example comes in the case of *Asmundsson v Iceland*,¹²⁷ where the applicant had been in receipt of a disability pensions for almost fifteen years when the eligibility rules were changed. The result was that his pension was discontinued entirely. The Court was satisfied that his pension entitlement was a possession and in the circumstances a violation was found, since the change in the rules placed a disproportionate burden on the applicant.

Legitimate expectation of future acquisition

In some cases, interferences in property rights will operate to prevent a value which should rightly have been acquired by a natural or legal person from being so accrued. In this situation, P1-1 should clearly be engaged to ensure that applicants receive the property which is rightfully their own. However, P1-1 cannot protect potential possessions which may or may not ever have been acquired. To cope with the difference in these two situations, the Court and the Commission have used the concept of legitimate expectation. Where an applicant had a legitimate expectation of acquiring a possession at some point in the future, that possession will be afforded the protection of P1-1. Where

¹²⁶ See, for example, *Pravednaya v Russia* (17371/90) 18 November 2004, *Solodyuk v Russia* (67099/01) 12 July 2005 and *Stec v United Kingdom* (2006) 43 EHRR 47

¹²⁷ (2005) 41 EHRR 42

the applicant had no grounds to believe the possession would definitely be acquired, P1-1 will not apply.

A clear example of the application of this test can be seen in *Prince Hans-Adam II of Liechtenstein v Germany*.¹²⁸ The applicant's painting had been confiscated by Czechoslovakia for treason in 1945. In 1991, the applicant sought restitution of the painting which had been loaned to a museum in Cologne. The German court declined jurisdiction on the basis of the Convention on the Settlement of Matters Arising out of the War and the Occupation 1954, which had the effect that German jurisdiction was not recognised in respect of property expropriated in the occupied territories during the Second World War. The applicant argued that the German Court had interfered with his rights under P1-1 by refusing to hear the case, but the Court did not agree. Ownership of the painting had been lost by the original expropriation. The applicant did not have a legitimate expectation of the painting returning to his ownership; whether such a right to restitution existed was the reason for the domestic court action, and that action was unsuccessful. Therefore the applicant had no possession with which the state could interfere.

The concept of legitimate expectation has been usefully elaborated in a series of cases arising from the issue and withdrawal of licences. The Court and the Commission initially wrestled with difficulty in identifying the possession to be protected where a licence had been granted and then revoked. Did a licence itself have an economic value? *Batelaan and Huiges v Netherlands*¹²⁹ concerned two GPs who had been granted licences to dispense medicines on the basis that there were no dispensing chemists within the immediate area. Some years afterwards, a chemist business was established and the GPs' licences were accordingly withdrawn. They argued that this had impacted to a significant extent on both their professional income and the goodwill of their practice. In considering whether a licence could constitute a possession, the Commission questioned whether the licence holder had a "reasonable and

¹²⁸ (42527/98) 12 July 2001

¹²⁹ (10438/83) 3 October 1984

legitimate expectation” that they would continue to benefit from the licence. If the licence was granted only subject to certain conditions, and those conditions were no longer fulfilled, the licensee could have no reasonable expectation of ongoing benefit. Accordingly, there was no property right with which the state could interfere. The possession here appears to be the legitimate expectation of ongoing benefit rather than the licence itself. The position was stated rather more clearly in *Pudas v Sweden*,¹³⁰ another decision of the Commission handed down two months after that in *Batelaan and Huiges*. *Pudas* dealt with a licence to operate a taxi service. In this case, the Commission confirmed that a licence “as such” could not constitute a possession, and that the benefit derived from the licence in terms of both income and goodwill could only be a possession if, again, the holder had a reasonable and legitimate expectation that the benefit would continue. The taxi licence had been granted subject to revocation if one of several conditions came to be fulfilled, and since one of those conditions had been fulfilled, the applicant could have no expectation of ongoing benefit.

The test, having been established, was applied in a variety of contexts. In *X v Federal Republic of Germany*,¹³¹ notaries claimed that legislation obliging them to halve their fees when carrying out work for schools, churches and other non-profit making organisations was an interference with their property rights. The Commission considered that a notary’s claim to a fee could only become a possession when the particular fee had been earned, taking into account the services rendered by the notary and on the existing scale of notaries’ fees. The mere expectation of notaries that the existing legal regulations on fees would not be changed in the future could not be considered as a property right. A similar line of reasoning emerged in *Greek Federation of Customs Officers v Greece*,¹³² where Greek Customs Officer sought compensation for the 80% reduction in their income as a result of the effective abolition of customs barriers between EU member states. Again, the Commission stated that future income could be considered a possession where it had already been earned or a legitimate claim to it could be proven to

¹³⁰ (1988) 10 EHRR 380

¹³¹ (8410/78) 13 December 1979

¹³² (24581/94) 6 April 1995

exist. The applicants in this case were not restricted from continuing to act as customs officers but had no legitimate expectation that the level of their business would continue at a given amount.

The fact that licences are granted on a conditional basis – and therefore that any anticipation of future income must be precipitated on those same conditions – is central to a determination of legitimate expectation. Where there are no such conditions, it is likely that the expectation of future income will be considered justified. In *Van Marle v Netherlands*,¹³³ the application was made by four men who had been practising as accountants for 24 years. New legislation was then introduced to regulate the profession. Each of the men applied for a licence to use the title of “accountant”, which had not previously been required, but each of their applications was refused. The Court noted that, by dint of their own work, the applicants had built up a clientele and a business which was dependent upon their profession as accountants. Their economic interest in the business was a possession for the purposes of P1-1. There was no reason for the applicants to think their use of the designation “accountant” would be prevented, and accordingly the legitimate expectation test was satisfied.

Equally, where a licence is granted subject to revocation on the basis of certain conditions, but none of these conditions is fulfilled, the legitimate expectation test will have been met. An example of this is *Tre Traktörer Aktiebolag v Sweden*.¹³⁴ The disputed licence here was for a restaurant to serve alcohol, and the submission by the applicant was that it was deprived of the restaurant business in its entirety if the alcohol licence was revoked, since the restaurant could not be profitable without it. It did not appear that the restaurant had infringed any of the conditions on which the licence was granted. The court concluded that the applicant could legitimately expect to keep the licence and that the revocation was therefore an interference with the company’s rights under P1-1.¹³⁵

¹³³ (1986) 8 EHRR 483

¹³⁴ (1991) 13 EHRR 309

¹³⁵ An interesting dissenting opinion is given in this case by M Martinez, who observed that the licence could not be transferred or inherited, used as security or seized on insolvency. Bearing that in mind, he did not see how a licence could be characterised as a property right.

It seems that any interest of economic value attached to the continuing grant of licence will be considered a possession for P1-1, provided there is a legitimate expectation of its existence. Future income to be derived from the work the licence allows will clearly be protected, as can be seen in the cases above. Goodwill in the business will also be protected, as demonstrated by *Batelaan and Huiges* and *Van Marle*. The position was stated more loosely in the *Fredin* case,¹³⁶ where the licence in question was a permit from the government to exploit a gravel pit located on the applicants' land. The permit was later revoked as the work of the pit was found to be damaging to the environment. The Court considered that, in general terms, the economic interests surrounding the exploitation of gravel were possessions in the sense of P1-1. In *Pine Valley Developments v Ireland*,¹³⁷ the applicant company bought land in reliance on outline planning permission for development of the site. Full planning permission was, however, not granted as the land was situated in a green belt. Under Irish law, a grant of outline planning permission confers a right to develop in principle. The applicants in the case therefore had a legitimate expectation, in the view of the Commission, that they would be able to develop the land, and the economic interests connected with that development should constitute "possessions" for the purposes of P1-1.

The legitimate expectation test has also been elaborated in a separate line of jurisprudence dealing with the notion of outstanding civil court actions as possessions which merit the protection of P1-1. It is clear that a court decree ordering payment of an obligation will fall within the remit of P1-1, effectively as a debt.¹³⁸ However, does an as yet unresolved civil litigation in a national court equate to a possession? The discussion of this subject starts with the case of *A, B and AS Company v Germany*.¹³⁹ The applicant company managed land which was mainly forestry, and during the period of French military occupation following the second world war, was ordered to fell trees

¹³⁶ (1991) 13 EHRR 784

¹³⁷ (1992) 14 EHRR 319

¹³⁸ See, for recent examples, *Sciortino v Italy* (30127/96) 18 October 2001, *Ari and Others v France* (65508/01) 3 April 2007 and *Broniowski v Poland* (2006) 43 EHRR 1.

¹³⁹ (7742/76) 4 July 1978

and export them as a form of reparation. Once democracy was restored in Germany, the applicant applied to the Commission under P1-1. The possession it alleged had been interfered with was not the trees themselves (which had been taken legitimately as reparations) but rather the purchase price received for them, which had been put into a fund to buy food and supplies for the German people. The Commission noted that a debt could constitute a possession, but with no clear proof that a promise of payment existed here – either in the form of evidence to that effect or a national court judgement confirming the debt – there could be no possession capable of protection under P1-1.

From that ruling, it appears that a civil action in itself will not be a possession. A debt established by a court decree, however, will be a possession. This ties together well with the legitimate expectation test previously discussed – an applicant can have no justified expectation of payment of a claim until an award is made by the national courts. Dismissal of a claim by the national courts therefore cannot be an interference in itself. This line of reasoning is elaborated in *Agneessens v Belgium*.¹⁴⁰ The applicant in this case had been in possession of Yugoslav banknotes which had been seized by the government on suspicion of being counterfeit. The applicant believed the notes were not counterfeit, but rather were of a series issued and subsequently withdrawn by a Yugoslav bank, who were allowing them to be exchanged for valid banknotes up until a certain date in 1974. This date passed without the applicant successfully recovering the notes, and subsequently he sought compensation instead. The Belgian courts dismissed his action. The Court considered that the applicant had given no evidence of ever having held a claim to payment. The action against the state did not create any claim to payment of a debt for the applicant, merely the possibility of securing such a payment. Consequently, since a liability action cannot be regarded either as a possession or as a debt, the decisions by the Belgian courts dismissing his action could not have the effect of depriving him of a possession which he owned. Similarly, in *Kopecky v Slovakia*,¹⁴¹ the applicant sought restitution of

¹⁴⁰ (12164/86) 12 October 1988

¹⁴¹ (2005) 41 EHRR 43

gold and silver coins confiscated from his father by the former Communist regime. In terms of the legislation, restitution was conditional on the applicant providing evidence of the location of the coins, which he was unable to do. On that basis, the domestic court dismissed the claim. The Court found no violation of P1-1 to exist, since the original confiscation had taken place prior to the adoption of the ECHR in Slovakia, and the dismissed court action could not constitute a possession.

The position was rather more complicated in *Stran Greek Refineries v Greece*.¹⁴² Here, the applicant company had entered into a contract with the Greek government, at the time under a military junta, to build an oil refinery. They incurred expenses in commencing the project, but when democracy was restored in Greece, the elected government did not wish to proceed with it. The company sought repayment of their expenses, and the matter was resolved by arbitration, as provided for in the original contract, with a decision in favour of Stran. At this stage, following the logic of *A, B and AS Company* and *Agneessens*, the debt had been established and Stran were holding a possession warranting the protection of P1-1. However, the Greek government then had the arbitration decision overturned in the national courts on the basis that the arbitration court did not have jurisdiction. By the time these proceedings had resolved, the company's right to raise the claim by an alternative route had prescribed. On a strict reading of the earlier cases, it seemed the company's possession had therefore been lost. However, the Court approached the case from a different angle:

The Court agrees with the government that it is not its task to approve or disapprove the substance of that award. It is, however, under a duty to take note of the legal position established by that decision in relation to the parties.

According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it. Under the Greek legislation, arbitration awards have the force of final decisions and are deemed to be enforceable.

¹⁴² (1995) 19 EHRR 293

[...]

[The arbitration award] therefore conferred on the applicants a right in the sums awarded. Admittedly that right was revocable, since the award could still be annulled, but the ordinary courts had already twice held – at first instance and on appeal – that there was no ground for such an annulment. Accordingly, in the Court's view, that right constituted a possession.¹⁴³

The rule therefore appears to be that a debt need only be established *enough* for the Court to be satisfied that it is a possession. It is difficult to see where the limits of this may lie. If the Greek courts had held on first instance that the debt existed, but on appeal had decided it did not, would the Court have ruled differently? The likelihood is that every case will turn on its merits, and until there is further jurisprudence on the issue, it will be impossible to determine the parameters within which the Court is working.

Another ruling handed down shortly after *Stran Greek Refineries* emphasises the importance of the domestic law of signatory states when deciding at what stage a debt will be considered established in light of ongoing litigation. The case in question is *Pressos Compania Naviera SA v Belgium*.¹⁴⁴ In Belgium, the piloting of sea going vessels is a public service organised by the State, and pilots are provided directly by the state. The pilot does not replace the ship master, who remains in command of the vehicle, but rather advises as to the best route to take. A Dutch appeal court ruling of 1983 held that the pilot, and accordingly the state on his behalf, would be liable for accidents caused by the negligence of the pilot. In August 1988, new legislation was introduced which said that the organiser of a pilot service could not be held so liable. The applicants in this case were in the process of litigating claims against the state for pilotage accidents which had occurred prior to August 1988. They contended that the new legislation, which was to be given retrospective effect, breached their P1-1 rights.

¹⁴³ *ibid.*, para s61-62.

¹⁴⁴ (1996) 21 EHRR 301

On the basis of the principle enunciated in *Agneessens* that a civil action is not, in itself, a possession, it would be expected that the applicants in *Pressos Compania* would not be protected by P1-1. However, once again the Court took a different approach.

In order to determine whether in this instance there was a “possession”, the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that the law ran counter to the object and purpose of P1-1.

The rules in question are the rules of tort, under which claims for compensation come into existence as soon as the damage occurs.¹⁴⁵

The Court’s view was the outcome of the civil claim in the domestic courts would simply be declaratory, as the debt existed as soon as the delict occurred. On that basis, the applicants had a possession in the form of a debt without the need for a court ruling.

It is difficult to see how this judgment can do anything other than contradict the previous line of case law in this area, although the Court did not suggest there was any conflict. It is accepted in most legal systems that payment of damages for a delict should run from the time of the delict itself, but that debt does not exist and cannot be enforced until any litigation surrounding the same is resolved. Similarly, in a contractual claim, the right to payment exists as soon as the contract is breached, but it cannot be enforced until court proceedings resolve the dispute in favour of one party. If the initial test of what constitutes a possession is an objective economic value, then what economic value can a delict which is disputed be said to have until the case is resolved in the courts? The decision is remarkable. It remains to be seen whether further jurisprudence will clarify the Court’s reasoning on civil claims.¹⁴⁶

2.3.3 Conclusion

¹⁴⁵ *ibid.*, para 31

¹⁴⁶ See also *Aubert and Others v France* (31501/03) 23 May 2007, in which a legislative change to employment law which affected pending litigation was considered to be a violation of P1-1.

The term "possession" has been determined by the Court to have an autonomous meaning for the purposes of the Convention, with the result that our understanding of the word in a P1-1 context has to be based on the Court's *dicta* to date. The jurisprudence suggests a range of factors will be taken into account when arriving at a determination of whether a possession exists.

In the first place, it seems to be necessary that a purported possession carries some form of objective economic value. This is clearly the case in respect of a house, or shares in a company, or intellectual property rights.

If an economic value attaches to the interest under consideration, the next question will be whether that interest had been acquired by the applicant at the time of the state action. This question will not always have a straightforward answer. The complexities of the issue have been explored at length in connection with state benefits. It seems that, where benefits are based on the solidarity principle, the possession held by potential recipients is the right to some payment from that fund. Potential recipients have not, however, acquired any right to payment at a particular level. Where benefits are based on the coverage system, the possession acquired at the point of contribution is the more specific right to a payment at a particular level. Once payment of the benefit has commenced, the person in receipt of that benefit has acquired the right to payment at a specified level regardless of the basis of the scheme. In most cases, the possession held in respect of any state benefit will be conditional on the fulfilment of certain requirements, for example, reaching state-defined retirement age.

If an economic value attaches to an interest, but it has not been acquired by the applicant at the time of the state action, the next question will be whether the applicant had a legitimate expectation of future acquisition of that interest. This principle is usefully illustrated by the licence cases, which demonstrate that there can be no legitimate expectation of ongoing possession where that possession is conditional and the conditions have not been fulfilled. Complications exist here in relation to the question of when a court action

seeking to establish a debt might become a possession. It seems, in some contexts, that a litigant may be considered to have a legitimate expectation of acquiring the court decree at some point prior to that decree being pronounced. The parameters of this exception, if it is an exception, are unclear to say the least.

Shortly put, then, a possession is an interest which has an objective economic value, where that value has been acquired by the applicant at the time of the state action, or where the applicant had a legitimate expectation of future acquisition of that interest which was interfered with by the state action.

The use of the case law in defining “possessions” also offers an interesting example of the way in which P1-1 has developed in the broader sense. From an initial lack of clarity, it can be seen how, over time, the jurisprudence allows lines of reasoning to be established from which predictions as to the applicability of the protection to new interests can be made. Although these lines are still blurred in places, progress has clearly been made and the discussion continues at a more nuanced level.

2.4 Peaceful Enjoyment

The next significant term in Article 1 of the First Protocol is “peaceful enjoyment”. These words taken together or separately do not convey a clear judicial concept or term of art. The logical argument to follow from this would appear to be that the words should be given a common sense meaning, but jurisprudence is necessary to set boundaries to that understanding.

What seems to be clear from the case law is that there is no absolute right to enjoyment of property in the aesthetic sense – in other words, no right to a pleasant environment. This was made clear in the Commission decision in *Powell v UK*.¹⁴⁷ Mr Powell lived in a house which, following changes in the flight path in 1972, became subject to a Heathrow departure route. Powell argued that he had paid a premium on his property for the pleasant rural

¹⁴⁷ (1987) 9 EHRR 241

environment in which it was situated, but that possibility for outdoor activities was now reduced owing to the noise pollution.

The Commission did not consider this to be an issue under P1-1.

This provision is mainly concerned with the arbitrary confiscation of property and does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment. It is true that aircraft noise nuisance of considerable importance both as to level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. However...there is nothing to show that the value of [Powell's] property was substantially diminished on the ground of aircraft noise such as to constitute a disproportionate burden amounting to a partial taking of property necessitating payment of compensation.¹⁴⁸

The concept of ambient pollution being sufficiently severe to amount to a partial deprivation is nicely illustrated by *S v France*.¹⁴⁹ The applicant in this case owned a house on the banks of the Loire. A rural area opposite the property became the site for the development of a nuclear power station with attendant destruction of the site and noise nuisance. The applicant in the case was awarded compensation by the domestic courts for the fall in the value of her house together with the environmental damage. The Commission considered that, bearing in mind the compensation paid, there was no violation of P1-1. Although it is not explicitly stated in the report, it would appear that the excessive noise pollution did amount to a partial deprivation, but that this was justified in the circumstances since proportionate compensation had been awarded.

Betten compares the concept of peaceful enjoyment to the right of quiet enjoyment enjoyed by a lessee, designed to protect against adverse rights over his land rather than aesthetic enjoyment of his property.¹⁵⁰ Another analogy may be to absolute warrandice in the transfer of land, where the seller guarantees good *title* unaffected by encumbrances, as opposed to good land as such.¹⁵¹ It seems clear that the Court wish to limit rights under P1-1

¹⁴⁸ *ibid.*, p243

¹⁴⁹ (13728/88) May 17 1990

¹⁵⁰ p 170

¹⁵¹ The writer is indebted to Professor R Paisley for this comparison.

along these lines to prevent too great a crossover with article eight, which protects the right to private, home and family life. It is notable that in both *Powell* and *S v France*, additional complaints under article eight were also made.¹⁵²

This analysis of “peaceful enjoyment” is supported by the judgment in *Loizidou v Turkey*,¹⁵³ where a Cypriot national was systematically denied access to her property in Northern Cyprus by the occupying Turkish forces. In the particular circumstances of the case, the Court was not prepared to find that the applicant had suffered a deprivation or a control of the use of her property. However, it considered it clear that there had been an interference with her peaceful enjoyment, stating that a physical hindrance can amount to a violation of the Convention in the same way as a legal impediment.

2.4.1 Positive obligation?

The concept of peaceful enjoyment goes, however, further than simply encapsulating the notion of adverse interference with enjoyment of possessions. In the P1-1 sense, it seems the state can also be under an obligation to take positive steps to ensure that enjoyment is allowed to continue. This idea was first given authority in *Oneryildiz v Turkey*,¹⁵⁴ discussed above. The applicant here had lost his home as a result of a gas explosion in a landfill site which had been foreseeable and could have been prevented had the Turkish state put in place the health and safety measures they had been advised to implement by expert advisers. The Court stated:

Genuine, effective exercise of the right protected by [P1-1] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions.¹⁵⁵

¹⁵² Indeed, in *Powell* the article 8 case taken on to the ECtHR, although the P1-1 case was not insisted in after the Commission decision.

¹⁵³ (1997) 23 EHRR 513

¹⁵⁴ (2005) 41 EHRR 20

¹⁵⁵ para 134

Given the clear causal link in this case between the government's omission to act and the applicant's loss of his dwelling in the explosion, the Court had no difficulty in finding the state had breached its obligation to allow peaceful enjoyment to continue. A violation of P1-1 was therefore established.

It is difficult to imagine that the Court was not understandably swayed by the horrific circumstances of the application in *Oneryildiz* when making its statement about positive obligations on the part of the state, and although it is difficult to question the use of this construction in that case, the limits of the idea are somewhat obscure at present. What is the extent of the state's obligation to ensure peaceful enjoyment can continue here?

The reported cases along this line of jurisprudence so far seem to be developing it in an almost delictual sense. In *Budayeva v Russia*,¹⁵⁶ the Court differentiated between the situation where a danger was created by matters entirely within the purview of the state, as with waste management in *Oneryildiz*, and the situation where the danger was brought about instead by natural forces. In the latter scenario, the state would still be subject to a positive obligation to the extent that measures within its control could prevent or lessen the impact of the danger, but the nature of the state's obligation here was likely to be more limited. *Budayeva* dealt with a number of applicants who had lost their homes as a result of mudslides, which the applicants claimed the state should have foreseen and warned them about. The Court found that the positive obligation on the state extended only to taking "reasonable measures" in an attempt to mitigate the effect of the mudslides, which evidence showed would have been ineffective in this situation.

In the present case, the damage in its entirety could not be unequivocally attributed to State negligence, and the alleged negligence was no more than an aggravating factor contributing to the damage caused by natural forces.¹⁵⁷

¹⁵⁶ (15339/02) 20 March 2008

¹⁵⁷ para 182

The idea of “reasonableness” limiting the extent of the state’s positive obligation was reiterated in a more quotidian example in *Blumberga v Latvia*.¹⁵⁸ Here, the applicant's house had been burgled whilst she was held in judicial custody. In terms of the domestic law, the Latvian authorities were under a specific statutory obligation to protect the applicant's premises while she was detained. The applicant complained that, in failing to prevent the burglary, the state had breached this obligation with a resultant impact on her rights under P1-1. Again, the Court recognised a positive obligation on the state to ensure peaceful enjoyment of possessions in line with the provisions of the domestic statute. Again, however, this obligation required only “reasonable” steps to be taken by the state: no absolute obligation could exist to prevent burglary. The state had taken reasonable steps to protect the applicant’s home, and so the positive obligation had been fulfilled. No violation of P1-1 was found.

A similar approach leading to the opposite result can be seen in *Novoseletskiy v Ukraine*,¹⁵⁹ where the police had clear guidelines indicating that an investigation into the disappearance of the applicant’s possessions whilst he was temporarily absent from the country should have been carried out. No such investigation in fact took place. In this case, The Court found that the investigation formed part of the “reasonable” steps required of the state in fulfilment of their positive obligation under P1-1. Since they had failed to fulfil this obligation, a violation of P1-1 had taken place.

2.4.2 Conclusion

The use of the phrase "peaceful enjoyment" relates to the enjoyment of the right of property itself, rather than to enjoyment of a physical piece of land or of an object as such. There would not appear to be any right to a pleasant environment as such, with a right of this kind perhaps more germane to argument in terms of article eight of the ECHR.

¹⁵⁸ (70930/01) 14 October 2008

¹⁵⁹ (2006) 43 EHRR 53

Protection of this peaceful enjoyment may, in some circumstances, impose a positive obligation on the state to prevent that enjoyment being interrupted. The recent emergence of this aspect to P1-1 protection in the jurisprudence is an interesting example of the manner in which the property right continues to evolve. It seems that, with a greater degree of clarity as to the notion of which “possessions” should be protected following on the wealth of jurisprudence discussed earlier in this chapter, the jurisprudence is now able to begin exploring where the limits of the right may lie in alternative directions.

2.5 Deprivation

The case law surrounding the concept of “deprivation” is perhaps more instructive than the jurisprudence connected with the other terms of P1-1. The Commission states in *Bramelid and Malmström v Sweden*.¹⁶⁰

[The article] is intended to refer to formal (or even *de facto*) expropriation, that is to say the action whereby the State lays hands – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest.¹⁶¹

From this initial statement, it can be seen that the Court and the Commission intended to approach the question of what constitutes a deprivation with a keen eye on the factual position. They will be looking to see whether, in reality, an applicant has been prevented from exercising their property rights, notwithstanding the formal legal position as reflected in, for example, the land registers. In other words, bare title will not be enough to acquit a state of responsibility – a *de facto* deprivation will merit the attention of P1-1 just as much as a *de jure* action. Such an approach seems consistent with the Convention’s role as a safeguard of “real and effective” rights.

2.5.1 *De jure* deprivation

Formal or *de jure* deprivation is usually easily ascertained. If a formal transfer of title has been effected, there can be no question of what exactly the state was attempting to do. For example, *Lithgow and Others v United Kingdom*¹⁶²

¹⁶⁰ (8588/79) 12 December 1983

¹⁶¹ *ibid.*, pg 82

¹⁶² (1986) 8 EHRR 329

concerns the nationalisation of the aircraft and shipbuilding industries in the UK in the 1970s. The Court notes in a single sentence that:

The applicants were clearly 'deprived of their possessions' within the meaning of the second sentence of Article 1¹⁶³

and proceeds with its judgment on that basis.

Straightforward expropriations of this type, which can be seen in cases of nationalisation, or for similar large scale social projects such as the development of new roads or the protection of conservation areas, do not form the major part of the jurisprudence on deprivation. This is because, in such situations, the loss caused by state action is usually an expressly acknowledged part of the scheme and financial recompense for that loss will form an essential part of the interference. Such cases typically come before the Court owing to a dispute over the equity of the compensation offered, which was precisely the issue to be decided in *Lithgow*.

However, there are occasional instances of large scale *de jure* deprivation where an absence of compensation is precisely the issue. One such unusual case is *Broniowski v Poland*.¹⁶⁴ The applicant was one of around 80,000 Polish nationals who had been repatriated following the redrawing of Poland's eastern border along the line of the Bug River after the Second World War. These "Bug River claimants" had an entitlement to claim compensation for the properties they had been forced to abandon beyond the line of the river, this compensation coming in the form of discounts on the sale of land in the ownership of the State. However, over the years, insufficient state property was made available for every claimant to "cash in" their entitlement, and in 2003, when the Polish state passed legislation discharging all obligations of compensation, nearly 80,000 nationals had their claims to compensation abolished. The Court had little difficulty in finding this amounted to a large-scale deprivation of the rights to compensation owed to thousands of

¹⁶³ *ibid.*, para 107

¹⁶⁴ (2005) 40 EHRR 21

repatriated Poles and insisted the government remedy the problem immediately and effectively.¹⁶⁵

Another complex example came recently in *Jahn v Germany*.¹⁶⁶ The deprived here were German “new farmers” who had been given ownership over land previously held by the GDR in a package of legislation passed to enable the reunification of Germany. Criticism was made of this award, since the land had been confiscated from the original owners by the Communist government decades earlier. It was considered unfair that the new farmers should receive a windfall benefit when the original owners had never received any compensation. In addition, many of the new farmers were not, in fact, farming at a time when agricultural land was much needed. Accordingly, two years later, the government passed further legislation attempting to undo the award of ownership in certain circumstances and return the land to the state for more appropriate redistribution. Again, the Court characterised this as a *de jure* deprivation, since land was being transferred out of the ownership of the new farmers, albeit that the original award of ownership may have been ill thought through or made in error.¹⁶⁷

An enforced sale though, for example, insolvency proceedings will also fall into the category of *de jure* deprivation, as in *Kanala v Slovakia*.¹⁶⁸

2.5.2 *De facto* deprivation

More problematic for the Court and the Commission are *de facto* cases. Exactly how far do an applicant’s rights of property have to be compromised before they will effectively cease to exist? The first serious consideration given to unravelling this problem came with *Sporrong and Lönnroth v Sweden*.¹⁶⁹ The two applicants in this case owned properties in Stockholm which had been the subject of expropriation permits for 23 years and eight years respectively. The permits earmarked the buildings for later expropriation by the state as part of a redevelopment planned for the area. For the same

¹⁶⁵ See further discussion of the case at p162 below.

¹⁶⁶ (2006) 42 EHRR 49

¹⁶⁷ See further discussion of the case at p162 below.

¹⁶⁸ (57239/00) 10 July 2007

¹⁶⁹ (1983) 5 EHRR 35

reasons, the properties were also subject to a prohibition on construction for 25 years and 12 years respectively. The redevelopment design changed over time, and ultimately the properties were not expropriated. The permits were cancelled.

The applicants in *Sporrong* did not claim to have been formally deprived; the titles had remained in the applicants' names throughout the time period in question and, in a purely legal sense, there could be no question that they were the owners. However, they contended that the limitations their properties had been subject to were excessive, and that their rights of property had accordingly been deprived of any substance while the measures in question were in force. They had been owners in name only, but with none of the attendant powers attaching to ownership.

The Court analysed the dispute from a practical point of view, stating:

In the absence of a formal expropriation, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a *de facto* expropriation.¹⁷⁰

The expropriation permits left intact in law the owners' right to use and dispose of their possessions. However, in practice, they significantly reduced the possibility of exercising these powers. The applicants' right of property thus became precarious and defeasible. On the other hand, the reduction in the applicants' powers was not absolute. Although the prospect of disposing of the properties was undoubtedly impacted upon by the permits and the prohibition on construction, the possibility of sale still existed; the government led evidence to the effect that sales of several properties similarly subject to the expropriation measures had, in fact, taken place.

The Court concluded that:

¹⁷⁰ *ibid.*, para 63

although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions.¹⁷¹

Sporrong provides something of a waterline for deciding when a *de facto* deprivation will have occurred. Where the applicant's ability to exercise his or her rights is compromised by the actions of the state, it will give rise to questions of deprivation. An impact on the right to dispose of the property will be given key importance.¹⁷² However, a mere reduction in the applicant's powers will not be sufficient, even where that reduction is significant. Little less than a complete inability to exercise the usual rights of ownership will suffice for a finding of *de facto* deprivation to be made. A similar statement of the Court's views can be seen in the quite different context of *Powell v UK*,¹⁷³ discussed above, where the applicant's home was on the route of a new the flight path to and from Heathrow. The Commission noted:

It is true that aircraft noise nuisance of considerable importance both as to level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property.¹⁷⁴

Again, the importance of disposing of the property is emphasised. As with *Sporrong*, the Commission did not feel the restrictions suffered by the applicant in *Powell* were extensive enough to equate to a deprivation.

Given the rigorous standard set out by the Court in *Sporrong*, it is perhaps not surprising that very few *de facto* deprivations have been held to exist. A recent example came in the case of *Papamichalopoulos v Greece*.¹⁷⁵ Here, the applicant's land had been expropriated for the benefit of the Navy Fund in 1967 when Greece was controlled by a dictatorship. The land was never formally transferred out of the names of the applicants, but it was occupied by the Navy and used for naval officers and their families as a holiday park.

¹⁷¹ *ibid.*, para 63

¹⁷² Some issues with the use of transfer as a deciding criterion are outlined at p56 above.

¹⁷³ (1987) 9 EHRR 241

¹⁷⁴ *ibid.*, para 5.

¹⁷⁵ (1996) 21 EHRR 439. Similar facts arose in *Karagiannis and Ors v Greece* (51354/99) 16 January 2003, in which the Court again found a violation on the part of Greece.

When democratic government was restored, the expropriation was acknowledged, and although it was not considered possible to return the land to the applicant given the changes which had been made to it subsequently and the importance of the area to the Navy, provisions were put in place to provide the applicant with alternate land in compensation for that which had been lost. Complications arose with the transfer of the new land, and ultimately neither the old land nor the proposed new land was ever made available to the applicant. Again, the Court gave weight to the fact that, in spite of retaining legal title to the property, the applicant had lost any ability to dispose of it. In the circumstances, the Court was prepared to find a deprivation. It is difficult, however, to see how the Court could find otherwise when the state itself, in providing for compensation (albeit which was never received), had tacitly acknowledged that a deprivation had taken place. Nonetheless, the case does show that the circumstances exist in which a finding of *de facto* deprivation can be made.

2.5.3 Exceptions to the rules

Where a disposal is possible, however, it seems a restriction of any severity on almost all other rights of ownership will not amount to a deprivation. *Mellacher v Austria*¹⁷⁶ dealt with the type of rent control legislation which is familiar to lawyers throughout Europe as a mechanism used by governments to avoid a housing crisis in areas where affordable housing has become scarce. The applicants in the case claimed that new restrictions on the rent they were lawfully able to impose on their leased properties were so severe that the applicants themselves were rendered mere administrators of the properties, receiving remuneration controlled by the national administration. One of the applicants had their rental income reduced by 82.4%, another by 80.2%. The legislation also made it impossible for the applicants to enforce contracts which had already been agreed to by the tenants. The Court was not prepared to view the unenforceable contracts as the property in question, preferring to look at the situation as a whole. Factually speaking, there was nothing to prevent the applicants from disposing of their property, or from using it or leasing it in the normal way. There was no deprivation in the

¹⁷⁶ (1990) 12 EHRR 391

circumstances. Similarly, in *Matos E Silva v Portugal*,¹⁷⁷ part of the applicants' land had been earmarked by the government for the creation of a nature reserve. No formal expropriation measures were put in place – the applicants remained registered owners – but they contended that their ability to use the land or enter into dealings with it had been severely restricted as a matter of fact. The Court found no formal or *de facto* expropriation, noting that the applicants' position was not irreversible, and also that:

Although the right in question had lost some of its substance, it had not disappeared. The Court notes, for example, that all reasonable manner of exploiting the property had not disappeared seeing that the applicants continued to work the land.¹⁷⁸

Additionally, the question of disposal will not, it appears, be the deciding factor in a case where a broader policy reason has informed the state's actions. This point is demonstrated by a trio of cases arising from criminal seizure and forfeiture proceedings. The first of these is perhaps the easiest to understand. *Air Canada v United Kingdom*¹⁷⁹ concerned an aircraft owned by the flight operator, which was seized by UK Customs after a quantity of cannabis resin was found on board. The plane was ultimately returned subject to conditions, chief among which was the requirement to pay £50,000 in caution. In determining the question of whether a deprivation had taken place, the Court gave weight to the fact that the seizure of the aircraft had only been a temporary measure; by the time the proceedings came before the Court, the plane had been returned to the possession of the applicant. The Court also looked more broadly at the end sought to be achieved by the seizure of the aircraft, namely to prevent carriers from bringing prohibited drugs into the UK. With those two factors in mind, the Court felt it would be more appropriate to classify the actions of the state as a control on the use of property, despite the fact that ownership with all its concomitant rights had been removed from the applicant.

¹⁷⁷ (1997) 24 EHRR 573

¹⁷⁸ *ibid.*, para 85.

¹⁷⁹ (1995) 20 EHRR 150

The important factor in *Air Canada* is, obviously, time. Although there was a total removal of the rights attaching to ownership, it was temporally limited. The plane was returned to the applicant. A temporary withdrawal of rights is not, perhaps, sufficient to amount to a deprivation in the P1-1 sense; the Commission's remarks about the possibility of reversing the position in *Matos E Silva v Portugal*¹⁸⁰ tend to support this interpretation of the jurisprudence. The opinion in *Air Canada* can logically be understood if time, in the view of the Court, is of the essence in such cases.¹⁸¹

Such logic is not so easy to extrapolate from the second of the confiscation cases, *Vasilescu v Romania*.¹⁸² Here, the removal of rights was not only total, but also permanent. Nonetheless, no deprivation was held to have taken place. The application arose from the police seizure of 327 gold coins during the course of a raid on the applicant's husband's home. Neither the applicant nor her husband was ultimately charged with any offence, but the police (unlawfully) decided to keep the coins anyway. Curiously, it was the lack of legal basis for the actions of the police which the Court considered to prevent a finding of deprivation, stating:

In view of the lack of any basis in law, as recognised by both the domestic courts and the Government, the continuing retention of the items in question cannot be interpreted as a deprivation of possessions or control of the use of property allowed by P1-1.¹⁸³

No further explication of this statement is given in the remainder of the judgment, with the Court ultimately concluding that the applicant had been the victim of a “*de facto* confiscation”. However, it does appear that the case was decided on the basis of a breach of the first sentence of P1-1 rather than on the basis of a deprivation. In terms of ascertaining a clear definition of the term “deprivation”, it is unclear what help this case can be.

¹⁸⁰ (1997) 24 EHRR 573

¹⁸¹ See also *Debelianovi v Bulgaria* (61951/00) 29 March 2007, in which an inability to enforce an order for restitution of a listed building owing to a moratorium which had been in place for 12 years was considered to be a control on the basis that the interference, although lengthy, was not permanent.

¹⁸² (1999) 28 EHRR 241

¹⁸³ *ibid.*, para 50

The waters are further muddied by the third confiscation case, *Allgemeine Gold-und Silberscheideanstalt v UK* (the AGOSI),¹⁸⁴ which is perhaps the most complicated on its facts. Here, Krüggerands had been smuggled into the UK and seized by Customs and Excise, being declared forfeit in the criminal proceedings which followed. The applicant company had sold the Krüggerands (unknowingly) to the smugglers, subject to a “retention of title” clause providing that the applicants were to remain the owners of the coins until such time as full payment was made. At the time the coins were seized, the applicant company was still awaiting payment and was therefore the legal owner of coins which were now entirely beyond their control. The company unsuccessfully sought return of the coins domestically before making an application under P1-1.

The Court found:

The prohibition on the importation of gold coins into the UK clearly constituted a control of the use of property...The seizure and forfeiture of the Kruggerands were measures taken for the enforcement of that prohibition. This did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Kruggerands. It is therefore the second paragraph which is applicable in the present case.¹⁸⁵

The language used by the Court merits some attention. There is an acknowledgement that the applicants had, indeed, suffered a deprivation, which would seem difficult to deny given the earlier *dicta* on what constitutes a deprivation. It would not have been possible for the company to use or dispose of the property, or to exercise any of the other rights normally associated with ownership. However, in this situation, the Court believed the deprivation to be “a constituent element of the procedure for control of the use [of gold coins].” This statement seems counterintuitive, given that deprivation would on the whole be seen as the more serious of the potential violations of P1-1, and certainly the one which attracts the strongest degree of protection.

¹⁸⁴ (1987) EHRR 1

¹⁸⁵ *ibid.*, para 51

How can deprivation therefore be a part of (the less stringently guarded) control? The Court's reasoning is unsatisfactory, and does not fit well with the earlier jurisprudence. What seems to have been informing the decision of the court is public policy considerations, namely, the need to enforce measures against high value international smuggling operations. P1-1, as discussed in later chapters, has provision for such policy arguments to be taken into account, but the appropriate place to do so is not when deciding whether an action constitutes a deprivation or not in the first place. As it is, the AGOSI judgment sits uncomfortably with the case law surrounding it.

The confiscation cases ultimately appear to be a contentious deviation from the usual rules on what will constitute a deprivation, and an unclear deviation at that. Unfortunately it does not appear that the Court is willing to clarify or even acknowledge any confusion here. The more recent case of *Phillips v United Kingdom* continued the confusion by relying on the previous case law.¹⁸⁶ The application arose from an order confiscating what were considered to be the proceeds of crime following the applicant's conviction for drug trafficking offences. In a short judgement on the P1-1 point, the Court noted:

As previously stated, the confiscation order constituted a "penalty" within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties.¹⁸⁷

Thus it seems the Court is content to rely on its previously bewildering jurisprudence as a basis on which to perpetuate the uncertainty in this area.

Unfortunately the confiscation cases are not a sole category in terms of contentious deviations from the general principles here. Another exception appears to exist where a change in the law creates a situation which could be construed as a deprivation for one particular individual. The first example of this, although the case is not analysed in precisely these terms, probably

¹⁸⁶ (41087/98) 5 July 2001

¹⁸⁷ Para 51

came with *Banér v Sweden*,¹⁸⁸ where a change in Swedish law turned what had previously been exclusive fishing rights held by the applicant into a public right available to any citizen to fish with hand-held tackle. The applicant complained that he had been deprived of his exclusive right to fish. The Commission noted that the applicant retained legal title to the fishings as well as the ability to fish as a matter of fact. That this right was no longer exclusive was considered to be a control of its use rather than a deprivation as such.

A clearer example is to be found in *Stran Greek Refineries v Greece*,¹⁸⁹ in which an arbitration award made in favour of the applicants was rendered unenforceable by a change in legislation. The applicants again retained title to the award in a formal sense; their inability to enforce it was simply a change in the way it could be used in the eyes of the Court. There was held to be no deprivation.

Again, it can be difficult to reconcile these cases with the *dicta* which surround them. Altering a right to the extent that it loses the significant part of its original substance would seem to be a classic example of a *de facto* deprivation. The fact that the law making this change might be justified in a policy sense is an issue to be addressed at a later stage, not when deciding the applicable rule in the first place.

One final point worthy of note, without the complications of the cases discussed immediately above, is that where a property right is based on a condition which ceases to be fulfilled, the consequent removal of that right cannot constitute a deprivation. This can be seen in a variety of licence cases, the most useful example of which is *Fredin v Sweden*.¹⁹⁰

2.5.4 Conclusion

On the face of it, identifying a deprivation is a straightforward matter. Where rights of ownership have formally been removed, there can be no question that a *de jure* deprivation has taken place. Similarly, where all rights have

¹⁸⁸ (11763/85) 9 March 1989

¹⁸⁹ (1995) 19 EHRR 293

¹⁹⁰ (1991) 13 EHRR 784

effectively been removed, even whilst formally remaining in place, a *de facto* deprivation will be found. However, the removal of rights here must be such as to result in an almost total inability to exercise the usual rights attaching to ownership. A key factor here will be whether or not the applicant has retained the right to dispose of the possession in question.

Where a disposal remains possible, however, even severe restrictions on the applicant's powers will be unlikely to amount to a deprivation in the eyes of the Court.

In addition, the complex issues surrounding confiscation and forfeiture of goods on a criminal law basis do not appear to fit readily into the definition of deprivation the Court has otherwise appeared to find acceptable.

The difficulties in defining this concept are closely connected with the manner in which the Court has approached the bigger question of determining P1-1 applications. These issues will be explored in detail in the third chapter of this thesis.

2.6 Control

The concept of control does not appear to have been given a similar level of scrutiny to that of deprivation. In most circumstances, it seems simply to be the fallback position when a deprivation cannot be established, or where common sense dictates that the action taken by the state is a control of the use of possessions rather than a removal of the same, for example, in the context of planning legislation.¹⁹¹

Some useful guidance is to be found in the 1976 decision of *Handyside v the United Kingdom*.¹⁹² The context here was essentially criminal. The applicant was an English publisher who had been charged under the Obscene Publications Act for publishing 'The Little Red Schoolbook', an alternative guide to adolescence for schoolchildren with a great deal of information on

¹⁹¹ See, for example, *Sporrong and Lönnroth v Sweden*, where the court states that prohibition on construction is clearly a control of the use of property.

¹⁹² (1976) 1 EHRR 737

topics such as sexual relationships and illegal drugs. The case raised a variety of issues surrounding freedom of expression and censorship. The relevance for property law, however, came with the seizure and subsequent forfeiture and destruction of around 1200 copies of the book, together with the printer's matrix.

In making its decision, the Court drew a clear distinction between the seizure of the books in the first place, and their destruction following a subsequent domestic court decision authorising the same.

The seizure complained of was provisional. It did no more than prevent the applicant, for a period, from enjoying and using as he pleased possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal.

In these circumstances, the Court thinks that the second sentence of the first paragraph of Article 1 does not come into play in this case.¹⁹³ Admittedly the expression 'deprived of his possessions', in the English text, could lead one to think otherwise, but the structure of Article 1 shows that that sentence...applies only to someone who is 'deprived of ownership'.

On the other hand the seizure did relate to 'the use of property' and thus falls within the ambit of the second paragraph.¹⁹⁴

The Court is able to be very clear on why the seizure does not amount to a deprivation, but very little is said to justify its categorisation as a control. The important thing seems to be that the applicant was prevented from using his possession as he pleased for the period of time during which it was out of his hands. The concept of prevention or restriction of *use*, rather than any interference with ownership *qua* ownership, therefore appears to be central to the definition of "control".

The same concepts were encapsulated in a series of cases involving regulation of landlords' interests. *Mellacher v Austria*,¹⁹⁵ discussed above,

¹⁹³ In other words, there was no "deprivation" in the P1-1 sense.

¹⁹⁴ *ibid.*, para 62.

¹⁹⁵ (1990) 12 EHRR 391

dealt with stringent rent control legislation severely limiting the rental income available to the applicant landlords. The court pointed out that the applicants retained the right to use the properties in a different way, or to sell them on. The legislation therefore amounted to a control of its use and nothing more.

Several cases arose from the administration of eviction orders introduced in Italy with the aim of stemming a housing crisis. It was possible for landlords to obtain orders evicting tenants from their property for a variety of reasons including non-payment of rent and the landlords' own need for the premises. However, police assistance in enforcing these eviction orders was granted only on a priority basis, with the result that some landlords, constantly pushed to the bottom of the priority list, were effectively unable to enforce their rights at all. In *Scollo v Italy*,¹⁹⁶ the application was initially considered by the European Commission of Human Rights, who noted that the applicant continued to receive rent and was not prevented from selling his property, thus rendering the measures in question a control of use, rather than a deprivation. The Court saw no reason to depart from the reasoning of the Commission. Similarly, in *Immobiliare Saffi v Italy*,¹⁹⁷ the Court again focussed on the fact the applicant was not prevented from letting or selling the property to find that the measures in question amounted to a control of use. It was noted in particular that the applicant in this case had eventually recovered possession of the premises.

¹⁹⁶ (1996) 22 EHRR 514

¹⁹⁷ (1999) 30 EHRR 756

Two further points can be extrapolated from the case law as to the definition of control. First, positive action enforced by the state can also be a control in terms of P1-1. In *Denev v Sweden*,¹⁹⁸ the state obtained a court order preventing the applicant from planting certain species of tree on his forestry land, and ordering him rather to plant Swedish pine, or else to face a heavy fine. The Commission considered the actions of the authorities to constitute a control, justified by the environmental motives underlying it. Similarly, in *Urbarska Obec Trencianske Biskupice v Slovakia*,¹⁹⁹ the applicants owned agricultural land which had been controlled by the Communist regime in the former Czechoslovakia, who allowed the land to be occupied and worked by people other than the owners, known as "gardeners". In the course of transition to a free market economy, legislation was passed compelling the owners to continue leasing their land to the gardeners for a fixed rate of rent which amounted in the applicant's case to less than 10% of the market value. This obligation to lease was considered by the Court to be a control, and a violation was ultimately found.

Additionally, *Langborger v Sweden*²⁰⁰ suggests the existence of a *de minimis* rule, whereby a legislative measure impacting on an applicant only a negligible amount will not be considered capable of constituting a violation of P1-1.

2.6.1 Examples of control

Common examples of state action which will be categorised as a control include the imposition of rules of taxation²⁰¹ or planning legislation,²⁰² restrictions on rent,²⁰³ licensing laws²⁰⁴ and the operation of rules of succession.²⁰⁵

¹⁹⁸ (12570/86) 18 January 1989

¹⁹⁹ (2009) 48 EHRR 49

²⁰⁰ (1990) 12 EHRR 416

²⁰¹ *Spacek v Czech Republic* (2000) 30 EHRR 1010, *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127

²⁰² *Agrotexim v Greece* (1996) 21 EHRR 250

²⁰³ *Mellacher v Austria* (1990) 12 EHRR 391

²⁰⁴ *Tre Traktor Aktiebolag v Sweden* (1991) 13 EHRR 309

²⁰⁵ *Inze v Austria* (1987) 10 EHRR 394

2.6.2 Conclusion

An action by the state, which regulates the use that can be made of possessions, but does not remove the right of ownership, will fall within the definition of control. The regulation may be positive or negative, and must have more than a *de minimis* impact on the applicant. Essentially, control must be less than deprivation.

2.7 Public/General Interest

Of all the terms contained within P1-1, the notions of public and general interest are perhaps the most ambiguous and difficult to define. Before consideration can be given to the case law in more detail, two important provisos must be put in place. First, the Court and the Commission tend to use the two terms interchangeably; there is nothing in the jurisprudence to suggest that one term encompasses a different or more demanding standard than the other.²⁰⁶ The second proviso is that the two terms form a central part of the decision-making process which has evolved for determination of P1-1 application and which will be considered in detail in chapter three below.²⁰⁷

So what will be considered to be “in the public interest”? Perhaps the most illuminating piece of case law is *James v the United Kingdom*.²⁰⁸ The applicants, as trustees, were substantial owners of residential property in London. They had been deprived of their ownership of a number of properties through the exercise by the occupants of rights of purchase conferred by the Leasehold Reform Act 1967. The reform was introduced to correct what was seen as an outmoded system of property tenure, and a compensation scheme was in place for deprived landowners. In making its decision, the Court emphasized that its role was not to adjudicate on whether or not the policy underlying the state’s decision was correct or not. It considered that the government had a democratic mandate to make such decisions on behalf of

²⁰⁶ This does tend to beg the question of why two different terms were used in the first place. Was it simply a question of sloppy drafting? See “The Protection of Property Rights” by George Gretton in *Human Rights and Scots Law* (Boyle, Himsworth, MacQueen, Loux eds.)

²⁰⁷ See p129 et seq.

²⁰⁸ (1986) 8 EHRR 123

citizens, and it would be inappropriate for the Court to substitute its judgment for that of elected representatives. In such matters, it was necessary for states to be given a wide margin of appreciation. As Reed and Murdoch put it, “policy-making of this nature is not amenable to international judicial scrutiny.”²⁰⁹

A similar view was expressed in the later decision of *Hentrich v France*,²¹⁰ an unusual case dealing with rights of pre-emption available to tax authorities in France when a property had been sold for a value less than the assessed value. The Court emphasized that:

the notion of “public interest” is necessarily extensive and that the States have a certain margin of appreciation to frame and organise their fiscal policies and make arrangements – such as the right of pre-emption – to ensure that taxes are paid. It recognises that the prevention of tax evasion is a legitimate object which is in the public interest.²¹¹

James also clarified another point of dispute as regards the interpretation of public/general interest. In the French language text of P1-1, it provides that there will be no deprivation of possessions other than *pour l'utilité publique*. Relying on this text, the applicants in *James* put forward the argument that property could only be taken by the state if it were to be used directly by the public. This point of view was rejected at the Commission stage.

A requirement that no one should be deprived of property except “in the public interest” is not the same as a requirement that no one should be deprived of property except when the property is to be put to a public use.

The Commission is therefore of the opinion that a taking of property may in principle be considered to be “in the public interest” where the property is taken in pursuance of legitimate public, social or other policies, notwithstanding that the property is not to be put in public use.²¹²

²⁰⁹ para 8.14

²¹⁰ (1994) 18 EHRR 440

²¹¹ *Ibid.*, para 39

²¹² (1984) 6 EHRR CD 475, para 133

It is obvious, then, that the discretion afforded to states here is extensive. However it is not, apparently, without limits. Where action the state maintains is in the public interest is viewed by the Court as manifestly unreasonable, it will not be accepted as a justification for interference with the applicant's rights under P1-1. *James*, again:

The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" *unless that judgment be manifestly without reasonable foundation.*²¹³

The virtual non-existence of cases in which such a finding of manifest unreasonableness is made, and the reasons for that, are discussed in more detail in chapter three.²¹⁴

2.7.1 Examples of public/general interest

It is impossible to give an exhaustive list of every justification which has been accepted by the Court as amounting to the public/general interest throughout the decades of jurisprudence. However it can be seen that the list ranges from state action designed to facilitate major regime change,²¹⁵ through to large scale political operations such as nationalisation of industry²¹⁶ or agrarian reform,²¹⁷ more typical state works such as new road projects²¹⁸ and the construction of public spaces²¹⁹ on to everyday examples like planning regulations,²²⁰ systems of taxation²²¹ and succession,²²² licensing of areas such as the sale of alcohol²²³ or guns²²⁴ and the enforcement of customs and

²¹³ *Ibid.*, para 46

²¹⁴ See p 129 et seq.

²¹⁵ *Jahn v Germany* (2006) 42 EHRR 49

²¹⁶ *Lithgow v United Kingdom* (1986) 8 EHRR 329

²¹⁷ *Almeida Garrett and Ors v Portugal* (2002) 34 EHRR 23

²¹⁸ *Papachelas v Greece* (2000) 30 EHRR 923

²¹⁹ *Matos E Silva v Portugal* (1997) 24 EHRR 20

²²⁰ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35

²²¹ *Spacek v Czech Republic* (2000) 30 EHRR 1010, *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127

²²² *Inze v Austria* (1987) 10 EHRR 394

²²³ *Tre Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309

²²⁴ *RC, AWA and Ors v United Kingdom* (37644/97) 1 July 1998

excise regulations,²²⁵ all of which seem generally accepted to be necessary parts of democratic governance. Interests which may arguably be considered more political than practical are also sometimes seen, such as the protection of public morality²²⁶ or the protection of the environment.²²⁷

2.7.2 Conclusion

The notions of public and general interest are extremely wide concepts that are ultimately defined by the states themselves. The Court will respect the views of the state as to what will be for the good of the public unless those views are manifestly unreasonable. The importance placed on the public interest does, however, have to be balanced against the interests of the applicant whose rights under P1-1 have been compromised. This control is put in place using the test of proportionality, which is considered in more detail below.

2.8 Conclusion

The aim of this chapter of the thesis was to set out systematic definitions of each of the key terms in P1-1. It was noted that the wording of the article was always recognised to be ambiguous. The subject matter of the protection fall squarely within the domain of private law, and there would seem to be a natural conflict between the emphasis on certainty traditionally found in that area of the law and the adaptive, flexible interpretation which befits a "living instrument" such as the ECHR. It was posited that defining the key terms might be one way in which to help bridge that schism.

Notwithstanding the autonomous concepts used by P1-1 to safeguard real and effective rights, it is possible to extrapolate some general principles as to how each of the key terms will be interpreted by the Commission and the Court. The approach is chiefly pragmatic, concerned with the reality of a given situation. This is demonstrated throughout the chapter, with examples including the rule that a majority shareholder in some situations will be entitled

²²⁵ *Air Canada v United Kingdom* (1995) 20 EHRR 150, *Vasilescu v Romania* 28 EHRR 737

²²⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737

²²⁷ *Fredin v Sweden* (1991) 13 EHRR 784, *Denev v Sweden* 1989 59 DR 127

to make an application relating to the property rights of the company in which he holds shares, and the concept that a *de facto* deprivation of property will be considered a violation in the same way as a *de jure* deprivation. Additionally, the flexibility of the Convention as a "living instrument" is reflected in for example, the reluctance of the Court to be prescriptive as regards the concept of a possession, or the margin of appreciation afforded to states to determine what state action might be in the public or general interest.

These principles have developed slowly over time. It is apparent that some terms required definition more urgently than others to enable P1-1 to offer any protection at all. The meaning of "possessions" has been debated more frequently and consequently benefited from a more sophisticated level of interpretation than probably any other term in the article. In the evolutionary process, determining what will constitute a possession was a critical first stage. In contrast, some of the other terms have had to wait longer for the light of judicial illumination. The recent discussion in the case law as to the positive obligation imposed on states by the term "peaceful enjoyment" is an interesting demonstration of the way in which the property right continues to develop. With some of the basic issues resolved, matters which may initially have seemed more peripheral can be given a greater degree of consideration.

The adaptive approach to the terminology adopted in Strasbourg can operate, however, at the expense of certainty. The Court and the Commission do not consider themselves bound strictly by rules of precedent, and in some situations this makes it difficult to state with any certainty how a term is likely to be interpreted. This difficulty is compounded by the fact that the explanation given by the Court for how it has decided certain cases is not always as full as might be desired. Some of the key terms will remain in a state of uncertainty until further jurisprudence is available as with, for example, the case law on domestic court decisions which make an award against the state. In other words, the understanding of the terminology which can be constructed from the jurisprudence will continue to evolve. It should be recognised, however, that this ongoing uncertainty can continue to cause difficulties in the

application of P1-1 which overall operate to weaken the protection it offers. This theme will be explored in more detail in chapter three.

The working definitions which have been extrapolated from the cases during the course of this chapter represent the position of the property right at the present time. These definitions should operate as a starting point from which a "best guess" as to the application of P1-1 in novel situations can be estimated.

Having considered what P1-1 actually says, the next step is to consider how it applies.

CHAPTER THREE: HOW HAS IT BEEN APPLIED?

"If any one of them can explain it," said Alice, "I'll give him sixpence. / don't believe there's an atom of meaning in it."²²⁸

3.1 Introduction

The complex political backdrop which informed the drafting of P1-1 resulted in a form of wording which suffered from certain ambiguities. Although this uncertainty was recognised by the drafters, the intention seemed to be that clarity should properly be obtained through jurisprudence. Has this intention been realised?

The analysis of the case law set out in chapter two has allowed definitions of each of the key terms in P1-1 to be put forward. However, that analysis also suggested that the development of the property protection to date has been uneven in places, with many questions yet to be resolved in relation to some of these terms, or at least as regards their use in particular contexts. Even were there no such equivalence in meaning, definitions of the words cannot in themselves explain the full extent of the protection offered by P1-1. It is also necessary to consider how those terms have been applied by the Court in determining the situations in which a breach of the property right has occurred. It is only in examining this process that a fuller sense can be achieved of where the boundaries of the protection may lie. This exercise is necessary to fully establish whether the intended clarity has been achieved through the case law, and to give an understanding of the strength (or otherwise) of the guarantee set out in P1-1.

An examination of the jurisprudence relating to P1-1 reveals essentially a five-step process through which it can be established whether the applicant's complaint entails a violation of P1-1. This process involves a determination of whether the applicant holds a possession in the meaning of the Convention, whether the state action complained of has contravened the basic principles of P1-1 and whether that contravention is justified in the terms of the article.

²²⁸ *Alice in Wonderland*, p106

The steps of the process are as follows:

1. The Court must determine whether the property or interest held by the applicant falls within the broad definition of "possessions" as discussed in chapter two above.²²⁹ The first question in the process is accordingly: does the applicant hold a possession?
2. Should it be determined that a possession is involved, the Court asks whether an interference with P1-1 has taken place by considering the "three rules" set out in *Sporrong and Lönnroth v Sweden*. As will be elaborated upon below, any violation of P1-1 must fall to be categorised as (a) general interference with the peaceful enjoyment of possessions, (b) deprivation of possessions or (c) control of the use of those possessions. State action which falls within one of these three rules constitutes a contravention. The second question is therefore: which rule has been breached?
3. Once it has been established that such an interference occurred, the Court must decide whether it is justified by the qualifications to the right of peaceful enjoyment of possessions set out in P1-1. No contravention can be fair if does not have a clear legal basis. The third question is accordingly: was the action of the state lawful in the meaning of the article?
4. Interferences can only be justified where they were carried out for the benefit of the wider society. The fourth question is therefore: did the action of the state pursue a legitimate aim in the public or general interest?
5. Finally, any interference must meet the test of proportionality inherent in the wording of the article. The fifth question is accordingly: did the state action strike a fair balance between the needs of the community

²²⁹ See pp48-69 above

and the burden placed on the individual applicant? This is also expressed by asking simply, was the interference proportionate?

Each of these steps will be considered in turn in this chapter.

3.2 Does the applicant hold a possession?

The essence of this step has been covered in the discussion of the definition of the word “possessions” in chapter two, and it is not necessary to repeat that discussion here. Briefly put, the Court must ascertain whether the applicant holds an interest with an objective economic value, or has a legitimate expectation of acquiring such an interest in future.²³⁰

If no such possession is found to exist, then it follows that P1-1 cannot be engaged, and the application will be dismissed.

3.3 Which rule has been engaged?

If it is determined that the applicant holds a possession meriting the protection of P1-1, the next step for the Court is to determine where the state action giving rise to the application fits within the framework set out in *Sporrong and Lönnroth v Sweden*.²³¹ This case, in which the “three rule” approach to an understanding of the protection offered by P1-1 was first elaborated, is arguably the most influential piece of P1-1 jurisprudence to date.

3.3.1 The dicta in *Sporrong and Lönnroth*

The application arose from a relatively commonplace planning dispute. The applicants owned two properties in central Stockholm, located in an area which was then zoned for future redevelopment. With this in mind, the local authority granted expropriation permits against the two pieces of land, along with prohibitions on building. This measure not only prevented the applicants from developing their land, but effectively rendered the properties unsaleable, as the prospect of future expropriation at an undefined time was unlikely to be

²³⁰ See page 48-69 above.

²³¹ (1983) 5 EHRR 35

appealing to buyers on the open market. After the permits had been in place for a significant period of time – 23 years and eight years respectively – a change in local authority planning strategy had the result that the properties were no longer in the redevelopment zone. The permits were redacted. The applicants argued that the impact of the permits throughout the period during which they were live was *de facto* deprivation of ownership of the properties concerned, since they could be neither developed nor sold. Having received no compensation for this alleged deprivation, the applicants contended that their rights under P1-1 had been violated.

In making its determination, the Court took the opportunity to carry out something of a review of the principles which could be extrapolated from P1-1 jurisprudence up to that point. Consideration was first given to the overarching purpose of the property protection, as elaborated in the *dicta* in *Marckx v Belgium*.²³²

By recognising that everyone has the right to peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: *biens, propriété, usage des biens*); the *travaux préparatoires*, for their part, confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property' to describe the subject-matter of successive drafts which were the forerunners of the present article.²³³

This was the context in which the restrictions placed on the applicants' ability to use and dispose of their properties had to be considered, and against the relatively expansive outline of the protection suggested by *Marckx*, the Court was satisfied that there had been some interference with the right to property. The issue then became: did this interference amount to a violation of P1-1? It was in answering this question that the Court pronounced the famous *dicta* which has formed the basic framework for every subsequent decision in which a violation of P1-1 is alleged.

²³² (1979) 2 EHRR 350

²³³ para 63. See also discussion of the *travaux préparatoires* in Chapter One at pages 19-32.

The Article comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.²³⁴

The Court does not offer any elaboration or justification for its analysis of the article. It is presented in the report as if this approach to the article is self-evident from the wording of the text itself. There is some grammatical support in the sense that each of the three rules is ascribed to a different sentence of P1-1. However, this is not the only interpretation even of the grammar: George Gretton points out that the layout of the article, with the first two sentences forming one paragraph and the third sentence forming a final paragraph, might seem to suggest that the first two sentences set out the basic principle with the third paragraph providing the exception to the general rule.²³⁵ Placing too much emphasis on the grammar, however, is likely to be counterproductive given the autonomous nature of the terminology involved and the focus in Strasbourg on pragmatism and the protection of real and effective rights.

Some indication as to the Court's reasoning may be offered in the continuation of its opinion, in which it suggests:

The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable.²³⁶

It seems then that the first rule, interference with peaceful enjoyment, can only come into play where the second and third rules (deprivation and control) have been considered and discounted. This is a little difficult to parse. The first rule sets out the general principle. The second and third rules appear to

²³⁴ para 61

²³⁵ *The protection of property rights* in Boyle, Himsworth *et al* (eds), Human Rights and Scots Law (Hart Publishing, 2002) 275-292

²³⁶ para 61

be subsets of that general principle; in other words, a deprivation or a control is a specific type of interference with P1-1. It is necessary, in the view of the Court, to consider and, where appropriate, discount the subsets before it can be decided whether there is some other quality in the action of the state which, although not a deprivation or a control, might still constitute an interference. In one sense, it seems that the first rule becomes something of a "catch-all" provision, or a safety net to catch applications which might fall outside the edges of the definitions of "deprivation" or "control". There is a level of ambiguity in that approach which cannot sit easily with systems of property law founded squarely on certainty, as in Scotland. However, it does not necessarily sit so uneasily with the language of the article, nor indeed with the motivations behind its inclusion in the Convention. If the property protection is to be flexible enough to adapt to changes in the law and society in signatory states, a definitive definition of "interference" is likely to be impossible.

It should also be noted that framing the rules in this way allows the Court an important element of flexibility when it comes to the hotly contested issue of compensation. As will be discussed further below, an interference categorised as a deprivation will almost always give rise to an entitlement to compensation for the deprived.²³⁷ There is an argument that the general "interference" category allows the court a way round this problem of mandatory compensation in cases where it may not consider it appropriate for a payment to be made. This argument may, in fact, be given some weight by the manner in which *Sporrong* itself was ultimately decided, and it could be said that there is something disingenuous about calling state action an interference when what is really meant is that it is a deprivation not meriting compensation. It should be borne in mind, however, that a violation categorised as an interference will still be subject to the same "fair balance" test as a deprivation or a control, and the payment or otherwise of compensation will always form a part of that balancing exercise. Furthermore, as is discussed above,²³⁸ it was made explicit in the *travaux préparatoires* that a property protection which

²³⁷ See page 154 et seq.

²³⁸ See page 30.

included a mandatory right to compensation for its violation would never have been included in the Convention in the first place. Again, it may be that the flexibility afforded to the Court here is a natural consequence of the way in which the Convention was conceived and drafted.

In any event, whether the three rule approach is the most intuitive way of understanding P1-1 or not, there is certainly no question that it is workable, as can be seen from its use in virtually every application subsequent to *Sporrong*. In the case itself, the Court applied its new framework with the result, as discussed in chapter two above,²³⁹ that the expropriation permits, despite placing serious constraints on the ability of the applicants to use their land, were not sufficient to amount to a *de facto* deprivation of land, and did not possess the requisite characteristics to qualify as a control. The expropriation permits therefore qualified as a first rule "interference", whereas the building prohibitions were more obviously a rule three "control of the use of property."

It is worthy of note that the violation of P1-1 found in *Sporrong* was decided upon by the slimmest of majorities: ten votes to nine. In the dissenting opinions, discontent was expressed with the way in which the majority of the Court had analysed the provisions of P1-1.

Our understanding of the way in which Article 1 should be interpreted and applied in the present case is different.

The first sentence of Article 1 contains a guarantee of private property. It is a provision in general terms protecting individuals and also private legal entities against interference with peaceful enjoyment of their possessions. However, modern States are obliged, in the interest of the community, to regulate the use of private property in many respects. There are always social needs and responsibilities relevant to its ownership and use. The ensuing provisions of Article 1 recognise these needs and responsibilities and the corresponding rights of the States. The very essence of city planning is to control the use of property, including private property, in the general interest.

²³⁹ See page 76-77.

It is obvious that, for the second paragraph to apply, restrictions on the use of private possessions must leave the owner at least a certain degree of freedom, otherwise the restrictions amount to deprivation; in this case no "use" is left. But it cannot be decisive against the applicability of the second paragraph that the final outcome of the measures taken may be the expropriation of the properties concerned. Where the use of the properties is still possible although restricted, this provision remains applicable, even if the intention behind the measures is the eventual deprivation of ownership. This is confirmed in the present case by the fact that deprivation in reality never took place. The use of the property by the owner was never terminated by state action. It was temporarily restricted in view of possible expropriations in the future.²⁴⁰

The argument here could suggest a slightly different construction of P1-1 than anything discussed so far. A control here would seem to be any interference up to the point at which it becomes a deprivation. Control in this sense might be the lesser of two evils, but there are still only two evils: the first rule "interference" is superfluous. In the event, it is difficult to say whether the opinion in dissent here intends to argue for a systematic understanding of P1-1 along the lines suggested, or whether it is restricting itself to the facts of *Sporrong*, arguing that *in the particular case* the expropriation permits amounted to a control and so categorisation as an interference, although a valid option, was incorrect in the circumstances. Whatever the intention, a systematic argument along these lines could be counter-balanced by the same considerations of flexibility already discussed above.

3.3.2 Development of the "three rule" approach

The three rule approach set out in *Sporrong* has been relied upon almost ubiquitously in subsequent jurisprudence, but a few cases have attempted to revise or refine it. One example often cited as having altered the framework is *James v United Kingdom*.²⁴¹ As set out in some detail in chapter two,²⁴² the application arose from a leasehold conversion scheme, in which tenants of very long leases had their interests converted to ownership, with compensation paid to the former landlords on the basis of a statutory scheme.

²⁴⁰ Joint dissenting Opinion of Judges Zekia, Cremona, Thór Vilhjálmsson, Lagergren, Sir Vincent Evans, Macdonald, Bernhardt and Gersing.

²⁴¹ (1986) 8 EHRR 123

²⁴² See page 92-93 above.

In its opinion, the Court first quoted the *Sporrong* three rule *dicta*, and then stated:

The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.²⁴³

This is useful in so far as it illuminates to a certain extent the reasoning of the Court in *Sporrong* in suggesting that, as discussed above, deprivation and control are subsets of the general category of interference. *James* does also go further than that in emphasising a connection between all three rules. However, it is not really clear what this connection entails. To say that the second and third rules must be considered in light of the general aim of the article is arguably superfluous: they are, after all, an essential *part* of the article. The Court did not offer any further elaboration of or authority for the point, and little is to be found in the numerous subsequent cases which cite this *dictum*.

A more radical alteration of the framework, although less remarked upon, is to be found in *Allegemeine Gold-und Silberscheideanstalt v United Kingdom* (the AGOSI.)²⁴⁴ Also discussed in chapter two,²⁴⁵ the applicant in this case had, in good faith, sold Krüggerands which were subsequently illegally smuggled into the UK. A condition of the sale had been the retention of the applicant's title until such times as full payment for the coins was made, a condition which had not been purified. Consequently, when the coins were confiscated and subsequently declared forfeit by UK customs, it was the applicant's right of ownership which was affected. The application was aimed at the forfeiture proceedings, which the applicant contended was unlawful since it, the legal owner of the coins, had done nothing wrong. In determining which of the three rules might be applicable in the case, the Court gave a further, perhaps unexpected, subdivision to the categories.

²⁴³ para 37

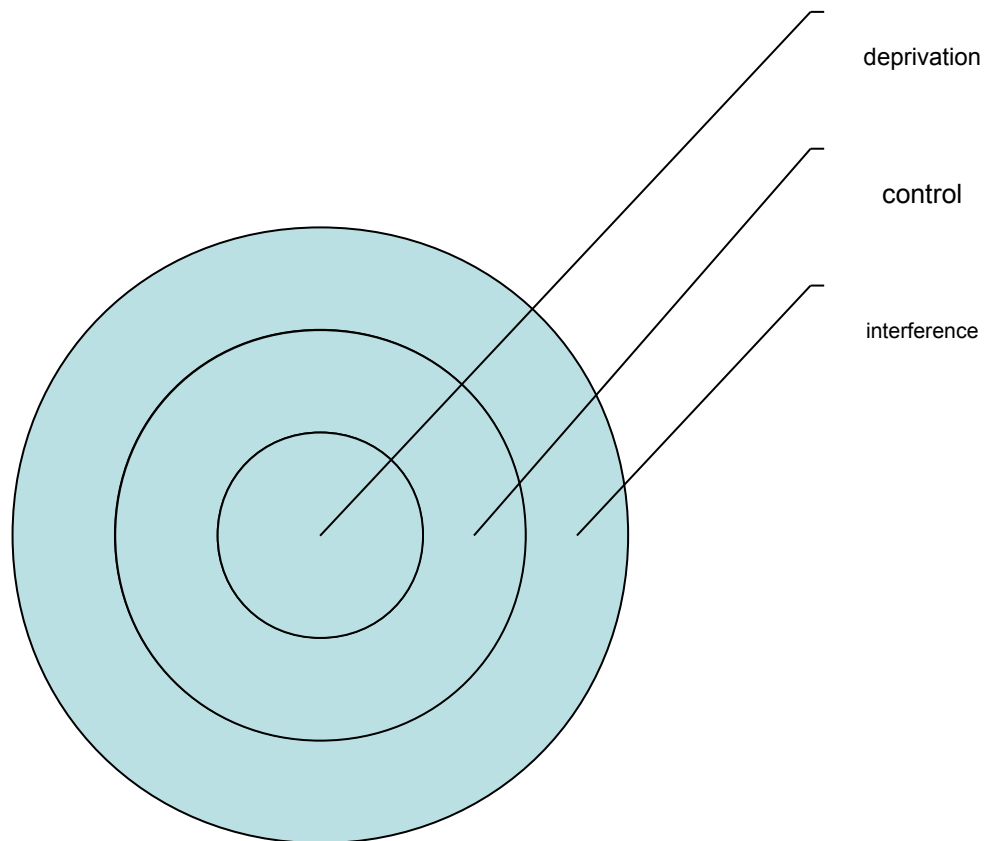
²⁴⁴ (1987) 9 EHRR 1

²⁴⁵ See page 81 above.

The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Krüggerands. It is therefore the second paragraph of Article 1 which is applicable in the present case.²⁴⁶

By this *dictum*, it seems that deprivation can, in certain situations, form a subset of control. If the construction of the *Sporrong* dicta outlined above is accepted, control is itself a subset of the general category of interference. There is a logical appeal about this reasoning from a semantic point of view; depriving someone of their property could be said to be the most extreme form of controlling their possessions. However, it is strange that these two categories which had previously been presented as sitting alongside one another should in fact be considered as a circle within a circle. Furthermore, even if such a presentation of the three rules as forming a set of concentric circles is appropriate, it does not explain why the central "deprivation" figure should in fact, be subsumed by "control". If that is the case, surely it follows that every deprivation or control becomes simply an interference? Why bother breaking down the categories at all?

²⁴⁶ para 51.



It is of some additional concern that the Court describes deprivation as a subset of control only "in the circumstances." Does this mean that in other circumstances, deprivation is entirely separate from control? Perhaps, however, this is the key to the AGOSI *dictum*. The case, as one of the problematic confiscation cases discussed in detail in chapter two,²⁴⁷ may best be considered restricted to its own facts, or at least to cases similarly based on matters of confiscation and forfeiture. It is difficult to see how it can form part of the broader *Sporrong* framework, and although it is often cited in P1-1 decisions, little weight seems to have been given to the actual wording of the *dictum* set out above.

²⁴⁷ See page 81-85 above.

3.3.3 Conclusion

The second step in any P1-1 application, therefore, is to determine which of the three *Sporrong* rules, (if any) best describes the state action complained of by the applicant. Categorisation as a deprivation or a control should first be considered and, if inapplicable, the question of whether the action amounts to a more general interference with the right to property should be resolved.

It may not be immediately apparent how the Court came to break down the principles of P1-1 in this way from the wording of the article. It is certainly not the only construction possible: in the judgment itself, an alternative, two-step approach was offered in dissent, to the effect that a control amounted to any interference up to the point that it became a deprivation.²⁴⁸ It is important to recall, however, that development of the three-rule approach does not start and finish with *Sporrong*. Initially it may have been a crude tool, but its use has been clarified and refined in subsequent cases. The Court has become more adept in its use.

Again, it is not suggested that an end-point has been reached in the evolution of this stage in the decision-making process. A lack of clarity remains in relation to the inter-relation of the three rules, and there is some question as to how clearly the different categories are conceptualised by the Court when faced with "difficult" cases. However, the three rules do offer some general guidance on how novel interferences will be dealt with, and in that sense at least, they have a value.

If the state action falls within one of the categories described by the three rules, a *prima facie* violation of P1-1 has taken place. The Court must then decide whether the violation can be justified by the qualifications to the property right set out in the article itself. The first step in justifying any violation is establishing whether it is lawful.

3.4 Is the interference lawful?

²⁴⁸ Discussed at pp 104-105 above.

P1-1 is a qualified right. In other words, it is not an absolute protection in every situation unlike, for example, the right to freedom from inhuman or degrading treatment enshrined in article three. The property right can be compromised, without penalty to the state, in specific circumstances which are set out in the terms of the article itself. Once it has been established that an interference in the meaning of one of the three *Sporrong* rules has taken place, it is for the Court to consider whether this interference can be justified.

The first requirement which must be fulfilled in justification of state action is that the interference has been carried out in accordance with the law. This requirement is plainly set out in the second sentence of P1-1, which states:

No one shall be deprived of his possessions except...subject to the conditions provided for by law.

3.4.1 Development of the lawfulness requirement

The Court's understanding of what is meant by this term in context draws heavily on jurisprudence beyond that relating to P1-1. A similar form of words can be seen elsewhere in the Convention, particularly in the case of other "qualified" rights which can be compromised where necessary for the public good, such as articles eight and nine.

The first time this wording was given detailed consideration by the Court was in *Sunday Times v United Kingdom*,²⁴⁹ in which the article 10 right to freedom of expression was in issue. The applicant had been prevented by court injunction from publishing a story about the history of the drug thalidomide. At the time, a number of women who had taken the drug whilst pregnant, and subsequently given birth to children suffering physical deformity, were pursuing damages claims against the manufacturer of the drug. The injunction had been granted on the grounds that the story the applicant wished to print would be unfairly prejudicial in respect of the ongoing court actions such as to result in contempt of court.

Article 10 states that everyone has the right to freedom of expression, but provides:

²⁴⁹ (1979-80) 2 EHRR 245

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...

The main thrust of the applicant's argument was that the rules on contempt of court were so arcane as to breach the requirement that any restriction be "prescribed by law": in other words, this requirement could not be fulfilled if it was uncertain what the law, in fact, was.

The Court noted that there was some ambiguity over the meaning of the phrase in the authentic texts of the Convention. In French, the expression "prévues par la loi" is used in articles nine, 10 and 11, and in each case is equivalent to "prescribed by law" in the English text. However, in article eight and article two of Protocol Four, the same French text is equivalent to the English "in accordance with the law," and then in P1-1, to "provided for by law."

Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.²⁵⁰

In tackling this problem, the Court came up with two main prerequisites for lawfulness.

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²⁵¹

The Court was clear that the "foreseeability" requirement hinged on reasonableness; absolute certainty was impossible. It was also of the view that legislation was not a pre-requisite for lawfulness; common law rules would be equally competent provided that they were sufficiently clear as to meet the requirements outlined above. In the particular case, it was decided

²⁵⁰ para 48

²⁵¹ para 49

that the rules on contempt of court *were* sufficiently clear – in other words, that the applicant could have foreseen that publication of the story would result in a finding of contempt. The applicant was aware of the legal rules which applied and could regulate his conduct according to those rules. The lawfulness requirement was accordingly fulfilled.

The Court had cause to look at the wording again some three years later, in *Silver v United Kingdom*.²⁵² Each of the several applicants in the case was a convicted prisoner and the argument concerned censorship by the prison authorities of outgoing mail, which it was alleged violated article eight (right to respect for private life) and article 10 (freedom of expression.) The Court looked at the phrase "in accordance with the law" in the context of article eight, and was satisfied that the meaning of the lawfulness provision in article 10, as set out by *Sunday Times*, must be the same as that required by article eight. In analysing the decision in *Sunday Times*, the Court extrapolated three requirements.

A first principle that emerges from the *Sunday Times* judgement is that the interference in question must have some basis in domestic law...A second principle is that the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case...A third principle is that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct...A law which confers a discretion must indicate the scope of the discretion.²⁵³

It was important in this case that the first two requirements be separated out. Legislation regulating censorship of prison correspondence, which was freely available to the public, had been supplemented by rules and orders issued to prison officers, which were not available to the applicants or to the body of prisoners in general. Many of the violations of article eight found in the case hinged on this critical difference. There was no dispute that the rules and orders had a basis in domestic law, but since they were not accessible, their use to censor correspondence could not be said to be lawful in the meaning of the Convention. The accessibility element was not new as such, in so far as its inclusion could be implied from the Court's treatment of the issue in

²⁵² 1983 5 EHRR 347

²⁵³ paras 86-88

Sunday Times, and particularly from the notion of foreseeability: it is impossible for a citizen to foresee the legal consequences of their actions if the law is hidden from them. *Silver* simply made explicit the point that the law must be certain both in terms of expression and of accessibility.

A more pragmatic view of the lawfulness requirement was taken by the Court in *Malone v United Kingdom*,²⁵⁴ two years after the outline provided by *Silver*. Mr Malone was an antiques dealer suspected of handling stolen goods. In the course of their investigations, the police obtained a warrant from the Home Office authorising the tapping of Mr Malone's telephone, in addition to "metering" his outgoing calls (a process by which all outgoing telephone numbers are recorded.) The applicant argued that his rights under article eight had been violated, which was accepted by the Court. The issue became one of whether the interference could be justified.

In breaking down the requirements of lawfulness, the Court again took a slightly different approach. The first principle they extrapolated from the previous jurisprudence was that "law" should be interpreted to cover both written and unwritten rules, which is made clear in *Sunday Times*. The second principle is that the interference must have some basis in domestic law. Additionally, the law must be accessible, and finally, it must be sufficiently certain to allow a citizen to regulate his conduct – the foreseeability requirement of *Sunday Times*.

The UK government argued that, in the context of laws regarding secret surveillance, there was no need for the foreseeability requirement to be satisfied, since the law was not regulating the conduct of citizens. In the government's view, the main question in determining whether the lawfulness requirement had been fulfilled was whether the administrative action had conformed to domestic legal requirements.

The Court was not impressed by this argument.

The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law,

²⁵⁴ (1985) 7 EHRR 14

requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. The phrase thus implies – and this follows from the object and purpose of article eight– that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph one. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident...The law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.²⁵⁵

The Court thereby set in stone another requirement, of "non-arbitrariness". The issue is not simply one of the foreseeability of the result of the citizen's own actions in terms of the law, but also of foreseeability of the actions of the state and the extent to which it is empowered to exercise its discretion in respect of a particular domestic legal provision. Domestic provisions should be sufficiently clear that state actions are not arbitrary, thereby operating in compliance with the rule of law. The Court went on to clarify that any discretion to be operated covertly in a situation such as the one described in the case could not be unfettered.

The law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.²⁵⁶

The Court then characterised the question to be answered in the case as follows:

Whether, under domestic law, the essential elements of power to intercept communications were laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities.²⁵⁷

Ultimately, the Court was of the view that the rules as to when and why communications could be intercepted by the State were uncertain and ambiguous. In particular, it was not clear what elements of the State's power

²⁵⁵ para 67

²⁵⁶ para 68

²⁵⁷ para 70

to intercept were embodied in the written rules and what remained within the discretion of the Executive. The discretion was not clearly defined, as the rule of law required it should be. Accordingly, the case fell foul of the lawfulness requirement of article eight.

In summary, the rules set out by the Court in the jurisprudence from *Sunday Times* through to *Malone* could be formulated roughly as follows:

- (i) The interference must have a clear basis in domestic law. This does not require a piece of legislation. Both written and unwritten rules might provide this basis.
- (ii) This legal basis must be freely accessible to the public and not, for example, contained in guidelines available only to a limited class of persons.
- (iii) The legal basis must be sufficiently clear that it allows an individual to foresee what the consequences of their actions will be, and to regulate their conduct accordingly. In other words, the legal basis cannot allow for arbitrary action on the part of the state. This is in accordance with the rule of law. If the legal basis allows for the exercise of discretion on the part of the state, that will not lead to lack of foreseeability, or arbitrariness, provided that the limits on that discretion are clearly defined.

3.4.2 Applying the test of lawfulness to P1-1

The rules set out above were adopted in relation to P1-1 with the case of *James v United Kingdom*.²⁵⁸ As discussed above, *James* arose from a statutory scheme converting leases lasting longer than a given duration into ownership in the hands of the lessees. The previous landlords complained of a violation of their P1-1 ownership rights. The detailed reading of the term "subject to the conditions provided for by law" in P1-1 was in fact undertaken

²⁵⁸ 1984 6 EHRR CD 475 (Commission decision) and 1986 8 EHRR 123 (Court judgement)

at the stage of consideration by the former Commission, with the later Court report adding little of substance. The interpretation of the provision which resulted does not, perhaps, follow exactly the summary of the previous jurisprudence given above.

The Commission's analysis of the lawfulness requirement began with the assertion that, in interpreting this phrase, the Commission was bound by the principles developed previously by the Court in relation to lawfulness requirements elsewhere in the Convention. However, the Commission felt it must also "take account of differences in the wording of the different provisions."²⁵⁹ This does not appear to sit easily alongside the *Sunday Times dictum* that the different versions of the wording in the authentic text must be reconciled as far as possible, or the view in *Silver* that the expressions "prescribed by the law/ *prévues par la loi*" in article 10 must, of necessity, share a definition with "in accordance with the law/ *prévue par la loi*" in article eight. On the other hand, in *Silver*, the same alleged violation gave rise to challenges under both articles, which might explain a need for absolute identity in the interpretation of the provisions in that instance which does not, perhaps, carry over in more general terms. In any event, such opening remarks are arguably of less significance than the details of the specific analysis which followed.

Having set out the context for its definition, the Commission went on to state, in the first place:

this condition in P1-1 requires *inter alia* that the law should define the power to expropriate with a degree of precision that is reasonable in all the circumstances.²⁶⁰

The use of the word "precision" here is perhaps ambiguous, but it seems apparent that, at least, this statement is reiteration of the requirement that the interference must have a clear basis in domestic law. It could be argued additionally that the reference to reasonableness imports something of the requirement of foreseeability. The Commission continued:

²⁵⁹ Commission decision, para 141.

²⁶⁰ *Ibid.*

Furthermore, the "conditions" on which expropriation takes place include, in the Commission's opinion, such matters as the compensation terms and these, like the power to expropriate itself, must also be defined by the law with reasonable precision.

²⁶¹

On first reading, it seems that the Commission may have been placing an importance on the use of the word "conditions" in P1-1 which does not sit easily alongside the lack of such focus on other individual words used in the various constructions of the lawfulness requirement elsewhere in the Convention. However, on a closer reading, it may be that the Commission is really not adding anything new here at all. Essentially what is being said is that all the terms of a state action interfering with a Convention right must be sufficiently precise. In this particular case, the terms of the state action include compensation provisions. However, arguably these so-called "conditions" are already covered in the wording of the original principle – the requirement that the law be clearly stated – since it is clear from earlier case law that all rules, written and unwritten, are covered by this principle. If the compensation scheme is set out not in legislation as such, but in some form of guideline or directive, that should still be precise and accessible to the public. If it is not, it will fall foul of the lawfulness requirement in the same way that the orders and directives guiding censorship of prisoners' mail were deemed unlawful in *Silver*.

The Commission went on to look at the standard to which domestic legal provisions must be held. This harks back to the approach taken in *Malone*, and particularly to the requirement that the lawfulness requirement in the various Convention rights demands that the domestic legal provisions in question accord with the rule of law. The Commission in *James* speaks of:

...terms and conditions which are in line with the Convention as a whole and with the particular purpose of the restriction on the right of property permitted by the second sentence of article 1 in particular.²⁶²

Essentially the requirement here is that there should be no arbitrariness in the actions of the state. The rule of law must be adhered to, so that what applies

²⁶¹ para 141

²⁶² para 143

to one citizen will apply to all citizens. Even where the state has discretion, the parameters of that discretion must be clearly defined.

The Commission went on to examine the provisions of the leasehold reform legislation against the test of lawfulness set out above, and ultimately found that the UK legislation was in line with the requirements of P1-1 in terms of both the transfer of ownership to lessees and also of the compensation available to landlords. When the case later came before the Court, it was happy to act largely in accordance with the views of the Commission. The applicants argued that a taking of property where compensation did not reasonably relate to the market value of the property at the time of the taking must be arbitrary in the meaning of the Convention jurisprudence, and accordingly that the actions of the UK in this instance fell foul of the lawfulness requirement of P1-1. The Court disagreed, considering:

There are no grounds for finding that the enfranchisement of the applicants' properties was arbitrary because of the terms of compensation provided for under the leasehold reform legislation.²⁶³

Essentially the Court, like the Commission, did not believe that payment of less than full market value in compensation rendered the compensation scheme "arbitrary." A decision to award compensation at a given level could be justified provided it was sufficiently clear what that level would be.

3.4.3 Key elements of the lawfulness requirement

Accordingly it appears that the three factors set out in the earlier jurisprudence as the determinants of lawfulness – namely a clear basis in domestic law, easily accessed by the public, resulting in foreseeable (or non-arbitrary) consequences – will apply equally in P1-1 applications. Importantly, compensation of less than market value will not be considered arbitrary provided the amount of compensation available and the reasons for setting it at such a level are clearly indicated. The jurisprudence subsequent to *James* in which issues of lawfulness have arisen tends to support this understanding of what is meant by "provided for by law," as shown in the following analysis.

²⁶³ Court opinion, para 67

3.4.4 Clear basis in domestic law

The lack of any clear basis in domestic law is an unusual ground for a challenge under P1-1, although it does arise occasionally. One short but useful example comes with *Vasilescu v Romania*.²⁶⁴ Here, the applicant's house was searched without a warrant by the Romanian militia and 327 gold coins were seized in connection with an investigation of her husband. The investigation was subsequently discontinued, but the seized items were not returned, despite the domestic courts ruling that the applicant remained the owner of the coins and that there was no legal justification for the state to retain them. Accordingly, a violation was found by the Court. More recently in *Islamic Republic of Iran Shipping Lines v Turkey*,²⁶⁵ the applicants were transporting arms to Iran on a Cypriot-owned vessel. The Turkish customs officials suspected organised arms smuggling and confiscated the ship and its cargo. The applicant appealed the decision of the customs officials in the Turkish security court. Despite the fact the Turkish Foreign Minister confirmed the arms were bound for Iran, and the Prime Minister of Turkey issued a statement saying that Turkey was not at war with any country, the court upheld the reasoning of the customs officials to the effect that Cyprus and Turkey were at war and that accordingly the confiscation was justified. In light of the evidence from the Foreign Minister and Prime Minister the Court saw no legal basis for the control of use.

In *Vasilescu* and *Islamic Republic of Iran Shipping Lines*, there was no real argument that any applicable legal rule existed to allow the actions of the state in the first place. A slightly different issue comes about where the state did have a legal basis for their actions initially, but that basis has come to an end for one reason or another. This situation can be seen in *Iatridis v Greece*,²⁶⁶ in which the applicant had leased and operated a cinema for some years before being evicted by the State as a result of a dispute over ownership of the land. Amidst the numerous legal complications in the case, the applicant obtained a domestic court decision quashing the eviction order, against which there lay no right of appeal. The State refused to vacate the

²⁶⁴ (1999) 28 EHRR 241

²⁶⁵ (2008) 47 EHRR 24

²⁶⁶ (2000) 30 EHRR 97

property on the grounds that the applicant had not obtained a "reinstatement order" for his return to the property, and cited also the ongoing dispute about the ultimate ownership of the piece of land.

The Court was very clear that it was not its role to adjudicate on issues of national law, which could only be ruled upon by the domestic courts. However, in simple terms, the Court noted that the applicant's property rights had been interfered with by the eviction order. The eviction order was therefore the legal basis for the interference. The eviction order had been quashed. Therefore there was no legal basis for the interference. A logical connection was drawn by the Court between lack of legal basis and lack of foreseeability of outcome. The underlying substantive guarantee of the lawfulness requirement was emphasised:

The rule of law, one of the fundamental principles of democratic society, is inherent in all the Articles in the Convention and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it.²⁶⁷

The failure of the State to comply with the decree quashing the eviction therefore resulted in arbitrariness.

It may also be appropriate to consider under this heading cases in which the state believes they do have a legal basis for their actions, but the Court considers that basis to be incorrectly applied or illegitimate given the circumstances of the case. This arose in two recent cases where the alleged legal basis in question was found to be incompatible in itself with the principles of the Convention. In the first, *Družstevní Záložna Pria v Czech Republic*,²⁶⁸ the Court determined that domestic legislation allowing a receiver to refuse sight of accounts and other business documents to a company in receivership (who sought to lodge an appeal) was incompatible with the right to a fair trial under article six. Accordingly, there was no legal basis for the interference with the applicant company's paperwork under P1-1. In the

²⁶⁷ para 58

²⁶⁸ (72034/01) 24 July 2008

second, *Russian Conservative Party Of Entrepreneurs v Russia*,²⁶⁹ the Court found that the Russian law on eligibility to stand for election violated article three of the First Protocol, which details the right to free elections. Accordingly, the forfeiture of the applicant's deposit on the basis of the faulty domestic regulations amounted to a violation of P1-1 without any legal basis.

A final point which has arisen here in a P1-1 context concerns the interaction of EC law and its implementation domestically with the rights contained in the Convention. In *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Sirketi v Ireland*,²⁷⁰ the applicant was a Turkish airline company who leased planes from Yugoslav Airlines. One of these aircraft was impounded by the Irish authorities following its arrival in Dublin. The impoundment occurred on the basis of EC Regulation 990/93, which implemented a UN Resolution adopting sanctions against the former Federal Republic of Yugoslavia in light of the armed conflict and human rights violations taking place there. The plane remained impounded for three of the four years for which the lease had been agreed. In its deliberations, a Grand Chamber accepted that a control of use had taken place here but was satisfied that the Regulation offered a clear legal basis in domestic law for that interference. The Regulation had direct effect in member states and did not require domestic implementation legislation. Ireland had no discretion as to whether the plane should be impounded; it was compelled to comply with the EC law.

3.4.5 Accessibility

Challenges under this head are even rarer and very few reported decisions of the Court under P1-1 touch on this issue. One recent example, however, appeared in the case of *Spacek v Czech Republic*.²⁷¹ The applicants here complained of an interference caused by a marked increase in their liability to income tax following on their change from single entry to double entry accounting. They argued that the change in tax rules was not contained within a publicly available piece of legislation, and accordingly that the lawfulness

²⁶⁹ (2008) 46 EHRR 39

²⁷⁰ (2006) 42 EHRR 1

²⁷¹ (2000) 30 EHRR 1010

requirement was not fulfilled. The Court noted that the rules on tax liability had been set out in the government's *Financial Bulletin*, which did not constitute a piece of legislation as such, but was designed to give official notice of changes in tax and accountancy regulations to those working in that sector of business and was distributed by the Czech state on that basis. The applicants had relied on such a bulletin to implement the book-keeping practice they had kept previously. Taking into account the nature of the applicant's business and the industry in which they operated, the Court was satisfied that the regulations had been sufficiently accessible to fulfil the lawfulness requirement of P1-1.

3.4.6 Foreseeability/Lack of arbitrariness

This is the most common ground of complaint as to lack of lawfulness in P1-1 applications. The usual context of the discussion is in relation to an exercise of discretion by the state which the applicant claims was incorrect, either because it overstepped the limits of that discretion or because the limits themselves were never clearly defined. One prominent example of this type of complaint is *Hentrich v France*.²⁷² The case was centred on the French General Tax Code, article 668 of which allowed the Treasury a right of pre-emption in any sale for which the price declared in the contract was considered by the Commissioner of Revenue to be too low. The intention behind the provision was to prevent cases of sale at a deliberate undervalue designed to evade liability to tax. The applicant in the case had bought land in Strasbourg in May 1979, only to have an action of pre-emption brought by the Commissioner of Revenue in February 1980.

It was a matter of agreement between the parties in the case that the applicant had been deprived of her property in the meaning of P1-1, and the question was whether the deprivation had been carried out in accordance with the restrictions set out in the article. Mrs Hentrich argued that the deprivation was arbitrary, and therefore unlawful, since no reason had been given by the Commissioner as to why he had decided to exercise his right of pre-emption. The Court had some sympathy with this argument.

²⁷² (1994) 18 EHRR 440

While the system of the right of pre-emption does not lend itself to criticism as an attribute of the State's sovereignty, the same is not true where the exercise of it is discretionary and at the same time the procedure is not fair.

In the instant case, the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the *Cour de Cassation* and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.

A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position – all elements which were lacking in the case.²⁷³

As the Court have so often stated in this regard, the existence of discretion is not in itself a barrier to the lawfulness requirement. However, the parameters of that discretion must be clearly defined. The problem in *Hentrich* was that they were not. It was impossible to say in a given situation whether the Commissioner of Revenue would exercise his right of pre-emption, and it was that lack of foreseeability that proved fatal to the lawfulness requirement in this case.

It might be noted that in the dissenting judgements of the case, there was some criticism of the Court's reasoning, particularly as regards the mention of "equality of arms".²⁷⁴ That issue should perhaps more properly be dealt with in terms of the right to a fair trial set out in article six of the Convention, and does not form a true part of the jurisprudence of P1-1.

A more recent example is *Smirnov v Russia*,²⁷⁵ in which the applicant's computer was retained as evidence in a criminal trial for over six years. The relevant evidence was allegedly contained on the computer's hard drive. The Court noted that the state criminal investigation authorities had the discretion to order retention of any object which they considered to be instrumental for

²⁷³ para 42

²⁷⁴ See the Partially Dissenting Opinion of Judges Ryssdal and Baka.

²⁷⁵ (71362/01) 7 June 2007

the investigation, a very wide test with no right of appeal available. The Court cast serious doubt on whether a provision this widely drafted could ever be in line with the lawfulness requirement of P1-1, although ultimately it was not necessary to decide the case on this point.

The Court has made clear that its role to adjudicate on issues of discretion will not extend to questioning the decision of a domestic court unless there is evidence of manifest unreasonableness on the part of that court. This point was recently reiterated in *Anheuser-Busch Inc v Portugal*.²⁷⁶

Confronted with the conflicting arguments of two private parties concerning the right to use the name “Budweiser” as a trade mark or appellation of origin, the Supreme Court reached its decision on the basis of the material it considered relevant and sufficient for the resolution of the dispute, after hearing representations from the interested parties. The Court finds no basis on which to conclude that the decision of the Supreme Court was affected by any element of arbitrariness or that it was otherwise manifestly unreasonable.²⁷⁷

This case neatly also provides authority for the idea that retrospective application of a piece of legislation will normally fall foul of this element of lawfulness, since it is not foreseeable that legislation will be applied in this way, and retroactivity does not conform to the rule of law. *Anheuser Busch* had argued that the decision of the Czech Supreme Court had the effect of retrospectively applying a bilateral treaty as to recognition of trademarks and trademark applications. The Court agreed that, had this argument been correct, that decision of the Supreme Court would have been arbitrary. However, in the event, the Court did not agree that any such retrospective application of the domestic law had in fact taken place.²⁷⁸

A final and perhaps obvious issue relevant to lack of foreseeability is the situation where domestic legal provisions are incorrectly applied by the state. This arose in *Lithgow v UK*.²⁷⁹ The allegation of misapplication of the law was made against the UK government by one of the applicants in the case, who complained that the statutory compensation scheme from which they were

²⁷⁶ (2007) 45 EHRR 36. For a summary of the facts, see discussion at 53 above.

²⁷⁷ para 86

²⁷⁸ para 84

²⁷⁹ (1986) 8 EHRR 329

entitled to benefit and which was based on a valuation of company shares at a specified period, had not been applied correctly since the shares in question were not valued at the relevant time. The Court suggested that if this complaint had been accurate, the lawfulness requirement would have been contravened. However, in the circumstances, the Court could see no difficulty with the valuation.²⁸⁰

3.4.7 The general principles of international law

The lawfulness requirement discussed above is not the only legal requirement contained in P1-1. A deprivation is not only subject to the conditions provided for by law, but also "by the general principles of international law." What exactly is meant by this provision has been the subject of much dispute.

It may assist to consider, in the first place, which general principles of international law might apply. The most relevant appear to be those relating to expropriation of foreign property.

The rule supported by all leading "Western" governments and many jurists in Europe and North America is as follows: the expropriation of alien property is lawful if prompt, adequate and effective compensation is provided for.²⁸¹

It should be noted, however, that this blanket rule is not accepted by all jurists as appropriate in all cases. It seems to be accepted, for example, that no compensation is necessary where property is seized by the police in the exercise of their powers or as a penalty for crimes. Additionally, the principle of national treatment, which provides that aliens are entitled only to the same treatment as nationals, may come into play here to suggest aliens are only entitled to compensation where an expropriated national would similarly be entitled to claim. A final point worthy of note is that compensation need not necessarily equate to the market value of the property taken in all situations. Particularly, where a state is taking steps towards nationalisation of an industry, it is understood that payment of full compensation in all cases would render the exercise impossible, and so some lesser degree of compensation

²⁸⁰ See paras 110 and 153 - 155.

²⁸¹ Brownlie (7th ed), p533-4.

would seem to be acceptable in order to allow the state to achieve their political goals.²⁸²

Some indication as to the meaning of the phrase in the context of P1-1 is given in the *travaux préparatoires*.

The Swedish delegation pointed out – and requested the fact be mentioned in these conclusions – that the general principles of international law referred to under article one of the protocol only applied to relations between a state and non-nationals. At the request of the German and Belgian Delegations, it was agreed that the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in the case of expropriation.²⁸³

The inclusion of this reference to the general principles of international law seems, then, to have been undertaken with a certain degree of clarity. In the first place, it is intended to apply only to deprivations, and not to the other forms of interference defined by the *Sporrong* three-rule approach to P1-1. Secondly, it applies only to expropriation of non-nationals. Thirdly, it necessitates the payment of prompt, adequate and effective compensation in respect of such expropriation. On its first consideration of this issue, in the case of *Gudmundsson v Iceland*,²⁸⁴ the Commission treated the phrase in exactly this straightforward manner.

Whereas the general principles of international law, referred to in article one, are the principles which have been established in general international law concerning the confiscation of the property of foreigners; whereas it follows that measures taken by a State with respect to property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing; whereas, moreover, in the present instance, the records of the preparatory work concerning the drafting and adoption of Article 1 of the Protocol confirm that the High Contracting Parties had no intention of extending the application of these principles to the case of the taking of the property of nationals.²⁸⁵

²⁸² It might be noted that generally speaking, however, payment of full and prompt compensation is necessary to meet the international law standard, with an exception in the case of natural resources: see generally Brownlie pp 509 - 520. The P1-1 standard may be less exacting: see the discussion at 3.6.6 below.

²⁸³ Committee of Experts, 18 July 1951

²⁸⁴ (511/59) 20 December 1960

²⁸⁵ para 19

However, an alternative interpretation which threw the preceding authority into some doubt came in the keynote case of *James v UK*.²⁸⁶ The applicants in this case accepted that, in previous jurisprudence, the Commission and the Court had been unambiguously of the view that the general principles of international law should not apply to the taking of property of nationals. However, the argument was that this view was incorrect, and that the general principles of international law should apply to the taking of property of foreigners and nationals alike. It was also argued by the applicants that the meaning of this phrase was that property could only be taken for purposes of public use, and that payment of prompt, adequate and effective compensation should be made.

The Commission gave very detailed consideration to the arguments put forward by the applicants. It noted that there were a number of ways of interpreting the term as it was laid out in P1-1, and affirmed the approach to date:

Everyone is entitled to the protection of international law by virtue of article one, but only in respect of acts in relation to which such law applies, namely the acts of States other than his own.²⁸⁷

The Commission accepted that in general the Convention set out to accord rights equally to all, and that accordingly it should be slow to favour an interpretation of the protection offered by P1-1 which discriminated dependent on the nationality of the parties involved. However, such discrimination could be justified in this instance. The taking of property by the state had different implications for a national than it would do for an alien; particularly, a state might be entitled to place a greater burden on its own nationals since, ultimately, they would likely benefit from the "public interest" served by the deprivation in a way which a non-national would not. Additionally, it was accepted that the Convention incorporated compliance with the rule of law amongst its tenets. Why, then, should other legal principles beyond the specific content of the Convention itself not also be incorporated? In the case of P1-1, the Convention has specified that both domestic and international law

²⁸⁶ (1984) 6 EHRR CD 475 (Commission) and (1986) 8 EHRR 123 (Court).

²⁸⁷ para 113

should be respected. There is nothing in the incorporation of those principles to suggest that they should be extended to persons to whom they would not usually apply.

The Commission, then, did not see any reason, on the basis of the wording of P1-1, to extend the principles of international law to nationals. It considered that this viewpoint was supported by an examination of the *travaux préparatoires*. It noted, as discussed in chapter one above, that an express right to compensation in all cases had been included in the initial drafts of P1-1, but had subsequently been removed since several signatory states had refused to subscribe to a property right which contained such an obligation. Indeed, there had been clarification that the reference to international law here was designed to apply only to aliens.²⁸⁸ A review of these materials led the Commission to conclude:

The reference to international law was not intended to apply to nationals. Indeed, [the Commission] finds it inconceivable that a Resolution in these terms would have been adopted if the intention had been that they should apply to nationals.²⁸⁹

Unsurprisingly, the Commission therefore concluded that the reference to the general principles of international law should be construed, as it previously had been, as applying to aliens and not to nationals.

The matter was debated once again by the Court. Again, the Court looked at the grammatical construction of P1-1, with the conclusion that:

The Court finds it more natural to take the reference to the general principles of international law to mean that the principles are incorporated into P1-1, but only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals. Moreover, the words of a treaty should be understood to have their ordinary meaning, and to interpret the phrase in question as extending the general principles of international law beyond their normal sphere of applicability is less consistent with the ordinary meaning of the terms used, notwithstanding their context.²⁹⁰

²⁸⁸ see para 119

²⁸⁹ para 119

²⁹⁰ Court decision, para 61

The applicants went on to argue that an application of the terms solely to aliens would mean the inclusion of the terms in P1-1 was entirely redundant. The general principles of international law already applied to expropriation of non-nationals – why reiterate that fact in the wording of the article itself? The wording must have been designed to add something more, namely by extending the principles to expropriation of nationals.

Again the Court disagreed. It pointed out that including these principles in P1-1 allowed non-nationals to assert their rights directly through the Convention, rather than having to use an alternative route to enforcement through international law. Additionally, the inclusion of the wording ensured no diminution of the rights of aliens; there could be no argument their rights were overridden by the new provisions of P1-1.

Finally, the applicants again argued that application of these principles only to aliens would mean discrimination on grounds of nationality. The Court reiterated that such discrimination could competently occur where there was objective and reasonable justification. Such justification could easily exist in this context.

To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.²⁹¹

The argument here seems to be that if the state expropriates property for some national good, a national will ultimately gain some benefit from that good. An alien, however, will not.

The Court also referred to the *travaux préparatoires*, reaching the same conclusion as the Commission, namely that the *travaux préparatoires* offered no support for the interpretation argued for by the applicants. Finally, the Court was of the view that practice amongst signatory states subsequent to

²⁹¹ para 63

the introduction of P1-1 tended to support the interpretation of the terminology contended for by the Commission.

The Court ultimately concluded that the general principles of international law are not applicable to a taking by a state of the property of its own nationals.

It should be noted that the Court's decision here does not imply that compensation will never play a part in cases of deprivation of nationals. As will be seen below, compensation has an important role in the process of determining whether an interference is proportionate or not.²⁹²

Whatever may be the substantive merits (or otherwise) of the Court's ruling on the non-applicability of the general principles of international law to nationals, the rule at least has the benefit of certainty: expropriated aliens are entitled to compensation under this head; expropriated nationals are not. However, even this clear cut policy line was thrown into some confusion by the case of *Gasus Dosier v Netherlands*.²⁹³

Gasus was a German company who had agreed to sell a cement mixer to a Dutch company, Atlas. Payment for the mixer was to be made in instalments, and a retention of title clause was inserted into the contract of sale, which stated that Gasus would remain the owner of the mixer until such times as Atlas had paid its debt in full. Atlas made one payment, and was then subject to enforcement proceedings at the hands of the Dutch tax authorities, to whom it was significantly in debt. The Dutch tax authorities seized the mixer and sold it, using the proceeds in part satisfaction of Atlas's debt.

Gasus argued that it, an alien, had been deprived of its property by the Dutch state. It was clear that in both Dutch and German law, a retention of title clause maintained the seller as the owner of the property until such times as the buyer had purified the conditions of the contract. There was no dispute, therefore, that Gasus was the owner of the mixer. However, no compensation was forthcoming.

²⁹² See page 154 et seq.

²⁹³ (1995) 20 EHRR 403

At the Commission stage, it was accepted that the seizure and subsequent sale of the mixer amounted to a deprivation of the applicant's right of ownership. The deprivation was lawful in the sense of P1-1. The Commission accepted that, as an expropriated non-national, Gasus would normally be entitled to compensation in terms of the principles of international law. However:

The deprivation of property which occurred cannot be compared to those measures of confiscation, nationalisation or expropriation in regard to which international law provides special protection to foreign citizens and companies.²⁹⁴

Under subsequent review by the Court, it was decided that the actions of the Dutch state did not amount to a deprivation, but rather "a control of the use of property...to secure the payment of taxes." The general principles of international law were therefore not considered, presumably because they apply only to deprivation in terms of the first paragraph of P1-1, and not to control in terms of the second paragraph.

It is difficult to know what to make of this decision. George Gretton has read it critically to suggest that the general principles of international law, explicitly stated in *James* not to apply to expropriated nationals, were implicitly stated in *Gasus* not to apply to aliens either.²⁹⁵ After all, Gasus was an alien deprived of its property, and no compensation was forthcoming. However, given the statement by the Commission that the deprivation in question was not one to which the general principles of international law applied, there may be an alternate argument. The "deprivation in question", namely the deprivation of ownership qualified by a retention of title clause, may not be a deprivation to which the principles of international law do or have ever applied. This deprivation falls into one of the categories for which expropriation of aliens does not give rise to compensation under the general principles of international law. A second alternate argument is also possible, based on the Court's judgement. It could be argued that that the general principles of international law are entirely irrelevant to the judgement, given that the action

²⁹⁴ para 63 Commission decision

²⁹⁵ *The protection of property rights* in Boyle, Himsworth *et al* (eds), Human Rights and Scots Law (Hart Publishing, 2002) 275-292

in the case was deemed a *control* rather than a deprivation. Admittedly the characterisation of the State's actions here as a control is problematic for the reasons more fully outlined in chapter above,²⁹⁶ although it can be seen that the Court have a tendency to deal with expropriation of aliens in this convoluted manner: see, for example, the *AGOSI* case, also discussed above.²⁹⁷

There is no question that the situation is confused. However, given the view of both the Commission and the Court in *Gasus*, it may be better to consider the decision here to be restricted to the particular case of retention of title, and to say that the general principles of international law apply in entitling expropriated aliens to compensation in the same way that they have always been thought to do. This approach also has the benefit of preventing this term in P1-1 from being rendered obsolete. In any event, the decision in *Gasus*, though difficult to reconcile with the terminological breakdown of P1-1 offered by the jurisprudence, is perhaps closer to the spirit of the protection than an alternative approach would have been.

3.4.8 Conclusion

The most basic conception of a protection of property suggests that any interference with the right must, at a minimum, be lawful. This idea is encapsulated within the wording of P1-1 itself. In developing an understanding of its application in the P1-1 context, the Court built upon the construction of the requirement that had been employed in relation to similar terms in other articles of the Convention. Using this foundation, the test the jurisprudence developed in connection with the property contained three key elements:

- (i) A clear basis in domestic law;
- (ii) Freely accessible to the public;
- (iii) Producing a foreseeable (non-arbitrary) result both in terms of the action taken by the state and the consequences for the individual.

²⁹⁶ See page 85 - 88 above.

²⁹⁷ See page 102-4 above.

It is interesting to note that the development of this step of the P1-1 decision-making process was effectively accelerated by the need for lawfulness in other areas of the Convention. Unlike certain other aspects of the property right – for example, the three rule approach outlined above – the issues which arise here are not peculiar to protection of property, and so the jurisprudence was able to build on pre-existing case law in a way which would not be possible elsewhere. The result would seem to be a step in the process which has been defined with relative clarity and which is clearly in keeping with the aims envisaged by the authors of the Convention.

The position here contrasts sharply with the confusion which still surrounds the reference in the text to the general principles of international law. The difficulty here can be traced back directly to the dispute between delegates drafting the Convention as to whether compensation should be an essential requirement in every case where deprivation of possessions had occurred. It is possible to draw a tentative conclusion that these general principles should only apply to expropriation of non-nationals, although the judgment in *Gasus* tends to muddy the water somewhat. Without the jurisprudence of other articles of the Convention to build on, it can be seen that the evolution of the Court's understanding of P1-1 is less speedy, and less certain, resulting in a protection which is less effective.

3.5 Is the interference in the public/general interest?

From the first discussions about including a property protection in the Convention, it has been clear that the right cannot be absolute. Signatory states may have any number of entirely legitimate reasons for controlling the use which is made of private property, from obvious examples such as taxation and planning to more broad-ranging political policies relevant to economic regeneration or climate change. There was never an intention to restrict the ability of signatory states to exercise their powers in this regard where it is necessary *for the national good*.²⁹⁸

²⁹⁸ See pages 19-32.

This idea is encapsulated in two separate phrases in P1-1. Firstly, in paragraph one:

No one shall be deprived of his possessions except in the public interest [...]

Paragraph two provides that:

The preceding provisions shall not 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 [...]

As discussed in chapter two above, these two terms – "public interest" and "general interest" – seem to have been used interchangeably by the former Commission and the Court.²⁹⁹

3.5.1 Development of the requirement of public/general interest

A useful place to begin any discussion on the use of this phraseology is the keynote case of *Handyside v UK*.³⁰⁰ As discussed above, this case concerned the confiscation and subsequent destruction of a number of copies of a publication called *The Little Red Schoolbook*, which dispensed "real life" advice to school-aged children on subjects including sex and drugs. The case is interesting in its examination of "public interest" since it sets up a juxtaposition of the term's use in two different articles of the Convention. Article ten, which contains the right to freedom of expression, was the basis of one of the challenges in the case. That article allows interference with the right in certain circumstances, outlined in the second paragraph of the article:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the

²⁹⁹ See page 91-92 above.

³⁰⁰ (1979-80) 1 EHRR 737

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As can be seen, the article itself specifies a finite number of justifications which can be relied on by a signatory state in respect of any interference with the primary right encapsulated in the article. In this particular case, the UK authorities had seized the book under the Obscene Publications Act and had relied expressly on the idea of "protection of health or morals" since the initial confiscation. This was ultimately accepted as sufficient justification for the interference with the right to freedom of expression by the Court.

In contrast, P1-1 has no such defined list. Taking that into account, the Court considered that it must:

...restrict itself to supervising the lawfulness and the purpose of the restriction in question...the aim of the seizure was 'the protection of morals' as understood by the competent British authorities in the exercise of their power of appreciation. And the concept of 'protection of morals', used in Article 10 (2) of the Convention, is encompassed in the much wider notion of the 'general interest' within the meaning of the second paragraph of Article 1 of the Protocol.³⁰¹

The Court seemed satisfied that if a justification had been given that was specifically listed as relevant under article ten, then that must also be sufficient justification for an interference with P1-1. The Court does not go any further in defining what the limits of the public interest requirement might be beyond the contents of the article ten list.

For further guidance on that point, we must turn once again to *James v UK*.³⁰² It is here that we see for the first time in connection with P1-1 the "margin of appreciation" which plays such a notable role in other areas of Convention protection. In considering whether the leasehold reform scheme met with the "public interest" test, the Court commence by noting:

³⁰¹ para 62

³⁰² (1986) 8 EHRR 123

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and the remedial action to be taken.³⁰³

As in other areas where the margin of appreciation plays a part, the Court considers its role here to be essentially supervisory. State governments have been elected by the citizens on the basis of their politics and policies. It is not for the Court to substitute its opinion for that of a democratically elected parliament. The Court goes on to say:

The notion of public interest is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgement as to what is "in the public interest" unless that judgement be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No.1 and, in so doing, to make an enquiry into the facts with reference to which the national authority acted.³⁰⁴

The level at which the Court will intervene, then, seems to be the stage at which the action of the State is "manifestly without reasonable foundation." Evidently this sets the standard of proof at an extremely high level, particularly when considered alongside the fact that the Court is seemingly willing to accept any explanation of the public interest involved at face value. So, for example, in *James*, the Court found that the state's justification for the scheme of leasehold reform was the aim of rectifying the social injustice caused by this outmoded system of property tenure which allowed landlords the sole benefit of the efforts and expenditure of their tenants. The Court did not investigate whether this was, in fact, a social injustice, despite

³⁰³ para 46

³⁰⁴ para 46

protestations on the part of the applicants, but rather concluded that the argument presented by the UK government was stateable, and on that basis could not be said to be without reasonable foundation. The public interest requirement was accordingly fulfilled.

The same concept was applied to the "general interest" in *Mellacher v Austria*.³⁰⁵ The challenge here was raised by landlords in respect of new rent control legislation, which the Austrian government again argued was intended to redress a social injustice, although the applicants argued that no such injustice existed. The Court again noted that, particularly in matters of property legislation, the range of political, economic and social factors to be taken into account was likely to be extensive, and that housing in particular was likely to be of central concern. It went on to state:

In order to implement [housing] policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The Court will respect the legislature's judgement as to what is in the general interest unless that judgement be manifestly without reasonable foundation.³⁰⁶

The Court is highlighting the discretion here of the government both to identify the existence of a problem and also to decide on an appropriate course of action to deal with it. The Court again concluded:

The explanations given for the legislation in question are not such as could be characterised as being manifestly unreasonable.³⁰⁷

3.5.2 The political dimension of the interest test

The Court's absolute unwillingness to be drawn into any evaluation of the public interest justifications put forward on the part of the state does leave serious question marks over the purpose of having this requirement in P1-1 in the first place. There is certainly an argument that states are engaged in a

³⁰⁵ (1990) 12 EHRR 391

³⁰⁶ para 44

³⁰⁷ para 47

"box-ticking exercise" here. Provided the state can provide some sort of reason for their actions that does not appear entirely spurious, the Court will be satisfied, even where the alleged public need is argued not to exist.

The obvious difficulty, however, with the Court taking more of an interventionist approach as regards P1-1 decision-making is that decisions as to the existence or otherwise of public interest are, almost of necessity, political. The application of the doctrine of margin of appreciation here is not a straightforward abdication of responsibility by the Court. In many ways, it is an important element of protection of the separation of powers. Simply put, the electorate of a signatory state did not vote to be governed by the European Court of Human Rights.

Consider, for example, the complex politics of a case like *Stran Greek Refineries v Greece*.³⁰⁸ Here, the applicants had concluded a contract with the Greek state during a time in which it was governed by military junta. Once democratically elected government was resumed, they sought to undo some of the actions of the junta which they believed to have damaging economic consequences for the country, and the contract with the applicants was one such action. The contract contained an arbitration clause, and both parties attended arbitration in accordance with it, with an award finally being made in favour of the applicants to compensate them particularly for expenses they had already accrued in connection with the contract. However, the arbitration award was subsequently quashed by the Court of Cassation on the grounds that it was unconstitutional.

The argument put forward by the government in terms of the public interest aim of their actions was very strong. Undoing the applicant's contract was one of a series of measures designed not just to undo the economic damage caused by the junta, but also to:

³⁰⁸ (1995) 19 EHRR 293

Cleanse public life of the disrepute attaching to the military regime and to proclaim the power and the will of the Greek people to defend the democratic institutions.³⁰⁹

Essentially the government sought to argue that undoing contracts such as the applicants' had the aim of removing the legitimacy which might otherwise be seen to attach to the brutal actions of the military junta.

The applicants did not accept this contention, submitting that it would not be fair to label every contract made with a dictatorship invalid once that dictatorship fell from power.

The argument that was made by the Greek state here involved fundamental political questions that went to the heart of governance of the country during a time of serious instability. It is extremely difficult to see how it could be the role of the Court to step in here and undermine what the government contended to be a fundamental step on the road to legitimacy of the state. The opposite view put forward by the applicants in the case is essentially an alternative political interpretation. It is surely the political view of the elected government which must prevail in such a situation. Of course, it may have been helpful if the court had expressed its view on the public interest question here in those kinds of terms. In fact it hardly commented on the arguments, but focussed rather on the overall question of fair balance.

3.5.3 Objective application of the test?

If it is accepted that political questions of public interest are not appropriate for the consideration of the Court, are there other areas where a more objective intervention may be both possible and justified? One situation in which there may seem to be greater scope for Court involvement is where the action taken by the state does not, in fact, appear to promote the public interest which the state contends was its purpose. If the hypothetical state were to declare an aim of increasing housing provision for a homeless population, but had taken the action of expropriating property which members of the cabinet subsequently used as a holiday home, the action could not be said to fit with

³⁰⁹ para 70

the stated aim. Again, though, the jurisprudence suggests that the Court will take an entirely "hands-off" approach in the face of such arguments. A demonstration of the same is given in the very different circumstances of *Pressos Compania Naviera v Belgium*³¹⁰ and *Holy Monasteries v Greece*.³¹¹

Pressos concerned retrospective legislation which deprived applicants of the right to enforce court decrees for damages which had previously been awarded. Amongst the various complaints made by the applicants, it was argued particularly that the retroactive effect of the legislation could not be justified by any of the public interest arguments put forward by the Belgian government. These interests were protection of the state's financial interests, the need to re-establish legal certainty in the field of tort and the harmonisation of Belgian law with that of the Netherlands in the same area. On the face of it, it is certainly difficult to see what purpose retrospective application could serve in relation to the public interest arguments outlined. Additionally, it should be borne in mind that all the provisions of the Convention are intended to conform to the rule of law, and retrospectively applied legislation would not normally fall within that category.

However, it is impossible to explore the matter much further, since all argument was swept aside at the level of both the former Commission and the Court. The Court generically noted that that wide margin of appreciation is available to national authorities both as regards the identification of a need and the methods used to resolve it, and that the Court should not interfere unless the actions of the legislature:

Be manifestly without reasonable foundation, which is clearly not the case in this instance.³¹²

There is no more detailed analysis of which of the public interest arguments related to the retroactivity of the application. It appears that, provided the state

³¹⁰ (1996) 21 EHRR 301

³¹¹ (1995) 20 EHRR 1

³¹² para 37

offers some sort of argument explaining the reasons behind their chosen course of action, the Court will be satisfied.

A perhaps even more borderline case was *Holy Monasteries v Greece*,³¹³ where the Greek state enacted legislation which transferred a large part of the patrimonies of each of eight monastic estates to the state. The public interest argument presented in respect of this was to end illegal sales of the relevant land, encroachment upon it, and abandonment, and instead to redistribute the land to some of the most needy into society who could help to build the agriculture industry. The applicants argued that the land was not, in fact, being transferred to destitute farmers and therefore serving a social purpose, but rather to agricultural co-operatives who stood to make a lot of money. The Court's view was as follows:

The optional nature of the transfer of the use of land to farmers or agricultural co-operatives and the inclusion of public bodies among the beneficiaries of such transfers might inspire some doubt as to the reasons for the measures, but they cannot suffice to deprive the overall objective of [the legislation].³¹⁴

The wording here is telling. Even though the Court appears to concede that it is dubious that the state are using the land for the purpose they have presented, nonetheless the Court does not feel it is appropriate for the Court to interfere.

3.5.4 Absence of public/general interest

The jurisprudence shows us, then, that public and general interest are used interchangeably, and that their scope is a matter which falls within the margin of appreciation of state governments. The Court will not adjudicate on whether the reasons put forward by the state are, as a matter of fact, in the interests of the country, since this is deemed to be a political question. The Court will not investigate whether a need identified by the state as justifying an interference does actually exist as a matter of fact. The Court will not even assess whether

³¹³ (1995) 20 EHRR 1

³¹⁴ para 69

the public interest founded upon by the state is being served in any way by the state action.

What, then, is the purpose of this requirement suppose to be? Does it serve any meaningful function whatsoever?

At its very barest, it can be seen that the requirement compels states to offer some reason for their action where it constitutes an intervention with the property right. In *Zwierzynski v Poland*,³¹⁵ the applicant complained of a series of court actions pursued by the state with the clear aim of delaying the return to him of land which had been expropriated almost 50 years previously. The state's defence to the application did not deal with the interference as such, arguing rather that the applicant had no possession capable of protection under P1-1.³¹⁶ This argument was rejected by the Court, who went on to categorise the interference as a deprivation of possessions, before stating:

The Court finds no justification for the situation in which the public authorities have placed the applicant. The Court is unable to discern in this particular case any serious "reason of public interest" to justify deprivation of property.³¹⁷

3.5.5 Criticism of the Court's approach to the interest test

Accordingly it seems clear that *some* public interest argument must be made by the state. Is that all that is required, a bare statement of interest served? This would not appear to offer any meaningful protection. The property right was designed to prevent totalitarian regimes from removing property from political opponents as a means of silencing their voices. To take an extreme example, imagine a white supremacist party came to power in a signatory state, perhaps through dubious means or as the result of a state of emergency. That party could pass a law removing all property from ethnic minorities, arguing that it would be in the best interests of society as a whole for white people to own the land, since white people were better equipped to exploit the land, which would in turn allow the economy to thrive. Based on

³¹⁵ (2004) 38 EHRR 6

³¹⁶ See discussion at page 52 above.

³¹⁷ para 72

the jurisprudential analysis offered above, a P1-1 application would not succeed on *Zwierzynski* grounds, since a public interest argument has been made. The Court would not question the political motivation underscoring the white supremacist action, since that is a matter falling within the state's margin of appreciation. The Court also would not investigate whether as a matter of fact white people were better equipped to exploit the land, or whether this was likely to benefit society as a whole. Could an action which is so clearly a method of racially motivated attack be considered to comply with the human rights standards set by P1-1, at least as far as this step of the process is concerned?

It would be hoped that this is the type of situation in which the action of the state would be found "manifestly without reasonable foundation," in the wording suggested in *James*. The use of that terminology suggests there is some minimum, objective moral standard to which the notion of "public interest" will be held, and a clear act of persecution such as the one given in the hypothetical example would not meet that minimum standard. The fact that no such case has yet come to light in the Strasbourg jurisprudence could be construed as a positive outcome of the fact that such acts of violence have not been carried out by states signatory to the Convention.

The difficulty here is clearly in finding a balance between political autonomy and minimum human rights standards. P1-1 is essentially an economic right. In the economic context, there is no universal consensus around one particular set of values such as may be found in other areas governed by the Convention. There is no agreement amongst politicians, economists, academics and so on as to the appropriate manner in which to regulate planning, or operate systems of land reform, or allow for economic growth. The types of issues likely to arise under P1-1 are almost by definition political in nature, and in that context, it is not only justifiable, but *desirable* that the margin of appreciation should be sufficiently widely drawn as to allow elected governments to pursue their own political agendas.

Clearly there is still work to be done in determining the correct limits of this requirement in respect of P1-1. It does not seem entirely obvious, for example, why the Court could not conduct more analysis as to whether the action of the state could, on any argument, be said to meet the public interest argument put forward in justification of that action. It is to be hoped that the rigour of the public interest requirement is enhanced to an extent that the requirement does not become meaningless, whilst the need for political autonomy amongst member states continues to be respected.

3.5.6 Taxes and other penalties

One other justification for State control of possessions is set out in the second paragraph of P1-1.

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.

The way in which this section is phrased, as is so often the case with P1-1, leaves it open to perhaps more than one interpretation. It could be said that the general right to protection of possessions can be interfered with, first, where the state wishes to enforce control laws in the general interest. Secondly, it can be interfered with where the state wishes to secure the payment of taxes or other penalties. This would seem to suggest that, where payment of taxes, other contributions or penalties is the reason for the interference, no general interest requirement has to be met. With tax, there is perhaps an argument that the "general interest" is inherent in any system of taxation, at least in the sense in which the phrase "general interest" has been interpreted by the Court (in other words, any interest the state says it has, whether it is in the general good or not.) Accordingly, it seems germane to examine the meaning of this phrase together with the other element of the public interest test. Is collection of taxes an alternative third step in the decision-making process which removes the need for state action to be carried out in the public interest?

This section of P1-1 is perhaps the least judicially considered of them all, but the few authorities that do exist suggest that the provision has not been interpreted in the way outlined in the preceding paragraph. Useful elaboration was provided by the decision of the former Commission in *Gasus Dosier v Netherlands*,³¹⁸ the facts of which are discussed in some detail above.³¹⁹ The Commission were of the view that a tax confiscation still required to be in the public interest and could be characterised as a deprivation. It is interesting to note that the one of the opinions in dissent in the Commission stated:

Leaving aside the sheer economical interest of filling the treasury, which cannot be meant by that provision, I can think of no "public interest" which could be used to justify such an expropriation as there exists no link whatsoever between the claims of the Dutch tax authorities and the applicant company's possessions.³²⁰

The majority of the Commission appeared to accept, however, that "filling the treasury" was in the public interest if the state said it was.

The Court took a different approach, determining that since the interference had come about as a result of the tax authorities' exercise of their statutory powers, the appropriate head under which to consider the case was "securing the payment of taxes." It is not entirely clear where this "head" is supposed to fit within the *Sporrong* three-rule approach. Is it a subset of "control"? It is never made clear. The Court emphasises that it is considering a "procedural" tax law, meaning one which details how taxes may be collected, rather than a substantive law setting out what tax will be due. As usual, the Court highlights the wide margin of appreciation open to member states in the exercise of their discretion, particularly:

...with regard to the question whether – and if so, to what extent – the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are to

³¹⁸ (1995) 20 EHRR 403

³¹⁹ See page 125-7 above.

³²⁰ Dissenting opinion of Mr S Treschel joined by MM C.L Rozakis and J-C Geus.

enforce commercial debts. The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation.³²¹

The collection of tax debt is considered:

...clearly in the general interest.³²²

A discussion of proportionality followed in the usual way with the result, as outlined above, that no violation was found to have taken place.

One case which focussed primarily on issues of taxation was *National and Provincial Building Society v UK*.³²³ There were a number of applicants in this case, each of whom was a building society, complaining about new legislation regarding the tax levied on savings accounts. Each applicant had paid the Inland Revenue a lump sum annually to represent the tax levied on savings held by their customers. The annual period over which the tax was assessed related to the accounting period of each of the building societies in question, and the various accounting periods began and ended on different months of the year. The government then introduced new legislation in terms of which the tax would be assessed over a period of one fiscal year, from April to April. After the legislation was in force, it became apparent that the changeover in rules left some "gap periods" - for example, where an accounting period ended in January, there would be a period of three months where no tax was assessed until the fiscal year began in April. The government retrospectively introduced transitional provisions to deal with this. The applicants paid the tax assessed under these transitional provisions whilst arguing that they were unlawful, and following a domestic judicial review process applied to the Court arguing *inter alia* that this payment of tax as a result of retrospective tax legislation was a violation of P1-1.

The former Commission and the Court took slightly different views, but both reached the same conclusion, namely that there had been no violation.

³²¹ para 60

³²² para 61

³²³ (1998) 25 EHRR 127

The Commission, for its part, viewed the situation as falling within the third rule, which

Explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes.³²⁴

It was satisfied that the use of the legislation to give effect to the initial legislative intention was sufficient to satisfy the interest requirement and were quite clear that the idea of retrospective legislation was not in itself enough to suggest that a fair balance had not been struck where it concerned taxation (even though it conceded that in *Pressos Compania Naviera*, retrospective legislation introduced with the intent of denuding the power of a court decree had constituted a violation.) The justification for this special treatment of tax legislation seemed to be founded on the fact that the UK government had some history of introducing retrospective tax law, combined with the fact that the applicants would have received a windfall benefit in tax avoidance over the gap period but for the retroactivity. The legislation corrected the lack of fair balance that the windfall benefit would otherwise have created.

The Court was of the view that it would be:

...the most natural approach to examine their complaints from the angle of a control of the use of property in the general interest to secure the payment of tax, which falls within the second paragraph of [P1-1].³²⁵

The Court found:

...an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax payment regime and do not deny the Exchequer revenue simply on account of inadvertent defects in enabling tax legislation.³²⁶

³²⁴ para 69

³²⁵ para 79

³²⁶ para 81

The strength of this public interest and the need to prevent a windfall benefit was sufficiently strong to strike a fair balance between the needs of society and the burden placed on the applicants.

Both the former Commission and the Court spoke of the public interest served by tax legislation in fairly strong terms here, but it may not be the case that this is a rule of general application. In *National and Provincial*, the complaint was made by large financial institutions effectively trying to evade paying a few months worth of tax which they had always known they should be paying in the first place as a result of a change from one complex, technical area of law to another. To have found in favour of the applicants here might have upheld the letter of P1-1, but it would seem hardly to be in line with the spirit of the provision.

It seems, then, that the reference to "taxes and other penalties" should not be considered as an alternative to the public interest test. State action cannot be *either* in the public interest *or* taken in order to collect taxes and other penalties. The case law discussed above suggests that, in fact, collection of taxes is an aspect of control of use which must satisfy the interest test in the normal way. It appears unlikely that collection of taxes would ever fail this test, however.

3.5.7 Conclusion

The third step in the decision-making process is perhaps the one which most closely expresses the conflict inherent in the existence of a right to protection of property, and the one which raises the most questions as to the true strength of such a right. The need for interference by the state to pursue a legitimate aim in the public or general interest is clearly stated in the text of P1-1. Building to some extent on the guidance given in other articles of the Convention as to what might constitute, such an interest, the Court developed a test which offered member states a very wide margin of appreciation in determination of whether and where this type of interest might exist. In keeping with the respect for political autonomy which it is recognised must be retained by member states, the Court has shown a marked reluctance to

intervene where it is argued by an applicant that this test has not been satisfied, and it seems that only a complete failure to advance any public/general interest on the part of the state will result in an adverse finding in respect of this step of the decision-making process.

The width of the margin of appreciation extended by the Court to signatory states here is open to question. In the first place, it is difficult to understand why this discretion is considered to extend to virtually all questions surrounding public interest, particularly as to whether that interest is actually promoted by the action taken by the state supposedly in furtherance of it. In situations where such objective questions are raised, it is arguable that the Court should play a genuinely adjudicative role. The political interests pursued by signatory states do, eventually, come up against the hard limit of manifest unreasonableness. Although it is reassuring that the Court recognises the existence of such a limit, a degree of dubiety exists over whether or when state action will fail to meet up to this test.

As with the previous steps in the decision-making process, it is apparent that the Court's understanding of this element of the property protection has taken some time to develop, and it is recognised that this step is the area in which the central conflict in P1-1 must be most closely negotiated. The examination of the case law here suggests that perhaps this evolution has, to date, tended more towards the interests of the state to the extent that it is unclear whether the aims of the property protection, as imagined by the Convention's authors, can genuinely be realised by application of the interest test in its current form.

3.6 Is the interference proportionate to the aim sought to be achieved?

The final step the Court will take in determining whether an interference with P1-1 can be justified is applying the test of proportionality. Is the interference proportionate to the aim sought to be achieved? The essence of proportionality is that one person should not be asked to bear an individual and excessive burden for the sake of the greater good of broader society.

3.6.1 Development of the proportionality test

*Sporrong and Lönnroth v Sweden*³²⁷ is again a useful place to begin the discussion of proportionality in a P1-1 context. In reviewing the compliance of the expropriation permits with P1-1 in that case, the Court set out the general rule:

The Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1.³²⁸

By way of precedent, the Court cited the *Belgian Linguistic Case (No. 2)*.³²⁹ This authority dealt not with P1-1, but rather with the right to respect for private and family life under article eight and the right to education under article two of the First Protocol.³³⁰ The applicants were parents of Belgian schoolchildren who believed that the legislation governing the "official" languages allowed to be used for teaching in schools violated their rights under these articles of the Convention. The difficulty was that French was not recognised as an "official" language in certain parts of Belgium (although it was so recognised in others.) A school teaching in an "unofficial" language would not receive the government funding provided to other schools. In exploring the extent of the right to education and considering in particular whether a right to education in a given language was enshrined in P1-2, the Court made the following observation:

The right to education guaranteed by the first sentence of Article 2 of the Protocol by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.

The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights was to

³²⁷ (1983) 5 EHRR 35

³²⁸ para 69

³²⁹ (1968) 1 EHRR 252.

³³⁰ Hereinafter referred to as P1-2

provide effective protection of fundamental human rights, and this, without doubt, not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter.³³¹

The Court implies here, as elsewhere, that the notion of proportionality is inherent in the Convention itself.

So how does the Court ascertain whether the test of proportionality has been satisfied? Essentially, this is a balancing exercise, where the needs of the community served by the interference are on one side of the scales, and the burden to be undertaken by the person (or persons) concerned lies on the other. The Court tends to look at a number of factors in order to decide whether the balance lies where it should do. More than any of the previous three steps, the question of proportionality tends to turn very much on the facts of the particular application at hand, and the Court will sometimes go through all the pros and cons of the situation in considerable detail.³³² Thought will be given to alternative mechanisms by which the state could have achieved the same aim³³³ and to the processes used in similar situations in alternative jurisdictions.³³⁴ The conduct of the parties may be relevant, particularly where the interference by the state has been triggered by suspicion of fraud.³³⁵ Any number of other issues may come into play, and it is impossible to give an exhaustive list. However, some common factors can be established, namely: the nature and importance of the aim sought to be achieved by the interference; the right to any process of appeal in the domestic jurisdiction; the nature and extent of information available to the applicant relevant to state action prior to the action being taken; attempted mitigation of any loss on the part of the applicant, and; the availability and

³³¹ para 5.

³³² For one of any number of examples, see *Immobiliare Saffi v Italy* (2000) 30 EHRR 756

³³³ *Hentrich v France* (1994) 18 EHRR 440

³³⁴ *Hentrich v France, ibid*; *AGOSI v UK* (1987) 9 EHRR 1

³³⁵ *Hentrich v France, ibid*; *AGOSI v UK, ibid*.

extent of any compensation in respect of the interference. Each of these shall be considered in turn.

3.6.2 Aim pursued by the interference

The purpose of the interference, as argued by the state, will inevitably be taken into account in determination of the proportionality question. If state action has been taken with the view to addressing a pressing social need, then this will tip the scales of proportionality much further in favour of the state than if something of less critical importance is being attempted. This makes sense: if the needs of the community are both urgent and fundamental, then one individual might reasonably be expected to undertake more of a burden to meet those needs without it being considered "excessive". The test is relative.

One useful example of this principle can be found in the case of *Mellacher v Austria*.³³⁶ This dispute arose from the introduction of new Austrian rent control legislation which capped rent increases at a certain level. Landlords complained that this effectively deprived them of the property rights they held in existing tenancy agreements which could no longer be enforced as the new law rendered them invalid. The stated aim of the legislation at the time of its introduction had been to redress the disparity between rent chargeable on equivalent properties. The government were concerned that levels of homelessness were on the rise whilst, at the same time, an increasing number of rental properties were lying vacant. Housing matters were considered key to the health of the economy overall, and the government sought to close the rift before it widened any further.

A key complaint made by the applicants was the limits on rent levels applied across the board without reference to the location of the properties or the amount that had been paid to buy the properties in the first place. This would result in some landlords suffering a much greater financial loss than others, with no correlation between this increased level of loss and the degree of need of the recipient. The Court was of the view that this indiscriminate approach to restriction of rent levels was the only practical way to deal with

³³⁶ (1990) 12 EHRR 391

the problem outlined by the government, since considering each property on a case-by-case basis would be impractical and inefficient. The applicants also argued that the rents were now set at an arbitrary level which in some cases did not cover the landlords' expenses, but the Court did not find this to be proved.

In making its decision, the Court noted that the rent reductions in the case of two of the particular applicants were "striking", but concluded:

It does not follow that these reductions constitute a disproportionate burden. The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice.³³⁷

Mellacher gives some indication of the arguably substantial burden that an individual may be expected to bear where the related aim is perceived to be of sufficient importance by the Court.

Another example is *Spadea and Scalabrino v Italy*.³³⁸ The applicants were again landlords, and their complaint related to the unenforceability of eviction orders they had obtained against the tenants in their properties, which had been suspended four times prior to the application. The justification for this action put forward by the Italian government was that there was a shortage of low-income housing available in the districts in which the applicants owned properties. Had the eviction orders not been suspended, there would have been a sharp increase in homelessness in these areas, which the government were concerned would lead, amongst other things, to social tension and might threaten public order.

In determining the issue of proportionality, the Court looked in some detail at the facts of the applications in question. It emphasised that Italy had put in place a series of measures designed to alleviate housing shortages, including

³³⁷ para 56

³³⁸ (1996) 21 EHRR 482

freezing rents and extending leases in a variety of situations, but had been unable to avoid the "last resort" of suspending eviction orders. The Court noted, as regards the applicants, that the tenants had not broken the terms of their lease agreement for example by failing to pay rent: the leases had simply reached the end of their term. The tenants had sought reallocation from Milan City Council but had not been offered anywhere else to live, and they were elderly ladies. The applicants, having been unable to remove the tenants from their property, were forced to buy another flat. Indeed, they did not recover possession of the rented property until one of the tenants died, following which the other agreed to move out.

The Court concluded that, given the aim pursued, the actions of the state were not disproportionate. There is no question that the risk of increased levels of homelessness with attached disruption to public order was afforded significant weight by the Court in its deliberations here, but it is important to note that the needs of the applicants were also weighed in the balance. It was noted specifically that applicants had the means with which to buy additional property. It would seem logical to suggest that, had the non-availability of eviction orders rendered the applicants themselves homeless, the Court would have reached a different conclusion.³³⁹

3.6.3 Domestic right to be heard

Another important element in the fair balance equation will be the extent to which the applicant has had the opportunity to have his case heard at the domestic level. Discussion of this issue tends to cross over with the requirements of lawfulness discussed above, and often also with the applicant's right to a fair trial under article six of the Convention. This does not lessen the importance of the point for determination of proportionality under P1-1. Where the issues on both sides of the alleged interference have already been aired at some length through a process of domestic appeals, this tends

³³⁹ The same difficulties in respect of sufficient, habitable housing have arisen in many Eastern European countries and a pattern of applications from landlords subject to excessive rent controls or the inability to resume occupation of their property can be discerned. See, for example, *Radovici and ors v Romania* (68479/01, 71351/01 and 71352/01) 2 November 2006,; *Hutten-Czapska v Poland* (2006) 42 EHRR 15 and *Schirmer v Poland* (2005) 40 EHRR 47. In *Blecic v Croatia* (2005) 41 EHRR 13, the applicant was a tenant whose lease had been terminated by the state after she left the country for an extended period during a time of severe housing shortages. No violation was found here.

to suggest that the state is at least trying to find a fair balance. On the other hand, the Court is generally unimpressed if an individual has had no opportunity to put his side of the story across after the initial state decision has been taken.

The issue is neatly illustrated by dicta in *AGOSI v UK*, which dealt with confiscation by the customs authorities of gold Kruggerands smuggled into the UK, more details of which are set out above.³⁴⁰ The discussion as to the proportionality of the interference opened as follows:

The Court must consider whether the applicable procedures in the present case were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company's conduct and the breach of the law which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive review must be taken of the applicable procedures.³⁴¹

In the particular case, the applicants had the opportunity to avail themselves of the extensive process of judicial review in the English courts, which allowed full discussion of various points raised by the applicants in their favour. The proportionality test was ultimately found to be satisfied here.

The appeal issue proved critical in *Hentrich v France*. As discussed previously, the application dealt with the power of the French tax authorities to exercise a right of pre-emption in respect of property transfers which they considered to be at an undervalue and suspected might be attempted tax evasion or fraud.³⁴² The discretion available to the tax authorities was extensive and the process was not at all transparent. In this situation, the Court considered the opportunity for the applicant to seek judicial review of the decision to be critical.

³⁴⁰ (1987) 9 EHRR 1, discussed at page 102-4 above

³⁴¹ para 55

³⁴² (1994) 18 EHRR 440, discussed at page 117-8 above.

In order to assess the proportionality of the interference, the Court looks at the degree of protection from arbitrariness that is afforded by the [French] proceedings in this case.³⁴³

The Court looked in some detail at the various stages of the adversarial process of tax review which was available to the applicant domestically, noting particularly that the state had not been obliged to provide any statement of reasons for the decision they had made, and also at the length of time taken to complete the proceedings which seemed to be subject to substantial delays. Ultimately the Court was not satisfied that the applicant had had a real opportunity to make her case as to why the decision should be reversed, finding that:

Mrs Hentrich "bore an individual and excessive burden" which could have been rendered legitimate only if she had had the possibility – which was refused her – of effectively challenging the measure taken against her.³⁴⁴

Where there is an admitted defect in fair hearing under article six, it seems likely that this would make any finding of proportionality in terms of P1-1 impossible. This issue was addressed in *Matos E Silva v Portugal*.³⁴⁵ The facts of the application were not dissimilar to those of *Sporrong and Lönnroth*. The applicant owned land which became subject to an expropriation permit when the Portuguese government made plans to create a nature reserve in the area. After 13 years, the permit was still in place, but the land had yet to be expropriated. Whilst subject to the permit, the land could not be developed, and practically speaking it was impossible to sell. During the 13 year period, the applicant made repeated attempts to use the domestic process of planning appeals, but was constantly thwarted by delays and adjournments on the part of the state with the result that no full hearing of the case ever took place before the permits were finally recalled. In the event, Portugal admitted a violation of article six. The Court took this into account during their consideration of the issues under P1-1, eventually finding a second violation for lack of proportionality under that article.

³⁴³ para 45

³⁴⁴ para 49

³⁴⁵ (1997) 24 EHRR 573

3.6.4 Information available to the applicant prior to the interference

Closely tied to the element of the lawfulness requiring that domestic law provides a foreseeable result in order that citizens know how to best regulate their conduct,³⁴⁶ the Court will take careful notice of the information available to the applicant as to the likelihood and nature of any interference before it occurs. Shortly put, if an applicant had no notice that they were likely to suffer an interference, then it is unlikely the interference will be considered proportionate.

A useful discussion of this factor can be seen in *Fredin v Sweden*.³⁴⁷ A licensing case, the applicants owned and operated a gravel pit until their licence to do so was unexpectedly revoked by the County Administration Board. The aim of the revocation was environmental; a cease in exploitation of the pit would allow the natural environment in the area to return to normal, in addition to which, there was already a sufficient supply of gravel in the area.

The applicants made various complaints under P1-1. The first – that the revocation was at such short notice they had no reason to expect it – the Court found unconvincing. The revocation was based on legislation introduced in 1973, which gave power to local administrative bodies to revoke licences no sooner than July 1983 (thereby allowing a ten year transitional period.) The applicants did not buy the pit until 1980, and therefore must have been aware of the potential for revocation. Shortly after the purchase, the applicants had been granted permission by the County Administrative Board to build a quay. It was argued that this permission and the huge capital expenditure which the Board knew would result amounted to some manner of promise or guarantee that the licence would not be revoked. However, the permission for the quay expressly reserved the question of licensing in the post-transitional period, and again the Court was not prepared to place any reliance on the applicants' argument. The Court also noted that the applicants

³⁴⁶ See discussion at 121-124 above.

³⁴⁷ (1991) 13 EHRR 784

had been given a three year closing-down period, which was extended by 11 months on their application.

In all, the Court felt that the applicants had been given entirely adequate information at the time the licence was originally granted, and ultimately the proportionality test was satisfied here. The relevance of the availability of information to the question of proportionality was clearly demonstrated.

Another example is found in the Grand Chamber decision in *JA Pye (Oxford) Land Ltd v United Kingdom*,³⁴⁸ discussed in more detail in chapter five.³⁴⁹ This application concerned the English law of adverse possession, which had operated in the case to allow former tenants of the applicant to gain ownership of what had been the applicant's land, simply through remaining in possession of the property for twelve years subsequent to the expiry of the lease. In its decision, the Grand Chamber noted that the rules of adverse possession were well established, and that the applicants should have been aware of the risk to their rights, a risk which could easily have been neutralised had the applicants simply asked the tenants to leave the premises or resume payment of rent. Again, this element of foreknowledge contributed to the overall finding of proportionality in respect of the interference.

3.6.5 Mitigation of loss

Proportionality is a question of balance. The conduct of the applicant may therefore be as important as the conduct of the state, and there may be some expectation on the applicant to mitigate his losses where it is possible and reasonable for him to do so. In *Phocas v France*,³⁵⁰ the Court was asked to look at a long-running planning dispute. The applicant owned land in an area subject to a development plan. He had made several applications for planning permission on his property, each of which had been repeatedly adjourned since there was a possibility that the land would be expropriated.

³⁴⁸ (2008) 46 EHRR 45

³⁴⁹ See page 272-76

³⁵⁰ (2001) 32 EHRR 11

Over the course of almost 20 years, the land was neither expropriated nor was planning permission granted. In terms of the domestic legislation, a landowner in this situation had the opportunity to apply to have his property declared abandoned, and to receive compensation equivalent to the value of that property as a result. Mr Phocas had commenced proceedings in this regard, but had not pursued them. In the view of the Court, the fact that a domestic remedy existed which had not been pursued was critical to the question of fair balance. The applicant was under a responsibility to use the remedies available to him. His failure to do so was one factor relied on by the Court in their finding that the interference in this case was proportionate.

3.6.6 Compensation

Often the most critical factor the Court will take into account when ruling on proportionality is the availability or otherwise of any monetary compensation in respect of the interference. The key authority in this regard is *Lithgow v United Kingdom*,³⁵¹ which arose from the nationalisation of the aircraft and shipbuilding industries in the UK. The complex compensation scheme proposed in the legislation here afforded the Court an opportunity to systematically consider the role compensation payments ought to play in a P1-1 application. As discussed above the Court looked in some detail at the meaning of the expression "subject to the general principles of international law," ultimately deciding that it did not have the effect of requiring compensation be paid for every interference under P1-1.³⁵² However, the Court did consider that some provision for compensation was necessary if a real protection was to exist:

The Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.³⁵³

³⁵¹ (1986) 8 EHRR 329

³⁵² See pages 124-32 above.

³⁵³ para 120

In considering the role of compensation specifically with regard to proportionality, the Court observed:

Clearly compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.³⁵⁴

The Court also made a ruling as to the appropriate level of compensation:

The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest,' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.³⁵⁵

The Court went on to review in detail the specifics of the compensation scheme introduced in the nationalisation legislation, which the applicants alleged was inappropriate. The Court prefaced their review by stating:

It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review in the present case is limited to ascertaining whether the decisions regarding compensation fell outside the United Kingdom's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.³⁵⁶

Ultimately, the Court found that the compensation provisions applicable in the case were proportionate.

Based on the observations of the Court in *Lithgow*, the first clear rule in terms of proportionality is that a deprivation of property must be balanced by a

³⁵⁴ para 120

³⁵⁵ para 121

³⁵⁶ para 122

compensation payment, other than in exceptional circumstances. It would, of course, be unusual for a state government to carry out a familiar form of expropriation such as a compulsory purchase or a nationalisation exercise without compensation being an integral part of the scheme, but some unusual situations do arise. A useful example is *Holy Monasteries v Greece*,³⁵⁷ where a change in the law resulted in the patrimonies of eight monastic estates vesting in the state without the opportunity of appeal or payment of any compensation. The situation arose in the context of a dispute as to whether the Monasteries had ownership of the relevant properties in the first place. Having discounted that argument, the Court had no difficulty in ruling that the lack of compensation upset the fair balance required to be struck between the needs of the applicants and the public interest, and found a violation of P1-1 had taken place. More recently, the applicants in *Strain v Romania*³⁵⁸ had owned a house which the state had nationalised in 1950 and converted into four flats. In 1993, the applicants brought an action for recovery of possession of the building. While that litigation was ongoing, the state accepted an offer to purchase one of the flats from the tenant in occupation at the time. The Court could see no justification for the non-payment of compensation in what ultimately appeared to be a relatively clear-cut case, and a violation was found to exist.³⁵⁹

Despite the clear statement in *Lithgow* that exceptional circumstances may allow deprivation without payment of compensation to be a proportionate interference, it seemed for many years as though such circumstances did not, in fact, exist. In *Holy Monasteries*, the former Commission had expressed the view that, since the monasteries had initially been given the property in question in order to facilitate the administration of tasks such as social care and education which were now performed by the state, it was justified for the state to take ownership of the properties without payment of compensation. As discussed in the previous paragraph, the Court was not of the same view.

³⁵⁷ (1995) 20 EHRR 1

³⁵⁸ (2008) 46 EHRR 1

³⁵⁹ See also *Yagtzilar v Greece* 41727/98 6 December 2001

Even major political shake-ups or regime change seemed not to be sufficiently exceptional. One example is *Papamichalopoulos v Greece*, in which the applicant's land was transferred to the Navy Fund by the Greek state, at the time under the control of a military junta. When democratic government was restored, the expropriation was acknowledged, and provisions were put in place to provide the applicants with alternate land in compensation. The case came before the Court as a result of complications and delays in providing that land, the result of which was that the Court ordered financial compensation to be paid in its place. There was no suggestion that compensation should be disregarded entirely given the circumstances in which the deprivation had occurred.

Similarly, when the Greek monarchy was abolished and the country reconstituted as a republic in 1973, properties formerly belonging to the royal family were transferred to the ownership of the state as part of the new constitutional framework. The former King of Greece and two other members of the former royal family complained that the property transfer had violated their rights under P1-1. The Court considered the circumstances surrounding the changes and, while they noted that compensation of the full value of the properties transferred might not be necessary to ensure a fair balance, they were firmly of the view that compensation of some description would have to be paid in line with the previous case law on deprivation.³⁶⁰

A more recent and much wider-reaching example of this approach is *Broniowski v Poland*³⁶¹ which concerned the difficulties created by the redrawing of Poland's eastern border along the line of the Bug River after the Second World War. Repatriated Polish nationals who had been living in the territories beyond the River were entitled to claim compensation in kind for the properties they had lost, by buying land from the state and having the value of the abandoned property offset against the cost. However, insufficient state property was made available, and in 2003, when the Polish state passed legislation discharging all obligations of compensation, nearly 80,000 nationals had their claims to compensation abolished. The Court did not

³⁶⁰ *The Former King of Greece v Greece* (2003) 36 EHRR CD 43

³⁶¹ (2005) 40 EHRR 21

consider even these extreme circumstances sufficiently exceptional to justify an absence of compensation, but rather ordered that the state put in place measures at a national level to secure the effective and expeditious realisation of the entitlement in respect of the remaining Bug River claimants.

Remarkably, however, the "exceptional circumstance" doctrine was invoked to allow an absence of compensation in an application arising from land reform occurring as part of the reunification of Germany. During the period of Communist rule in East Germany, certain areas of agricultural land had been taken into state ownership and allocated in small parcels to certain farmers who were allowed to work it. In the process of reunification, a law was passed, saying that all farmers currently in occupation of parcels of land would become the outright owners of that land on the reunification date. However, owing to the shambolic administration of the regime under Communist rule, this produced what were perceived to be some unfair results, particularly in cases where "farmers" had ceased to use the land for agricultural purposes but had not given up occupation of the land as they should have done under the Communist system. To redress this perceived imbalance, the German state passed a second law stating that land which was not being used for agricultural purposes at the time of reunification would be assigned to the state for redistribution. The non-farming "farmers" complained that this violated their P1-1 rights, since they had become outright owners of their parcels of land on the date of reunification, and were then deprived of that ownership with the introduction of the second law, with no payment of compensation. This was the case of *Jahn v Germany*.³⁶²

In its decision, the Court looked in some detail at the history of the disputed areas of land and gave considerable weight to the pressures faced by the governments of the former East and West Germany in trying to put together the complex measures required to reunify the country. It concluded:

In the unique context of German reunification, the lack of any compensation does not upset the fair balance which has to be struck between the protection of property and the requirements of the general interest.³⁶³

³⁶² (2006) 42 EHRR 49

³⁶³ para 117

Bearing in mind the previous jurisprudence such as *Papamichalopoulos* and particularly *Broniowski*, it is difficult to see exactly why the circumstances of *Jahn* should be considered so much more exceptional. The previous case law of the Court would seem to suggest that regime change in itself is not enough to merit a finding of exceptional circumstances, but which factors will tip the balance? In the current global climate, it is possible to imagine a number of threats – the war on terror, for example, or the perceived need to secure national boundaries from illegal immigrants – which governments might seek to use as a basis for expropriation without compensation. Might these be considered exceptional circumstances? There is very little to work with in determining the direction in which the court might choose to develop this doctrine, and the potential for a political influence to come into play in doing so is obvious. To leave the Court with such a wide power of discretion over such a fundamental element of P1-1 must be considered to lessen the protection of the property right at its most basic level.

Further jurisprudence is required before any definitive statement can be made on how damaging the decision in *Jahn* might be. Early indications suggest, however, that the Court will not be quick to invoke the exceptional circumstances doctrine again. *Pincová and Pinc v the Czech Republic*³⁶⁴ dealt similarly with applicants who had obtained "nationalised" property from the state during the Communist regime, and then been deprived of it by legislation restoring the property to its original owners after the regime fell. In its discussion of proportionality, the Court:

...accepts that the general objective of the restitution laws, namely to attenuate the consequences of certain infringements of property rights caused by the communist regime, is a legitimate aim and a means of safeguarding the lawfulness of legal transactions and protecting the country's socio-economic development. However, it considers it necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs. To that end, the legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their possessions in good faith are not made to bear the

³⁶⁴(36548/97) 5 November 2002

burden of responsibility which is rightfully that of the State which once confiscated those possessions.³⁶⁵

The Court went on to set out three factors to be considered in each of the individual cases which made up the application in order to determine whether a fair balance had been struck, namely (a) whether the applicants had acquired their properties from the state as the result of abuse of power, substantive unlawfulness or minor omissions which were attributable solely to the administrative authorities; (b) the hardship suffered by the complainants as a result of losing their property, especially if it were the only property available to them; and (c) the amount of the compensation paid compared to the value of the property. This thoughtful, measured approach was followed in similar circumstances in *Velikovi v Bulgaria*.³⁶⁶ In both cases, the proportionality arguments were set out in full and in neither case was the blanket rule on exceptional circumstances considered to be appropriate. Although it is too early to say whether the decision in *Jahn* may turn out to be something of an isolated incident, these cases do mark a promising start to the development of the jurisprudence.

As set out in *Lithgow*, compensation, when it is provided for, does not have to be equivalent to the full market value of the property to which it relates. The signatory states will be allowed some margin of appreciation here to enable them to decide how best resources should be applied in order to achieve the aim sought. As it was expressed in *James*:

Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.³⁶⁷

The value of the property should, however, be fairly assessed, even if compensation is not to be awarded at that level. This was demonstrated

³⁶⁵ para 58

³⁶⁶ (2009) 48 EHRR 27

³⁶⁷ (1986) 8 EHRR 123 para 54

recently in *Kozacioglu v Turkey*,³⁶⁸ where the historic importance of an expropriated building was ignored during the course of its valuation for the purposes of calculating the compensation payable.³⁶⁹

The state is entitled to take into account material benefits derived by the applicants when computing the appropriate compensation for an interference, confirmed by *Katkaridis v Greece*.³⁷⁰

The Court recognises that when compensation due to the owners of properties expropriated for roadworks to be carried out is being assessed, it is legitimate to take into account the benefit derived from the works by adjoining owners.³⁷¹

In this case, the applicants owned property along the site of a major road, and part of their land was expropriated as part of a project to widen the road in certain places. The compensation scheme included a discount on the amount of compensation to be paid to owners of land adjacent to the road, since it was considered that they would benefit from the redevelopment of the road. The opposite side of this coin may be the situation where expropriation of a parcel of land impacts negatively on the value of the (non-expropriated) land surrounding it, creating an overall loss greater than simply the value of the expropriated land. In *Bistrovic v Croatia*,³⁷² the Court confirmed a prejudicial effect of this kind must also be taken into account when compensation levels are being assessed by the state.

Delay in payment of compensation will also impact negatively on proportionality. The Court gave clear confirmation of the position here in the recent case of *Almeida Garrett and Ors v Portugal*,³⁷³ where the applicants had been deprived of property as part of a far-reaching programme of agrarian reform. An entitlement to compensation was set out in the reform

³⁶⁸ (2334/03) 31 July 2007

³⁶⁹ See also *Urbárska Obec Trenčianske Biskupice v Slovakia* (2009) 48 EHRR 49, in which the market value of the expropriated land was ignored entirely.

³⁷⁰ (2001) 32 EHRR 6

³⁷¹ para 49

³⁷² (25774/05) 20 May 2007

³⁷³ (2002) 34 EHRR 23

legislation, but 24 years after the event, full compensation had yet to be received. The Court made a clear statement of its policy:

The States have a wide margin of appreciation to determine what is in the public interest, especially where compensation for a nationalisation is concerned, as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions.

...However, the Court notes that 24 years have now elapsed without the applicants being paid the final compensation to which the domestic legislation nonetheless states that they are entitled. It reiterates that the adequacy of compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as unreasonable delay.

The delay is indisputably attributable to the State and neither the complexity of the authorities' activities in that sphere nor the number of people entitled to compensation can justify a delay as long as that which has occurred here.³⁷⁴

A final point worth noting here is that it is not only compensation paid or payable by the state that will be relevant in terms of proportionality. If it is the case that the applicant has received a financial payment of some kind from, for example, a third party who has benefited from the loss to the applicant as a result of state action, that financial payment will also be taken into consideration by the Court. Examples of where this could be relevant can be seen in two cases arising from the Communist land reform in the former Czechoslovakia in 1967, where the state confiscated huge areas of land without payment of compensation. Whilst some of this property was retained by the state, parcels were sold on to third parties who were required to make payment of "compensation", which would rarely be seen by the original owners. When democracy was restored, legislation was passed to allow restoration of the land to the original owners. However, the Court was concerned that the new law was weighted too heavily in favour of those who had been expropriated, without regard for the rights of those who bought from the state.

³⁷⁴ paras 52-54

In *Zvolsky and Zvolska v the Czech Republic*,³⁷⁵ the Court took a broad look at the legislation, noting that the possibility of setting aside a property transfer carried out during the Communist regime without ascertaining whether the original owners had voluntarily transferred the land, and without taking account of compensation paid by third parties such as the applicants in the case, did not strike a fair balance between the protection of the third party's rights and the general interest served by remedying the wrongs perpetrated by the Communist state. In *Pincová and Pinc v the Czech Republic*,³⁷⁶ an application was made by a family who had purchased property from the state, paying full market value in "compensation". In 1991, the original owner sought, and was granted, restitution. The applicants were awarded compensation, but only of the amount originally paid in 1967. Although the Court was clear that it was not its place to assess appropriate compensation, it considered it self evident that what was market value for the land in 1967 could not possibly be market value for the land now. Moreover, the applicants had spent money maintaining the land in the intervening years. The compensation paid was therefore manifestly inequitable, and a violation of P1-1 was found.

3.6.7 Conclusion

The test of proportionality is critical to the operation of any effective protection of property rights. The desire to safeguard the political aspects of property ownership requires to be balanced against the need for states to regulate the economic aspects of that ownership in order to secure a functioning society. Proportionality is the exercise which allows these competing interests to be measured and, if correctly carried out, an appropriate balance struck.

Proportionality is most often the critical question in P1-1 applications. Since states will most often provide a legal basis for their interference and since the test of public interest is so rarely enforced in any meaningful way, the question of balance becomes critical. Perhaps for this reason, the

³⁷⁵ (46129/99) 12 November 2002

³⁷⁶ (36548/97) 5 November 2002

jurisprudence on this step of the process is more voluminous and more instructive than elsewhere.

Although questions of proportionality will turn on the individual facts of any given application, general themes can be extrapolated from the case law to date which give an indication of the factors which are likely to be important for the Court under this head. The relevance of the aim of the interference, the ability of the applicant to have his arguments heard domestically and, critically, of compensation, particularly in cases of deprivation of possessions, has been stated repeatedly. This level of transparency in the application of the right has an important part to play in ensuring the protection is effective.

This is not to say, however, that the development of this step in the process is without difficulties. In particular, the recent suggestion that compensation will not be required for deprivation of possessions in "exceptional circumstances" creates the type of opacity in the Court's approach which tends to weaken the strength of the protection over all. It is noteworthy that, so far, the Court seems reluctant to make use of this new doctrine. It may be that the Court recognises the difficulty with this type of ambiguous innovation itself.

3.7 Conclusion

It was posited at the beginning of this chapter that definitions of the key terms of P1-1 could only go so far to explain the extent of the protection it offers. What would also be necessary is an understanding of how these terms, and the article as whole, have been understood and applied by the Commission and the Court. It can be seen that, over time, an identifiable process has been developed through which P1-1 applications will be determined. This process has taken time to evolve. As with the discussion of definitions in chapter two, it can be seen that, perhaps through necessity, some aspects of this process have received more judicial consideration than others. In some places, the Court has been able to build on the foundations of case law relating to other articles of the Convention to accelerate understanding of the requirements of P1-1. In other places, a degree of ambiguity remains, if not as to the existence

of a step in the process, then as to its application. What has been demonstrated without doubt, however, is that a decision-making process does exist.

The first step in this process entails determination of the existence of a possession in the meaning of the Strasbourg jurisprudence, as discussed in chapter two.³⁷⁷ The second step requires categorisation of the state action complained of into one of the three *Sporrong and Lönnroth* rules: general interference with the peaceful enjoyment of possessions, deprivation of ownership or control of use. This three-rule division may not be the most obvious breakdown of the protection offered by P1-1, and even within the *Sporrong* judgment it can be seen that an alternative approach was very nearly adopted by the Court. However, the point of critical importance here is the three-rule approach did not cease to evolve as soon as it was created. The test has been slowly refined in subsequent cases. It is used almost ubiquitously in P1-1 applications and offers some degree of insight as to what the Court consider to be the important elements of state action.

That is not to say, however, that the approach is without its difficulties even yet. There is still some scope for confusion as to how the three categories relate to each other. Problems arise particularly with problematic subjects such as confiscation and retention of title, where the existing jurisprudence may serve more to obfuscate than to illuminate.

Nevertheless, the combination of this step of the decision-making process with the increasing clarity of definition of the key terms discussed in chapter two will allow an accurate prediction to be made of the Court's view of the nature of state action in the majority of cases. This exercise will in fact be attempted with novel issues in chapter five of this thesis. The importance of this clarity must be given due account in determining the strength of the protection offered by P1-1.

³⁷⁷ pp48-69 above

The third step in the decision-making process deals with the lawfulness of state action. Measures taken by the state must have a clear basis in domestic law, which is accessible to the public, and which produces a foreseeable result in conformity with the rule of law.

The question of lawfulness is the area where the P1-1 jurisprudence is most substantially founded upon case law relating to other articles of the Convention. It is perhaps also the step of the process which is easiest for private lawyers to grasp: it demands the legal certainty which is such a feature of property law domestically. The case law demonstrates how this requirement works well to neutralise arbitrary state action in situations where political power has been too heavily wielded or discretion is unfettered. In terms of achieving the aims of the property article, this requirement is a very necessary element.

The fourth step in the decision-making process is, however, less successful. The requirement that the measures implemented by the state be pursued in the public or general interest seems to amount, in reality, to little more than a requirement that such an interest be mentioned by the state. It has been demonstrated that the Court requires *some* justification to be offered under this head before an interference can be justified. It has also been said that where the interest contended for is "manifestly unreasonable," it will not be accepted. However, beyond that hard limit, which has yet to be exceeded in the reported applications, it appears that "anything goes."

It is recognised that this step is in closest contact with the conflict inherent in the nature of property protection. The state has many legitimate reasons to interfere with property rights. The political reasoning which justifies such interference must be the purview of a democratically elected government. It is not for the Court to substitute its will for that of the electorate. Fulfilment of that aim requires a substantial margin of appreciation on the part of signatory states which should not quickly be eroded by the Strasbourg institutions.

However, the protection of property demands that the Court performs some function in this context. There would seem to be more scope for intervention

by the Court than is currently undertaken without compromise of the necessary margin of appreciation. For example, it is difficult to understand why the Court will not take a firm stand in situations where the interest claimed by the state does not appear to marry up with the action actually taken. Perhaps some further development along these lines might be desirable here to increase the overall strength and purpose of P1-1.

The final step in the process demands that a fair balance be achieved between the burden placed on the party whose rights have been violated and the needs of society which are served by the interference. In many ways, it is the question of proportionality which anchors the remainder of the decision-making process, and it is often the step most realistically required to safeguard the balance between justifiable and unjustifiable state action.

Any number of factors may be relevant to the proportionality of a particular action by the state, but consideration here is usually closely tied to the findings of the Court in connection with steps one and three of the decision-making process. The initial determination of the category of interference will give some indication of how heavily the scales have tipped towards the state through the action which has been taken. This can be seen particularly in relation to deprivation of ownership, where compensation will almost always be required to balance the equation and justify the interference. In a case of control of use, compensation will not be a requirement, but the gradual development of jurisprudence to date demonstrates that court will often expect other types of protection to be put in place, such as the opportunity to have the arguments aired before a domestic tribunal. The value of the aim sought to be achieved will also be evaluated under this head, with consideration given to the extremity or otherwise of the interference which might be considered justified.

The development of the proportionality test is a good demonstration of the manner in which the property protection has evolved over time. In many ways it is not surprising that there is such a huge amount of jurisprudence available in connection with this step of the process: the degree of flexibility required of

P1-1 as a result of its inherent conflict means that proportionality will often be called into question. Despite the necessary subjectivity in the test, however, it is useful to see that common themes can be drawn out, with the suggestion of limits of protection that these themes suggest. As with the other steps in the process, however, that evolution is ongoing, as unfortunate complications such as the "exceptional circumstances" doctrine serve to demonstrate.

Overall, the analysis of the Strasbourg jurisprudence suggests that, despite its ambiguous beginnings, the property protection has slowly evolved into a right with more definite guidelines and limits. The progress to date has been imperfect. However, a clear decision-making process has been established which serves to protect property interests albeit imperfectly, and allows for some degree of certainty in how future applications will be dealt with.

The next part of this thesis will attempt to situate these findings within the United Kingdom context through an analysis of the domestic case law.

CHAPTER FOUR: APPLICATION IN THE DOMESTIC COURTS

"It would be so nice if something made sense for a change."³⁷⁸

4.1 Introduction

It has been possible for UK citizens to apply to the European Court of Human Rights (ECtHR) in respect of P1-1 since 1966. The property right has only been part of domestic legislation, however, since the introduction of the Human Rights Act 1998 and, north of the border, the Scotland Act 1998. Despite this relatively short time frame, the Scottish and English courts have had the opportunity to consider cases brought under P1-1 on a surprisingly large number of occasions in a range of different contexts.

In this chapter of the thesis, authorities from both Scotland and England will be considered. Although the rules of property law can vary significantly between the two jurisdictions, both are subject to the same human rights legislation.³⁷⁹ There is no doubt that the approach taken by a judge to a novel problem in one jurisdiction will be viewed as persuasive by a judge in the other.

As discussed in the opening chapter, judgments of the ECtHR and decisions of the former Commission do not create a strict precedent for the courts in the UK. The domestic legislation provides that the courts are under an obligation to "take account of" the Strasbourg jurisprudence. However, the House of Lords has indicated that a Strasbourg precedent should normally be followed unless there is a strong reason to deviate from it.³⁸⁰ Accordingly, it is this approach to the Strasbourg case law that is assumed in the analysis of the domestic jurisprudence carried out in this chapter.

Following the structure of the thesis so far, this chapter will look firstly at the way in which the key terms of P1-1 have been understood by the domestic

³⁷⁸ *Alice in Wonderland*, p

³⁷⁹ The Scotland Act impacts on the outcome where a violation of P1-1 is held to exist, but substantive questions of whether a right is engaged or has been breached are governed by the Human Rights Act in both jurisdictions.

³⁸⁰ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. An interesting discussion of some potential difficulties with this approach where domestic precedent conflicts with Strasbourg judgments can be found in *Kay v Lambeth Borough Council* [2006] 2 AC 465.

courts. Does this accord with the definitions of the terminology extrapolated from the Strasbourg jurisprudence, described in chapter two? The approach the domestic courts have taken to determination of a case brought under P1-1 will then be analysed, using the five-step process developed by Strasbourg and outlined in chapter three as a point of comparison.

4.2 Definitions and the domestic courts

In chapter two of this thesis, a review of the Strasbourg jurisprudence was undertaken with a view to extrapolating definitions of the key terms of P1-1. It may not be correct to describe the terminology of the property right as containing terms of art. What can be said with certainty is that the definitions ascribed to key words and phrases by the Strasbourg court may not sit easily alongside the traditional understanding of such terms in domestic private law. This may create difficulties for the conscientious domestic court seeking to take the Strasbourg jurisprudence into account.

In this first section of the chapter, the Strasbourg definitions of they key terms will be briefly reconsidered before a comparison is made with Scots and English domestic jurisprudence in the same area.

4.2.1 Every natural or legal person

Bodies corporate benefit from the protection of P1-1 in the same way as natural persons. Shareholders will also be entitled to make an application under P1-1 where there has been an interference with the possessions of a company provided that (a) they hold a majority of shares in the company and (b) they have a special connection with that company.

There are some similarities in the approach adopted by the ECtHR in this context to the situations in which domestic courts have traditionally been prepared to “lift the veil of incorporation”, disregarding the separate legal personality of a company in order to look at the actions and interests of the company members. The modern statement of the law in this area was set out

in *Adams v Cape Industries Plc*,³⁸¹ which suggests lifting the veil is only possible where necessary as a question of interpretation of an ambiguous statutory provision or, more pertinently, where special circumstances exist indicating that the company is “a mere façade concealing the true facts.”³⁸² An example of such a situation is found in *Jones v Lipman*,³⁸³ in which the defendant, having contracted for the sale of land with the plaintiff, changed his mind. Lipman formed a company and contracted with that company for the sale of the same land, which was duly registered in the company’s name, thereby frustrating the plaintiff’s right to enforce the original contract. Since it was clear the company had been formed purely to allow the defendant to carry out an act of fraud, the Court had no difficulty in lifting the veil, finding the company to be a façade and making an order for specific performance in respect of the original contractual obligation.

The domestic conception of the company as “a mere façade” may import more of a moral overtone than is contained within the “special connection” sought by the Strasbourg jurisprudence. However, there is some identity of ideas here, in the sense that those behind the veil must be more than mere shareholders or directors of the company before the court will disregard the incorporation.

Although various bodies corporate have pursued litigation in respect of P1-1 both north and south of the border,³⁸⁴ there has yet to be discussion in the domestic courts of shareholders making an application in respect of company possessions. It remains to be seen whether the domestic approach to “lifting the veil” will carry across into complex and somewhat ill-defined area of Strasbourg jurisprudence.

4.2.2 Possessions

³⁸¹ [1990] Ch 433

³⁸² This form of wording, first used by Lord Keith in *Woolfsion v Strathclyde Regional Council* [1978] SLT 159 at p161, was reiterated as a useful way to delineate this category of cases in *Adams*.

³⁸³ [1962] 1 All ER 442

³⁸⁴ See, amongst many others, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546; *Catscratch Limited v City of Glasgow Licensing Board (No 2)* 2002 SLT 503; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728

This term has an autonomous meaning for the purposes of P1-1. Strasbourg jurisprudence suggests that an interest must have an objective economic value before it will be considered a possession. That value must either have been acquired by the applicant at the time of the alleged interference, or else the applicant must have a legitimate expectation of its acquisition in future.³⁸⁵

4.2.2.1 Freedom of definition

The UK Courts appear to have accepted that the word "possessions" as used in P1-1 bears little relation to the term of art which forms a part of domestic property law. This has not necessarily made it easy to determine when an interest will merit the protection of P1-1, however. An excellent example of the difficulties which can arise here came with the keynote decision of *Wilson v First County Trust (No 2.)*³⁸⁶ The facts of the case were deceptively mundane. Penelope Wilson borrowed £5,000 from a pawnbroker, First Country Trust, for a period of six months. The pawned property was her car, a BMW 318 convertible. She did not repay the loan within the agreed time frame. The pawnbroker sought repayment, indicating that if no payment was made timeously, the car would be sold as provided for in the contract. Mrs Wilson's response was that the agreement was unenforceable because it did not contain all the prescribed terms. She sought an order for the return of her car.

The argument concerned a £250 "document fee" (administration fee) the claimant had been required to pay, which was then added to the overall amount of the loan. Did this mean the loan amount, given in the contract as £5,250, was incorrectly stated, thus rendering the contract unenforceable in terms of the legislation?

The Court of Appeal agreed that this was exactly the position. The contract was unenforceable. It held, however, that this result amounted to an interference with First County's P1-1 rights, and a declaration of incompatibility was made. This declaration was appealed by the Secretary of State for Trade and Industry to the House of Lords.

³⁸⁵ See page 48 above.

³⁸⁶ [2004] 1 AC 816

Each of the five judges gave detailed speeches in which the question of whether a possession could be said to exist was an important consideration. There was consensus that contractual rights were an interest which attracted the protection of P1-1, in itself an uncontroversial conclusion given the Strasbourg jurisprudence. The issue of whether such rights could be said to exist in the circumstances of the case was, however, more divisive. Lord Hope of Craighead and Lord Scott of Foscote took the view that, since the contract was invalidly formed, no rights could ever have existed under it, and therefore there was no possession capable of protection. As Lord Hope expressed it:

[P1-1] does not confer a right of property as such nor does it guarantee the content of any rights in property...It is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into.

...[First County Trust] never had an absolute and unqualified right to enforce this agreement or to enforce the rights arising from the delivery of the motor car. [P1-1] cannot be used to confer absolute and unqualified rights on FCT which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into.³⁸⁷

This line of reasoning is perhaps uncomfortable from a Strasbourg point of view. There is no question in the ECtHR jurisprudence of P1-1 "conferring" rights onto an individual. The question is whether First County Trust held some type of right, whether or not absolute and unqualified, which would merit protection under P1-1.

Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough took an alternative view. Their conclusion was that a right of property held by the defendant had arisen under the contract. That right, however, had been rendered unenforceable by the application of the Consumer Credit legislation. Lord Nicholls notes:

³⁸⁷ paras 106-108

Clearly the expiry of a limited interest such as a license in accordance with its terms does not engage P1-1. That is not this case. Here the transaction between the parties provided for repayment of the loan and for the car to be held as security. What is in issue is the "lawfulness" of overriding legislation. The proposition advanced by the Secretary of State would mean that however arbitrary or discriminatory such legislation might be, if it was in existence when the transaction took place a court enforcing human rights values would be impotent. A convention right guaranteeing a right of property would have nothing to say. That is not an attractive conclusion.³⁸⁸

This argument is more convincing in Strasbourg terms. Lord Nicholls essentially conceptualises the contractual right as coming into existence at the time of the conclusion of the contract. That right is then affected by the legislation in a way that causes it to become unenforceable. It is the very impact of the legislation which, in Strasbourg terms, would constitute an interference with a possession and have to be justified. The fact that this interference has the result that the right is no longer in the possession of FCT is exactly the situation that P1-1 is designed to protect against.

Part of the difficulty in *Wilson* was that it was arguably unclear whether a possession could be said to exist under domestic law, even without consideration of the P1-1 jurisprudence. The courts have shown, however, that they are prepared to find the existence of possession for P1-1 purposes where such a possession would not have existed under domestic law.

This was demonstrated in *Strathclyde Joint Police Board v Elderslie Estates*.³⁸⁹ The pursuer in this case owned land under a feu contract which was subject to a title condition prohibiting the use of the former police house on the premises for anything other than police purposes. The Police Board wished to sell the house as a private residence. It had raised the issue of a waiver of the condition with the defender, the feudal superior, who had asked for a substantial sum in exchange, a sum which the Police Board was not willing to pay. Instead, it made an application to the Lands Tribunal to have

³⁸⁸ Para 41

³⁸⁹ 2002 SLT (Lands Tr) 2

the condition varied or discharged in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970, which also allowed the tribunal to award compensation for a variation or discharge when and at whatever level it considered appropriate. The defender argued that a failure on the part of the tribunal to award compensation in a case such as this would amount to a violation of its rights under P1-1.

The tribunal made what was clearly a good faith attempt to interpret the legislation and resolve the particular issue in the case in as Convention-compliant a manner as possible. Detailed consideration was given to the nature of the possession with which the tribunal had been empowered to interfere by the 1970 Act: was the possession the right of the superior to control the use the vassal made of the land? Or was it alternatively the right of the superior to extract money in exchange for a minute of waiver of the offending condition, bearing in mind the importance placed by the Strasbourg court on looking at the reality of a situation rather than focusing on the formalistic elements?

The Tribunal noted:

We accept that it is appropriate, in seeking to identify possessions, to look behind appearances and ascertain the reality of the situation...We are satisfied that the primary right of the respondents [Elderslie] is accurately described as a right to control the use of the dominium utile. The power given to the tribunal could well be described as a control of the use made of that right. However, as the method of control produces a permanent change effectively removing the right, we accept that there is clearly a sense in which he is deprived of a possession. But it may be misleading to refer to that as a "right to extract money." It is in no sense a right enforceable by way of legal process. No money is due to the respondents. They have no right to payment. There is accordingly no right to extract payment.³⁹⁰

Having identified the possession in question as the defender's right to control the pursuer's use of the property, and clarified that the defender had been deprived of this possession by the decision of the tribunal to waive the

³⁹⁰ p7

condition, the tribunal went on to consider whether such a deprivation could be justified in terms of the exceptions to P1-1. They noted that in many cases (including, impliedly, the one in question) the superior's right to control could not be enforced since the superior lacked interest to enforce. This formed part of the discussion in respect of proportionality. However, the question of interest is arguably more fundamental. Can a right incapable of enforcement really be regarded as a possession? It exists nominally, but in reality it is useless. The tribunal would not accept that a right to payment of a waiver fee was a possession since it was no right capable of enforcement in law. Is the situation with the right of control of use really any different?

Perhaps a more accurate analysis of the situation in the case would be not that the defenders had been deprived of a possession in circumstances which did not necessitate compensation in order to strike a fair balance, but rather that there was no possession here in the first place, and so no deprivation had taken place at all.

Another complicated discussion over the determination of "possessions" arose in the case of *Rowland v Environment Agency*.³⁹¹ An understanding of the issue here requires the facts to be set out in some detail. Mrs Rowland was the owner of property including a non-tidal stretch of the River Thames known as Hedsor Water. She had succeeded to the property on the death of her husband in 1998, he having purchased the estate in 1974. At the time of the purchase, Mr Rowland had believed Hedsor Water to be a private stretch of the river. This belief was based in part on signs to that effect erected along this part of the river by the navigation authorities. In 2001, the navigation authority, now in the body of the Environment Agency, formed the view that, in fact, public rights of navigation over Hedsor Water subsisted, and indicated to the claimant that all signs indicating otherwise required to be removed. Mrs Rowland argued, *inter alia*, that the actions and statements of the representatives of the defendant at the time of her husband's purchase and subsequently had created a legitimate expectation that she would continue to

³⁹¹ [2005] Ch. 1

enjoy the stretch of river as private water. Resiling from this position therefore constituted a violation of P1-1.

One of the difficult aspects of the case was that, even if such an expectation of continuing use could be considered to exist, it was *ultra vires* the powers afforded to the Environment Agency. No statutory power existed which would allow the Agency to extinguish a public right of navigation in Hedsor Water. The result of this situation in English law was that no remedy could exist for Mrs Rowland, since her expectation had no lawful basis. She argued, however, that same result was not true of P1-1. Her case was that a legitimate expectation constituted a possession, and the fact that it could not be fulfilled lawfully would be relevant not to the creation of this possession, but rather to questions of the aim of any interference with the possession and proportionality. Both the trial judge and the Court of Appeal were satisfied that this interpretation of the Strasbourg jurisprudence was correct. Peter Gibson LJ, giving the leading judgement in the Court of Appeal, noted the relevance of *Pine Valley v Ireland*³⁹² and *Stretch v UK*³⁹³ in confirming that:

An expectation may amount to a possession for the purposes of P1-1 even though it arises from an act unlawful under the domestic law...I would therefore hold that Mrs Rowland's expectation was a possession entitled to protection under P1-1 unless the interference with that possession was justified and proportionate.³⁹⁴

The decision of the Court of Appeal here is a good example of the fact that "possession" has an autonomous meaning for the purposes of P1-1. This meaning will not be subject to the constraints of domestic law. Mrs Rowland's expectation would not have been a possession in the meaning of the English law nor afforded any remedy, but the wider scope of the definition under P1-1 allowed a possession to be held to exist.

4.2.2.2 *Economic Interest*

³⁹² 14 EHRR 319. See discussion at page 65

³⁹³ 38 EHRR 196

³⁹⁴ paras 91 and 92.

Despite the complexities of the cases discussed above, in fact the majority of domestic case law has dealt with more straightforward subject matter, at least in terms of what may be defined a possession. The test of economic interest used by the ECtHR fits well with domestic decisions. Traditional heritable property such as a house,³⁹⁵ a garden,³⁹⁶ farmland,³⁹⁷ a country estate³⁹⁸ and a pub³⁹⁹ have all been accepted as possessions. As in the Strasbourg jurisprudence, licences for the sale of alcohol,⁴⁰⁰ driving a taxi,⁴⁰¹ HGV driving⁴⁰² and medical practice⁴⁰³ have also fallen within the definition. Livestock, including sheep and cattle,⁴⁰⁴ and fish stocks⁴⁰⁵ have been litigated upon under P1-1. In a line of cases surrounding customs legislation, motor vehicles including cars,⁴⁰⁶ lorries⁴⁰⁷ and even a hovercraft⁴⁰⁸ were accepted as meriting the protection of the property right. The right to enjoy the benefit of a shareholding was also considered a possession.⁴⁰⁹

4.2.2.3 Acquisition and legitimate expectation of future acquisition

The concept that an interest must be acquired before it will be considered a possession has also been used without difficulty domestically.

The issue in *Catscratch Limited v City of Glasgow Licensing Board (No 2)*⁴¹⁰ was an application for an extension to the regular opening hours of a public house which had been refused by the defenders. The applicant argued that its rights under P1-1 has been breached, in this instance on the basis that the extension had been granted in previous years, therefore refusing to grant it again amounted to an interference.

³⁹⁵ *Malekshad v Howard de Walden Estates Ltd* [2002] QB 364

³⁹⁶ *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42

³⁹⁷ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546

³⁹⁸ *Adams v Scottish Ministers* 2004 SC 665; *R (Countryside Alliance) v Attorney-General* [2008] 1 AC 719

³⁹⁹ *Catscratch Limited v City of Glasgow Licensing Board (No 2)* 2002 SLT 503

⁴⁰⁰ *Di Ciacca v Scottish Ministers* 2003 SLT 1031; *Adams v South Lanarkshire Council* 2003 SLT 145

⁴⁰¹ *Baird v Glasgow City Council* [2003] SLLP 27

⁴⁰² *Crompton v Department of Transport North West Area* 2003 WL 117004

⁴⁰³ *Whitefield v General Medical Council* [2003] HRLR 9

⁴⁰⁴ *Westerhall Farms v Scottish Ministers* Unreported, Court of Session, 25 April 2001

⁴⁰⁵ *Booker Aquaculture Ltd v Secretary of State for Scotland* 2000 SC 9

⁴⁰⁶ *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766

⁴⁰⁷ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728

⁴⁰⁸ *R (Hoverspeed) v Customs and Excise Commissioners* [2002] 3 WLR 1219

⁴⁰⁹ *R (on the application of Professional Contractors Group Ltd) v Inland Revenue Commissioners* [2001] HRLR 42

⁴¹⁰ 2002 SLT 503

The Court noted that a licence could constitute a possession following the Strasbourg authorities.

A fortiori a failure to obtain permission to occupy one's property in the manner desired can equally be an interference with the property right on the basis of both *Chapman*⁴¹¹ and *Pine Valley*.⁴¹² The difficulty in the present case is that senior counsel for the respondent submitted that if the licence in question is of limited duration and capable of revocation or removal it is not properly to be regarded as a right of property... In my opinion, the important point in *Gudmundsson*,⁴¹³ was that when the applicant started his employment as a taxi driver, there was no licensing provision. Thus when it arrived it was an invasion of his existing right to be a taxi driver without control. The converse would appear to be that failure to obtain a taxi licence at the start of the work proposal period that was necessary to achieve that aim would not be an interference with the property right, because of the nature of the licence being sought and in particular its limited character, but more importantly, in my opinion, it is not a right until at least a grant is made. A refusal of an application thus invokes no right.⁴¹⁴

The applicant neither had the licence itself, nor any legitimate expectation that one would be granted. The interest had not been acquired, and so no possession could be said to exist.

A contrary finding was made in the succession context *In re Land*,⁴¹⁵ discussed in more detail below.⁴¹⁶ The claimant in this case had been convicted of his mother's manslaughter through gross negligence. He was the sole beneficiary named in her will. The English law of forfeiture, a public policy rule designed to prevent wrongdoers acquiring a benefit through their own wrongdoing, precluded the claimant from taking his legacy under the will, however. Although the case did not involve a direct human rights challenge, turning rather on a point of statutory interpretation, the Court considered P1-1 in the performance of its obligation to construe legislation in a Convention-compliant manner wherever possible. Judge Norris QC stated simply:

⁴¹¹ *Chapman v UK* (2001) 33 EHRR 18,

⁴¹² *Pine Valley v Ireland* (1992) 14 EHRR 319, discussed at 63 above

⁴¹³ *Gudmundsson v Iceland* (1996) 21 EHRR 89

⁴¹⁴ para 27

⁴¹⁵ [2007] 1 WLR 1009

⁴¹⁶ p222-3

The right to inherit property under a will is, in my judgment, a "possession" within the protocol.⁴¹⁷

No explanation is offered for the finding, and no reference is made to Strasbourg authority. However, this view of a right to inheritance accords with the approach taken by the ECtHR in *Inze v Austria*.⁴¹⁸ It is submitted that the "possession" in this context is best understood as a type of debt. The possession held by a beneficiary is a claim against the deceased's estate for payment of a legacy. Prior to the death of the testator, no possession can exist since any claim is, at best, conditional: it is within the testator's power to change her will at any time. On death, however, the claim "crystallises" and the right that vests in the beneficiary constitutes a "possession" in the P1-1 meaning of that word.

The complex issue of welfare benefits has also been explored with some difficulty in the domestic jurisprudence. In *Campbell v South Northamptonshire District Council and the Secretary of State for the Department for Work and Pensions*,⁴¹⁹ the claimants were members of the Jesus Fellowship Church. They lived communally in properties owned by the Church, subject to a variety of religious rules on lifestyle and child-rearing, and paid a charge to the Church for board and lodging. The charge could be altered by the Church, with retrospective effect, without any need for consultation or agreement. The applicants had been claiming housing benefit in respect of their boarding charges for an undisclosed period of time prior to the amendment in 1998 of the regulations on eligibility to receive the benefit. The result of the amendment was that the applicants were no longer eligible, since their living situation was not a "commercial arrangement" in the meaning of the legislation. The applicants argued that this change amounted to a violation of P1-1, effectively on the basis that, since they had previously been in receipt of the benefit, they had a legitimate expectation that they would continue to receive it. The argument advanced before the Court of Appeal

⁴¹⁷ para 20

⁴¹⁸ (1987) 10 EHRR 394, discussed at p57 above.

⁴¹⁹ [2004] 3 All ER 387

went further in suggesting essentially that any welfare benefit amounted to a possession for the purposes of P1-1, based on the ECtHR jurisprudence.⁴²⁰

Jacob LJ was not prepared to entertain this argument, noting that if it were accepted, its consequences would be far reaching.

At first blush, this is a startling proposition. The appellants never "owned" a right to [Housing Benefit (HB)] in any meaningful sense. HB is a non-contributory state benefit given to certain persons who have housing needs and who satisfy the relevant criteria. If it is right, then so far as I can see, any form of State benefit would count as a "possession." So, once a State has allowed payment of a benefit, it can never be withdrawn or even, I suppose, reduced.⁴²¹

Having carefully reviewed the Strasbourg jurisprudence, the Court concluded that it did not lay down a general rule in relation to welfare benefits.⁴²² No possession was considered to exist in the case, and so no violation of P1-1 was possible.

This case appeared to be in direct conflict with the European case law. Although the position of welfare benefits had taken some time to emerge clearly from the cases, by the time the decision in *Campbell* was made, the position seemed fairly settled. Certainly following the subsequent Grand Chamber judgment in *Stec v United Kingdom*,⁴²³ there could be no question that entitlement to payment of a welfare benefit constituted a possession. Even had that not been the situation, the reasoning in *Campbell* is not easy to follow. The right to a benefit does not include payment at a particular level, and so Jacob LJ's concern that a benefit could never be reduced seems unfounded.

The subject was revisited more recently in *R (RJM) v Secretary of State for Work and Pensions*,⁴²⁴ in connection with the exclusion of homeless persons

⁴²⁰ For further discussion, see pages 57-61

⁴²¹ para 31

⁴²² para 35

⁴²³ (2006) 43 EHRR 47

⁴²⁴ [2009] 1 AC 311

from the right to payment of a disability premium on income support. In the leading speech, Lord Neuberger of Abbotsbury quoted at length from the opinion in *Stec*, noting its clear finding that welfare benefits fell with the scope of P1-1. He concluded:

As disability premium is part of the UK's social welfare system, RJM does have a sufficient "possession" to bring his claim within P1-1.⁴²⁵

The decision in *Campbell* was not subject to revision, presumably on the basis that *Stec* represented a subsequent change in the Strasbourg position. It seems, however, that domestic law on benefits will be in line with the ECtHR jurisprudence from this stage onwards.⁴²⁶

The idea of legitimate expectation of future acquisition of benefit was also explored in one of the most controversial areas of domestic dispute, arising out of the separate bans on foxhunting imposed by the Scottish Parliament (in the form of the Protection of Wild Mammals (Scotland) Act 2002) and by Westminster (with the Hunting Act 2004.) Both pieces of legislation operated to prohibit mounted foxhunting with dogs, together with the use of land or dogs for that purpose. Challenges were raised north and south of the border in respect of a number of different articles of the ECHR, including the right to private and family life under article eight, freedom of association under article 11 and freedom from discrimination under article 14. The P1-1 arguments covered a range of alleged violations. Primarily, landowners argued that they were no longer able to use their possessions in the form of land, horses or hounds to hunt foxes. The ban also impacted the foxhunting "industry" more generally with the result that jobs were lost, hounds had to be destroyed and rental income for land on which hunts had previously taken place could no longer be obtained.

⁴²⁵ para 34

⁴²⁶ In regards to the P1-1 position, at least. The arguments relating to interpretation of article 6 may not yet be resolved.

In the leading Scottish case, *Adams v Scottish Ministers*,⁴²⁷ the issue of what constituted a possession was dealt with relatively shortly. The land, horses and hounds were obviously possessions, but a question arose over the livelihood of one of the petitioners, who described himself as a self-employed manager of foxhounds for the Duke of Buccleuch's hunt. Accommodation for this applicant and his wife was tied to his employment on the hunt. The Second Division accepted the Lord Ordinary's analogy with Strasbourg licence cases.

The first petitioner's economic interest in making his livelihood as a self-employed manager of foxhounds is a possession within the meaning of [P1-1]. That interest is comparable with an interest in operating a licensed restaurant (*Tre Traktörer Aktiebolag v Sweden*) or in carrying on a medical practice (*Karni v Sweden*) or in practising a profession (*Van Marle v Netherlands*), each of which has been recognised as a possession.⁴²⁸

Bearing in mind the definition set out above in relation to legitimate expectation of acquisition of economic interest, this decision seems entirely in accordance with the Strasbourg case law.

The relevant case in England and Wales, *R (Countryside Alliance and others) v Attorney General and another*,⁴²⁹ grappled with similar issues. Lord Bingham of Cornhill seemed satisfied that on the basis of the Strasbourg jurisprudence, the following could all be considered instances of interference with possessions:

...landowners who cannot hunt over their own land or permit others to do so, those who cannot use their horses and hounds to hunt, the farrier who cannot use his equipment to shoe horses to be used for hunting, owners of businesses which have lost their marketable goodwill, a shareholder whose shares have lost their value and so on.⁴³⁰

⁴²⁷ 2004 SC 665

⁴²⁸ para 97

⁴²⁹ [2008] 1 AC 719

⁴³⁰ para 20.

He goes on to observe the distinction between goodwill and future unearned income (which, as noted, may not be a possession), but does not distinguish any particular element of the various claims in the case as not constituting a possession on that basis. Perhaps it seemed unimportant given that the violations were to be considered justified in any event, although it does make it unclear why he raised the point in the first place.

4.2.3 Peaceful enjoyment

The use of the phrase "peaceful enjoyment" relates to the enjoyment of the right of property itself, rather than to enjoyment of a physical piece of land or of an object as such. There is no right to a pleasant environment. Protection of this peaceful enjoyment may, in some circumstances, impose a positive obligation on the state to prevent that enjoyment being interrupted, although the limits of this have yet to be clearly defined.

There has yet to be much in the way of domestic jurisprudence in relation to this aspect of P1-1. Certainly there does not appear to have been any litigation raised concerning the loss of a pleasant environment. It will be recalled that in extreme circumstances, excessive detriment to pleasant environment can be enough to amount to a deprivation.⁴³¹ The same principle has been applied by the English courts in *Dennis v Ministry of Defence*.⁴³² The pursuer here was the owner and occupier of Walton Hall in Cambridgeshire, which was situated alongside an RAF airbase and subjected to frequent, excessive noise pollution from Harrier Jump Jets. The Court found the noise from the jets to be "highly intrusive, frightening, persistent and unpredictable" to the extent that it constituted an "interference" with the property rights of the owner.

Along similar lines, in *Marcic v Thames Water Utilities Ltd*,⁴³³ the plaintiff owned a sizeable family home with large gardens at the front and back. His garden had been repeatedly flooded with sewer water over a period of more than ten years as a result of the fact the sewerage system, which was the

⁴³¹ See *Powell v UK* (1987) 9 EHRR 241, *S v France* (13728/88) May 17 1990 and the discussion at 71-75 above.

⁴³² [2003] Env LR 34

⁴³³ [2004] 2 AC 42

responsibility of the defendants, was overloaded at points in proximity to the plaintiff's premises. Although the defendants were aware of the problem and although it was possible to remedy the difficulty, no works had been carried out or were planned at the time of the hearing owing to budgetary constraints.

The plaintiff contended that the flooding amounted to an interference with his right to peaceful enjoyment of his property, which was not disputed by Thames. The nature of this interference was found by the trial judge to amount to a partial deprivation:

Although I have not heard expert evidence of any diminution in value of his property, there is expert evidence of damage to the property and the evidence of Mr. Marcic, who considers it to be unsaleable. The value of Mr. Marcic's property must have been seriously and adversely affected by the nuisance. That effect has constituted a partial expropriation: in *S v. France*⁴³⁴ the Commission observed that where the value of real property was seriously affected by noise nuisance, that nuisance would amount to a partial expropriation.⁴³⁵

One interesting interpretation in the domestic case law which has yet to be aired in Strasbourg is whether the concept of "enjoyment" carries with it both positive and negative aspects. This point arose in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another*.⁴³⁶ The issue at stake was the cost of repairs to the chancel⁴³⁷ of St John the Baptist Church in Aston Cantlow, which the plaintiffs contended were due to be paid by the defendants as the proprietor of Glebe Farm, a former rectorial property which imposed on its owner a variety of burdens as lay rector. The judge at first instance had found this liability on the defendants to be established by virtue of the Chancel Repair Act 1932. The defendants argued inter alia that this obligation was essentially an indiscriminate and unduly burdensome form of taxation which amounted to a breach of their rights under P1-1.

⁴³⁴ See discussion at 72-73 above.

⁴³⁵ 2001 WL 542174, para 69. Although the case was subsequently appealed as far as the House of Lords, this finding of the trial judge was not disputed.

⁴³⁶ [2004] 1 AC 546

⁴³⁷ The area at the end of the church traditionally housing the choir.

The House of Lords was not satisfied that the burden on the defendants here arose from anything other than the private law. There was no outside interference by a public body causing the liability; it was part and parcel of the defendants' ownership and had always been so. Lord Hope of Craighead noted:

I recognise that Mr and Mrs Wallbank may well need to draw on their personal funds to discharge the liability. But they are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of [P1-1.] The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens attached to it as well as the enjoyment of its rights and privileges.⁴³⁸

This is an interesting corollary to the concept elaborated by the European Court of Human Rights to the effect that peaceful enjoyment can involve a positive obligation being imposed on the state, which has yet to be discussed domestically. This development in the Strasbourg case law is, of course, fairly recent. It would be fortuitous if the parameters here were more clearly defined at the Strasbourg level before the domestic courts were obliged to make sense of them in a UK context.

4.2.4 Deprivation

Where rights of ownership have formally been removed, there can be no question that a *de jure* deprivation has taken place. Similarly, where all rights have effectively been removed, even whilst formally remaining in place, a *de facto* deprivation will be found. However, the restriction here must be such as to result in an almost total inability to exercise the usual powers attaching to ownership. A key factor here will be whether or not the applicant has retained the right to dispose of the possession in question. Where a disposal remains possible, even severe restrictions on the applicant's powers will be unlikely to amount to a deprivation in the eyes of the Court.

⁴³⁸ Para 72

In addition, the complex issues surrounding confiscation and forfeiture of goods on a criminal law basis do not appear to fit readily into this definition of deprivation.

The domestic jurisprudence on deprivations is, at best, confusing, and at worst entirely contradictory. Although the concept of *de jure* deprivation may be subject to a certain amount of ambiguity in the Strasbourg case law, *de facto* deprivation is easier to identify.

Such deprivations are sometimes recognised by the UK courts. One example is *R (Clays Lane Housing Co-operative Ltd.) v The Housing Corporation*.⁴³⁹ The defendant in this case is the statutory regulatory body for social landlords, who had directed the plaintiff to transfer its housing stock to the Peabody Trust following findings of serious mismanagement within the plaintiff's administration. This compulsory transfer was agreed by the parties to constitute a deprivation, a definition which the Court of Appeal had no difficulty accepting. Indeed, it is difficult to imagine why they would not have accepted it: the plaintiff's rights of ownership were being removed as a matter of both law and fact.

This clear-cut test has not been so simply applied in an agricultural context, however. The difficulties began with *Booker Aquaculture Ltd v Secretary of State for Scotland*.⁴⁴⁰ This case concerned the Diseases of Fish (Control) Regulations 1994 which set out a scheme for the destruction of fish and sanitisation of fish farming facilities in which certain listed piscine diseases had been identified. The Regulations, which had been introduced in implementation of an EC Directive, made no provision for compensation in respect of destroyed fish stock. The pursuer in the case had been subject to the scheme and its request for compensation had been rejected.

It would seem difficult to argue that the pursuer had not been deprived of its possessions here: the fish were literally destroyed. However, the Court was not prepared to accept that there was any case to be made under P1-1 here,

⁴³⁹ [2005] 1 WLR 2229

⁴⁴⁰ 2000 SC 9

holding rather that the matter as a whole turned on EC law.⁴⁴¹ No deprivation was acknowledged to have taken place.

Matters only became more confusing with the outbreak of foot-and-mouth in 2001. Foot-and-mouth is a highly contagious viral disease which affects cloven-hoofed animals including cattle and sheep. The outbreak of the disease in the UK in spring 2001 was identified by the Ministry of Agriculture, Fisheries and Food as being a particularly virulent strain which could spread through animal, human, mechanical or airborne transfer between neighbouring farms. Veterinary advice suggested that rapid culling of all animals not only on affected farms, but also on neighbouring farms, would be necessary to prevent the spread of the disease. This was the situation in *Westerhall Farms v Scottish Ministers*.⁴⁴² The petitioner owned a hill farm bounded at its highest point by an infected farm. When foot-and-mouth was identified in the neighbouring concern, a notice was served on the petitioner indicating that its livestock would be slaughtered. The petitioner argued that the blanket rule on culls of animals in neighbouring farms was disproportionate.

Again, the pursuer in the case was to suffer actual destruction of his property. Yet Lord Carloway did not find that P1-1 was engaged.

Although it is proposed that the petitioners' peaceful enjoyment of their livestock be interfered with, it was not suggested that this was otherwise than purportedly in the public interest and subject to the conditions provided for by law. These conditions involve the payment of compensation amounting to the value of the beasts slaughtered and this type of approach seems to be permitted under the Convention where the public interest demands the interference.⁴⁴³

Looking later at proportionality, he noted:

Here, there is on the one hand the prospect of substantial, potentially catastrophic, economic harm being caused to the farming industry if swift and effective action is not

⁴⁴¹ See further discussion of this case below.

⁴⁴² Unreported, Court of Session, 25 April 2001

⁴⁴³ Para 27

taken to prevent the spread of the disease. Such steps as are advised may result in a limited amount of farming livestock being slaughtered. However, the legislation empowering the executive to order the slaughter of animals also compels the executive to pay compensation amounting to the value of the animals killed. This process does not seem to amount to a potential breach of the article.⁴⁴⁴

Although there is little to argue with in the conclusion reached by the Court here, it is perhaps indicative of the general lack of understanding exhibited by the Court of Session towards the Convention that the judge considers the article not to have been engaged. Using the approach of the Strasbourg jurisprudence here, it would seem quite clear that culling the beasts would amount to a deprivation of property: in other words, the article would most certainly have been engaged. The deprivation may well have been justified given the aim pursued and the compensation offered, but it is unfortunate that the Court's reasoning does not appear to accord with the essentials of the Strasbourg jurisprudence.

More confusingly, however, the same judge appears to have taken a different tack in a similar decision days later. In *Christopher Shepherd v Scottish Ministers*,⁴⁴⁵ a slaughter notice was issued against the petitioner's farm on the basis that he had visited his brother's farm three days before foot-and-mouth was identified there. Although there were no signs of infection amongst the petitioner's sheep, there was a particular concern that the disease should not spread into the previously infection-free area of Sutherland where the petitioner's farm was located.

In the opening paragraph of his decision, Lord Carloway notes:

There is no doubt that the respondent's proposals involve an interference with the petitioner's possessions albeit purportedly in the public interest and subject to conditions provided for by law.

⁴⁴⁴ Para 27

⁴⁴⁵ Unreported, 1 May 2007

The case again turns on proportionality, and again there may be little to disagree with in the eventual decision of the Court. However, the approach taken in these cases suggests a fundamental lack of understanding of the Strasbourg approach to interpretation of P1-1.

Unfortunately this apparent lack of grasp on the Strasbourg way of doing things has not prevented the domestic courts becoming mired in the same confusion over confiscation and forfeiture cases as their sister institutions in France.

It will be recalled that, despite a seeming conflict with the usual rules as to what will constitute a deprivation, the ECtHR has repeatedly characterised confiscation and forfeiture as a control of use. *Lindsay v Customs and Excise Commissioners*⁴⁴⁶ refreshingly bucks this trend. *Lindsay* was effectively a test case for the many individuals who had fallen foul of the heavier penalties introduced by Customs and Excise to deal with members of the British public taking the car ferry over to France, buying quantities of alcohol and cigarettes subject to the much lower rates of French tax and then bringing them back to the UK, sometimes in illegal quantities for resale. In July 2000, Customs and Excise instituted a new policy by which any car or light goods vehicle used to smuggle excise goods would be seized, even for a first offence, and usually confiscated unless there was sufficient proof that such a forfeiture would be disproportionate.

The particular plaintiff in the case had been caught attempting to smuggle around £2,000 worth of tobacco products into the UK without paying duty. He was instructed to forfeit not only the goods, but also his car.

The leading speech in the case was given by Lord Phillips of Worth Matravers MR. He started on the basis that the commissioners' policy led to the deprivation of possessions, an interesting conclusion in itself given that the

⁴⁴⁶ [2002] 1 WLR 1766

general trend in the Strasbourg jurisprudence towards characterising confiscation as a control rather than a deprivation.⁴⁴⁷ He goes on to say:

[Under P1-1] such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is “to secure the payment of taxes or other contributions or penalties.”⁴⁴⁸

Securing a payment of taxes or other penalties is, however, defined in the Strasbourg case law as a control of use.⁴⁴⁹

Were the domestic courts, then, to categorise confiscation as a deprivation, which would seem the most logical approach? Sadly it appears this deviation from the Strasbourg line of jurisprudence was to arise only in the context of *Lindsay*. A selection of cases emerging from the provisions surrounding confiscation of the proceeds of crime suggests that courts north and south of the border are more generally inclined to define confiscation as a control. The key piece of legislation in this area is the Proceeds of Crime Act 2002, which allows for criminal income to be confiscated. Where a person is convicted of certain offences, particularly involving drug trafficking or money laundering or where there is a defined pattern of recidivism, he will be considered to have a “criminal lifestyle” in the wording of the statute. The impact of this finding is that every piece of property obtained by the accused during the six years prior to his conviction will be presumed to be the result of criminal activity, unless the accused can show evidence to the contrary. A confiscation order can be made for the full amount of this “benefit” received by the criminal, regardless of whether he is still in possession of the property or not by the time the order is made.

The P1-1 implications of this legislation were first considered in Scotland in *McSalley v HMA*.⁴⁵⁰ Lady Cosgrove emphasised that a confiscation order was an order for payment of money. It did not compel a transfer of ownership from

⁴⁴⁷ See discussion at pages 81-85 above.

⁴⁴⁸ Para 52

⁴⁴⁹ See discussion at pages 1141-145 above.

⁴⁵⁰ 2000 JC 485

the criminal to the state. Accordingly the action of the state here should be considered a control of use rather than a deprivation. However, this reasoning may be somewhat disingenuous. The level at which a confiscation order is set by the Court is calculated based on the available assets of the criminal. If the order is not paid timeously, the Court can appoint a management administrator (in Scotland) or a management receiver (in England and Wales) who will take control of the assets and arrange for them to be sold off, much like a trustee in bankruptcy proceedings. The idea that a confiscation order does not compel a transfer of ownership is true on paper, but in reality the order is calculated with that very action in mind.

There may be something of a middle road solution here that has been put forward in the more recent English authority of *R v Goodenough*.⁴⁵¹ The suggestion was made in this case that, at the time the confiscation order is made, it amounts to nothing more than a control. However, the action taken by the state in appointing a management administrator/receiver goes further and essentially amounts to a deprivation. *R v Goodenough* was not decided on this basis, so the comments here are *obiter*. Given the body of Strasbourg authority to the effect that a confiscation is a control, it seems perhaps unlikely that this distinction would ever be accepted in domestic jurisprudence. However, it is interesting nonetheless to see the difficulties with the Strasbourg approach being acknowledged at least to some extent.

4.2.5 Control

An action by the state, which regulates the use that can be made of possessions, but does not remove the right of ownership, will fall within the definition of control. The regulation may be positive or negative, and must have more than a *de minimis* impact on the applicant. Essentially, control must be less than deprivation.

As with the European jurisprudence, the concept of control has been subjected to considerably less scrutiny than that of deprivation. One celebrated Scottish case in which the principle of control is demonstrated is

⁴⁵¹ [2005] Crim. L.R. 71

Karl Construction Ltd v Palisade Properties.⁴⁵² Scots law allows for a form of diligence known as inhibition, which, when in operation, prevents the owners of a property from selling or otherwise disposing of it. Inhibition of the defender's property was automatically allowed in the Scottish civil court system whenever a conclusion for payment of money formed part of the summons. There was no requirement that special circumstances existed – for example, that the defender be on the verge of bankruptcy - to justify the grant of inhibition on the dependence. In this particular case, the pursuer sued for payment of damages in respect of construction work completed under a contract between the defender and an agent of the pursuer. In its summons, the pursuer included the standard conclusion for diligence on the dependence. The defender argued that the blanket grant of inhibition in these circumstances without any need to show that it was justified in a given case amounted to a breach of its rights under P1-1.

Lord Drummond Young considered the Strasbourg case law, particularly *Sporrong and Lönnröth v Sweden*⁴⁵³ and *Marckx v Belgium*,⁴⁵⁴ and noted that inhibition on the dependence constituted a restriction on the right to dispose of property. The ability to transfer title is one of the key elements of ownership, and accordingly any obstacle to the exercise of that right is fundamental. However, there can be no question of deprivation as such – the owner retains title, and is free to use and enjoy his property in all other ways. This limited restraint on the powers attaching to ownership is a classic example of a control of use of possessions, and Lord Drummond Young characterised it as such.

Some less controversial examples of controls on the use of possessions found in the domestic case law include planning restrictions,⁴⁵⁵ licensing the sale of alcohol⁴⁵⁶ and imposing tax on business profits.⁴⁵⁷ In *Adams v Scottish Ministers*, the ban on hunting with horses and hounds was categorised as a

⁴⁵² 2002 SLT 312

⁴⁵³ (1982) 5 EHRR 50, see discussion at pages 99-105 above.

⁴⁵⁴ (1979) 2 EHRR 355, see discussion at 100 above

⁴⁵⁵ *Di Ciacca v Scottish Ministers* 2003 SLT 1031

⁴⁵⁶ *Adams v South Lanarkshire Council* 2003 SLT 145

⁴⁵⁷ *R (on the application of Professional Contractors Group Ltd) v Inland Revenue Commissioners* [2001] HRLR 42

control of use of the land over which hunts had previously taken place, in addition to a control of the use of horses and hounds.⁴⁵⁸

4.2.6 Public/General Interest

The notions of public and general interest are extremely wide concepts that are ultimately defined by the states themselves. The Court will respect the views of the state as to what will be for the good of the public unless those views are manifestly unreasonable.

The domestic jurisprudence has hardly touched upon this definition, which is perhaps unsurprising given the width of the original parameters. Examples of the public interest served by state action have covered a fairly wide range, however. In *Strathclyde Joint Police Board v Elderslie Estates*,⁴⁵⁹ discussed above, it was determined that the legislative power given to the Lands Tribunal to waive title conditions served a public interest in preventing a superior effectively holding a vassal to ransom for waiver fees in a situation where the superior had title in respect of the land condition but no interest to enforce the same.

The power of one party to extract money from the other in circumstances which were unlikely to have been contemplated by the parties at the outset has been perceived as producing an unfair imbalance of property rights. The aim [of the legislation] has been to correct that imbalance.⁴⁶⁰

*International Transport Roth GmbH and Others v Secretary of State for the Home Department*⁴⁶¹ concerned regulations by which heavy good vehicles could be confiscated if it was discovered that asylum seekers had smuggled themselves aboard in an attempt to cross the British border. The public interest served by the regulations was noted as the need to combat the "grave social evil"⁴⁶² of illegal entry to the UK. In *McSalley v HMA*,⁴⁶³ Lady Cosgrove

⁴⁵⁸ 2004 SC 665. Similar findings were made in the analogous English case *R (Countrywide Alliance) v Attorney-General* [2008] 1 AC 719

⁴⁵⁹ 2002 SLT (Lands Tr) 2

⁴⁶⁰ p12

⁴⁶¹ [2003] QB 728

⁴⁶² As Simon Brown LJ describes it in para 1.

⁴⁶³ 2000 JC 485

noted that the legislation allowing for the confiscation of the proceeds of crime was put in place with the aim of:

protecting the public from the evils and dangers of illegal drugs whose effects are pervasive and which cause untold human misery.⁴⁶⁴

Perhaps more prosaically, destruction of property in the form of cattle and fish stocks have been deemed necessary to halt the spread of infectious diseases.⁴⁶⁵ Prevention of cruelty to animals was the justification offered by both Holyrood and Westminster for the ban on foxhunting in the subsequent P1-1 challenges.⁴⁶⁶ The legitimacy of state controls such as planning regulations⁴⁶⁷ and licensing of various kinds⁴⁶⁸ have also been accepted, as they had been in Strasbourg.

4.3 Determining an application under P1-1

In chapter three of this thesis, analysis of the jurisprudence demonstrated that the European Court of Human Rights carried out a five step process when determining the outcome of an application under P1-1. That process was summarised as follows:

1. The Court must determine whether the property or interest held by the applicant falls within the broad definition of "possessions" as discussed in chapter two above.⁴⁶⁹ The first question in the process is accordingly: does the applicant hold a possession?

2. Should it be determined that a possession is involved, the Court asks whether an interference with P1-1 has taken place by considering the

⁴⁶⁴ P495

⁴⁶⁵ *Westerhall Farms v Scottish Ministers* Unreported, Court of Session, 25 April 2001; *Booker Aquaculture Ltd v Secretary of State for Scotland* 2000 SC 9

⁴⁶⁶ *Adams v Scottish Ministers* 2004 SC 665; *R (Countryside Alliance) v Attorney-General* [2008] 1 AC 719

⁴⁶⁷ *Di Ciacca v Scottish Ministers* 2003 SLT 1031;

⁴⁶⁸ *Catscratch Limited v City of Glasgow Licensing Board (No 2)* 2002 SLT 503 and *Adams v South Lanarkshire Council* 2003 SLT 145 (both alcohol licensing); *Crompton v Department of Transport North West Area* 2003 WL 117004 (licence to drive an HGV); *Whitefield v General Medical Council* [2003] HRLR 9 (medical licence.)

⁴⁶⁹ See pp50-6971 above

“three rules” set out in *Sporrong and Lönnroth v Sweden*. Any intervention with P1-1 must fall to be categorised as (a) general interference with the peaceful enjoyment of possessions, (b) deprivation of possessions or (c) control of the use of those possessions. State action which falls within one of these three rules constitutes an interference. The second question is therefore: does the state action fall within one of these three categories?

3. Once an interference has been established, the Court must decide whether it is justified by the qualifications to the right of peaceful enjoyment of possessions set out in P1-1. No interference can be fair if does not have a clear legal basis. The third question is accordingly: was the action of the state lawful in the meaning of the article?
4. Interferences can only be justified where they were carried out for the benefit of the wider society. The fourth question is therefore: did the action of the state pursue a legitimate aim in the public or general interest?
5. Finally, any interference must meet the test of proportionality inherent in the wording of the article. The fifth question is accordingly: did the state action strike a fair balance between the needs of the community and the burden placed on the individual applicant? This is also expressed by asking simply, was the interference proportionate?

How have the domestic courts adapted to this decision-making process? To say that success has been mixed seems perhaps inevitable. Given the uncertainties surrounding the ECtHR's own approach to applications under P1-1, it would hardly be possible to expect the domestic courts to have somehow followed Strasbourg step-by-step. Additionally, it must be borne in mind that the domestic courts are not bound by Strasbourg “precedent” as such, being under an obligation only to “take account of” the European case law.⁴⁷⁰ Nevertheless, it is discouraging to discover that, in some cases, it

⁴⁷⁰ Human Rights Act 1998, s2(1). See discussion at 38-40 above.

would appear that every element of the Strasbourg jurisprudence had been ignored almost entirely.

One example of this is the decision in *Booker Aquaculture Ltd v Secretary of State for Scotland*.⁴⁷¹ As discussed above, the case concerned regulations which allowed for destruction of fish stocks in order to prevent the spread of piscine disease. There was no provision in the regulations for compensation where a destruction order was made. The pursuer in the case had been subject to the scheme, and had made a request for financial recompense. This request was rejected; there was no basis on which to grant it. The case called for an answer to the question of whether this lack of provision for compensation meant the regulations were in breach of the right to property.

There was no dispute between the parties that domestic law had to be implemented in accordance with the principles of community law. There was also no dispute that the right to protection of property formed one of those principles. In the particular case it was considered that the notice requiring slaughter of certain fish amounted to a deprivation of property. (Alternatively, certain fish were allowed to be sold for commercial purposes under specific conditions, which was properly categorised as a control of use.) The public interest served by the regulations in preventing the spread of virulent fish diseases was accepted by all parties. However, the pursuer argued that the failure of the regulations to make provision for compensation amounted to a breach of P1-1 based on the Strasbourg case law.

The Lord President (Rodger), having reviewed the authorities, concluded correctly:

I am satisfied that the right to property is recognised as a fundamental right under Community law and that the availability of compensation is relevant to any consideration of whether the right has been respected. Moreover the right pervades the Community legal order and...will fall to be taken into account by any member state when implementing the obligations placed on it by a directive.⁴⁷²

⁴⁷¹ 2000 SC 9

⁴⁷² p 19

He goes on to consider, however, whether community law applies to the determination of compensation in this case, concluding ultimately that:

In my view, these observations [by the European Court of Justice in *Flip CV and O Verdegem NV v Belgian State*⁴⁷³] suggest that in the absence of any provision in a particular Community act requiring the payment of compensation, the question of compensation for owners whose pigs had been slaughtered under national measures taken to fulfil a Community obligation remained a matter within the competence of each member state.⁴⁷⁴

Applying that conclusion to the present case, the Court found the question of whether compensation should be awarded was a matter purely for the national law. The right of property enshrined in the general principles of community law was the sole basis of the pursuer's claim; since only national law was applicable in respect of the compensation question, the pursuer's claim was therefore bound to fail.

The Court referred the matter to the ECJ for clarification on whether community law applied in this situation. No opinion was offered on whether, if community law did apply, the property right had been violated by the failure to provide compensation. The Court believed rather that the ECJ would set out the relevant principles to be considered in their judgement should it consider that community law was, indeed, applicable here.

This case is odd and dissatisfying due to the insistence that human rights only have an application in the UK where the issue is one of community law. It may be that the pursuer was somewhat hoist by its own petard, however, in pleading the case on a community law basis. Presumably it would always have been open to Booker to make an application directly to the ECtHR questioning the compliance of the slaughter order with P1-1 given the absence of provision for compensation. It seems unfortunate and contrary to justice, though, that it should have been necessary to take this step: after all,

⁴⁷³ [1995] ECR I-913

⁴⁷⁴ p 25

the domestic court had already reviewed the relevant ECtHR authorities, and it had been some decades since the First Protocol had been ratified. The regulations under dispute in this case were introduced prior to the Human Rights Act. If the case were to be considered nowadays, the Court would be under an obligation to review their P1-1 compatibility based on that statute, so perhaps this particular oddity is unlikely to be repeated. It still serves, however, as an example of the difficulties the domestic courts have sometimes had with grasping the general tenor of the Strasbourg jurisprudence on P1-1.

4.3.1: Does the applicant hold a possession?

As before, the essence of this step has been described in detail during the discussion above⁴⁷⁵ of the definition of “possessions” by the domestic courts. If no such possession is found to exist, the application can go no further.

4.3.2 Which rule has been engaged?

As discussed in chapter three, the three-rule approach to P1-1 first elaborated in *Sporrong and Lönnroth v Sweden* is not without its difficulties. However, it is unquestionably the framework around which all P1-1 decisions have been made in Strasbourg for almost 30 years now. It has been seen in the preceding chapter that whether a state action is categorised as an interference, a deprivation or a control of use will impact on the remainder of the five-step decision-making process, and particularly will impact on the question of proportionality. Given the numerous ambiguities which surround the definition and application of the P1-1 terminology, it would seem desirable that the certainties that do exist be adhered to by the domestic courts now that the article has been incorporated into UK legislation. In the majority of domestic case law, the courts begin by deciding which *Sporrong* rule is applicable. However, this adherence is not universal. Unfortunately it does not appear that the deviations from the rules are due to principled objections to the difficulties with it, but rather due to a lack of understanding of the rules in the first place.

⁴⁷⁵ See pp50-70 above

An example of this confusion can be seen in *International Transport Roth GmbH and Others v Secretary of State for the Home Department*.⁴⁷⁶ The regulations under fire in the case concerned illegal aliens attempting to smuggle themselves into the UK by hiding in the back of goods lorries. A penalty scheme was created by which the owner, hirer and driver of any vehicle found to contain a “clandestine entrant” could be subject to significant fines. The vehicle could be detained if there was a “serious risk” that the penalty would not be paid in the opinion of the issuing officer and if no alternative security was given. There would be a defence to the penalty if the driver had no actual or constructive knowledge of the clandestine entrant and also operated a system designed to prevent such entrants from making use of the vehicle.

There were a number of different things going on in this case which make the P1-1 elements of the decision somewhat difficult to identify and parse. Asylum seekers are obviously something of a political hot potato. In addition to the P1-1 point, there was a case made in terms of article six of the ECHR which required discussion of whether the penalty scheme should be categorised as civil or criminal in addition to determination of whether the right to a fair trial had been breached. The Court was also very occupied by the definition of proportionality as set out in the English public law cases of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*⁴⁷⁷ and *R (Daly) v Secretary of State for the Home Department*.⁴⁷⁸

Perhaps it was the overall complexity of the case which resulted in the analysis of the P1-1 elements being something less than satisfactory in comparison with the usual Strasbourg jurisprudence. Essentially the whole discussion of P1-1 revolved around some notion of proportionality. There was no mention of the three Sporrang rules, nor discussion of which category state action in this case might fall into. Despite this, both the trial judge and the Court of Appeal had found the regulations to breach P1-1.

⁴⁷⁶ [2003] QB 728

⁴⁷⁷ [1999] 1 AC 69,

⁴⁷⁸ [2001] 2 AC 532

We have seen in the Strasbourg jurisprudence that categorisation of the breach of P1-1 is an essential pre-requisite to determining whether or not a fair balance has been struck. In particular we have seen that, in case of deprivation of property, compensation must almost always be paid before a fair balance can be said to be achieved. The situation in this case is not even one in which the categorisation is obvious: as discussed at length in the preceding chapters, there is a substantial degree of confusion in the ECtHR case law on confiscation cases between whether forfeit of an item amounts to a deprivation or merely a control.

The majority of the judges in the Court of Appeal did not concern themselves with these issues. Only Laws LJ in dissent clarified that he considered the matter to be one of control of use rather than deprivation of property, although this was not without difficulties.

I accept the submission that what is at issue here is the *control* of the use of property, as regards which it is clear that the signatory states enjoy a wide margin of discretion. Given the approach of the Strasbourg court in *Air Canada*, and in light of the overall nature of the scheme, there is in my judgment no transgression of the margin.⁴⁷⁹

The margin of appreciation to which he refers is relevant to the methods by which a legitimate aim can be pursued, not to control of use as a general category. It is unfortunate when it has been demonstrated repeatedly by the Strasbourg jurisprudence that these categories are significant and impact on the decision-making process as a whole that the domestic courts do not feel the need to take them into account.

The confusion over the three *Sporrong* rules is also demonstrated by the two cases arising from the foot-and-mouth epidemic in 2001, as discussed above. In *Westerhall Farms v Scottish Ministers*,⁴⁸⁰ Lord Carloway did not find P1-1 to be engaged:

⁴⁷⁹ para 110

⁴⁸⁰ Unreported, Court of Session, 25 April 2001

This process does not seem to amount to a potential breach of the article.⁴⁸¹

On the other hand, in *Christopher Shepherd v Scottish Ministers*,⁴⁸² Lord Carloway referred to identical state action to amount to an interference.⁴⁸³ It is difficult to imagine how this can be meant in the technical *Sporrong* sense. Following the Strasbourg jurisprudence here, what might have been expected (in both cases) was a finding of deprivation of property amounting to a breach of the article, although this may well subsequently have been justified with reference to the remaining steps of the decision-making process. If Lord Carloway did mean to suggest that the state action in *Shepherd* should be categorised as a *Sporrong* interference, this should no doubt have been explained since it is less than evident from the facts. Further, it seems impossible to understand why this technical categorisation should have been decided upon in one case but not the other when the nature of the state intervention is virtually identical in each. What appears more likely is that the whole notion of the three-rule approach has been ignored entirely.

A final example of uncertainty arising in this area either from lack of understanding or lack of interest is *MW and H Ward Estates Limited v Monmouthshire County Council*.⁴⁸⁴ The council in this case wished to enter onto the plaintiff's land to construct a drainage channel designed to alleviate a severe flooding problem. The claimant argued that this action on the part of the council would amount to a disproportionate interference with his rights under P1-1.

Unlike the *Westerhall Farms* and *Christopher Shepherd* cases, the Court here did not ignore the question of the *Sporrong* categories entirely. Rather, it seems that the discussion over which category was applicable became confused. The claimant contended that, should the work be undertaken by the council, it would amount to a deprivation of property. The respondent challenged this contention, and indeed the Court was not convinced on the

⁴⁸¹ Para 27

⁴⁸² Unreported, Court of Session, 1 May 2001

⁴⁸³ See discussion of this case at p194

⁴⁸⁴ 2002 WL 31413995

argument, but opted to proceed on that basis in any event. It is hard to see, bearing in mind the Strasbourg jurisprudence on the meaning of the various terms, how the Council's action could sensibly be said to amount to anything other than a control of use. Nevertheless, at least what appeared to be a clear basis for the decision was put in place.

The basis, however, was not founded upon in the way that might be expected. Laws LJ went on to find that the fact compensation was to be paid meant there was no violation of P1-1. However, he considered the compensation provisions not in terms of proportionality, but rather from the point of view of whether an interference could be said to have taken place at all. His view was that, given the compensation, there was no violation. This finding is difficult to parse to say the least. Having already decided that the state action amounted to a deprivation, why go back and reconsider the question of whether any interference has taken place at all? It may be that what was intended here was a finding that the deprivation of possessions was justified as lawful, in the public interest and ultimately proportionate as a result of the compensation payment. It is unfortunate that, if this is what was meant, it is not what was said.

Overall it might be said that the approach domestically to the first step of the decision-making process is confused in places. However, it does not appear that this confusion has as yet amounted to a result in any particular case that might have been different had the Strasbourg approach been fully applied. It is to be hoped, however, that a clearer grasp of the *Sporrong* categorisations and the role they play is obtained before more difficult cases arise.

4.3.3 Is the interference lawful?

The question of lawfulness is one which rarely arises in the domestic case law. It can be seen from the jurisprudence of the ECtHR that the most common context for applications under this head is one of political uncertainty, where regimes are in the process of change whether voluntarily or as a matter of force. In a sense, the lawfulness requirement is the one which most clearly encapsulates the original spirit of the property right: the

idea that a state should not be able to deprive a citizen of his possessions on a whim or as a means to weakening political opponents. It is to the credit of both Westminster and Holyrood that this is not a situation with which the courts here have had to contend.

Lawfulness arguments are not entirely unknown, however. One interesting case where a discussion of lawfulness arose amidst a variety of other P1-1 arguments was *R (on the application of Professional Contractors Group Ltd) v Inland Revenue Commissioners*.⁴⁸⁵ The application here came out of the introduction of a piece of composite tax legislation known as IR35. The legislation was aimed at "service companies." A person who wished to provide professional services of whatever kind could set up such a company with herself as the only member and herself also as the only employee. The company would contract out her services in return for remuneration which would be paid by the client to the company. Some of this income could be taken as a salary by the individual-as-employee, and some could be taken later as a dividend by the individual-as-shareholder. The Inland Revenue had taken the view that these companies were often operated for tax avoidance purposes, and IR35 introduced new rules providing that where the professional was effectively acting as an employee of the client, notwithstanding the interposition of the service company, the professional would be obliged to pay tax and National Insurance contributions on the same basis as any other employed person.

The applicant, representing a number of individuals who operated service companies, made various arguments under P1-1 to the effect that its members had been deprived of possessions in an unlawful and disproportionate manner. The lawfulness argument turned on the contended uncertainty in determining when an individual might be considered to be "employed" by the client using the Inland Revenue guidance on the subject. The parameters of legal certainty as defined by the Strasbourg case law were outlined, before detailed consideration was given to the IR guidance on the subject. This largely attempts to encapsulate the common law on the

⁴⁸⁵ [2001] HRLR 42

differences between a contract of employment and a contract to provide services.

Burton J eventually concluded:

Notwithstanding certain areas of potential dispute [outlined in the IR guidance], I do not consider that it offends against the concept of certainty for the common law of employment to apply to a service contractor; and I find no difficulty with the concept of what the claimants have described as the "entirely hypothetical relationship between the service contractor, when no such relationship exists." ...I do not consider that [the service contractor's] subjection to the same law as if he were a sole trader or an individual is objectionable, or submits him to unacceptable uncertainty, any more than I conclude that it is contrary to Human Rights to apply such law in an ordinary case to an individual.⁴⁸⁶

The case is reminiscent of *Sunday Times v United Kingdom*⁴⁸⁷ in the sense that it is the general principles of an existing area of law which are in dispute (contempt of court in *Sunday Times*, employment law in the instant case.) In both cases, the common law rules were alleged to be so uncertain that they did not fulfil the foreseeability requirement of lawfulness, which demands that the application of the law should be sufficiently clear as to allow a person to regulate their conduct in accordance with it. As in *Sunday Times*, the Court was of the view that this requirement was fulfilled, and accordingly the case on this point was unsuccessful.

One other example of a case which, it is submitted, turns on a question of lawfulness although it is not explicitly identified as such in the report is *Crompton v Department of Transport North West Area*.⁴⁸⁸ The possession in question here was an HGV licence which had been revoked as a result of the driver no longer being "in good repute", one of the conditions for holding a licence in terms of the relevant legislation. The loss of good repute had come about as the result of an incident at an unconnected Transport Tribunal hearing concerning the applicant's brother in which the applicant had verbally

⁴⁸⁶ para 49

⁴⁸⁷ (1979-80) 2 EHRR 245. See discussion at pages 109-11 above.

⁴⁸⁸ 2003 WL 117004

abused a journalist, called a traffic examiner a "big fat fucking trollop" and advised the Traffic Commissioner that he knew his car registration number and that he should therefore "sleep with one eye open." (It might be noted that the applicant subsequently apologised to all parties.)

It was agreed that the licence was a possession and that revocation of a licence could amount to a deprivation in the sense of P1-1. At first instance, the Transport Tribunal had determined that the intention of the legislation in including the condition of "good repute" was to ensure a license holder was, in fact, fit to hold such a licence. In the view of the Tribunal, the applicant's behaviour had demonstrated him to be unfit to hold the licence.

The Court of Appeal was unhappy with this conclusion. No matter how reprehensible the applicant's actions may have been, the Court could not accept that they had impinged on the applicant's ability or fitness to drive heavy goods vehicles. In the view of the Court, that could be the only element of the applicant's reputation which was relevant for the purposes of the licence condition. The Tribunal's decision was accordingly overturned.

Essentially the argument here surrounded a misapplication of the law by the Tribunal at first instance. Once again, this difficulty goes to a failure to meet the foreseeability requirement. The law on licence conditions here had been incorrectly applied leading to a result which could not have been foreseen by the applicant. Accordingly, his argument under P1-1 was successful.

4.3.4 Is the interference in the public/general interest?

As discoursed upon at length in chapter three, the requirement that state interference with possessions be carried out in the public or general interest is a requirement in which the state is given an exceptionally wide of margin of appreciation. Given the apparently absolute unwillingness of the Strasbourg court to make a finding that state action is not in the public interest, at least in a case where the state has made some sort of argument that a public interest exists, it is perhaps not surprising to find that this requirement has not caused much difficulty for Holyrood or Westminster domestically either.

The parameters of the margin of appreciation were set out helpfully and comprehensively by Lord Drummond Young in *Karl Construction Ltd v Palisade Properties*,⁴⁸⁹ the case which led to the reform of the law in Scotland on inhibition on the dependence, discussed further below.

The margin of appreciation and the equivalent principle in national law are in large measure based on the idea that the aims of the articles of the Convention can usually be achieved in a number of different ways. It is accordingly open to the national authorities of the individual states to decide which method of achieving those aims is to be used... Within a single national system of law, it will frequently be the legislature or the executive that is in the best position to determine how the margin of appreciation accorded to the national authorities should be exercised. In cases where the legislature has chosen to act, it is obvious that the courts must exercise great restraint in interfering with the decisions made by it; the legislature is the democratically elected organ of government. The same is true to some extent of decisions of the executive, although for somewhat different reasons. The function of the executive is to govern in an effective manner, and the courts must allow it to do so; in particular, they should be slow to take over functions involving the exercise of administrative discretion, or to foreclose major budgetary decisions. Similarly, where a principle or procedure of the common law has been clearly established, I am of opinion that a court should exercise restraint in holding that that principle or practice contravenes the Convention. That is in accordance with the basic principle that the national authorities are given a margin of appreciation because they are in the best position to know how to respond to local conditions; the common law can be regarded as just such a response. Consequently, in every case where a common law principle or practice is challenged under the Convention, the court must consider whether the principle or practice in question can be regarded as a legitimate way of achieving the aims of the Convention, having regard to the national equivalent of the margin of appreciation.⁴⁹⁰

Interestingly in this case, the state's margin of appreciation was considered to have been exceeded, although not on the basis of a lack of public interest, rather through a lack of proportionality. However, what is useful in Lord Drummond Young's summary is that it sets out quite how widely drawn the discretion afforded to the state will be here. As with the Strasbourg case law,

⁴⁸⁹ 2002 SLT 312

⁴⁹⁰ para 69-70

this will ensure the flexibility needed to meet the intended aims of P1-1. However, it may be argued to rob the right of some of its force, since the requirement of public/general interest may become little more than a hoop through which the state is required to jump on paper.

A wide range of public/general interests have already been accepted domestically as sufficient, as outlined above. It remains to be seen whether any unexpected developments might take place in this element of the jurisprudence.

4.3.5 Is the interference proportionate to the aim sought to be achieved?

A fair balance must be struck between the aim of any state interference with P1-1 and the burden to be borne by the individual affected by the interference. This final step in the decision-making process is the one most frequently discussed and perhaps most fully understood by the domestic courts. Questions of proportionality must, by definition, be decided on a case-by-case basis, since each interference takes place in its own individual circumstances. Nonetheless, as discussed in chapter three, some common elements have arisen in a number of ECtHR cases. The aim of the state action will always be of critical importance. Other concerns which appear repeatedly include the availability of domestic appeal processes to the applicant, the impact of the applicant's own behaviour on the situation as a whole and, of course, the availability and level of any compensation for the interference.

Analysis of the domestic case law also suggests the existence of some common factors in the reasoning of the UK courts, although these are not necessarily the same issues which have arisen in Strasbourg. One interesting point which has come up repeatedly in the domestic jurisprudence is the idea of flexibility in terms of how the state acts. This has been best illustrated by a trio of cases dealing with a variety of customs regulations which provided for forfeiture of goods as a penalty for certain transgressions.

The first of the three, a complex case in which the English Court of Appeal opened a useful discussion about proportionality, is *Lindsay v Customs and*

Excise Commissioners.⁴⁹¹ As discussed above, this concerned day-trippers to France who would purchase alcohol and cigarettes at the significantly reduced rates of French tax and return with them to the UK. There was concern that many people were exceeding the limits imposed on the quantities which could be brought back into the country as a means of tax evasion. In July 2000, the commissioners instituted a new policy by which any car or light goods vehicle used to smuggle excise goods would be seized, even for a first offence, and usually confiscated unless there was sufficient proof that such forfeiture would be disproportionate.

The particular plaintiff in the case had been caught attempting to smuggle around £2,000 worth of tobacco products into the UK without paying duty. He indicated that some of the goods were for personal use and some had been bought for members of his family with money they had given him for this purpose. He was instructed to forfeit not only the goods, but also his car, a new Ford Focus which he had bought only a few months previously and which had a showroom price of £12,000. The issue in the case was whether the forfeiture of the car in such circumstances was disproportionate. Specifically, it was asked whether the guidance which had been given to customs officers – to the effect that all smugglers should have to forfeit their car except where it would be "inhumane", for example, in the case of a first time technical offence where a minimal amount of tobacco had been brought back for a relative – was too great a fetter on their discretion to allow a true test of proportionality in every case.

Lord Phillips of Worth Matravers MR proceeded on the basis that the commissioner's policy led to the deprivation of possessions.⁴⁹² The crux of the matter for the court seemed to be that there was not enough discretion afforded to customs officers by the general policy to allow a proportionate result in every case. Particularly, the court believed that a distinction had to be drawn between genuine commercial smugglers who were importing goods to sell for profit and individuals who were bringing back extra goods to give to

⁴⁹¹ [2002] 1 WLR 1766

⁴⁹² This is an interesting approach in itself, given the usual Strasbourg position on confiscation and forfeiture. See discussion at pages 81-85 above.

family and friends. The aim of the policy did not justify such a harsh penalty in the case of this latter group, of which Mr Lindsay was, on his evidence, a member.

Where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of the importation, whether it is a first offence, whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is a wider range of lesser sanctions that will enable them to impose a sanction that is proportionate where a forfeiture of the vehicle is not justified.⁴⁹³

Given the wide range of possible circumstances in which a person might be caught by customs and excise officers, then, it was considered that the policy was not sufficiently flexible to take into account all the relevant factors. This decision positively embraces the position taken by the ECtHR on proportionality, in which individual context is key. It can be seen that the factors concerning the Court here – the behaviour of the individual and the chance for his case to be properly considered, as in an appeal process – are familiar from the Strasbourg jurisprudence. The reasoning set out by the Court seems very much in keeping with the line the ECtHR would likely take in a similar situation.

The second case, arising from the same customs and excise policy, is *R (Hoverspeed) v Customs and Excise Commissioners*.⁴⁹⁴ The plaintiffs here included three individuals who borrowed the car of a fourth and, more elaborately, used the hovercraft of a fifth to travel to France and Belgium seeking tobacco products and alcohol. On return to the UK, the party were searched by customs officials and found to be carrying goods in excess of customs limits. Only one of the individuals was found to be importing goods for "commercial" use. However, on the basis of this finding, the customs officers confiscated all the goods and the fourth plaintiff's car.

⁴⁹³ para 64

⁴⁹⁴ [2002] 3 WLR 1219

The Court was invited to declare that the commissioners' policy regarding the seizure of goods and vehicles was contrary to P1-1. The argument concerned both the commissioners' powers to stop and search travellers and their vehicles and the eventual forfeiture provisions, which had been discussed in *Lindsay*. In the consideration of proportionality, the Court interestingly made note of the fact that the ECtHR was not, in general, enthusiastic about too wide a discretion being afforded to public bodies since it tended obfuscate the decision-making process and render the consequences of action difficult to foresee. The Court was satisfied that the limits on the powers of customs officers to stop and search vehicles,⁴⁹⁵ taken together with the temporary nature of confiscation of goods and vehicles, which could be returned to the individual if appropriate after evidence and arguments had been aired in court, were sufficient to render the policy on stop and search proportionate in the meaning of P1-1.

However:

It is their present policy on restoration which concerns us. They do not purport to treat all absentee owners equally, and they do not purport to give a proportionate response in every case. If goods worth £1,000 are seized, the genuine smuggler's car worth £2,000 will also be seized, and both will be forfeited. If goods worth £500 are seized from a "not for profit" smuggler, the absentee owner's car worth £15,000 will also be seized, and both will also be forfeited. And the policy discriminates in favour of the absentee owner who is a hiring company and against the absentee owner who is a private individual, although both could have imposed conditions on the terms on which they were willing to hire or lend their goods.⁴⁹⁶

Again, it was the blanket nature of the policy which caused concerns about whether the requirement of proportionality had been met. More flexibility was required.

The third in this trio of cases is the previously mentioned *International Transport Roth GmbH and Others v Secretary of State for the Home*

⁴⁹⁵ Essentially they required to have reasonable grounds for suspicion before they were entitled to search an individual or vehicle.

⁴⁹⁶ para 189

Department, arising from legislation designed to combat "people smuggling" into the UK by, *inter alia*, allowing for forfeiture of vehicles in which illegal aliens were found.⁴⁹⁷ As outlined above, this case was complex both in terms of its facts and of the legal questions it raised, with arguments made in terms of article six and the English public law of proportionality as well as under P1-1.

The trial judge had found the scheme to breach P1-1 since the provisions for restoration were too restrictive: a detained vehicle would only be returned in cases where there was both a stateable case on which to defend the penalty notice and also a compelling need for the vehicle to be returned. In the Court of Appeal it was once again argued that P1-1 had been breached by the scale and inflexibility of the penalty.

The social and political importance of the people smuggling problem was given appropriate weight by the Court in considering the aim of the state in intervening with the property rights of the plaintiff. Simon Brown LJ noted, however, that achieving this aim was only one part of the proportionality equation:

Even acknowledging, as I do, the great importance of the social goal which the scheme seeks to promote, there are nevertheless limits to how far the state is entitled to go in imposing obligations of vigilance on drivers (and vicarious liability on employers and hirers) to achieve it and in penalising any breach. Obviously, were the penalty heavier still and the discouragement of carelessness correspondingly greater, the scheme would be yet more effective and the policy objective fulfilled to an even higher degree. There comes a point, however, when what is achieved is achieved only at the cost of basic fairness. The price in Convention terms is just too high.⁴⁹⁸

Again, the lack of flexibility in the provisions was considered to be the key issue, and Simon Brown LJ's speech explains the issue neatly and succinctly.

⁴⁹⁷ [2003] QB 728

⁴⁹⁸ para 53

It is worth noting that not all the speeches in this case are similarly "on message" with the Strasbourg jurisprudence, however. Jonathan Parker LJ stated:

There is no dispute as to the "legitimate aim" [of the forfeiture provisions.] The question is whether the detention regime is disproportionate in the *de Freitas* sense. I have already concluded that it is, and no remedial interpretation is able to save it. Accordingly, in my judgement, the scheme falls foul of [P1-1.]⁴⁹⁹

Parker LJ had already concluded that the scheme was disproportionate in the English public law sense in respect of article six of the ECHR. An article six argument had been made concerning an alleged shift in the burden of proof from the authorities onto the driver to prove that he had no knowledge of a clandestine entrant in his lorry. Parker LJ had decided this aspect of the regulations breached the plaintiff's right to a fair trial in a disproportionate manner. It surely cannot be correct, however, to consider proportionality in the particular light of one provision of the ECHR, and then to say that the same result applies to all other relevant articles. A violation of an article of the ECHR involves a particular type of harm with particular consequences, with the intention of securing a particular aim. The fact that one article has been violated may in itself be relevant to the proportionality determination in respect of another; the extent to which the applicant has the right to argue his case before the domestic courts has been identified as a relevant consideration in deciding whether a fair balance has been struck in terms of P1-1.⁵⁰⁰ However, the same factors that render a violation of, as here, article six, disproportionate are not, of necessity, the same factors that carry weight in respect of P1-1. The justification for reversing the burden of proof in this situation is *not* the same as the justification for detaining the vehicle involved in the incident except in the broadest sense. The impact on the driver of reversing the burden of proof is very different than the impact on the driver of losing the use of his vehicle for weeks or months. If compensation had been paid, that would be relevant for P1-1 but it is unlikely to be relevant to questions of a fair trial. The factors on either side of the proportionality scale

⁴⁹⁹ para 193

⁵⁰⁰ See discussion at pp 150-152 above

vary depending on the violation in question. To say that the interference with article six is justified cannot be the basis on which it is concluded that the interference with P1-1 is also justified. It is submitted that Parker LJ's approach here simply cannot be correct.⁵⁰¹

Where the state does have a certain amount of discretion within which to operate, the Court will be concerned to see that they have done so in an appropriate manner. This will tend to include some indication that the various routes which are open to the public authority have been given due consideration. For example, in the case of *MWH and H Ward Estates Limited v Monmouthshire County Council*⁵⁰² mentioned above, the council needed to construct a drainage channel to deal with a repeated problem of flooding in the area. A plan to insert the channel under the applicant's land had been decided upon following a lengthy consultation which formed part of the planning application for a new residential development on neighbouring land. The claimant argued that this action on the part of the council would amount to a disproportionate interference with his rights under P1-1. In considering proportionality, the Court reviewed the various routes the council may have gone down to achieve the result they sought (such as a compulsory purchase order.) With the work in question involving little more than a day's entry onto the applicant's land, and evidence of full consideration being given to all potential options at the planning stage, the Court agreed with the trial judge that the proportionality test was satisfied.

Consideration of all the options, however, does not mean to say that the least intrusive action by the state will be the only proportionate action that could be taken. There is not, in this sense, a principle of minimum intervention where proportionality is concerned. This point was eloquently made by the Court of Appeal in *R (Clays Lane Housing Co-operative Ltd.) v The Housing Corporation*.⁵⁰³ The defendant in this case is the statutory regulatory body for

⁵⁰¹ Unfortunately this confusion is not unique in situations where more than one article of the ECHR is engaged. For example, in *McIntosh v Lord Advocate* [2003] 1 AC 1078, the Court deals with the proportionality of an alleged breach of art 6 caused by the confiscation of proceeds of crime legislation, before concluding that the P1-1 breach must be proportionate if the art 6 breach is proportionate.

⁵⁰² 2002 WL 31413995

⁵⁰³ [2005] 1 WLR 2229

social landlords, who had directed the plaintiff to transfer their housing stock to the Peabody Trust following findings of serious mismanagement within the plaintiff's administration. The plaintiff did not dispute that a transfer of stock was necessary and appropriate, but it wished the transfer to be made to its choice of successor, Tenants First Housing Co-operative, with whom the plaintiff had already agreed the terms of a voluntary transfer. It argued that by imposing a compulsory transfer when a voluntary transfer was possible and, indeed, the preference of the plaintiff, the defendant had acted disproportionately in violation of P1-1.

The parties had agreed that the case constituted a deprivation, as would appear fairly straightforward given full legal title was to be removed from the plaintiff and transferred elsewhere. An argument was made by the plaintiff's counsel that the use of the word "necessary" in P1-1 should be interpreted to mean that an interference could only be justified by a strict necessity test, in other words, the state should only take action if there was absolutely no alternative. The Court of Appeal rejected this submission, however, noting that the Strasbourg case law made clear that this word could have different meanings in different contexts within the Convention, and *James v UK*⁵⁰⁴ had made it explicit that, in P1-1, the correct test was what was reasonably necessary to achieve the legitimate aim sought to be achieved by the state whilst managing to strike a fair balance between the relevant interests.

How this would apply would depend on the context of the state action. In the instant case, there was not an option for the defendant to do nothing; having ascertained the extent of the mismanagement by the plaintiff, it was necessary for the housing stock to be transferred somewhere. The action the defendant was required to take was to make a choice between two alternatives. In that context, Maurice Kay LJ concluded:

...that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention

⁵⁰⁴ (1984) 8 EHRR 123

rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as...the present one.⁵⁰⁵

The whole tenor of this finding appears very much in keeping with the approach of Strasbourg towards enforcement of P1-1 rights. The margin of appreciation afforded to states is wide; flexibility is important; many interests have to be balanced up. It is difficult to argue with the idea that a test of necessity should be less strictly applied in economic questions than in, for example, cases of deprivation of the right to liberty.

Although there is no principle of minimum intervention as such, the impact on the applicant will nevertheless be important to the question of proportionality. This point is neatly illustrated in *Baird v Glasgow City Council*,⁵⁰⁶ in which the pursuer was a taxi driver who had had his licence suspended for six months following an allegation that he had acted in a racist and threatening manner towards another driver on the road. The sheriff noted that depriving the pursuer of his licence, even for a temporary period, would prevent him from working entirely during that period and might have a longer term impact on his business. The severity of this result was, in the view of the sheriff, out of proportion with the aim of securing the appropriate behaviour of taxi drivers.

The impact on the applicant also carried weight in the succession case *In re Land*.⁵⁰⁷ As set out above, the claimant had been convicted of his mother's manslaughter through gross negligence; he was the sole beneficiary under her will, but the English law of forfeiture applied to preclude him from taking the legacy since to do so would mean acquiring a benefit through his own

⁵⁰⁵ para 25

⁵⁰⁶ [2003] SLLP 27

⁵⁰⁷ [2007] 1 WLR 1009, discussed at p183 above.

wrongdoing. This left the claimant in a position of financial hardship. The question in the case was whether he could seek relief in terms of the Inheritance (Provision for Family and Dependents) Act 1975, which allows the Court to regulate distribution of an estate where reasonable financial provision has not been made under a will for a dependant of the deceased. Pre-existing *obiter dicta* of the Court of Appeal suggested that a person in the claimant's situation could not make an application under the 1975 Act, since reasonable financial provision *had* been made for him in the will. The fact that he could not benefit from that provision as a result of the forfeiture rule was not relevant to the statute.

The matter was essentially one of statutory interpretation, and the Court noted its obligation to construe legislative provisions in accordance with the ECHR so far as possible.⁵⁰⁸ The claimant's right to inherit was a possession in the meaning of P1-1; a restrictive reading of the legislation would result in him being deprived of that possession. The Court accepted that such a deprivation would be in the public interest in the sense that forfeiture rule exists in the first place to fulfil a public policy. However, in the Court's view:

[the legislation] must be read...in a way that enables the court to deprive the wrongdoer of benefit from the estate when it is in the public interest so to do, but to confer a discretion to mitigate the harshness of the absolute rule where it is not in the public interest to deprive the wrongdoer of all benefit from the estate.⁵⁰⁹

Although the Court talks in this passage of "public interest," it is submitted that the argument here is really about proportionality. Where the wrongdoer would find himself in a state of extreme financial hardship as a result of the deprivation, it would place a disproportionate burden upon him. The Court considers the legislation must be interpreted to allow discretion in order to avoid such a result as it would constitute a breach of P1-1. The impact on the individual applicant in the circumstances of the case must be taken into account.

⁵⁰⁸ This obligation is set out in s3 of the Human Rights Act 1998.

⁵⁰⁹ Para 20.

Another factor which may assist in determining the proportionality of an interference is the comparative viewpoint. This is an approach which has, perhaps surprisingly, been little considered in the Strasbourg jurisprudence. A useful example is given in *Karl Construction Ltd v Palisade Properties*.⁵¹⁰ As discussed above, this case concerned the rules on inhibition on the dependence which, at the time, was allowed as a matter of right to any pursuer of a summons containing a conclusion for payment of money.

Lord Drummond Young took the opportunity to carry out a fairly systematic review of the law and procedure of inhibition on the dependence, noting the ease with which it could be obtained, the very limited grounds for recall and the potentially very significant impact of the diligence on the pursuer. In respect of proportionality, he considered the range of criticisms of the automatic grant of inhibition on the dependence made by commentators, noting that in almost every case comparative provisions in other jurisdictions required special circumstances to be made out before a restraint on sale would be imposed. He also noted the potentially severe repercussions on the defender before concluding:

...the automatic right to an inhibition conferred by Scots law, with very limited right to compensation for use of the diligence without objective justification, does not strike a fair balance between the interest of the pursuer in having assets available to satisfy his claim and the right of the defender, recognised in P1-1, to dispose of his property as he wants. The requirement of proportionality is accordingly not satisfied.⁵¹¹

Ultimately, it was held that the automatic grant of inhibition on the dependence was in breach of P1-1. The law in this area was subsequently reformed along the lines suggested by Lord Drummond Young in his judgment, to the effect that the diligence would only be granted where it was justified in the particular case.⁵¹² This reform was extended to apply to all

⁵¹⁰ 2002 SLT 312

⁵¹¹ para 66

⁵¹² ss15A-N Debtors (Scotland) Act 1987, inserted by s169 Bankruptcy and Diligence (Scotland) Act 2007, although there is some doubt as to how successfully this protection operates in practice: see "Diligence on the dependence – a return to the old regime?" 2009 SLT 71

forms of diligence on the dependence by *Advocate-General for Scotland v Taylor*.⁵¹³

Finally, as in any discussion of proportionality in relation to P1-1, some consideration must be given to the importance of compensation. As in the ECtHR jurisprudence, where financial recompense is made for a loss to an individual sustained in violation of his P1-1 rights, this will play a part in the proportionality equation. One short example is given in the case of *Westerhall Farms v Scottish Ministers*,⁵¹⁴ discussed above, where the pursuers' sheep were ordered to slaughter owing to the risk of foot and mouth disease spreading from the infected neighbouring farm premises. Looking at the proportionality of the measures, Lord Carloway noted:

Here, there is on the one hand the prospect of substantial, potentially catastrophic, economic harm being caused to the farming industry if swift and effective action is not taken to prevent the spread of the disease. Such steps as are advised may result in a limited amount of farming livestock being slaughtered. However, the legislation empowering the executive to order the slaughter of animals also compels the executive to pay compensation amounting to the value of the animals killed. This process does not seem to amount to a potential breach of the article.⁵¹⁵

It will be recalled that the Strasbourg authorities set out a principle by which compensation had to be paid in respect of a deprivation of property, except in exceptional circumstances. Those circumstances seem to have existed only once, in the form of the reunification of Germany in 1991, and the extent to which even these circumstances could be said to be "exceptional" is one of some debate.⁵¹⁶

This issue of exceptional circumstances has been touched upon somewhat unhelpfully by the English courts in *R v Secretary of State ex parte Eastside Cheese Co.*⁵¹⁷ In this case, a ban on commercial dealings with a batch of cheese which was likely, ultimately, to lead to destruction of that cheese was

⁵¹³ 2004 SC 339

⁵¹⁴ Unreported, Court of Session, 25 April 2001

⁵¹⁵ Para 27. See also *Christopher Shepherd v Scottish Ministers*, unreported, 1 May 2007

⁵¹⁶ See page 163 above.

⁵¹⁷ [1993] CMLR 123

considered by the Court to amount to a control of use. In considering the question of proportionality in this case, the Court correctly observed that payment of compensation was necessary in deprivation cases. It went on to state that:

Such a rule is readily understandable where the State is itself assuming ownership of property belonging to another, or where property is being transferred from one citizen to another. It appears to us to have much less force where, in a case such as the present, the object of the measure is to restrain the use of property in the public interest.⁵¹⁸

There can be little to argue with in the Court's reasoning up to this point. Indeed, there seems no reason why the argument could not have ended here. However, the Court goes on to observe:

If, however, the general rule stated by the court concerning compensation has any application to a situation such as faced by the Secretary of State, we would have little hesitation in holding that the circumstances were sufficiently exceptional to displace it.⁵¹⁹

It is a little unfortunate that the Court felt the need to make this statement when it was entirely unnecessary for their decision. Given the Strasbourg jurisprudence on the subject in which various instances of dramatic political upheaval and regime change have not amounted to circumstances exceptional enough to render payment of compensation for a deprivation to be unnecessary, it seems somehow unlikely that the risk of an albeit dangerous strain of bacteria infecting cheese stocks would be sufficiently unusual to displace the normal compensation doctrine. The words "exceptional circumstances" may well have been used somewhat loosely in this context, but their use nevertheless suggests a grasp on the part of the domestic courts of some important and complex elements of the ECtHR case law.

⁵¹⁸ para 57

⁵¹⁹ para 57

One final and shorter point on compensation made by the domestic courts relates to the appropriate level at which compensation should be paid. This arises in *Dennis v Ministry of Defence*.⁵²⁰ It has been made clear in the Strasbourg jurisprudence that compensation for a deprivation will not necessarily be considered disproportionate simply because it does not reflect the market value of the property lost. The problem in *Dennis* was not a deprivation, but rather an interference with the peaceful enjoyment of possessions as a result of noise pollution from Harrier Jump Jets, as discussed above. The severe extent of the interference led the Court to conclude that payment of compensation would be necessary to meet the test of proportionality. The Court confirmed that the appropriate level of compensation should be assessed on the same principles as delictual damages for common law nuisance. This seems sensible and appropriate in the domestic context.

Overall, the question of proportionality appears to be one of the aspects of P1-1 which is most clearly understood by the domestic courts, with the variety of novel issues dealt with domestically seeming to be in keeping with the reasoning of the Strasbourg court. Some issues remain in relation to the relationship between different articles of the Convention and their related requirements of proportionality, and the complex matter of "exceptional circumstances" may create problems domestically as it has done in Strasbourg.

4.4 Conclusion

The analysis of the Strasbourg jurisprudence in the second and third chapters of this thesis suggested a property right which had evolved gradually and with some difficulty in light of the ambiguity which characterised the protection from its conception. Although the domestic courts have had the opportunity to build to a large extent on the understanding of the right already developed in Strasbourg, it still remains necessary for the conflict at the heart of the right to be negotiated. That fact taken together with the range of areas of uncertainty

⁵²⁰ [2003] Env LR 34

which have yet to be resolved (or in some cases, have recently been created) by the Strasbourg jurisprudence, it is only to be expected that the path of the right in the domestic courts would not run entirely smoothly.

For the most part, it would seem reasonable to say that the domestic courts have approached the question of interpretation and application of the right in good faith. Even subsequent to the coming into force of the Human Rights Act 1998 and the Scotland Act 1998, the judiciary in the UK were not bound by Strasbourg precedent as such, being under an obligation rather to take account of the Strasbourg case law. Nonetheless, it has been shown that in a majority of cases, the domestic courts have attempted to use the same principles of effective application which inform the Strasbourg understanding of the “autonomous concepts” which make up Convention law. This can be seen in the wide approach to the definition of possessions adopted both north and south of the border. The Court of Appeal even took the opportunity to ask some interesting questions about the extent of “peaceful enjoyment” which have yet to be given a proper airing in Strasbourg in *Aston Cantlow*.⁵²¹

There have inevitably been some mis-steps along the way, although the approach taken by the House of Lord in *R(RJM)*⁵²² following shortly after the difficult case of *Campbell*⁵²³ tends to confirm that the domestic judiciary are doing what they can to follow their Strasbourg counterparts. Unfortunately some of the difficulties which have arisen in the ECtHR jurisprudence, particularly in the context of confiscation and forfeiture cases, seem set to be duplicated here, although it may not be fair to place the responsibility for these complexities at the doors of the Scottish and English courts.

The use by the domestic courts of the five step decision-making process which has emerged gradually from the Strasbourg jurisprudence may perhaps not be viewed in such a positive light. Although it is possible to have some sympathy with the fact the ECtHR approach to resolution of P1-1 cases has taken some time to evolve and contains various uncertainties of its own, it is

⁵²¹ [2004] 1 AC 546

⁵²² [2004] 3 All ER 387

⁵²³ [2009] 1 AC 311

worth bearing in mind that the significant majority of cases decided domestically and discussed in this chapter have been dealt with within the past decade. It should have been open to the domestic courts to build upon the substantial work already carried out in Strasbourg to ensure an effective protection was in place, notwithstanding the difficulties inherent in the right itself.

Although the domestic jurisprudence rarely fails to at least mention the *Sporrong and Lönnröth* “three rules,” there seems to be a lack of understanding as to how the categories are delineated which does not result directly from confusion in the European understanding of the doctrine. In Strasbourg, the three-rule approach is used almost universally. As discussed in chapter three, the approach is not without its difficulties, but it has come to offer a useful starting point for the discussion of P1-1 rights within a variety of contexts, and at the least, it is certainly a workable doctrine.

The lack of enthusiasm for the three-rule approach may be linked to an over-generous interpretation by the domestic courts of the proportionality doctrine. Although it has been seen in the Strasbourg jurisprudence that the question of fair balance is decided very much on a case by case basis, it remains the case that the right in question must be balanced against the state action with which it interferes. There is a tendency in the domestic jurisprudence to apply some general concept of proportionality to state action as a whole as compared with the aims it seeks to achieve as a whole, without any more detailed consideration of the rights and possible violations involved. It is submitted, consequent to the discussion in chapter three, that this is not how the doctrine of proportionality is meant to operate within the P1-1 context. An overly generous application of this doctrine can only lead to a lesser protection both in the immediate sense of seeming to justify what should be a disproportionate interference, and in the broader sense of creating further ambiguity in a right that needs exactly the opposite.

One positive development in the domestic jurisprudence, however, seems to be a tendency on the part of the courts to question more closely the issue of

the public interest which is said to be served by the action of the state. Such scrutiny can be seen particularly in the customs cases including *International Transport Roth*⁵²⁴ and *Lindsay*.⁵²⁵ The domestic courts continue to recognise the margin of appreciation afforded to the state here, but there seems to be a greater willingness to determine exactly where the limit of that may lie. In many ways, the domestic courts are a more appropriate context for such discussions to take place. It is correct to say that the UK electorate did not vote to be governed by the European Court of Human Rights; nor did they vote to be governed by the domestic judiciary, but it remains a fact that the domestic judiciary have a much clearer understanding of the values of the British society and the impact of implementation of political policies here. There would seem to be scope for a more interventionist approach to be taken by the domestic courts under this head.

Overall it may be fair to say that the evolution of the property right to date in the domestic jurisprudence is encouraging, with a tentative acceptance by the national judiciary of the Strasbourg approach in many places leading to a protection that is practical and effective. It is to be hoped that the jurisprudence in the next decade will continue to allow the right to evolve as it has been doing at the European level. In the fifth chapter, some consideration will be given to novel situations in which that jurisprudence may arise.

⁵²⁴ [2003] QB 728

⁵²⁵ [2002] 1 WLR 1766

CHAPTER FIVE: P1-1 IN THE PRESENT DAY

"What *is* the use of repeating all that stuff," the Mock Turtle interrupted, "if you don't explain it as you go on?"⁵²⁶

5.1 Introduction

Over the 50 years since the ECHR was first ratified by the United Kingdom, human rights have become increasingly central to virtually every area of law. The proliferation of jurisprudence from the ECtHR, celebrating its 50th birthday this year, and the domestic courts has assisted in augmenting comprehension of human rights both amongst members of the legal profession and citizens of signatory states. It may not be correct to say that human rights are better respected than they ever were, but they are certainly better known.

There is a trend at present towards taking stock of what has been achieved over the past five decades and planning for the future of human rights. In the UK, in June 2009, the Equality and Human Rights Commission published the report of their inquiry into the position of the domestic human rights framework at present and how it should be developed in the coming years.⁵²⁷ The European Parliament, in its most recent annual report on human rights, emphasised that economic, social and cultural rights must play as much of a role as civil and political rights in the future.⁵²⁸ A conference on the short and long-term future of the European Court of Human Rights is to be held in Interlaken at the beginning of 2010, during Switzerland's Chairmanship of the Committee of Ministers of the Council of Europe.⁵²⁹ There is no doubt that human rights will continue to evolve at a rapid pace.

What does this mean for P1-1? In this chapter, an analysis will be carried out of the role which may be played by the property protection in four areas currently of significant importance either globally or domestically. First,

⁵²⁶ *Alice in Wonderland*, p93

⁵²⁷ Human Rights Inquiry: Report of the Equality and Human Rights Commission (June 2009)

⁵²⁸ "Annual Report on human rights in the world 2008 and the European Union's policy on the matter," (INI/2008/2336) (10 June 2009)

⁵²⁹ "Memorandum of the president of the European Court of Human Rights to the states with a view to preparing the Interlaken conference," 3 July 2009

consideration will be given to the UK legislative response to the worldwide problems of the recent (and ongoing) economic crisis. Secondly, an examination will be made of the legislation on which the UK's fight to combat terrorist activity in the area of finance is based. Thirdly, a review will be undertaken of the Scottish Parliamentary strategy for dealing with climate change, before finally an analysis of the P1-1 implications of the proposed wide-ranging reform to the Scottish system of land registration will be undertaken.

5.2 Economic crisis

The collapse of the US sub-prime mortgage market in the summer of 2007 led to an international economic crisis, popularly referred to as the "credit crunch." The genesis of the crisis was the huge availability of credit to Western consumers, who had been living beyond their means for many years prior to 2007. As house prices rose in accordance with spending, the criteria by which banks assessed the risk inherent in making a home loan grew increasingly less stringent. Poor quality loans were sold off in packages with less risky debts in a process known as securitisation. When the US housing market crashed, it became apparent to holders of these securities that the packages were worth a lot less than they had believed. This loss of confidence caused banks to cease lending to each other and to rein back credit extended to consumers.⁵³⁰

One of the most high-profile victims in the UK of this series of events was Northern Rock. This bank financed its lending through a type of securitisation process. With the crisis causing a virtual freeze on inter-bank lending, Northern Rock was no longer able to raise money in its usual way. Although it held more assets than it did liabilities, the inability to raise liquid funds meant that Northern Rock was not able to pay its debts as they fell due.⁵³¹ In other words, Northern Rock became "cash flow insolvent" in the terminology of the

⁵³⁰ This hugely simplified explanation of the crisis is based on a number of sources including numerous articles at <http://www.guardian.co.uk/business/financial-crisis>, <http://www.guardian.co.uk/business/credit-crunch>, and http://news.bbc.co.uk/1/hi/in_depth/business/2007/creditcrunch/default.stm.

⁵³¹ "£3bn lent to Northern Rock," Financial Times, 22 September 2007; "Northern Rock gets bank bail out," BBC News 13 September 2007, available at <http://news.bbc.co.uk/1/hi/business/6994099.stm>

insolvency legislation.⁵³² This state of affairs became known to the public through the media and led to a run on the Bank.⁵³³ Since Northern Rock could not meet its debts and since the impact of the collapse of a high street bank on the domestic economy could be catastrophic, the Government intervened, first to underwrite Northern Rock's liabilities, and later to nationalise the bank on what is intended to be a temporary basis.⁵³⁴

Northern Rock was not the only institution in need of assistance from the Government. Bradford and Bingley Building Society was split into two parts, with the mortgage book nationalised in September 2008.⁵³⁵ Lloyds TSB, HBOS and the Royal Bank of Scotland received funding as part of the Governmental "bail out" scheme later in 2008.⁵³⁶

The state intervention in financial institutions which has taken place since the economic crisis blew up in the summer of 2007 raises some interesting questions in terms of P1-1. The institutions concerned are all public limited companies which have floated on the stock market. The rights of share holders, which are accepted by the Strasbourg court to be possessions,⁵³⁷ have therefore been affected by the bail out. Rights to vote and veto may have been overridden in the name of state-determined capital restructuring. More dramatically, total deprivation of possessions may have taken place where shares have been compulsorily transferred into the hands of the state as part of the nationalisation process. Through a review of the legislation introduced to deal with the banking crisis and consideration of the case law to date, it will be determined whether the banking bail out has or is likely to lead to a violation of P1-1.

⁵³² See principally Insolvency Act 1986, s123(1)(e)

⁵³³ The story was first broken by Robert Peston on his BBC blog here:
http://www.bbc.co.uk/blogs/thereporters/robertpeston/2007/09/rock_or_crock.html

⁵³⁴ "Timeline: Northern Rock banking crisis," BBC News, 5 August 2008,
<http://news.bbc.co.uk/1/hi/business/7007076.stm>

⁵³⁵ Statement by Bradford and Bingley, 29 September 2008,
<http://www.bbg.co.uk/bbg/ir/news/releases/groupnews/pressrelease/?id=4765430>

⁵³⁶ "UK Banks receive £37bn bail-out," BBC News, 13 October 2008,
<http://news.bbc.co.uk/1/hi/business/7666570.stm>

⁵³⁷ *Bramelid and Malmström v Sweden* (8588/79) 12 December 1983

5.2.1 The legislation: the Banking Act 2009

New legislation was required to deal with the crisis situation in which many of the major banks and building societies in the UK had found themselves in mid and late 2007. The Banking (Special Provisions) Act 2008 was fast-tracked through the legislative process in a matter of days before coming into force on 21 February 2008 to allow for the nationalisation of Northern Rock. It expired a year to the day later, when it was superseded by the Banking Act 2009. The 2009 Act built upon the skeleton of the earlier legislation by making provision for bank nationalisation, as well as setting out a new scheme for processing bank insolvency.

The centrepiece of the 2009 Act, and the area which gives rise to various questions in respect of P1-1, is the permanent Special Resolution Regime (SRR) set out in Part 1.⁵³⁸ Where a bank has encountered, or is likely to encounter, financial difficulties, the SRR addresses the situation by allowing one of three “stabilisation options” in addition to new procedures for insolvency and administration.⁵³⁹ The three stabilisation options are transfer to a private sector purchaser,⁵⁴⁰ transfer to a bridge bank⁵⁴¹ and temporary transfer to public ownership.⁵⁴² The tripartite authorities – the Treasury, the Bank of England and the Financial Services Authority – are each given a role in implementing these options.⁵⁴³

S4 of the Act sets out five special resolution objectives as follows:

- (i) to protect and enhance the stability of the financial system of the United Kingdom;⁵⁴⁴
- (ii) to protect and enhance public confidence in the stability of the financial system of the United Kingdom;⁵⁴⁵
- (iii) to protect depositors;⁵⁴⁶

⁵³⁸ Ss1-89

⁵³⁹ S1(1)

⁵⁴⁰ Ss1(3)(a) and 11

⁵⁴¹ Ss1(3)(b) and 12

⁵⁴² Ss1(3)(c) and 13

⁵⁴³ S1(5)

⁵⁴⁴ S4(4)

⁵⁴⁵ S4(5)

⁵⁴⁶ S4(6)

- (iv) to protect public funds;⁵⁴⁷
- (v) to avoid interfering with property rights in contravention of a Convention right (within the meaning of the Human Rights Act 1998.)⁵⁴⁸

It is worth bearing in mind that in the explanatory notes to the Banking Bill, the government specifically drew attention the terms of P1-1 here, pointing out that the right was not absolute but could be interfered with:

...particularly when acting for economic and public policy reasons, where that interference is lawful, proportionate and justified in the public interest...the Government therefore considers that any interference with the Convention rights will be for a legitimate aim.⁵⁴⁹

In order to implement the stabilisation options, the Act also provides for share transfer instruments (to transfer to a private sector purchaser),⁵⁵⁰ property transfer orders (to transfer to a bridge bank)⁵⁵¹ and share transfer orders (to transfer to temporary public ownership.)⁵⁵² In each case, the transfer order or instrument may refer to specific shares or classes of shares, or to specific property. Additional powers are also provided for to enable the transfer orders to be implemented properly, including a power to convert securities into other forms⁵⁵³ and to remove existing directors and/or appoint new ones.⁵⁵⁴ The administration procedure set out in Part 3⁵⁵⁵ allows the Bank of England to appoint an administrator to deal with the bank's assets and affairs where it has been temporarily transferred into public ownership.

Where a transfer of some kind is carried out on the basis of these provisions, the Act allows for three different orders in respect of compensation.⁵⁵⁶ There is no substantive provision in the legislation itself. Rather, the Treasury is empowered to lay out an appropriate scheme in each individual case. It can

⁵⁴⁷ S4(7)

⁵⁴⁸ S4(8)

⁵⁴⁹ Banking Bill, Explanatory Notes, para 540

⁵⁵⁰ S11

⁵⁵¹ S12

⁵⁵² S13

⁵⁵³ s19

⁵⁵⁴ s20

⁵⁵⁵ ss136-168

⁵⁵⁶ See generally ss49-62

do so by making a compensation scheme order, which allows for payment of financial recompense for loss sustained as a result of a transfer,⁵⁵⁷ a resolution fund order, which allows for transferors to receive the proceeds of sale of the assets transferred,⁵⁵⁸ or a third party compensation order where persons other than the transferor sustain loss.⁵⁵⁹ There is provision for assessment of appropriate levels of compensation to be made by an independent valuer,⁵⁶⁰ although the Treasury may set out “valuation principles” on which the assessment must be based.⁵⁶¹

The overall scheme set out in the 2009 legislation raises two major issues in respect of P1-1. The first relates to the rights of shareholders whilst they continue to hold shares. The second relates to compensation provisions where shares or property are transferred in implementation of one of the stabilisation options.

5.2.2 Interference with shareholder's rights

As discussed in chapter two above, the Strasbourg court recognises that shares carry an economic value and therefore can be construed as possessions within the meaning of P1-1.⁵⁶² Shares in a public limited company such as Northern Rock carry with them a variety of rights relating to the operation and governance of the company. In the normal course of events, a shareholder would have the right to vote on such matters as the election of new directors to the board, the sale of company assets and any proposed alteration to the company articles. In particular, articles 25 to 29 of the European Council's Second Company Law Directive⁵⁶³ provide that any proposed increase or decrease of the company share capital must be approved by the general meeting.

⁵⁵⁷ S49(2)

⁵⁵⁸ S49(3)

⁵⁵⁹ S49(4)

⁵⁶⁰ S54

⁵⁶¹ S57

⁵⁶² See pages 54-56 above.

⁵⁶³ Directive 77/91/EEC

Changes to the administration or capital structure of a company without the approval of shareholders where appropriate has already been found by the ECtHR to amount to an interference with possessions. In *Sovtransavto Holding v Ukraine*,⁵⁶⁴ the applicant had originally been a 49% shareholder in a company which was reduced to 20.9% as the result of a state-agency ordered increase in the share capital. Although the Court was unclear whether the domestic law allowed such action to take place, it was satisfied that the manner in which the original state interference and the subsequent domestic review procedure had been conducted was sufficiently opaque as to make a finding of violation of P1-1 appropriate in the case.

The potential difficulty in respect of the 2009 Act is that it enables similar types of state interference with the governance of a bank to take place in the name of facilitating the stabilisation options. Directors can be appointed, securities can be restructured and ultimately an administrator can be appointed to manage the bank's affairs without shareholder approval being required. Is this likely to amount to a violation of P1-1 on similar grounds to those explored in *Sovtransavto*?

Any action taken under these provisions of the 2009 Act seems most likely to be characterised by the Court as a control of the use of possessions. Shareholders are being prevented from exercising one of the rights associated with their ownership, but they are not deprived of their ownership entirely.⁵⁶⁵ The control will be presumably be considered lawful, since the nature and extent of the possible interference is clearly set out in legislation. It would also seem difficult to argue that the control does not pursue a legitimate aim in the public interest, since the objectives of the Act in respect of stabilisation of financial markets and protection of the economy are clearly set out in the legislation itself. The main issue is most likely to be that of proportionality.

⁵⁶⁴ (2004) 38 EHRR 44

⁵⁶⁵ Unless, of course, they are, via share transfer order. The P1-1 implications of that deprivation are considered in the section on compensation immediately below.

As will be recalled from discussion in chapter three, a control of use does not require payment of compensation for a finding of proportionality to be made. Beyond that, it is difficult to say what the balance of proportionality will be. Recent events have demonstrated that protection of the economy is vital for the overall public good, and the significance of that aim of the legislation is likely to weigh heavily in the proportionality equation. There would seem also to be a need for the state to be able to act both quickly and decisively in such situations in order to restore faith in the market and prevent panic amongst depositors and investors which could destabilise the economy further. On the other hand, it is difficult to know precisely what impact the exercise of the legislative provisions under discussion here might have on an individual shareholder, particularly in a case where shares will not ultimately be transferred out of his hands. Based on *Sovtransvato*, the manner in which the powers are exercised by the state are also likely to play a part in determining the question of proportionality.

Ultimately it is not possible to say whether the exercise of these provisions will entail a violation of P1-1 until a specific example of their exercise is available. What does seem clear is that such a violation has the potential to occur here, a risk which the state will presumably wish to bear in mind.

5.2.3 Problems with compensation

Where a transfer of shares or property is implemented under the provisions of the Act, there can be no question that a deprivation of possessions has taken place. Such a deprivation will presumably be considered both lawful and in the public interest on the basis of the analysis set out above in relation to capital restructuring. The question of proportionality, however, is likely to depend to a substantial extent on the provision made for compensation.

It will be recalled, from the discussion in chapter three, that deprivation of property without payment of compensation can only be justifiable in exceptional circumstances.⁵⁶⁶ To date, a finding of exceptional circumstances

⁵⁶⁶ See *Lithgow v United Kingdom* (1986) 8 EHRR 329 and the discussion at pages 158 - 168 above.

has been made only once, in relation to the reunification of Germany,⁵⁶⁷ and it may be safe to assume that such a finding would not be made in respect of the provisions of the 2009 Act. The ECtHR has indicated that compensation should normally be reasonably related to the value of the property lost,⁵⁶⁸ whilst clarifying that this does not mean full market value must be paid for the proportionality test to be satisfied in every case. The state is permitted to take into account broader factors when deciding on the appropriate level, such as the reason for the deprivation and any benefit which may be obtained by the deprived party from the public interest served by their loss.⁵⁶⁹ Ultimately, and most importantly for the 2009 Act, the precise terms of any compensation scheme are, in the view of the Strasbourg court, a matter which falls within the margin of appreciation afforded to the state. Accordingly, the ECtHR will only intervene where the terms of that scheme are manifestly without reasonable foundation.⁵⁷⁰

These principles of compensation have already led to litigation in respect of the Northern Rock nationalisation. A conglomeration of both institutional shareholders and smaller investors, including employees of the Bank, brought an action in which they argued that the compensation scheme established in respect of their shares amounted to a violation of their rights under P1-1. This ongoing dispute is called *R (SRM Global Master Fund and Ors) v HM Treasury*.⁵⁷¹

The Northern Rock Plc Transfer Order came into force on 22 February 2008 and transferred all shares in the company to a nominee of the Treasury with immediate effect. The compensation scheme for shareholders thus expropriated was set out in the Northern Rock Plc Compensation Scheme Order 2008. It provided, in the first place, that:

⁵⁶⁷ *Jahn v Germany* (2006) 42 EHRR 49, discussed at pages 163-4 above

⁵⁶⁸ *Lithgow v United Kingdom*, *ibid.*

⁵⁶⁹ *Katikaridis v Greece* (2001) 32 EHRR 6

⁵⁷⁰ Discussion of all the above can be found at pages 158 – 168

⁵⁷¹ [2009] EWHC 227 (Admin) (High Court); [2009] EWCA Civ 788 (Court of Appeal)

The amount of compensation payable to a person shall be an amount equal to the value immediately before the transfer time of all shares in Northern Rock held immediately before the transfer time by that person.⁵⁷²

That value was to be determined by an independent valuer. However, his assessment had to be based on the "valuation assumptions" set out in paragraph 6 of the schedule, namely that:

...Northern Rock–

- (a) is unable to continue as a going concern; and
- (b) is in administration

These assumptions formed the crux of the debate. The shareholders believed that, in application of the assumptions, the value of the shares immediately before transfer was highly likely to be nil. Accordingly, they argued that they were being deprived of their possessions without payment of compensation in violation of P1-1. This was said to be disproportionate since, as a matter of fact, immediately before the transfer, Northern Rock was *not* in administration. It was operating on the basis of the assistance of the Treasury and the Bank of England and had a legitimate expectation that this support would continue to be extended, particularly since security had been given for the Bank of England loans. The shareholders also noted that the Treasury stood to make a profit from the eventual resale of Northern Rock once the liquidity crisis was over, and this, it was argued, added to the lack of proportionality brought about by the absence of compensation.

At first instance, the Court found the plaintiffs' argument to be fundamentally misconceived. The case was not one of deprivation without compensation. Clearly compensation had been provided for. The question was whether the basis on which that compensation was assessed – which the court accepted may well result in a nil valuation – was justified. Following the Strasbourg jurisprudence, the Court noted that the terms of the scheme were a matter within the margin of appreciation of the state, which could only be questioned by the Court if they were manifestly without reasonable foundation. Given that

⁵⁷² Schedule, para 3(2)

Northern Rock *would* have become cash-flow insolvent without the assistance of the state, and given that Northern Rock and the plaintiffs had no right to expect that such support would continue to be offered, the Court could make no finding that the valuation assumptions exceeded the margin of appreciation afforded to the state.

We do not think that the implicit determination of the legislature that the Compensation Scheme does not impose an "individual and excessive burden" on the shareholders was outside even the narrowest margin of appreciation. To the contrary, there is a good argument that the excessive burden would, in the Claimant's case, be borne not by the shareholders but by the taxpayer who, having provided financial support to Northern Rock, would then have to pay to the shareholders the value of their shares enhanced by that support.⁵⁷³

After this decision was handed down in February 2009, the shareholders appealed unsuccessfully. The Court of Appeal affirmed the approach taken at first instance to the terms of the compensation scheme, which it agreed were within the margin of appreciation afforded to the state. It was noted that the nationalisation was effected as a strategic exercise of government policy in the interests of preserving the economy, and was not designed to benefit shareholders. At the time, Northern Rock was unable to obtain support from anywhere else, and the Court found this to be the situation reflected in the valuation assumptions. The Court also noted that the assessment of compensation need not necessarily be nil – Northern Rock still held assets, such as its mortgage book, which the valuer would no doubt take into account as he saw fit.

The purpose of the assumptions was to put the shareholders in the position they would have occupied (*vis-à-vis* the value of the shares) had no [state] support been provided. That objective was achieved. Once the whole context in which [the compensation scheme] was evolved is understood, it can by no means be characterised as manifestly without reasonable foundation.⁵⁷⁴

⁵⁷³ para 168

⁵⁷⁴ para 77

On the whole it seems likely that the conceptualisation of the case by the English courts is one that would find favour in Strasbourg. It is impossible to escape the fact that the whole sequence of events which unfolded around Northern Rock subsequent to the liquidity crisis was highly political. The decision to provide support to the bank in the first place was, in itself, a state interference. The nationalisation could be considered an extension of that interference. The fact that the Strasbourg Court will only take issue with the terms of a compensation scheme where it is manifestly without reasonable foundation, considered together with the traditionally extreme reluctance of the Court to find that a state has exceeded its margin of appreciation where some political or policy argument is put forward, all tend to suggest that the outcome of an application to the ECtHR would be the same as the results of the litigation so far.

There are, however, two complications, both of which relate to the identity of the shareholders involved. The first is touched on by the High Court towards the end of its decision, where it states:

We have some sympathy for the position of the former long-term shareholders of Northern Rock, who doubtless believed that they had an investment in a reliable bank.⁵⁷⁵

Not every shareholder affected by the nationalisation was in the same position. It is clear that the conglomeration of parties who raised the litigation included both large institutional investors, some of whom had purchased the majority of the shares *after* it had become known that nationalisation was likely, and also individual personal shareholders including employees and former employees of the company. Proportionality is a question of balance. Although it may well be right that the Court could not question the terms of the compensation scheme in itself on the grounds of proportionality, in looking at the bigger picture of the deprivation, the impact on different shareholders could obviously be quite significant. A large institutional investor may only suffer a loss of profits, whereas a retiree depending on his dividend as part of

⁵⁷⁵ para 170

his income may be in a significantly worse position. The burden on one may not be considered individual and excessive, whereas the same may not be true of the burden on another. At present compensation has not been assessed and so the ultimate impact of the share transfer cannot be known. It should also be borne in mind, of course, that any investor speculating on the stock market is responsible for the risk of that, and the collapse of the market which led to the extreme diminution of the value of Northern Rock's shares was not the result of state interference. However, this may be an issue which requires to be revisited at a later stage, when the value of compensation is known.

The second complication relates to the nationality of the various shareholders. It is quite correct to say that compensation for expropriated nationals is only part of the bigger picture of proportionality, and that the terms of a compensation scheme may only be questioned where they are manifestly without reasonable foundation. However, the position for expropriated aliens is not the same. As discussed in chapter three, the reference in P1-1 to the general principles of international law has been understood, through a series of cases, to apply only to expropriations of non-nationals, and carries with it the guarantee that such expropriation should result in payment of prompt, adequate and effective compensation.⁵⁷⁶ "Adequate" in this context is generally accepted to mean "market value." The relevant time at which the value should be assessed for the shares in question is at or immediately before the date on which the expropriation occurred or the decision to expropriate became known, without reference to the effects of the expropriating measure.⁵⁷⁷

It has been argued that the terms of the compensation scheme for Northern Rock do not meet these requirements of international law. N. Jansen Calamita contends that:

Notwithstanding the financial difficulties experienced by Northern Rock in late

⁵⁷⁶ See discussion at pages 124-131 above.

⁵⁷⁷ See World Bank Guidelines Art IV 3

2007/early 2008, there is considerable evidence in the public record indicating that at the time immediately prior to the nationalization...none of the 'assumptions' required by the [Compensation Scheme Order] was true. Northern Rock in fact was not in administration. By the Government's own account, Northern Rock was solvent and a going concern. Financial assistance from the Treasury and the Bank of England had not been withdrawn. And there was no suggestion one way or the other how the Treasury or the Bank of England would act in the future with respect to further financial assistance to Northern Rock. In essence, the CSO requires a rewriting of history. As a result, it is difficult to see how a valuation based upon the CSO assumptions can be characterized as independent of the effects of the UK's expropriating measures.⁵⁷⁸

With respect, however, this approach may be closer to the letter than to the spirit of the law. It is true, of course, to say that the valuation is not free from the effects of the expropriation; it is a statutory instrument resulting from that expropriation which defines the assumptions on which the valuation is to be based. However, presumably the government would argue that the purpose of those assumptions is to do exactly as international law demands. If the state had not stepped in, Northern Rock would have inevitably fallen into administration. The valuation should therefore be made on this basis, not on the basis of the expropriation which saved the bank.

Whether either of these points of views is correct is not known. What is clear, however, is that the implications of the different treatment required for nationals and non-nationals have not been considered at all by the jurisprudence to date. It is an issue which it would appear needs to be addressed. It seems, however, that the Northern Rock shareholders may be prepared to appeal the case further to the ECtHR.⁵⁷⁹ It may be that answers are provided to the issues raised here at that stage.

5.2.4 Debtor protection

One additional impact of the economic crisis in Scotland has been the proposal of the Home Owner and Debtor Protection (Scotland) Bill, introduced

⁵⁷⁸ "British bank nationalizations: an international law perspective," 2009 ICLQ 119, p140

⁵⁷⁹ "Northern Rock shareholder battle could end up in House of Lords," Guardian, 28 July 2009

into Parliament on 1st October 2009. The Bill is the result of recommendations put forward by the Repossession Group, a sub-committee of the Debt Action Forum, set up by the Scottish Government in January 2009 to consider appropriate protection measures for debtors in the current financial climate. As its name suggests, the sub-committee was tasked particularly with examining the issue of lender repossession in light of the substantial increase in residential repossessions subsequent to the collapse of the banks.⁵⁸⁰

The Bill proposes amendment of the Conveyancing and Feudal Reform (Scotland) Act 1970 to restrict the ability of creditors to enforce standard securities over residential properties where debtors default on loan repayments. In particular, if the Bill passes into law, it will no longer be possible for standard security holders to repossess residential property without first obtaining a warrant from the court.⁵⁸¹ Prior to making a warrant application, the creditor will be under an obligation to make reasonable efforts to arrange a repayment scheme with the debtor, in addition to providing them with details of where to seek advice and assistance on their financial problems.⁵⁸² The Court, in determining a warrant application, is directed to consider:

- (a) the nature of and reasons for the default,
- (b) the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default,
- (c) any action taken by the creditor to assist the debtor to fulfil those obligations,
- (d) where appropriate, participation by the debtor in a debt payment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002, and
- (e) the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.⁵⁸³

The P1-1 implications in respect of the creditor's rights are obvious. Debt is

⁵⁸⁰ For further discussion, see the SP Bill 32 Policy Memorandum.

⁵⁸¹ S1(1) and (2), amending s20 and 23 of the 1970 Act

⁵⁸² S4(1) and (2), insertion ss 24A and 5B into the 1970 Act

⁵⁸³ S3(7)

considered a possession in terms of the Strasbourg jurisprudence,⁵⁸⁴ and the restriction of the creditor's remedies to enforce repayment of that debt would no doubt amount to a control of the use of that possession.

Although the property right will be engaged, however, it seems unlikely that a violation would be found should the Bill become law. The new restrictions on creditors would have a clear basis in legislation, and there is little doubt that the protection of debtors in light of the tumultuous global financial situation and a desire to limit the incidence of homelessness would be considered a legitimate aim in the public interest. The real question would be whether the protection represents a disproportionate interference with creditors' human rights. Although there is no immediate comparison in the domestic jurisprudence, the Strasbourg case law does offer some useful guidance as to the likely attitude of the Court.

As a general rule, the ECtHR is sympathetic to the position of individuals who are at risk of losing their home. In particular, the Court appears reluctant to prioritise financial interests of one party over the need of another for a place to live. This attitude has been demonstrated in a number of applications dealing with rent controls or restrictions on the landlord's power to evict where these measures have been put in place to alleviate the risk to tenants of homelessness.⁵⁸⁵ In *Spadea and Scalabrino v Italy*,⁵⁸⁶ the landlords had gone as far as obtaining eviction orders through the courts, but were unable to put the orders into effect due to a lack of cooperation from the police. The police had been issued with guidelines directing them to de-prioritise work of this kind. In *Mellacher v Austria*,⁵⁸⁷ rent control legislation had reduced the rental income of some applicants by more than 80%. In each of these cases, the interference was found to be proportionate.

In proportionality terms, the proposed Scottish legislation could be argued to

⁵⁸⁴ *A, B and AS Company v Germany* (7742/76) 4 July 1978

⁵⁸⁵ See *Immobiliare Saffi v Italy* (2000) 30 EHRR 756, *Scollo v Italy* and the discussion at pages 158-168 above.

⁵⁸⁶ (1996) 21 EHRR 482

⁵⁸⁷ (1990) 12 EHRR 391

weigh less heavily on creditors than the restrictions on landlords outlined in the Strasbourg cases. Creditors who hold standard securities will almost inevitably be financial institutions whose interest in the repossession is purely economic. The hardship here is less direct than for some applicant landlords in the tenancy applications discussed above, who sought to resume physical occupation of the premises concerned. The determination of creditors' rights will be made through the courts, which will be looked upon favourably in the proportionality equation.⁵⁸⁸ At a minimum, the involvement of the courts should lead to greater protection of the creditors' rights than in *Spadea*, where court decrees were effectively rendered impotent by administrative guidelines on policing. Perhaps most critically, it does seem from the Bill that eventual repossession, although more difficult to obtain than it may be at present, is not *de facto* impossible, as it appeared to be in some of the Italian cases.

No definitive statement can be made in respect of the P1-1 compliance of the proposed debtor protection provisions at present. Amendments may be made to the Bill during its passage through Parliament, and the manner in which any resulting legislation is ultimately applied may also give rise to proportionality concerns. On the basis of the material currently available, however, it seems unlikely that any violation of P1-1 would be found.

5.3 The war on terror and anti-terrorist financing

Terrorist organisations require a financial infrastructure to carry out acts of violence. Dismantling that infrastructure is therefore one aspect of the global governmental efforts to combat terror. There are generally considered to be two main elements to this task. The first is to identify and prevent money laundering operations worldwide. The second is to confiscate assets held by or on behalf of terrorist networks. It is this second element which raises interesting questions in respect of P1-1.

5.3.1 Domestic legislation

⁵⁸⁸ See the discussion at pages 154 - 156 above.

Seizure of assets in connection with terrorism was first seen in the United Kingdom as part of the Prevention of Terrorism Act 1989, a piece of legislation drafted primarily in response to the activities of the IRA. However, it was not until the attack on the World Trade Centre in New York on September 11th 2001 that asset freezing became an international priority in respect of the newly conceptualised "war on terror." The USA led the agenda with extensive powers of seizure set out in the much publicised Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (or the USA PATRIOT Act 2001.) At the same time the mandate of the Financial Action Task Force (FATF), an independent inter-governmental body which had previously focused on developing and promoting policy to protect the global financial system from money laundering, was extended to include anti-terrorist financing measures.⁵⁸⁹ In October of that year, Gordon Brown, then Chancellor of the Exchequer, stated that:

Those who finance terror are as guilty as those who commit it. So our response to the funding of terrorist acts must be every bit as clear, as unequivocal and as united as our response to the terrorist acts themselves.⁵⁹⁰

He announced an action plan on terrorist financing which ultimately led to the Anti-Terrorism Crime and Security Act 2001 (ATCSA).

ATCSA builds on the Terrorism Act 2000 to set out a variety of methods by which funding of terrorism can be intercepted or dismantled. Section 1 provides for forfeiture of "terrorist cash," defined as cash intended for use for the purposes of terrorism, cash which forms part of the resources of a proscribed organisation and cash which is or represents property obtained through terrorism. Sections 4 and 5 confer on the Treasury the power to make a freezing order, which prohibits the person on whom the order is served from making financial assets and economic benefits of any kind available to specified persons. Failure to comply with the order is a criminal offence.

⁵⁸⁹ www.fatf-gafi.org

⁵⁹⁰ "Action against financing of terrorism – statement of Chancellor of the Exchequer," 16 October 2001

Schedule 2 enhances the powers of seizure and forfeiture of terrorist cash and property set out in Part 3 of the 2000 Act.

The anti-terrorist financing legislation has recently been further augmented by the Counter-Terrorism Act 2008. Section 62 and Schedule 7 of that Act set out a scheme by which the Treasury may "give a direction" imposing certain requirements on any credit or financial institution operating in the United Kingdom. Such a direction can only be given where certain conditions are fulfilled, primarily where the FATF has advised a risk of terrorist financing or the Treasury "reasonably believe" there is a risk of terrorist financing being carried out in a specific country, by that country's government or by persons in the county. A direction can include a variety of requirements. Most pertinent for the purposes of P1-1 is the requirement to limit or cease business set out in articles 9 and 13 of the schedule, which prohibits entering into or continuing specific transactions, all transactions of a specified type or all transactions with particular persons. Again, non-compliance with the terms of a direction will result in penalties, in this case both civil and criminal.

The scope of the powers contained within these three pieces of legislation is wide to say the least. Is there potential for a violation of P1-1 to occur in their exercise?

5.3.2 P1-1 implications

In the first place, it seems clear that action by the government here is likely to engage P1-1. State action to freeze cash or assets, or to restrain certain types of business transaction, would presumably be considered a control of the use of possessions. This is the view taken by the ECtHR and the domestic courts in respect of similar provisions for the seizure of smuggled goods identified at a border check, for example.⁵⁹¹ The subsequent forfeiture of terrorist cash or other property should, as a matter of common sense, be categorised as a deprivation of possessions, since ownership of the goods is transferred from

⁵⁹¹ *Vasilescu v Romania* (1999) 28 EHRR 241

the original holder to the state as the result (usually) of a court order. However, a useful point of comparison here is likely to be the treatment of forfeiture provisions in respect of the proceeds of crime. As discussed in chapters three and four above, both the ECtHR⁵⁹² and the domestic courts⁵⁹³ have viewed forfeiture orders in relation to proceeds of crime following on drug trafficking convictions as a control of the use of possessions, notwithstanding the loss of ownership they entail. Although it is impossible to say with any certainty how an anti-terrorist forfeiture would be viewed, it seems that the trend of the jurisprudence is towards categorisation as a control of use.

Whether the state action under the terrorist financing legislation is considered a control or a deprivation, P1-1 will be engaged. Consideration must then be given to whether the breach is lawful and pursues a legitimate aim in the public interest. On the face of it, there would seem to be little difficulty here. Any action of the state will be based on the terms of the legislation, which would normally be sufficient to meet the lawfulness requirement. It is also difficult to imagine that there would be any argument to the effect that dismantling the financial infrastructure of terrorist organisations is not a legitimate aim in the public interest.

However, one high-profile use that has been made of the legislation to date does beg some questions about whether the analysis of its P1-1 implications is quite that straightforward.

5.3.3 The Lansbanki case

On 7th October 2008, the Icelandic financial institution Landsbanki was put into receivership by the Icelandic Financial Supervisory Authority. A press release from the Authority stated that all domestic deposits were guaranteed,⁵⁹⁴ however, the Icelandic government indicated that foreign creditors would receive only a small percentage of their deposits following the

⁵⁹² *Phillips v UK* (41087/98) 5 July 2001

⁵⁹³ *McSalley v HMA* 2000 JC 485

⁵⁹⁴ "Based on new legislation, the Icelandic Financial Supervision Authority (FME) proceeds to take control of Landsbanki to ensure continued commercial bank operations in Iceland," 7 October 2008, www.fme.is/?PageID=581andNewsID=331 [accessed 17 August 2009]

receivership procedure.⁵⁹⁵ Landsbanki, through its subsidiary Icesave, had around 20,000 accounts in the United Kingdom, including several held by UK local authorities, police authorities and other public bodies with combined deposits of close to £800 million.⁵⁹⁶ Concerned that UK depositors would not be protected and, particularly given the public money involved, that this could have a dangerous impact on the economy, the UK government passed the Landsbanki Freezing Order 2008. The order was made under s4 of ATCSA, specifically on s4(2)(a) which provides that the Treasury may make a freezing order where it reasonably believes that:

Action to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons.⁵⁹⁷

The freezing order prohibited funds being made available to Landsbanki, the Central Bank of Iceland, the Icelandic Financial Services Authority, the Landsbanki receivership committee and the government of Iceland.⁵⁹⁸ The essential effect of the order in this situation was to prevent Landsbanki assets being "repatriated" to Iceland. However, an exception from the Order was granted by the Treasury which allowed Icesave to trade with its UK customer base.

Is such action really what the anti-terrorist finance legislation was designed to do? Genevieve Lennon and Clive Walker note that:

The Government adopted an almost flippant response to inquiries about the legal basis of the order, disclosing that "it happened to be in the Anti-Terrorism, Crime and Security Act."⁵⁹⁹

At this stage, it is worth recalling the explanation of the lawfulness requirement given by the Strasbourg court in the series of cases outlined in chapter three. For an interference to be "subject to the conditions provided for by law," it must have a clear basis in domestic law, easily accessed by the public, which results in foreseeable consequences. In other words, the state

⁵⁹⁵ "Excerpts: Iceland's Oddson," Wall Street Journal, 17 October 2008

⁵⁹⁶ "Icelandic government seizes control of Landsbanki," Guardian, 7 October 2008

⁵⁹⁷ s4(2)(a)

⁵⁹⁸ Landsbanki Freezing Order 2008, arts 2-4

⁵⁹⁹ "Hot money in a cold climate," 2009 PL 37

action must not be arbitrary. A person should be able to read the legislation and regulate their conduct accordingly. Similarly, it should be possible to reasonably foresee how the state will act on the basis of that legislation.⁶⁰⁰

It is possible to make an argument that there was no reasonable foreseeability in this particular case. The provisions of ATCSA were designed to counter terrorist financing, operating in tandem with more stringent money laundering regulation. There is no suggestion that the circumstances surrounding Landsbanki were in any way connected to terrorist activity. Could the bank reasonably have foreseen, based on the legislation, that the UK government would impose a freezing order on its assets?

The difficulty with this argument is likely to be that the wording of the statute is certainly sufficiently wide to allow for the outcome that in fact occurred. If the context (and title) of the legislation is ignored, and the focus is placed solely on the wording of the specific provision, it can be seen that the government had the power to make the order to prevent action which would be detrimental to the UK economy. That danger certainly seems to have been very present in this case. The background to the legislation also seems to suggest that it was never intended to be restricted to use strictly for anti-terrorist purposes. When the ATCS Bill was at the debate stage in the House of Lords, the width of the provision was questioned by Lord Goodhart, who had moved an amendment which would have changed the relevant paragraph of s4 to read:

Action involving terrorism to the detriment of the United Kingdom's economy (or part of it) has been or is likely to be taken by a person or persons⁶⁰¹

In support of the amendment, he gave a hypothetical example of a potential outcome of the legislation as it stood at the time.

A Japanese company is considering whether to build a new car manufacturing plant in the United Kingdom or in Switzerland. The Swiss Government offer the company a financial inducement to build its plant in Switzerland – something in the nature of, say, a tax holiday.

⁶⁰⁰ See *Sunday Times v UK* (1979-80) 2 EHRR 245, *Malone v UK* (1985) 7 EHRR 14 and the discussion generally in chapter three at pages 109 - 132

⁶⁰¹ Emphasis added. *Hansard*, HL Vol 629, col 347 (28 November 2001)

That is plainly action to the detriment of the United Kingdom economy. The result is that, at least in theory, the Treasury could make a freezing order stopping anyone in the United Kingdom, or United Kingdom nationals resident abroad, from making payments to the Swiss Government. Some people might say that that was quite right, but I am sure that it was not the intention.⁶⁰²

In the discussion which followed, it became plain that the government had not intended that this aspect of the legislation be restricted to use for anti-terrorist purposes. It was noted that the intention to "provide for the freezing of assets" in the long title of the bill was entirely separate from the reference to the intention to "make further provisions about terrorism and security." Various circumstances were suggested in which a threat to the economy may arise independent of terrorism and it was argued that emergency legislation remained appropriate for dealing with such a wide ranging issue since not all emergencies are the result of terrorism. The amendment was ultimately withdrawn.⁶⁰³ No further discussion appears to have taken place on this point in the House of Commons, although it is perhaps worth noting the description given of this Part of the Act by the Home Secretary:

Parts I and II complement the Proceeds of Crime Bill in stopping organised terrorism and crime being perpetrated through money laundering by organised finance – We are seeking the ability to freeze assets, to take unified action with other countries and to introduce restraining orders. I also referred to the terrorism finance unit.⁶⁰⁴

Ultimately the issue might best be described as one of the letter of the law in opposition to the spirit of the law. Although the action against Landsbanki was in accordance with the wording of the legislation, it was not the type of action which the legislation was perceived to have been designed for. In other words, although the state action here did pursue a legitimate aim in the public interest, it was *not* a foreseeable aim in the context of the legislation which enabled the action.

Notwithstanding this argument, it is difficult to imagine that the ECtHR would be likely to find a violation on this basis. It is clear that where the provisions of

⁶⁰² *Hansard*, HL Vol 629, col 348 (28 November 2001)

⁶⁰³ For the discussion, see generally *Hansard*, HL Vol 629, col 347 - 358 (28 November 2001)

⁶⁰⁴ *Hansard*, HC Vol 375, col 34 (19 November 2001)

the domestic law have been misapplied, state action will be considered unlawful. However, the question here is not one of misapplication. The way in which the government used the ATCSA provisions is perhaps best described as a matter of policy. The exceptionally wide margin of appreciation granted to state governments by the Strasbourg court in such matters cannot be ignored, and it seems unlikely that the ECtHR would choose a matter as politically complex as this to take a more proactive approach. It seems that Landsbanki may make an application to the ECtHR in respect of the Order, however, so perhaps a more definitive answer to this conundrum may be given at a later date.⁶⁰⁵

The final hurdle that any state action in terms of the anti-terrorist financing legislation would have to overcome is that of proportionality. Without a specific set of circumstances to consider, it is impossible to say whether the fair balance test would be satisfied. However, some general observations can be made. By analogy with the views taken on confiscation of the proceeds of crime,⁶⁰⁶ the aim of countering terrorism is likely to be given significant weight both domestically and in Strasbourg, which will allow for an accordingly heavier burden to be placed on individuals. In relation to compensation, both freezing orders and subsequent forfeitures are likely to be treated as a control of use,⁶⁰⁷ meaning payment of compensation is not a necessary step towards a finding of proportionality. Even if state action here was to be characterised as a deprivation, it is possible to envisage the government arguing that compensation should not be necessary nonetheless. Alistair Darling, the Chancellor of the Exchequer, explained the decision to freeze Landsbanki's assets to the House of Commons as follows:

Despite the fact that this is a branch of an Icelandic bank, I have in the exceptional circumstances that we see today guaranteed that no depositor loses any money as a result of the closure of Icesave and I am taking steps today to freeze the assets of Landsbanki in the UK until the position in Iceland becomes clearer.⁶⁰⁸

⁶⁰⁵ "Iceland may take UK to European Court over freezing of bank assets," Guardian, 6 January 2009

⁶⁰⁶ See discussion at page 196 above.

⁶⁰⁷ See discussion at p249-50 above.

⁶⁰⁸ *Hansard*, HC Vol 480, col 280 (8 October 2008)

It will be recalled that no payment of compensation is required for a deprivation in exceptional circumstances, according to the Strasbourg jurisprudence.⁶⁰⁹ It is presumably coincidence that the Chancellor happened to use precisely this formulation of words in this instance, but nevertheless this is a doctrine which it seems likely could be invoked in connection with the global economic crisis. Whether it would be accepted by the ECtHR remains unclear.

Another issue which may arise in connection with compensation is the difference in treatment which P1-1 seems to demand between nationals and non-nationals, as discussed in relation to the economic crisis above. This seems particularly pertinent in circumstances such as those of Landsbanki, where action taken to benefit UK nationals will quite clearly work to the detriment not only of the company, but also to Icelandic nationals. Again, however, we are unlikely to see much debate on this topic in the courts since, if all measures are to be categorised a control of use, the payment of compensation will not be mandatory.

Ultimately it seems unlikely that any of the far-reaching provisions set out in terms of the anti-terrorist financing legislation will run up against difficulties in terms of P1-1.

5.4 Climate Change

On 4th August 2009, the Climate Change (Scotland) Act received Royal Assent.⁶¹⁰ Working in conjunction with the UK-wide Climate Change Act 2008, the Scottish legislation has the principal function of setting a target for reduction of Scottish emissions of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride, collectively known as "greenhouse gases,"⁶¹¹ over the course of the next forty years. Section 1 of the Act provides that the Scottish Ministers must ensure that Scottish emissions in the year 2050 are at least 80% lower than at present.

⁶⁰⁹ See *Jahn v Germany* (2006) 42 EHRR 49 and the discussion at pages 163-4 above

⁶¹⁰ <http://www.scottish.parliament.uk/s3/bills/17-ClimateChange/index.htm>, accessed 17 August 2009

⁶¹¹ s9(1)

The remainder of the Act sets out a variety of mechanisms and powers by which Scottish Ministers can attempt to achieve this 2050 target. Parts 2 to 4 contain provisions for the potential establishment of an independent advisory body known as the Scottish Committee on Climate Change who would be tasked with monitoring and reporting on progress towards the target and might have powers to impose interim reduction targets on public bodies. Part 5 comprises a range of additional, more specific provisions designed to tackle the emissions problem. It is these specific provisions which are more interesting from a P1-1 perspective.

The potential effects of the Climate Change Act can be grouped into two rough categories. The first is provisions which may entail a deprivation or a control of use of land in the usual way. The second is a more speculative question about the potential positive obligation imposed on the state by the Act to ensure that emissions targets are met, or else to be held responsible for any climate change related damage to property which may occur.

5.4.1 Control of use

The way in which land is used forms a part of the overall picture of emissions. Described in the simplest terms, land, and certain plants which grow on it, may either absorb greenhouse gases or emit them. This is particularly relevant in Scotland since so much of the country is unpopulated. As noted by the Scottish Government in their consultation document on proposals for the Climate Change Act:

The way we use agricultural, afforested and other undeveloped land has a major impact on net greenhouse gas emissions. Scotland has huge amounts of carbon locked up in peatlands, organo-mineral soils and vegetation, including forests. Maintaining the overall level of these carbon stocks is an important priority, particularly as climate change itself might make them more vulnerable to oxidation, thereby adding to emissions. Land use changes like deforestation and conversion of grassland to arable all result in CO₂ emissions. Livestock and use of fertilisers are sources of methane and nitrous oxides. On the other hand, woodland creation and conversion of arable grassland create carbon sinks, with CO₂ being locked up in

biomass and soils. Given Scotland's significant land resource, emissions reduction from, and carbon sequestration through, land use will remain a key part of our climate change strategy.⁶¹²

Against that background, s45D of the Act creates an obligation on Ministers to produce a land use strategy by the end of March 2011 detailing their proposals for meeting sustainable land use objectives. It is obviously impossible to know exactly what this will entail at present. However, it is worth noting that 12% of Scotland's total greenhouse gas emissions are the result of land, particularly grassland, being converted to use for cultivation of crops.⁶¹³ Land converted to forestland operates, however, as a carbon sink, and the Forestry Commission, in their Climate Change Action Plan 2009-2011, set out a goal of increasing the area of forestry in Scotland to 25% by 2050, requiring around 10,000 hectares of new planting to occur each year.⁶¹⁴ Muirburn – the practice of burning gorse or heather to encourage new vegetation growth – is also an emissions concern, since moorland often lies on top of carbon-rich peat soil, and extensive burning can cause greenhouse gases to be released into the atmosphere.⁶¹⁵ S46 of the Act empowers Ministers to further restrict the dates on which muirburn can take place with a view to minimising the environmental impact, and further restrictions on the precise methods employed to carry out this practice have been discussed.

The Act also sets out a range of specific environmental targets beyond the control of land use. S48 creates an obligation on Ministers to promote energy efficiency, which includes improving the energy efficiency of living accommodation with specific reference to alteration of planning and building regulations to ensure that new buildings avoid emissions. S48A creates an obligation on Ministers to promote the use of renewable sources of heat (meaning sources other than fossil fuels and nuclear power.)⁶¹⁶ s50 and 50A set out a new duty to assess the energy performance of non-domestic buildings and living accommodation by which Scottish Ministers *must*:

⁶¹² para 4.57

⁶¹³ Thomson et al, para 1.2.2

⁶¹⁴ p 15

⁶¹⁵ SPICe Briefing on Climate Change (Scotland) Bill, p39

⁶¹⁶ s48(8)

Require owners of such buildings to take steps...to –

- (i) improve the energy performance of such buildings;
- (ii) reduce such emissions.⁶¹⁷

The Act provides that these assessment regulations should include measures of enforcement to ensure owners meet the requirements,⁶¹⁸ and also introduce offences in relation to failure to comply with the requirements of the regulations.⁶¹⁹

It seems reasonable to assume, then, that meeting the goals set out in the Climate Change Act is likely to involve some level of interference with the rights of landowners under P1-1. The state action may be negative in form: for example, legislation may prevent land which is currently grassland being used for the cultivation of crops. The alterations which have already taken place to muirburning regulations would seem to fall within this category. Alternatively, it may be that the interventions of the state are actually positive in nature. Landowners in certain areas may be obliged to plant or allow for afforestation of their land, or a part of it. Building developers may be required to design or renovate new houses using specified materials or with provision for energy to be provided from particular sources. Even domestic homeowners may be subject to obligations in respect of, for example, insulation, with the possibility of criminal sanctions if the requirements are not met.

Whether such interventions will amount to a deprivation or a control is likely to be question of degree. It can be seen in both the Strasbourg and domestic jurisprudence that the right to dispose of property is often used as the litmus test: where that right is retained, state intervention can amount to no more than a control.⁶²⁰ However, it is possible to imagine a situation where the use of land is so tightly controlled that it may be effectively impossible for the landowner to use it for profit (eg by cultivating crops) or, realistically, to sell it, precisely because the land has been rendered unprofitable by environmental

⁶¹⁷ s50(1)(b) and s50A(1)(b)

⁶¹⁸ s50(2)(l) and s50A(2)(l)

⁶¹⁹ s50(2)(m) and s50A(2)(m)

⁶²⁰ See the discussion at pages 79-81 and 190-196 above

regulation. It is also worth bearing in mind that the courts have been prepared to make a finding of partial deprivation in scenarios where a specific area of an applicant's land has been rendered unusable.⁶²¹ A finding of this type may be likely where an area has been earmarked for increased forestry, for example. The requirement to promote renewable energy sources carries with it the question of whether power plants using fossil fuels or nuclear power will eventually be decommissioned. Direct regulation preventing the use of power plants would seem to be an interference with property rights, although by analogy with the rights of owners of horses and hounds who are no longer able to hunt,⁶²² it seems likely that this would be characterised as a control of use – the plant and the land on which it stands will still belong to the owner after all, it simply cannot be used for energy generation.

Assuming that P1-1 will indeed be engaged, will the interventions be justified? Against the background of the Climate Change Act and the evolution of environmental legislation to date, it seems reasonable to assume that any intervention would meet the test of lawfulness and would, in fact, most likely be set out plainly in legislation.

The question of whether such measures could be said to serve the public or general interest is potentially complex. The science surrounding climate change is still an area of substantial dispute and the impact of the types of measures it seems to be suggested that Scottish Ministers may put in place is not the subject of universal agreement amongst the scientific community. It can be imagined that a challenge to the contended societal need for these measures could be mounted based on expert evidence from scientists and environmentalists. However, would such a case have any likelihood of success? The exceptional reluctance of the Courts both in Strasbourg at home to make a finding of lack of public/general interest in respect of any state action where some sort of justification is put forward has been remarked upon at length earlier in this thesis. Certainly an environmental motive has been accepted as sufficient by the ECtHR previously, in at least one case

⁶²¹ *Powell v UK* (1987) 9 EHRR 241; *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42

⁶²² *Adams v Scottish Ministers* 2004 SC 665; *R (Countryside Alliance) v Attorney-General* [2008] 1 AC 719, discussed at pages 187-9 above.

involving measures not entirely dissimilar to those under discussion here.⁶²³ Although the scientific basis of climate change may be disputed, it seems impossible that a party could successfully argue that it was manifestly unreasonable for Scottish Ministers to take action based on the "pro" climate change evidence. Ultimately, and somewhat predictably, it seems likely that the actions of Scottish Ministers here would be considered to fall within the margin of appreciation afforded to the government to determine what is within the public/general interest.

The real question, as is so often the case, is likely to be whether the proportionality test is satisfied. This is an area in which the extent of restrictions placed on a landowner will be paramount. Although there is an argument that the landowner will receive some benefit from the environmental restrictions in the broad sense that we will all benefit from a reduction in emissions, it is apparent that such benefit may seem nebulous compared to the immediate loss of, for example, land which had been intended for agricultural development.

Where restrictions are severe or where state action amounts to a deprivation, the legislative scheme will no doubt have to contain provision for reasonable compensation or a finding of lack of proportionality is likely. It is difficult to imagine any way in which this might be avoided, unless it could be argued that the environmental threat caused by emissions had become so urgent that the "exceptional circumstances" doctrine should be brought into play.⁶²⁴ That doctrine is, at present, so ambiguous that an attempt to imagine whether this is likely is more or less speculation. Some climate change analysts already argue, for example, that the damage caused to the planet by emissions is virtually irreparable, meaning that state action must be taken immediately to prevent inevitable disaster. If that argument were to be accepted by the courts, those circumstances would seem fairly exceptional. On the other hand, given the extremely limited case examples of exceptional circumstances to date, and the apparent trend of the Strasbourg court away

⁶²³ *Fredin v Sweden* (1991) 13 EHRR 784, *Denev v Sweden* 1989 59 DR 127

⁶²⁴ See discussion at 158-9 above.

from that finding,⁶²⁵ it is perhaps most realistic to assume that exceptional circumstances will not apply here, and compensation will require to be paid. In situations where positive action is required on the part of owners – for example, if a home owner should be required to replace a system of gas heating with an alternative from a renewable source of energy – the proportionality requirements will be different, and it seems likely that some sort of grant contribution towards alterations may be necessary to meet the test.

5.4.2 Positive obligation on the state

One relatively recent development in the case law of the Strasbourg court is the idea that P1-1 may, in some situations, create a positive obligation on the state to ensure that an applicant's peaceful enjoyment of their possessions is able to continue. As discussed above, this was first elaborated in *Oneriyildiz v Turkey*,⁶²⁶ in which a build up of methane in the landfill where the applicant's dwelling was situated caused an explosion in which the applicant's dwelling was destroyed and several members of his family died. Evidence was to the effect that the state was aware that the explosion was likely to occur if the methane build up was not alleviated, and yet did nothing to resolve the problem. A breach of P1-1 was therefore held to exist. This duty, however, did not extend to the situation in which a natural disaster caused destruction of property, even where that disaster might have been anticipated in the sense that it was seasonal or to be expected in certain weather conditions, such as the mudslides in *Budayeva v Russia*.⁶²⁷

The parameters of this relatively new development in P1-1 jurisprudence are at present ill-defined. Additionally, the matter has yet to receive any consideration by the domestic courts. However, on the limited authority currently available, it is possible to see where an argument in respect of climate change may be made out.

⁶²⁵ See discussion at page 160 above.

⁶²⁶ (2005) 41 EHRR 20. See discussion at page 71 above.

⁶²⁷ (15339/02) 20 March 2008

Although the scientific basis for climate change is disputed, it is clear that Scottish Ministers accept the existence of a link between emissions and the global rise in temperature, amongst other environmental impacts.⁶²⁸ The UK Climate Impacts Programme predicts that, without a sufficient reduction in emissions, Scotland will suffer increasingly extreme weather with more severe storms, an increased risk of flooding and sea level rises of up to 600mm which would threaten coastal regions.⁶²⁹ The temperature will also rise by 2.5% in the winter and 3.5% in the summer, with a resultant effect on the plants and wildlife of the Scottish biosphere. Certain areas of the country could be rendered uninhabitable.

An argument could be made that the government have accepted responsibility for these potential outcomes of climate change. In other words, the government have been advised of a risk by experts and are taking the recommended steps to neutralise the risk with the new climate change legislation. If the government fails to meet the 2050 emissions reduction target, would it be possible for individuals who have suffered loss of property, perhaps through flooding, to make an application in terms of P1-1? Could such a duty extend more generally to anyone who has suffered a reduction in the quality of the air they breathe and the environment in which they live?

What seems clear from the sparse case law to date is that there must be a direct connection between the state omission and the subsequent loss. At present, the scientific background is still perhaps not clear enough for this argument to be properly made out. Additionally, it could be said that the power to neutralise the threat of climate change is not entirely in the government's hands. In *Oneryildiz*, there was one specific problem which one specific act by the government could have resolved. With climate change, the government must try to educate and coerce the population as a whole into making changes in the way they live in the hope of reducing emissions. The connection between the risk and the potential consequences is perhaps more

⁶²⁸ See, for example, "What is climate change?" at <http://www.scotland.gov.uk/Topics/Environment/climatechange/what-is> [accessed 17 August 2009]

⁶²⁹ See the various scenarios outlined at http://www.ukcip.org.uk/index.php?option=com_content&task=view&id=156&Itemid=554 [accessed 17 August 2009]

akin to the situation in *Budayeva*, where a risk was known about but the power of the state to prevent it coming about was limited. As scientific knowledge increases, however, that balance may change. It may be interesting to monitor the situation here alongside developments in the Strasbourg and domestic jurisprudence in the area. It could be the case that a stronger possibility of P1-1 challenge along these lines develops in due course.

5.5 Land Registration

Following the introduction of the Land Registration (Scotland) Act 1979, Scotland has moved, county by county, onto a system of registration of title in respect of ownership of land. The basics of the scheme are relatively easy to explain. When an interest in land is created or transferred, the person holding the interest applies to the Keeper of the Registers of Scotland to have that interest registered.⁶³⁰ The effect of registration is to vest in the registered title holder a real right in and to the interest concerned.⁶³¹ Since the register creates the real rights, it cannot be "wrong", as such – if a person is registered as owning a property, he *does* own that property. However, sometimes this may not be an accurate reflection of the deeds which induced the registration. For example, a disposition may have been forged, and so no transfer of the title could be said to have taken place on the basis of ordinary property law. In situations such as this, the Register may be considered "inaccurate." In some situations, most importantly where the inaccuracy has been caused by fraud or carelessness on the part of the registered title holder, the Register may be rectified to correct this inaccuracy.⁶³² Every interest on the Register is, however, backed by a state guarantee, meaning that where a person suffers loss as a result of a rectification of the Register, they will usually receive an indemnity payment in respect of that loss. Similarly, if it is not possible for the Register to be rectified, perhaps because the mistake was not caused by fraud or carelessness on the part of the registered title holder, any person

⁶³⁰ 1979 Act, ss2 and 4

⁶³¹ 1979 Act, s3

⁶³² 1979 Act, s9

suffering loss as a result of this omission to rectify will also receive payment of state indemnity.⁶³³

This account of the system of land registration, although very simplified, gives a platform on which to discuss the potential P1-1 implications of the scheme.

On one view of things, these implications could be substantial. The Scottish regime is understood to be a "positive" system of land registration.⁶³⁴ What this means is that real rights in land which are created or transferred as a result of registration actually flow from the register itself. (This is distinct from a negative system of land registration, in which rights come from the deeds underlying the creation or transfer of those rights.⁶³⁵) This positive system of land registration may have P1-1 repercussions in terms of registration of interests, rectification of the register and administrative errors by the Keeper.

5.5.1 Registration

In one sense, any transfer of a property interest is likely to involve an interference with possessions.⁶³⁶ If A sells something to B, A will be deprived of his real right at the point when B takes the legal steps required to complete B's right of ownership, for example, by taking possession of corporeal moveable property following on a contract of sale. In a transaction of this kind between two legal persons, there can be no P1-1 implication, simply because the state is not involved.

With transfer of heritable property, in Scotland, the final legal step required to complete the right is registration of title. If A sells his house to B, A will lose his right of ownership and B will obtain the title to the house at the point of registration. The potential difficulty here, from a P1-1 perspective, is that

⁶³³ 1979 Act, s12

⁶³⁴ This is not entirely clear from the legislation, but the jurisprudence seems to have interpreted the Act to that effect. See the discussion at para 5.6, Scot Law Com DP No 124.

⁶³⁵ The previous Scottish system, in which deeds were recorded in the Register of Sasines, is an example of such a system.

⁶³⁶ This is, of course, opposed to creation of an entirely new interest in property, which sometimes occurs.

registration is not an automatic process. This is where the state becomes involved.

When B is in possession of the disposition and other documents required to effect a transfer of A's house to her in terms of ordinary property law, she must make an application to the Keeper to have that interest registered. The legislation provides, in s4(1), that:

Subject to subsection (2) below, an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require.

Subsection (2) sets out a list of circumstances in which an application will not be accepted, for example where the land concerned is not sufficiently described to enable the Keeper to identify it by reference to the Ordnance Map, or where the relevant fee for registration has not been paid. The wording of the legislation suggests, then, that Keeper will refuse an application if one of the situations described in subsection (2) has arisen, and may also refuse an application in any other situation where he has not been provided with the documents and other evidence such as he might require.

The Keeper has a discretion here. He may accept the application and register the title if he has been presented with the evidence required, or he may refuse to do so. If he registers the interest, a real right will be conferred on the new holder of the interest, and the real right held by the previous holder will be extinguished. It is this act of the Keeper in registering the interest which extinguishes the real right held by A and transfers it to B. In other words, an action by the state (represented by the Keeper) has led to A being deprived of his interest in land.

The nature of this discretion was recently discussed by the Lands Tribunal in *PMP Plus Ltd v Keeper of the Registers of Scotland*.⁶³⁷ In this case, the Keeper had registered the appellant's title to an undeveloped plot of land within a residential development, but had excluded indemnity on the basis that

⁶³⁷ 2009 SLT (Lands Tr) 2

it was not clear, from an examination of the titles of the surrounding residential units, or arguably as a matter of the underlying law, whether that undeveloped plot should be included within the common parts of the development. The Keeper did not express a opinion one way or the other as to the validity of the title, but rather expressed uncertainty and excluded indemnity on that basis.

The Lands Tribunal took the opportunity to consider the nature of the Keeper's discretion here, noting:

...in exercise of his statutory duty, when presented with an application to register, the Keeper is not merely acting administratively but has a duty to investigate the title. He must actively investigate the relevant circumstances to enable him to reach a sound decision. If he is considering excluding indemnity, he is very likely considering an actual or a potential competition between owners or claimants. However, it is clear that he does not have a full adjudicative function. Where the issue is one of law, he can usually be expected to reach a decision; proceed on the basis of such decision; and leave it open to a dissatisfied party to seek to have the matter finally determined on appeal. Where the doubtful issue is one of fact, he may well be faced with a situation which he simply cannot resolve. In rare cases, that might arise also in relation to legal issues (as in this case, where he was presented with conflicting opinions by two of the country's most respected academics in this area of law)...He obviously has to decide what to do in relation to the application before him.⁶³⁸

As can be seen from this passage, there is no doubt that the Keeper operates in a decision-making capacity as to registration. His discretion may not be unlimited, but it nevertheless requires an investigation of the title before a decision can be made as to whether it is registered, and whether indemnity is excluded. He is taking positive action, as a representative of the state, which results in a loss of the right for the previous holder to the benefit of the transferee.

If that analysis of the process of registration is correct, it suggests that every registration based on transfer of an interest engages P1-1. Can this interference by the state be justified, however? Logic suggests that it must be, although the justification is not as straightforward as might be hoped.

⁶³⁸ Para 43

The first complication is in determining which of the three Sporrang rules the state action falls into in this situation. On the face of it, the action of the Keeper might appear to be a straightforward deprivation of property. The Keeper's act of registering a title extinguishes the transferor's right.

The Strasbourg court, however, do not necessarily agree with this analysis of the situation. It appears, in its view, that even in a positive system of registration of title, registration is no more than a control of use. In *JA Pye (Oxford) Land Ltd v United Kingdom*,⁶³⁹ the ECtHR had cause to look at the question of registration of title in the context of the English law of adverse possession. This legal doctrine bars any claim to ownership of land by the registered title holder where the land has been occupied as of right for at least 12 years by another person. In the case, the doctrine operated to prevent the applicant asserting any claim to ownership, despite being registered as the owner, when a couple, Mr and Mrs Graham, who had occupied the land for the necessary period applied to register title in their name. The Grahams had taken occupation originally on the basis of a lease from the applicant. However, on the expiration of the lease, no further contract was agreed. The couple continued to occupy the land in full knowledge of the applicant without any attempt by it to have them removed or even to claim rent payments. The Grahams were allowed to register their title.

When the case was first heard by a Chamber of the European Court of Human Rights, a slim majority of four votes to three categorised the action of the state as a deprivation, based on the fact that the applicant had lost its ownership as a result of the registration. However, when the application came before a Grand Chamber, it disagreed with this conclusion. By ten votes to seven, it categorised the action of the state in registering the Grahams' as a control of use. The state, it said, had merely altered the register to reflect the position of the underlying law.

There is no doubt that the English system of registration of title is a positive system. Ownership flows from the register. In making its decision, however,

⁶³⁹ (2008) 46 EHRR 45

the Grand Chamber looked behind the register, at the underlying law on the basis of which applications for registration are made. In the view of the ECtHR, the action of the state in responding to that underlying law by reflecting the position in the relevant Land Register entries amounted to nothing more than a control of use.

This approach seems questionable. The provisions as to registration in the equivalent English legislation are similar to those in Scotland. The Keeper has discretion to refuse registration in various circumstances.⁶⁴⁰ His actions are not simply a mechanical application of the underlying law. Even if they were, as the Grand Chamber seems to imply, it is not clear why that would make registration a control of use. It would seem rather to suggest that registration is not an action of the state at all. If registration is merely a reflection of the underlying law, it is the underlying law which deprived JA Pye of its title to land. The state did not act to control JA Pye's use of its land; the state did not "act" at all. This understanding is, of course, at odds with the true legal position, namely that rights flow from the register and the Keeper has discretion over whether registration occurs. It seems impossible to reach an understanding of the opinion of the Grand Chamber here which accords with the facts.

Notwithstanding any criticism of the ECtHR's decision here, it seems likely that the domestic courts would follow its lead in categorising registration as a control of use. Can this control be justified in P1-1 terms? The answer is probably yes. The legal basis for the state action is set out in legislation, and although the Keeper has discretion, its parameters are clearly defined.⁶⁴¹ The public interest served by a system of registration of title is obvious. The issue of proportionality is likely to be easily resolved on the basis that the person losing a real right had engaged in a transfer with the intention of that result. Additionally, in the overwhelming majority of cases, the transferor will have been adequately compensated for her loss through the proceeds of a sale or, for example, the repayment of a loan resulting in discharge of a standard

⁶⁴⁰ Land Registration Act 2002, ss9-10 (first registrations), s27 and schedule 2 (dispositions of registered land), s42 (restrictions.)

⁶⁴¹ Clear guidelines are available in the Registration of Title Practice Book, available online at www.ros.gov.uk/rotbook/

security. In Strasbourg terms, compensation need not be the market value of the property, with the result that sale at undervalue or even a transfer of ownership for "love, favour and affection" would not necessarily seem to result in a lack of proportionality here. Most likely, the act of registering an interest in the Land Register would not result in a violation of P1-1.

It should be noted that, in any event, this point is likely soon to become moot. The Scottish Law Commission is in the process of scrutinising the Land Register with a view to substantial reform both on a principle and practice level. To date, three discussion papers have been published⁶⁴² and a report with finalised proposals for reform together with a draft bill should be issued shortly.⁶⁴³ The first of the discussion papers, which dealt with the broad principles underlying the registration scheme, recommended a change from a positive to a negative system of land registration, albeit still backed up with a state guarantee of title.⁶⁴⁴ This would seem to resolve many of the issues outlined above, and make registration the simple reflection of the underlying law which the Strasbourg court seemingly already considers it to be.

5.5.2 Rectification

It is worth briefly noting that rectification of the Land Register gives rise to similar questions. As outlined above the Register can be rectified when it is "inaccurate" in the sense that the position shown on the Register is not the same as the position under the rules of ordinary property law. The Keeper has discretion to rectify the Register under s9, although it cannot usually be exercised where it would prejudice a proprietor in possession.

As with registration, action by the Keeper here could be construed as a state act interfering with the property rights of affected title holders: rectification may result in ownership being lost where a different name is entered in the title section. Whether this interference would be categorised as a deprivation or a control of use is difficult to predict for the reasons explained above in

⁶⁴² *Void and Voidable Titles*, Scot Law Com DP No 125 (2004); *Registration, Rectification and Indemnity*, Scot Law Com DP No 128 (2005); *Miscellaneous Issues*, Scot Law Com DP No 130 (2005)

⁶⁴³ <http://www.scotlawcom.gov.uk/html/cplandreg.php>, accessed 6 August 2009

⁶⁴⁴ See generally Part 5 and particularly Proposal 9 of DP No 125.

connection to registration. However, as with registration, the state act has a clear legal basis. It serves a legitimate aim in the public interest. It is also likely to be proportionate, since rectification of the register usually results in payment of indemnity to any person who suffers loss as a result.

Additionally, as with registration, in most cases the P1-1 repercussions of rectification would cease to exist following implementation of the SLC proposal to switch to a negative system of registration.

5.5.3 Administrative error

One further issue on which the SLC propose reform is the consequences of administrative error on the part of the Keeper. It is an inevitable result of the involvement of human beings in the registration process that, on occasion, mistakes will be made. This may result in inaccuracy of the Register. Where it is the title holder who has made the mistake, the Keeper can rectify the inaccuracy caused by the title holder's carelessness without payment of indemnity. The fact the Keeper may also have made some contribution to the error will not affect his power to rectify where the mistake was substantially due to carelessness on the part of the title holder, as discussed recently in *McCoach v Keeper of the Registers of Scotland*.⁶⁴⁵ However, there are circumstances in which the Keeper's office itself may be responsible for the error, independent of anyone else. The proposal of the SLC is that rectification of the register to correct a purely administrative error of this type, as with carelessness on the part of the applicant, should not result in payment of indemnity.

An administrative mistake may result in a person being registered as the proprietor of a larger area of land than he was entitled to in terms of the underlying deeds. This occurred in *Safeway Stores Plc v Tesco Stores Plc*.⁶⁴⁶ Two supermarkets owned neighbouring pieces of land, with a shared boundary in the form of a river. Safeway's title had been registered on the Land Register prior to Tesco's title. At the time of registering Safeway's title,

⁶⁴⁵ Unreported, 19 December 2008, Lands Tribunal

⁶⁴⁶ 2001 SLT (Lands Tr) 23; 2004 SLT 701

an administrative error resulting from digital conversion of the map lead to the boundary line between the properties being drawn close to the bank on Tesco's side of the river, rather than in the middle of the river, which is where it was shown to be on the underlying disposition. Effectively Safeway had become the owner of an area of the river which it did not, in fact, own as a result of the administrative error. On registration of Tesco's title, the error was discovered, and following the conclusion by both the Lands Tribunal and the Inner House that Safeway could not be said to be in "possession" of the disputed area of river in the meaning of the 1979 Act, Safeway's title on the Register was rectified to redraw the boundary in the correct place. Safeway received an indemnity payment in respect of the area of river they had "lost" through the rectification. If Safeway had been in possession of the disputed area, rectification would not have been possible, and Tesco would have received an indemnity payment for the loss of the river bed resulting from the administrative error.

In the first Discussion Paper, the SLC consider this case as an example of the problematic nature of universal indemnity payments. Safeway must always have been aware of the fact that the disputed area of river did not belong to it. When it received the title sheet and reviewed the plan section, the supermarket knew that it had, through error, been gifted an area of land at the expense of its neighbours. Why, the SLC asks, when that error is corrected, should Safeway be entitled to receive indemnity? The land did not belong to it; it has suffered no loss, and accordingly no indemnity payment should be made.

The position under P1-1 may be less forgiving of administrative error. If rights flow from the register, a person registered as the owner of an area of land *is* the owner of that area of land. The fact this registration may have come about as a result of administrative error would not seem to be relevant. Accordingly, if the error is corrected through rectification, that ownership will be lost. The state action taken in rectifying the title would result in deprivation of ownership. P1-1 would be engaged.

As with registration, the Strasbourg jurisprudence might suggest that rectification of the register here is no more than a control of use. However the position is not the same: it is a positive, albeit mistaken, act of the state which created the possession in the first place. The ownership of the area registered in error is exactly opposite to the position reflected in the underlying law. The state has expressly given a real right to the title holder where the underlying law would not have done so. On that basis, it would seem impossible to argue that the registration, or the subsequent rectification, is simply a control of use.

If rectification following on administrative error is a deprivation, compensation would usually be required to render the deprivation proportionate. The SLC proposal to remove indemnity in such a situation would therefore create an imbalance in P1-1 terms which is likely to result in a violation of the article.

If a switch is made to a negative system of registration, this difficulty will evaporate. Again, if real rights no longer flow from the Register, an administrative error cannot confer a right of ownership on the "wrong" person. Rectification therefore does not engage P1-1, since the person incorrectly registered as the owner never had any right of ownership in terms of the underlying law. It will be important, however, to reconsider the proposal to remove indemnity for administrative error if that proposal seems likely to be implemented, but the proposed switch to a negative system does not.⁶⁴⁷

5.5.4 Servitudes

Another area where the Keeper's discretion may interfere with property rights on a practical level concerns his policy on registration of servitudes. In Scots law, servitudes can be created in a variety of ways, not all of which are express or involve creation of a deed. The policy of the Keeper is not to register servitudes created by prescription or implication.

⁶⁴⁷ Even in that event, it may be unlikely that the ECtHR would demonstrate much sympathy towards a title holder who had obtained land through an administrative error which was subsequently rectified. To date the Strasbourg jurisprudence suggests the Court are not keen to protect "windfall benefits": see, for example, *Jahn v Germany* (2006) 42 EHRR 49 at p163 above, and *National and Provincial Building Society v United Kingdom* 25 EHRR 127 at p145 above.

Robert Rennie points out that this creates real difficulties in practice. He uses the example of a solicitor purchasing a farm in 1997. The solicitor has received affidavit evidence which supports the view that a servitude right of access has been created over neighbouring land through prescription. He accepts this is correct as a matter of property law, and considers that the servitude exists, even though the Keeper will not register as such. When the farm is sold again in 2009, however, the conveyancing landscape has changed. The purchasing solicitor will look for the servitude on the title sheet and will not be prepared to proceed with the sale if the servitude is not there. The tile will not be considered "safe" if the servitude is not registered by the Keeper. Rennie notes:

It can of course be argued that really all that such a seller has to do is threaten the current farmer with an action of declarator of servitude and the farmer will immediately capitulate and grant the necessary deed for no consideration. Frankly that does not happen in the real world. If the action of declarator is defended it can last for years and no seller can, generally speaking, afford to wait that long nor would any purchaser be prepared to maintain an interest in such property for that length of time.⁶⁴⁸

There is an argument that P1-1 should be engaged in this situation, as the action of the Keeper can be construed as a *de facto* interference with property rights. In *Sporrong and Lonroth v Sweden*,⁶⁴⁹ the ECtHR accepted that, even where rights continued to exist formally, their exercise could be restricted so extensively that in reality they lose all substance. Servitudes created by prescription or implication continue to exist as a matter of property law, but does the Keeper's refusal to register these rights make them so difficult to enforce in practice that they could be said *de facto* to have ceased to exist?

It should be recalled that the ECtHR apply a stringent standard in determination of the existence of *de facto* deprivation. In *Sporrong*, the properties belonging to the applicants had been subject to expropriation permits for years with the result that the land could not be developed and was

⁶⁴⁸ "Land Registration and the Decline of Property Law," p8, due for publication in *Edinburgh Law Review*, January 2010.

⁶⁴⁹ (1983) 5 EHRR 35

virtually impossible to sell. This was not enough, in the eyes of the Court, to amount to a deprivation, since the land could still be used for other purposes and sale could still potentially occur, albeit at undervalue. The permits were considered to be an interference with the peaceful enjoyment of possessions, and that interference was ultimately found to be lawful, in the public interest and proportionate.

A similar approach seems likely in respect of servitudes. There is no question, in terms of property law, that a servitude created through prescription or implication continues to exist regardless of the Keeper's refusal to register. That servitude is difficult to prove and enforce, but it is possible to do so through an action of declarator. The fact that recourse to the courts to enforce the servitude has virtually become necessary could possibly be construed as an interference with the peaceful enjoyment of that right, but based on *Sporrong*, it seems unlikely that an outright deprivation would be found to exist.

If the Keeper's policy on registration of servitudes does result in an interference with the peaceful enjoyment of possessions, can that interference be justified? The Keeper's policy is clearly expressed and seems likely to meet the lawfulness requirement. The aim behind the policy is to restrict the likelihood of indemnity claims arising from improperly constituted servitudes being registered. Although there may be an argument about whether reducing indemnity claims is more clearly in the public interest than maintaining existing servitude rights, it seems unlikely that the decision of the state to prioritise one over the other would fall beyond the margin of appreciation in such matters that the state is afforded by the ECtHR. The final issue of proportionality would be likely to turn on the individual facts of an application in which the non-registration of a servitude had impacted negatively on a proprietor. However, it should be noted that the existence of a domestic right of appeal is a factor which usually weighs in favour of proportionality rather than against it. The broader picture of the delay and expense inherent in the domestic court system seems unlikely to be something that the Strasbourg

court will consider as inherently unreasonable. In the big picture, it seems unlikely that a violation of P1-1 would be found to exist in this type of situation.

5.5.5 Prescription

A final discussion which it may be useful to have in this context concerns the law of prescription. Very shortly put, prescription is a mechanism by which a person can acquire ownership over a piece of land through uninterrupted possession over a period of ten years. Prescription played a vital role under the previous Scottish system of registration of deeds in the Sasine Register. Since prescription "cured" any defects in title provided the land had been continuously possessed by the seller and his predecessors throughout the prescriptive period, there was no need to investigate the legal position any further back. From a practical point of view if nothing else, this was a matter of major importance. With the introduction of land registration, however, it seemed to be thought that prescription was no longer important. Since title flowed from the Register, and was guaranteed by the Keeper, there could be no defect in a title. Accordingly, the argument ran, there was no need for prescription to run on Land Register titles. Prescription was accordingly excluded by s10 of the 1979 Act.

In the first discussion paper, the SLC doubt whether this exclusion ever made sense in the first place. In any event, with the move to a negative system of land registration, they suggest that now would be a sensible time to reintroduce the running of positive prescription on titles registered in the Land Register. If real rights are not to be conferred by the Land Register, but regulated by the underlying law and reflected in the Land Register, it is obviously important to be sure that the underlying law is P1-1 compliant in itself.

The indications of P1-1 compliance here are positive. As mentioned above, the English law of adverse possession was discussed by both a Chamber and a Grand Chamber of the European Court of Human Rights in *JA Pye (Oxford) Land Ltd v UK*.⁶⁵⁰ Having decided that the registration of the adverse

⁶⁵⁰ (2008) 46 EHRR 45

possessors' ownership in that situation was no more than a reflection of the underlying law, the Court considered whether that underlying law could be compliant with P1-1. There was no difficulty in finding the adverse possession doctrine both lawful, as it was encapsulated in statute, and in the public interest, as it could be seen that it fulfilled a useful role in "curing" title defects and ensuring an absence of "ownerless" land. The issue of proportionality was also considered in detail. It was noted that very simple action on the part of the applicants – such as asking for payment of rent – could have stopped the clock of adverse possession from running at any point during the 12 years it took for the title to be lost. The rules of adverse possession were clear cut and well known, and the applicants had the opportunity of review of the outcome through the domestic courts.⁶⁵¹ The Court was also swayed by the fact similar doctrines exist in most legal systems with sound policy reasons underlying that. By ten votes to seven, it was concluded that the doctrine was proportionate, and accordingly there had been no violation of P1-1.

The Scottish system of prescription is not identical to the English law of adverse possession, but if anything, the differences may serve to make it more likely that prescription is P1-1 compliant. The relevant statute is the Prescription and Limitation (Scotland) Act 1973. Section 1 of the Act lays down three criteria:

- (i) the interest in land concerned must be possessed for 10 years;
- (ii) the possession must be open, peaceable and without judicial interruption;
- and
- (iii) the possession must be founded on and follow the recording or registration of an *ex facie* valid title to the land in question.

If these criteria are fulfilled, the validity of the title shall be exempt from challenge at the conclusion of the ten year prescriptive period.

⁶⁵¹ This option had, of course, been exercised without success by the applicants before they took recourse to the ECtHR.

The differences between the two jurisdictions are small, but important. The period of possession required is 10 years, as opposed to the 12 years needed in England. In Scotland, possession must be peaceable (ie not secured or maintained through force), which is not required by the English legislation. Finally, in Scotland possession must be founded on a writ recorded in the Register of Sasines or a title registered in the Land Register, both of which are available for public inspection. There is no mirror to this provision under the English law. The ultimate effect of our law is to purify any defect in a purported title already on one of the registers, rather than, as in the English system, extinguishing the title that appears, on the face of the register, to be valid.

The proportionality argument would seem to be sound. As with the English law of adverse possession, the rules of prescription are well known and have been in operation for some time. The effect of their application is entirely foreseeable. The running of the prescriptive clock can be halted with very little action on the part of the owner, and the additional requirement that the possession be peaceable will, if anything, assist the original owner here. The dispossessed owner has the opportunity to dispute the application of prescription in the courts. The same consideration of windfall benefits would presumably be applied.

To tip the proportionality scales further in favour of the individual, prescriptive possession must be based on a registered or recorded *ex facie* valid title. This requirement will be strictly construed: for example, a disposition purporting to be from a person to himself has been held to lack *ex facie* validity.⁶⁵² It should be clear from an inspection of the registers that the possessor is in a position to obtain title through the process of prescription. In adverse possession, the only publicity comes from the possession itself, which maybe ambiguous if the owner believes the possession to have a legal basis such as a lease.⁶⁵³ In Scotland, the rules of prescription operate to confirm the publicly stated

⁶⁵² *Aberdeen College v Youngson* 2005 1 SC 335

⁶⁵³ English law has been altered subsequently by the Land Registration Act 2002 to provide that an adverse possessor must notify the "paper owner" before expiry of the limitation period in order that the paper owner can take action if he wishes to do so. This change in itself did not, in the eyes of the Grand Chamber, mean to say that the previous English law was incompatible.

position, rather than to undermine it. The publicity afforded to the process of prescription in Scotland must, if anything, lessen the burden the original owner is forced to bear, making a finding of a fair balance more likely.

Based on the conclusions of the Grand Chamber in *J A Pye (Oxford) Ltd v United Kingdom*, there seems no reason to believe that the Scots law of positive prescription is not entirely compliant with P1-1.

5.6 Conclusion

The argument has been made in the earlier chapters of this thesis that, despite the ambiguity that formed part of P1-1 since its inception, the jurisprudence of both the Strasbourg and domestic courts have allowed the right to evolve into a meaningful protection. Although it is clear that certain elements of the right and its application remain uncertain, and in places the protection may not be as strong as had been hoped by the authors of the Convention, nevertheless a decision-making process does exist. In this chapter, an attempt has been made to apply this process to a series of issues of topical importance either globally or within the United Kingdom. The purpose of this exercise was, in the first place, to demonstrate the stage of development which the property right has currently reached, emphasising its attributes whilst identifying the flaws which remain. Secondly, this chapter offers support to the notion that P1-1 is a highly relevant protection in the present day, and one which may continue to grow in importance into the twenty first century.

In each of the topics analysed in this chapter, different elements of P1-1 have been brought to the fore. In relation to the economic crisis, the application of the five step decision-making process to the new legislation and its impacts has thrown light on some potentially problematic issues, particularly as regards the provision for compensation as between nationals and non-nationals. The confusion which had been noted in respect of the jurisprudence earlier on this topic makes it appear likely that further litigation will be required to resolve this new manifestation of a pre-existing problem.

The international move towards dismantling the infrastructure of terrorist financing has also raised questions in respect of P1-1. The latitude of the legislation introduced to combat the problem has produced some unexpected results in its application to the collapsed Icelandic bank Landsbanki. The requirement of lawfulness demanded by the property right has been subject to a test in this context. However, the likelihood that no violation of P1-1 would be found may stand less as an indictment of the protection offered by P1-1 than as a red flag in respect of the breadth of the provisions drafted by domestic legislators under the banner of anti-terrorism.

Scotland's new and wide-ranging Climate Change Act gives an opportunity to demonstrate that the key challenges with which we are presently faced on a global basis are likely to create significant issues in respect of P1-1 domestically. It is hard to imagine that the authors of the Convention could possibly have foreseen a scientific development of this kind. Nonetheless, the manner in which the property right has evolved allows for an examination of this new legislation from a human rights perspective. The development of a positive obligation imposed on states by P1-1, a relatively recent development in the jurisprudence of the Strasbourg court, may also be in the frame for deeper analysis in this context.

Finally, consideration of the Land Registration system with an eye on the reforms that seem likely to be implemented soon allows for a P1-1 analysis of a key aspect of Scots private law. There is scope for discussion of issues both of law and of practice within the framework of the existing P1-1 jurisprudence. It is reassuring to note that, although human rights issues do arise, in most cases they are satisfactorily resolved, with the proposed reforms taking Scots law further in the direction of Convention compliance.

The fact that it is possible to carry out an analysis of this type on such a diverse range of topics evidences the fact that the existing jurisprudence has developed the property right into a robust and yet flexible safeguard. The five step decision-making process goes some way to assist in navigating new

issues from a P1-1 perspective, allowing for the twin goals of political autonomy and human rights protection. At the same time, the continuing ambiguities in the judicial understanding of the right continue to create uncertainty in its real world application, and it may be that further litigation is required in some areas.

Overall, the findings of this chapter suggest that the property right has evolved to a point where it can be meaningfully applied in novel situations. The inherent conflict in the article nonetheless continues to create some difficulties. The evolutionary process is not complete.

CONCLUSION

“Oh, how I wish I could shut up, like a telescope! I’m sure I could if only I knew how to begin.”⁶⁵⁴

6.1 Introduction

A right to protection of property was in the contemplation of the Convention drafters from the outset. The aim of this research has been to examine the evolution of the right from its initial conception, with a view to establishing what a meaningful protection of property might entail.

The central thesis of this research was set out as follows: although a framework has been established within which determination of P1-1 applications will be made, there is still considerable work to be done in strengthening the parameters of the framework in order to create a protection that, whilst sufficiently flexible to deal with changes in law and society, still offers a clearly defined and meaningful safeguard against unnecessary intervention by the state in every context. This concluding chapter will attempt to establish how the critical analysis carried out in the preceding chapters has demonstrated the accuracy of the central thesis.

In the first place, it is made clear that a decision-making framework does exist, built upon the three rules in *Sporrong and Lönnroth*.⁶⁵⁵ These rules form the foundation of the five-step process extrapolated from the Strasbourg jurisprudence in chapters two and three, which has been seen to operate in a domestic context in chapter four.

It will then be submitted that the framework is effective in providing a certain level of safeguarding of property rights. The limits suggested by the case law in chapters two, three and four have been applied to novel topics in chapter five, demonstrating that a meaningful protection does exist.

⁶⁵⁴ *Alice in Wonderland*, p13

⁶⁵⁵ (1983) 5 EHRR 35

It will finally be argued, however, that this protection is not as robust as it should be. Ambiguities remain as to the extent of the right. It is not clear whether the intentions of the state are adequately reviewed or controlled by the judiciary and serious questions remain over the application of P1-1 in certain areas of particular conflict. These criticisms require to be addressed if the right is to continue to evolve into a flexible yet robust protection.

6.2 The existence of the decision-making framework

The detailed review of the Strasbourg jurisprudence carried out in the second and third chapters of this work indicate that, following an initially tentative approach to interpretation and application of P1-1, over time a clear decision-making framework has emerged within which the ECtHR operates in determining P1-1 cases.

It is not difficult to understand the length of time taken to develop such a framework. The genesis of the property right was fraught with political and ideological conflict, and the wording of the article which was ultimately agreed represented such a compromise that its meaning was deeply ambiguous. Working with such an instrument, and without a coherent set of cross-European legal principles to unite the bench, it should be of little surprise that the initial incursions of the ECtHR into the P1-1 jurisprudence were hesitant and lacking in conviction.

The turning point occurred with the landmark decision in *Sporrong and Lönnroth v Sweden*, in which the Court set out its lynchpin "three-rule" dicta. Briefly put, *Sporrong* determined that state action must be capable of construction as a deprivation of ownership, a control of use or a more general interference with the peaceful enjoyment of possessions before P1-1 will be engaged.

Engagement with P1-1, however, is not synonymous with breach of the article. The property right is a qualified right: it can be compromised where such compromise is justifiable in the interests of broader society. Over time, and building upon work that it had done in defining and limiting human rights

protection in respect of other articles of the Convention, the ECtHR clarified the requirements that would justify compromise of P1-1.

As a basic standard in keeping with the rule of law, any action of the state has to be lawful, in the sense of having a clear and easily accessible basis in law which produces a non-arbitrary result. Protection of human rights demands that law produce foreseeable results in order that legal persons can know how to regulate their conduct.

A lawful state act must also pursue a legitimate aim in the public or general interest. State intervention with property rights must be motivated by the needs of the wider society, as only then can interference with individual property rights be justified in a moral sense. The essence of this requirement is contained within the wording of the article itself.

Finally, the action of the state must be proportionate, meaning that a fair balance requires to be struck between the needs of society served by the interference and the impact on the person whose property rights have been qualified. A single person should not be expected to bear an individual and excessive burden for the benefit of the wider community. This notion of proportionality is inherent within the construction of the Convention as a whole and its terms are repeated in the jurisprudence of every qualified right.

Thus a five step decision-making framework emerges:

1. Does the applicant hold a possession?
2. Does the action of the state fall within the definition of one of the "three rules"?
3. Was that action lawful?
4. Was that action carried out in pursuance of a legitimate aim in the public or general interest?
5. Did that action strike a fair balance between the impact on the applicant and the needs of the community such as to satisfy the requirement of proportionality?

The first two questions must be answered in the affirmative for the article to be engaged. If one of the latter three questions is then answered in the negative, the result will be a violation of the article, followed by a ruling as to the appropriate remedy.

This framework, developed over time through the Strasbourg jurisprudence, has been followed to a greater or lesser extent in the majority of the domestic opinions. The review of Scots and English cases in the fourth chapter of this work indicates that, where the five-step process has not been followed, it is at least arguable that the deviation is not the result of principled opposition to the Strasbourg approach on behalf of the domestic judiciary, but rather an oversight based on lack of a nuanced understanding as to how the ECtHR determines the outcome of P1-1 applications.⁶⁵⁶

The first element of the central thesis of this research has therefore been demonstrated. It must now be asked whether the framework allows for a meaningful protection. Subsequently the limits of that protection must be identified.

This evaluation of the five-step approach must be prefaced by a restatement of the central conflict inherent in a human right to enjoyment of possessions. The importance of the political autonomy afforded by a protection of private ownership is not in question in this work. However, it is recognised that ownership of property is, first and foremost, an economic interest which plays a variety of roles in society beyond allowing political participation on the part of its holder. In the European free market, economic interests are not held as an absolute moral good in the way that some political interests, such as the right to a fair trial, may be. Economic rights must be subject to qualification to allow the operation of systems of taxation, laws of succession, welfare benefits, protection of the environment and a multitude of other essential

⁶⁵⁶ This is not to say, however, that principled objections to the framework do not exist. These criticisms will be addressed below.

facets of western society. In some cases, economic rights must be compromised in order to uphold the absolute moral standard of other rights protected by the ECHR. A viable approach to the protection of property must be flexible enough to allow for these competing demands in a rapidly changing world. However, such flexibility must have clear and enforceable limits, or else the political importance of possession of property will no longer be protected. A human right plainly stated on paper will, in reality, become meaningless.

6.3 The protection offered by the framework

In the spirit of optimism in which the right was originally conceived, it seems apposite to focus first on the successful elements of the evolution of P1-1. The thesis contends that the right, as developed in the jurisprudence, does offer a flexible yet meaningful protection to a certain extent. The existence of this protection is evidenced by the jurisprudence.

Considered in the broad sense, the decision-making framework is sufficiently clear to allow for a reasonably sound prediction as to the P1-1 implications of new legislation or other legal innovation. That this is the case is demonstrated by just such an analysis comprising the contents of the fifth chapter of this thesis. The significant achievement represented by the clarity of this framework should not be overlooked. The ambiguity in the wording of the article itself is impossible to ignore, and the overarching discussion throughout the thesis of the construction of P1-1 terminology indicates that a myriad of interpretations of the text is possible. In that context, the fact that a foreseeable outcome to a P1-1 application is possible in many situations indicates in itself that the protection has some value.

The courts both in Strasbourg and domestically have grasped the need for a wide definition to be given to the key terms in the article, allowing in turn for protection to be given to a broad range of interests. This seems to be in keeping with the goal of the drafters that such interests as allow for economic and political participation should be included within the right. It also has the

benefit of allowing P1-1 to apply easily to "new" possessions such as intellectual property rights in internet addresses. It is encouraging to see that the courts will work over a period of time to refine the parameters of a definition, as occurred with the series of cases on pensions and social security benefits, and it is hoped that a similar path will be followed in areas where the definitions of key terms are still subject to some doubt, as with the position of court decrees as a type of possessions, or the uncertainty over the interaction between the term "deprivation" and the term "control." It was always the case that a property protection would require to be flexible enough to cope with continual developments in law and society. It is possible for this flexibility to be maintained within the five-step framework which has evolved.

In a similar sense, it is obvious that the courts do not have a closed mind as to the various ways in which property rights may require to be protected to meet the aims of P1-1. The recent suggestion of a positive obligation on the state to allow peaceful enjoyment of possessions to continue, first explored in *Oneriyildiz v Turkey*,⁶⁵⁷ indicates that the right is continuing to evolve.

Perhaps the most striking indication that P1-1 offers a meaningful protection comes from individual cases themselves. In situations which most closely mirror the circumstances originally envisaged by the Convention drafters as likely to infringe upon property rights, violations have indeed been found to exist. In the Strasbourg jurisprudence, *Broniowski v Poland*⁶⁵⁸ indicates that large-scale deprivation of possessions still takes place. This scenario is one in which the property right seemed to play the exact role which had been envisaged for it. In the domestic jurisprudence, more quotidian examples such as the trio of customs cases – *Lindsay v Customs and Excise Commissioners*,⁶⁵⁹ *R (Hoverspeed) v Customs & Excise Commissioners*⁶⁶⁰ and *International Transport Roth GmbH v Secretary of State for the Home*

⁶⁵⁷ (2005) 41 EHRR 20

⁶⁵⁸ (2005) 40 EHRR 21

⁶⁵⁹ [2002] 1 WLR 1766

⁶⁶⁰ [2002] 3 WLR 1219

*Department*⁶⁶¹ – still demonstrate situations where a violation finding by the Court must have had a real and important effect for the individual applicants.

Ultimately, P1-1 has, as a matter of fact, protected the rights of individual applicants within the five-step framework outlined. The parameters of the protection as established to date do offer a flexible and yet meaningful protection in certain contexts, as contended in the central thesis of this research.

6.4 Limitations of the right as currently understood

Despite these positive indications, there are undoubtedly areas in which serious question marks arise over the ability of the framework as currently formulated to offer a real and effective protection of property rights.

In the first place, due regard must be given to the significant influence that the necessity for compensation has played in the application of the decision-making process overall. The Strasbourg court has established that, where a deprivation of possessions has occurred, compensation must be paid to the deprived party or else the interference will fail the test of proportionality. In most day-to-day examples of deprivation by a state, such as compulsory purchase, or nationalisation, such compensation will be provided as a matter of course. The principle seems solid and is backed up by the general principles of international law. However, there are situations in which it creates difficulty, and in these situations the courts have not coped particularly well.

The most obvious example is cases in which confiscation and forfeiture has occurred by way of penalty in furtherance of a political policy. Confiscation of the proceeds of crime is a useful example which has been discussed both by the ECtHR⁶⁶² and in the domestic courts.⁶⁶³ In confiscation cases, possessions are often permanently removed from their owner by state officials or by a court decree. The possessions are not returned. In every logical

⁶⁶¹ [2003] QB 728

⁶⁶² *Phillips v United Kingdom* (41087/98) 5 July 2001

⁶⁶³ See discussion at page 194 et seq.

understanding of the term, such action must amount to a deprivation. Yet the courts are almost universal in determining such interventions to be a control of the use of possessions. Given that no logical explanation can be given for making such a determination, an alternative reason must be sought. In such cases, it is impossible to resist the suggestion that the requirement of compensation for deprivations is what leads the courts to conclude that confiscation is a control. The courts look at proportionality first, and then fit their definition of the state action around the result they wish to achieve. The tail is wagging the dog.

There can, of course, be no argument that compensation *should* be paid for confiscations of this type. Such a result would be nonsensical. However, it is submitted that the ECtHR and the domestic courts must find an alternative approach to dealing with such cases if integrity in the five-step process is to be maintained. As discussed in the course of the thesis, it may be germane in some situations, such as confiscation of the proceeds of crime, to reason that possessions obtained through illegal means are not possessions which merit the protection of P1-1. That would seem to create no conflict with the aims of the article. Alternatively, where a confiscation results from breach of, for example, a border control policy, there may be scope for a rule that penalty confiscations do require compensation to meet the test of proportionality. It may be that more than one solution is required. It is submitted, however, that continuing to adhere to the current approach is not tenable in the long term if P1-1 is to be seen as a solid and effective protection.

Whatever solution is adopted in resolution of this difficulty, it must be explained in a principled and detailed manner which will allow for clear application of the new rules to novel sets of facts. What would not be desirable is the introduction of another doctrine as ambiguous and open to political abuse as the rule on "exceptional circumstances" so bizarrely implemented in *Jahn v Germany*.⁶⁶⁴ Although it is not contended that circumstances exceptional enough to warrant an absence of compensation for deprivation are impossible, it is argued that such circumstances did not, in

⁶⁶⁴ (2006) 42 EHRR 49

fact, exist in *Jahn*. The reunification of Germany, although no doubt political tumultuous, seems no more exceptional than other instances of European regime change as witnessed, for example, in Poland and Greece. It remains unclear why the German reunification should be considered exceptional in the eyes of the Strasbourg court. At present, it appears that *Jahn* may be a fairly singular example, but it still stands as a warning. If the decision-making framework is to be reliable enough to offer an effective protection, cases must be decided within that framework, even where the decisions are difficult.

One other issue of significant concern in any evaluation of the five-step framework is the evident weakness of the third step in the process. The courts will ask whether the state action served a legitimate aim in the public interest. As discoursed on at length in chapters three and four, the answer to this question appears always to be "yes", omitting the unusual situation in *Zwierynski v Poland*⁶⁶⁵ in which no public interest argument whatsoever was put forward by the state.

The question of public interest is the one in which the conflict inherent in the notion of a property protection is most clearly apparent. The ECtHR often repeats that states must be given a wide margin of appreciation to implement political policy free of interference from Strasbourg. The electorate of a signatory state did not vote to be governed by the ECtHR; accordingly it would be undemocratic (and, of course, contrary to human rights) for the ECtHR to substitute its political judgment for that of the state government.

However, the political independence of signatory states should not be an absolute barrier to any evaluation of the question of public or general interest either by the ECtHR or by the domestic courts. It seems difficult to understand why the courts should not at least seek to establish that the state action taken will, at least *prima facie*, lead to promotion of the interest which is said to be pursued. It is not suggested that a detailed investigation should be undertaken, but the state aim should appear to be met by the state action at least on the basis argued before the Court. It is unsettling that the ECtHR,

⁶⁶⁵ (2004) 38 EHRR 6

even when expressing doubt in the judgment itself as to whether the stated public interest will be served by the action taken, still has no difficulty in holding that the public interest requirement has been met.⁶⁶⁶

The ECtHR has also indicated that it will not accept that state action is justified where the public interest being served is "manifestly unreasonable." At the present time, there is no reported case in which such a finding has been made by the courts either in Strasbourg or domestically. It is difficult to draw even a tentative conclusion from this fact. It is submitted that the concept of manifest unreasonableness should operate as an absolute moral safeguard in as much as such a thing is possible in the context of an economic right. Simply put, the court should not accept "silencing the political opponents of the government" as a legitimate aim in the public interest, even if a democratically elected government asserts that this is so. The standard of manifest unreasonableness to be met here is obviously, and, it is submitted, correctly, set very high. It is hoped that no such finding has, as yet, been made because no state has acted in the manner feared by the drafters of the Convention.

Each of the criticisms outlined serves to impair the strength of P1-1 overall. Ambiguity in interpretation and lack of rigour in application of the protection must be avoided, even in circumstances where the facts are complex and the answers to the five step process may not be easy to decide. It is in these areas that the parameters of the framework require to be strengthened, as contended in the central thesis of this work.

6.5 Final conclusions

In the final analysis, the strength of the property protection can only be measured by its results to date. The huge volume of case law which has been discussed through the course of this thesis serves to demonstrate that P1-1 is far from a forgotten right. The complexity of protecting an economic right was recognised by the authors of the Convention from the very earliest stages. Its

⁶⁶⁶ See discussion at 3.5.3.

jurisprudential development has accordingly been slow, faltering at times, plagued with ambiguities and doubts which continue to give rise to serious questions. Nevertheless, basic principles for resolution of P1-1 applications have been articulated. A decision-making framework has been developed and implemented to varying degrees of robustness. These guidelines have been adopted and applied domestically with some degree of success. It is apparent that the property protection continues to be of significance in respect of current issues of major importance.

It would be foolish to argue that the property protection is a clear and unambiguous right or that its implementation has been an unqualified success. P1-1 has, at its heart, conflict between intervention and autonomy. The ideological and political complexities of the economy are layered on top of this inherent clash of ideals. In places, injudicious jurisprudence creates an additional, undesirable level of uncertainty.

Nevertheless, the case law demonstrates that clear breaches of the right can and have taken place. The Strasbourg court has remedied violations arising from circumstances as dramatic regime change through to inequalities in the law of succession. In the domestic jurisprudence, P1-1 has played a part in alleviating unfairness in forfeiture schemes, litigation practices and licensing decisions. From its inauspicious beginnings, the property protection is slowly developing into a human right worthy of the name. Current issues of global concern suggest the right will continue to have an important role to play over the coming years and decades. It is hoped that, with further jurisprudence, article one of the First Protocol will continue to evolve into a meaningful protection in every context.

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