AS TO THE ADMISSIBILITY OF

Application No. 28778/95
by Graeme Peter KIGHTLEY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 July 1995 by Graeme Peter KIGHTLEY against the United Kingdom and registered on 27 September 1995 under file No. 28778/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a British citizen, born in 1970, is unemployed and lives in Leicester. Before the Commission, he is represented by Ms. Jill Yvonne Barratt, a solicitor practising in Nottingham.

The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Particular circumstances of the case

On 17 May 1989 the applicant sustained severe spinal injury resulting in paralysis in a road traffic accident.

After the accident the applicant was paid statutory sick pay for the period from 18 May to 6 December 1989. He further applied for and received attendance allowance for the period from 11 December 1989 to 5 April 1992, mobility allowance for the period from 5 July 1989 to 5 April 1992, severe disablement allowance for the period from 4 December 1989 to 11 May 1994 and disability living allowance for the period from 6 April 1989 to 10 May 1994. These payments constituted recoverable benefits under the Compensation Recovery Scheme.

He instituted a claim for compensation in respect of his injuries and consequential financial losses. On 7 February 1991 judgment was given on the basis of an apportionment of liability of 20% to the applicant and 80% to the defendant.

On 16 March 1995 the High Court agreed a total award of damages for the applicant in the sum of £1,187,532.30. As the applicant was entitled to 80% of the award, the total damages amounted to £950,025.80 out of which a sum of £25,025.85 was retained by the defendant to repay to the Compensation Recovery Unit the benefits received already by the applicant.

B. Relevant domestic background law and practice

In the 1980s the Government saw a number of problems with the scheme of compensation recovery concerning the Law Reform (Personal Injuries) Act 1948 ("the 1948 Act"). The 1948 Act provided for half of certain benefits received by an accident victim for up to five years since the accident to be offset against damages. The scheme was considered to be misconceived in principle because it was based on the presumption that the money paid out in benefits was provided by the State. In reality, payments were, at least in part, of the nature of an insurance payment to which accident victims had contributed.

The Social Security Act 1989 included the legal powers for the compensation recovery scheme. The Government based the scheme on the principle that "where a person is injured or incapacitated by accident or disease, he may be entitled to claim certain social security benefits. If that injury or incapacitation was caused by the negligence of another party he may also be able to sue that party for damages in tort. The damages should only be compensatory and in particular there should not be double compensation for the same loss".

The Department of Social Security in its memorandum contrasted the 1948 scheme with the 1989 scheme:

> "(i) under the old scheme, monies were set off by the compensator and retained; in the present scheme they are remitted to the Exchequer [the Compensation Recovery Unit];
>
> (ii) the old scheme could take account of potential future benefit entitlement; the present scheme does not do so;
>
> (iii) the old scheme involved rates of recovery at 50 per cent and 100 per cent depending on the benefit involved; the present scheme applies a rate of recovery at 100 per cent across the board;
>
> (iv) under the old scheme recoupment was from special damages [in the action for loss of earnings]; the present scheme permits recoupment against special damages and general damages [in the action for pain and suffering].
>
> (v) under the old scheme there was no requirement to notify victims of recoupment details; under the new scheme such notifications are issued."

On 21 July 1989 the Social Security Act 1989 received the Royal Assent. The Act provided for a system for the recoupment of social security benefits from accident victims who have obtained a compensation payment, the Compensation Recovery Scheme ("the Scheme"). The provisions of the Social Security Act 1989 relating to the Scheme have since been repealed and re-enacted in the Social Security Administration Act 1992 ("the 1992 Act").

A compensation payment is defined in Section 81 (1) of the 1992 Act as "... any payment falling to be made (whether voluntarily, or in

pursuance of a court order or an agreement, or otherwise) (a) to or in respect of the victim in consequence of the accident, injury or disease in question, and (b) either (i) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of that accident, injury or disease; or (ii) in pursuance of a compensation scheme for motor accident, ..."

Section 81 (3)(a) to (j) of the 1992 Act exempts certain payments from the application of the Scheme. These are, inter alia, small payments (currently up to and including £2,500) and payments made under a contract of insurance between a victim and an insurance company.

According to Section 81 (7) of the 1992 Act, "[The Scheme] shall apply in relation to any compensation payment made on or after 3 September 1990 (the date of the coming into force of Section 22 of the Social Security Act 1989 which, with Schedule 4 of that Act, made provision corresponding to that made by this Part) to the extent that it is made in respect of (a) an accident or injury occurring on or after 1 January 1989; or (b) a disease, if the victim's first claim for a relevant benefit in consequence of the disease is made on or after that date".

By Section 82 (1) of the 1992 Act, "a person ("the compensator") making a compensation payment, whether on behalf of himself or another, in consequence of an accident, injury or disease suffered by any other person ("the victim") shall not do so until the Secretary of State has furnished him with a certificate of total benefit and shall then (a) deduct from the payment an amount, determined in accordance with the certificate of total benefit, equal to the gross amount of any relevant benefits paid or likely to be paid to or for the victim during the relevant period in respect of that accident, injury or disease; (b) pay to the Secretary of State an amount equal to that which is required to be so deducted; and (c) furnish the person to whom the compensation payment is or, apart from this Section, would have been made ("the intended recipient") with a certificate of deduction".

According to Section 81 (1) of the 1992 Act, the "relevant period" is defined as (a) the period of five years beginning with the date on which the victim first claims a relevant benefit in consequence of the disease; or (b) in any other case, the period of five years immediately following the day on which the accident or injury in question occurred.

According to Section 93(2)(a) of the 1992 Act "where a party to an action makes a payment into court which, had it been paid directly to the other party, would have constituted a compensation payment, the making of that payment shall be regarded for the purposes of this Part of this Act as the making of a compensation payment, but the compensator may withhold from the payment into court an amount equal to the relevant deduction".

Attendance allowance, mobility allowance, severe disablement allowance and disability living allowance are all relevant benefits for this purpose under the Social Security Regulations 1990.

COMPLAINTS

The applicant alleges a violation of Article 1 of Protocol No. 1 and Article 6 of the Convention. He submits that the Social Security Administration Act 1989 was enacted on 21 July 1989 and did not come into force until 1990 but covered all accidents occurring after 1 January 1989 and was thus retrospective in effect. The applicant has been treated less favourably as a result of the application of the Act than he would have been had the Act not purported retrospectively to include his claim. By paying National Insurance contributions whilst in employment the applicant should be entitled to the benefits that he

received following his accident whether or not he was making a claim for compensation. However, the retrospective legislation has deprived him of part of his compensation.

THE LAW

1. The applicant complains that by the operation of the Social Security Administration Act 1992, which allegedly had retrospective effect, he has been deprived of a part of his compensation. He invokes Article 1 of Protocol No. 1 (P1-1).

Article 1 of Protocol No. 1 (P1-1) to the Convention provides 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 impair the right of a State to enforce such laws as it deems necessary ... to secure the payment of ... other contributions ..."

The Commission first recalls that Article 1 Protocol No. 1 (P1-1) guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, the three rules are not "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 constructed in the light of the general principle enunciated in the first rule (cf. Eur. Court HR, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 46, para. 55).

The applicant bases his argument on the premise that he had been deprived of his property.

The Commission considers that the interference complained of in this case was in fact the result of the Compensation Recovery Unit's exercise of their powers under the Social Security Act 1989, as repealed and re-enacted, which provided for the Compensation Recovery Scheme. The Scheme was based on the principle that damages for personal injuries are compensatory, and that there should not be a double compensation for the same loss. Where a person is injured or incapacitated by accident or disease, he may be entitled to claim certain social security benefits. If that injury or incapacitation is caused by the negligence of another party the person may also be able to sue that party for damages in tort.

It was in the exercise of these powers that the sum of £25,025.85 was recouped by the defendant from the total damages allowed to the applicant (£950,025.80) and repaid to the Compensation Recovery Unit as the benefits received already by the applicant.

The applicant's complaint falls to be examined under the head of "securing the payment of other contributions", which comes under the rule in the second paragraph of Article 1 (Art. 1-2). That paragraph

explicitly reserves the right of Contracting States to pass such laws as they deem necessary to secure the payment of other contributions (ibidem, p. 48, para. 59).

Moreover, this paragraph must be construed in the light of the principle laid down in the Article's first sentence (cf. Eur. Cour HR, Agosi v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 48). Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 (Art. 1) as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (cf. Eur. Court HR, Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, pp. 26 and 28, paras. 69 and 73).

In the present case the High Court agreed a total award of damages for the applicant of £1,187,532.30. As the applicant was entitled to 80% of the award, the total damages amounted to £950,025.80 out of which the sum of £25,025.85 was retained to the Compensation Recovery Unit in respect of benefits received by the applicant from the date of his accident.

The Commission considers that the principle that social welfare benefits are provided on the basis of immediate need, and may therefore be recovered by the State from a subsequent award of damages cannot be said to be incompatible with Article 1 of Protocol No. 1 (P1-1) as such. This is particularly clear where statutory sick pay is received, and then a figure is subsequently obtained by way of special damages for loss of earnings in the relevant period. The same applies, however, to the other benefits the applicant received: the aim of any award of special damages is to put the victim of an accident in the same financial position as he would have been in if the accident had not happened. A person who receives both his salary (by way of special damages) and the various welfare benefits for which he is eligible, has indeed, overall, received more money than if the accident had not happened.

The position is not analogous to the position of the person who has private insurance, as the private insurance is a matter which does not concern the State in any respect.

The applicant received a total of £950,025.80 by way of damages, of which £25,025.85 was returned in respect of the benefits he had already received. The applicant has not given a breakdown of his award of damages as between general and special damages, but the Commission finds no disproportion between the sum awarded by the court by way of damages for the applicant, and the sum with which he was finally left in the present case.

Finally, as regards the retroactivity of the Act also alleged by the applicant, the Commission notes that retroactivity in civil legislation is not as such prohibited by Article 1 of Protocol No. 1 (P1-1) (cf., for example, the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom, Comm. Report 25.7.96), but in any event, Section 22 of the Social Security Act 1989 and Schedule 4 to that Act entered into force on 3 September 1990, and apply to payments made on or after this date. The provisions are not, therefore, retroactive, even though the accident may have taken place between 1 January 1989 and 2 September 1990.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that the retrospective legislation affected his right to a fair trial in a civil dispute. He invokes Article 6 (Art. 6) of the Convention which provides, so far as relevant, as follows:

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

The Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Contracting States. In particular, it is not competent to deal with an application alleging that errors of fact or law have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of the rights and freedoms set out in the Convention (cf., for example, No. 21283/93, Dec. 5.4.94, D.R. 77, p. 81).

The Commission notes that the applicant brought his case before the courts. He was represented throughout the proceedings, and had ample opportunity to present his views and challenge the submissions of his adversary in the proceedings. The fact that the particular sum was recouped from the total award of damages agreed by the tribunal by the Compensation Recovery Unit, in accordance with the legislation criticised by the applicant, cannot render the proceedings unfair or otherwise in contradiction with Article 6 (Art. 6) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber