17 November 2016

PRESS SUMMARY

Arorangi Timberland Limited and others (Appellants) v Minister of the Cook Islands National Superannuation Fund (Respondent) (Cook Islands)
[2016] UKPC 32
On appeal from the Court of Appeal of the Cook Islands [2014] CKCA 4

JUSTICES: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson

BACKGROUND TO THE APPEAL

The Cook Islands National Superannuation Act 2000 ("the 2000 Act") established, for the first time, a national superannuation pension scheme ("the Scheme") for all those employed in the Cook Islands. Under the Scheme, employees and employers are obliged to contribute to the National Superannuation Fund ("the Fund") at rates calculated as a percentage of the employee's earnings.

Under s.53 of the Scheme, the right of withdrawal before an employee reaches the age of retirement is limited to persons resident in the Cook Islands for the sole purpose of being employed under a contract of service of not more than three years. A person who so elects receives a refund only of the employee contributions upon permanent departure from the Cook Islands. The employer's contributions are transferred to the Fund's reserve account.

The seven appellants submit that the Scheme as a whole involves a disproportionate taking or deprivation of property contrary to article 40(1) and/or 64(1)(c) of the Cook Islands Constitution, or alternatively that s.53 of the 2000 Act involves such a taking or deprivation and/or is unjustifiably discriminatory in relation to migrant workers contrary to article 64(1) of the Constitution. The Chief Justice accepted the appellants' primary case, on grounds including a conclusion that migrants' loss of employer contributions under section 53 seemed both unnecessary and unfair. The Court of Appeal allowed an appeal and rejected both cases advanced by the appellants who now appeal to the JCPC.

JUDGMENT

In a judgment given by Lord Neuberger and Lord Mance, the Board humbly advises Her Majesty to dismiss the appeal in respect of the first ground and to allow it on the second ground. Lord Sumption agrees with the Board in relation to the first ground but dissents in relation to the second.

REASONS FOR THE JUDGMENT

The overall constitutionality of the Scheme

The appellants contend that the mandatory contributory nature of the Scheme, which deprives employees of a proportion of their remuneration without realistic access thereto until retirement or death, is disproportionate given the absence of (i) a Government guarantee or other underwriting of the Scheme ("a Guarantee"); (ii) constitutional entrenchment of the Scheme ("Entrenchment"); and (iii) a right to make early withdrawals (save under s.53) **[16]**.

The Scheme engages article 64(1)(c): the compulsory extraction of contributions from an employee's wages amounts to a "deprivation". In assessing its proportionality, the nature of the issue (a measure of social policy with significant macro-economic implications), the identity of the decision-maker (the elected legislature) and the nature of the interference (which, while serious, is relatively mild) place the case at the lower end of the intensity of review spectrum **[37-41]**.

The absence of a Government Guarantee, Entrenchment or right of early withdrawal do not render the Scheme disproportionate. Under the 2000 Act, and relevant Trust Deed, the Scheme is sufficiently secure and independent of Government interference **[46-63]**. Whether to allow members general early withdrawal of vested funds involves legislative policy choices **[64-66]**.

The constitutionality of the treatment of migrant workers

Section 53 is unjustifiable in its present form, on the grounds that it unjustifiably deprives migrant workers of their property and unjustifiably discriminates against them.

The Cook Islands' hotel and tourism businesses rely extensively on non-resident employees ("migrant workers") who tend to be modestly paid and are discouraged from long-term residence **[69-70]**. Once migrant workers have left the Islands, the prospect of their claiming any limited pension earned there are inevitably slight **[72]**. The Scheme's general aim of providing financial security for Cook Islanders in their retirement therefore does not apply to migrant workers **[73]**. Section 53 recognises that fairness requires that special provision be made for their special position **[74]**. However, s.53 goes only half way in compensating for the difference, in effect giving the benefit of half of their interest to the Fund and/or to other pension-right holders and/or to the Cook Islands Government itself **[75]**. Section 53 treats migrant workers as if their employer contributions had not been earned and vested in them **[77]**. Further, s.53 does not meet international standards addressing the need to enhance the portability of pensions **[78-81]**. No substantial justification has been shown for the limitation. It is not, and could hardly be, suggested that the viability of the Scheme depended on it **[87]**.

The Board invites written submissions within 28 days on its proposal that it should declare that s.53 should be read and applied as if the offending language is struck out **[91-92]**.

Lord Sumption dissents, on the ground that in circumstances where the migrant workers have the option of taking a deferred pension on the same basis as everyone else, the limitation in s.53 cannot be said to be discriminatory or to constitute unjustified confiscation.

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html