Human Rights and Planning

Standard Note: SN/SC/1295
Last updated: 21 June 2010
Author: Christopher Barclay
Section Science and Environment Section

- This note describes the consequences of the Human Rights Act 1998 on UK planning law, including the House of Lords case, *Alconbury*, in 2001. The idea of third party rights of appeal is discussed in *Planning Appeals: Policy* (SN/SC/1031)
- The Alconbury case, decided by the House of Lords in the Government's favour in 2001, questioned whether a planning committee meeting constituted the "fair and public hearing.by an impartial and independent tribunal" to which citizens are entitled under article 6 of the European Convention on Human Rights. The House of Lords found that the planning system as a whole constituted an appropriate tribunal.
- Several cases relating to Gypsies and Travellers have used article 8 of the convention – the right to respect for private and family life. It has been successfully argued that moving on Gypsies from a camp site where they live might be a breach of article 8, unless they have somewhere else to go.
- There have been some unsuccessful attempts to prevent neighbouring development by using article 8.
- The Coalition Programme for Government, May 2010, states: "We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties."

Contents

1 Some relevant parts of the European Convention

The European Convention does not explicitly mention planning, but various Articles might be relevant. The first Article to be used was Article 6(1), the right to a fair hearing in civil, as well as criminal, cases. This was the basis of the *Alconbury* case, discussed in Section 2, won by the UK Government.

> Article 6 – Right to a fair trial
>
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The UK Government lost a case (Hatton v United Kingdom) on noise caused by night flights at Heathrow, although the result was overturned on appeal by the Court sitting as Grand Chamber. [1]

The objectors based their case on Article 8 of the Convention:

> Article 8 – Right to respect for private and family life
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Another possibility is Article 1 of the First Protocol:

> Article 1 – Protection of property
>
> 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.

---

[1] http://www.hacan.org.uk/resources/reports/echr.hatton_judgement.pdf

> 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 Convention has been incorporated into UK law, and can be used in legal challenges to planning applications. Other possible remedies exist, including action for damages in some cases or intervention by Environmental Health Officers to prevent noise nuisance.

2 The *Alconbury* Judgement and Article 6

A group of four test cases in December 2000 resulted in a High Court ruling that the planning system was incompatible with the Convention. The Government stated the position:

> **Mr. Raynsford:** On Wednesday 13 December the Divisional Court gave judgement on four test cases brought in relation to the compatibility of certain aspects of domestic legislation with Article 6(1) of the European Convention on Human Rights (ECHR) concerning the right to a fair hearing before an independent and impartial tribunal. The Convention right was incorporated into UK legislation in the Human Rights Act 1998, which became operative in England and Wales on 2 October this year.
>
> The legal challenges related to cases involving the Secretary of State's ability under the Town and Country Planning Act 1990 to call in and determine applications for planning permission and to recover and determine appeals, the confirmation by him of Compulsory Purchase Orders and related Orders under the Highways Act 1980 made by one of his departmental agencies and the making of orders under the Transport and Works Act 1992.
>
> The Court concluded that the processes involved in each of the cases were not compatible with Article 6(1) of the ECHR. In particular, the Court concluded that:
>
> The Secretary of State for the Environment, Transport and the Regions is not 'an independent and impartial tribunal' for the purposes of Article 6(1), but is a judge in his own cause as both policy maker and decision taker;
>
> Judicial Review is not sufficient to remedy the defects in the Secretary of State for the Environment, Transport and the Regions' decision-making role--the scope of Judicial Review is not sufficiently wide and the Court is not prepared to enlarge its power of review...[2]

The case, *Alconbury v SSETR* [2001] JPEL 291, was heard in the House of Lords and judgement was announced on 9 May 2001, overturning the High Court judgement and upholding the planning laws.

> In a ruling that many lawyers say indicates a restrictive approach by judges to the Act, the law lords agreed that the Secretary of State for the Environment's role as final arbiter was in breach of the Act, but added that there was no need to overturn existing planning laws and procedures. Their decision – condemned by lawyers as a step back for human rights law – is a blow for those who had hoped that the case would pave the way for an independent planning system.[3]

The Times Law Report summarised Lord Slynn's judgement, with which the other Law Lords concurred, including the following points:

---

2 HC Deb 19 December 2000 cc 119-120W

3 "Human rights challenge to planning law fails", *Times*, 10 May 2001

> Lord Slynn said that it seemed plain that the dispute was one which involved the determination of civil rights within the meaning of the Convention. The European Court of Human Rights had, however, recognised from the beginning that some administrative law decisions which affected civil rights were taken by ministers answerable to elected bodies…
>
> It was not suggested [by the respondents] that there was actual bias against particular individuals, on the part of the secretary of state or the officials who reported to him or who advised him. But it was contended that the secretary of state was involved in laying down policy and in taking decisions on planning applications in accordance with that policy. He could not therefore be seen objectively to be independent or impartial…
>
> Before the House, the secretary of state did not contend that in dealing with called-in or recovered matters he was acting as an independent tribunal. He accepted that the fact that he made policy and applied that policy in particular cases was sufficient to prevent him from being an independent tribunal and for the same reasons he was not to be seen as an impartial tribunal for the purposes of article 6. But the many decisions of the European Court did not stop there…The European Court had recognised that in many European countries planning decisions were made by elected or appointed officers with a limited judicial review even though the extent of that might vary from state to state…
>
> The common law had developed specific grounds of review of administrative acts and those had been reflected in the statutory provisions for judicial review such as were provided for in the present case…The legality of the decision and the procedural steps had to be subject to sufficient judicial control. But none of the judgements before the European Court of Human Rights required that the court should have full jurisdiction to review policy or the overall merits of a planning decision.[4]

In *Holding & Barnes PLC v UK* (Application No.2352/02) the European Court of Human Rights declared inadmissible the application by one of the *Alconbury* claimants who sought to raise in Strasbourg the Article 6 issues decided in *Alconbury*. The Court concluded in terms similar to those expressed by the House of Lords.

Had the Lords ruling gone the other way, the whole Town and Country Planning system would have required reform, possibly by introducing a system of environmental courts, as in New Zealand, and allowing third party rights of appeal.

3 The Use of Article 8 in cases involving Gypsies

Article 8 of the Convention has been cited in several cases involving Gypsies. Often, the Gypsies have bought land and developed it without planning permission. Councils sometimes apply for an injunction to remove them, in order to cut short the delays involved in planning enforcement and also to ensure compliance with planning law. However, the Gypsies object on the grounds of Article 8, arguing that their homes are being taken away.

In *South Bucks District Council v Porter and Another*, decided by the House of Lords in May 2003 three local authorities applied for injunctions (in support of enforcement action under the statutory planning regime) against Gypsies to prevent them living in mobile homes and caravans on land acquired by them for that purpose, but for which planning permission had been refused. The injunctions were not granted, but part of the judgement by Lord Bingham (with which the other Lords concurred) referred to the European Convention on Human

---

[4] "Minister's power is Convention compatible", *Times Law Report*, 10 May 2001

Rights, arguing basically that the Convention required no more than was already required by domestic law:

> Both *Buckley v United Kingdom* (Application No 20348/92) (1996) 23 EHRR 1010 and *Chapman v United Kingdom* made it plain that decisions properly and fairly made by national authorities had to command respect and that any interference with a person's right to respect for her home, even if in accordance with national law and directed to a legitimate aim, had to be proportionate. As a public authority the English court was prohibited by section 6(1) and 3(a) of the Human Rights act 1998 from acting incompatibly with any Convention right as defined in the act, including article 8. It followed that when asked to grant injunctive relief under section 187B the court had to consider whether, on the facts, such relief was proportionate in the convention sense and grant relief only if it judged it to be so.
>
> Although domestic law was expressed in terms of justice and convenience rather than proportionality, that was in all essentials the task which the court was in any event required by domestic law to carry out.[5]

The Labour Government tried to make its policy on Gypsies compatible with Article 8 by increasing the supply of land available for Gypsy camp sites. Provided there is somewhere else for the Gypsies to go, the decision to prevent them from developing one site is unlikely to be an infringement of the Convention. However, the process took time, partly because of delays in finalising Regional Spatial Strategies and Local Development Frameworks. The process had not been completed by the 2010 General Election. The Coalition Government has reversed that policy by scrapping regional planning, along with housing targets and targets for Gypsy sites. This is explained in another note, Gypsies and Travellers: camp sites and trespass, (SN/SC/1127).

In July 2008, the House of Lords gave another judgement confirming that county court judges should continue to follow existing guidance when considering a human rights defence against possession proceedings.

> HELD: (1) At common law a landlord was entitled to possession of premises if the tenant's lease, or tenancy, or licence had expired or had been validly terminated. The local authority's common law right was surrounded by statutory infrastructure, and the Caravan Sites Act 1968 and the Mobile Homes Act 1983 conferred some protection on those who made their homes in caravans. However, the words of s.5(1) of the 1983 Act were a clear indication that Parliament intended that the law should be different in respect to gipsy caravan sites provided by local authorities. In the instant case the composite legal scheme clearly reflected the intention of Parliament and s.6(2) did apply.
>
> (2) The basic rule remained as laid down by the majority in Qazi v Harrow LBC (2003) UKHL 43, (2004) 1 AC 983 and reaffirmed by the majority in Kay v Lambeth LBC (2006) UKHL 10, (2006) 2 AC 465, and county court judges should continue to follow the guidance given in Kay, Quazi and Kay applied. Although in McCann v United Kingdom (19009/04) (2008) BLGR 474 ECHR the European Court of Human Rights endorsed the reasoning of the minority in Kay and practical recognition must be given to the principles laid down in judgments from the European Court of Human Rights, that could be done in the instant case by applying and developing the reasoning of the majority, McCann considered. Until the European Court of Human Rights had developed principles on which the English courts could rely for general application, the only safe course was to take the decision in each case as it arose. The point of

[5] "Injunctions must be just and proportionate" *Times Law Report*, 23 May 2003

> automatic possession proceedings was generally to provide a quick and reliable way for a public authority to evict tenants whose lease had been terminated by the operation of law. A procedure which gave a discretion to the court by requiring it to consider whether, having regard to art.8, the making of the order would be proportionate would be inimical for that purpose.
>
> (3) The modification that was made to Qazi to accommodate the decision in Connors applied to the instant case. Special considerations to the needs of gipsies and their different lifestyles required that D must be able to insist that it be shown that there was a proper justification for the decision to seek a possession order. If it could not be shown that the local authority's decision to evict him was justified by a pressing social need and was proportionate there was a risk that D's rights under art.8 would have been violated, Connors applied. (…)[6]

4 Can Article 8 be used to prevent neighbouring development?

The *Sweet & Maxwell Encyclopedia of Planning Law and Practice* summarised the position in September 2002. The Encyclopedia summed up on objections to the grant of planning permission:

> The courts have proved distinctly unhappy about being invited to uphold Article 8 claims on a prospective basis on behalf of objectors to the grant of planning permission. They have not found Article 8 a sufficient basis, even if taken together with Article 6, to overturn Green Belt policies; and they will require real evidence of interference where it is alleged, and not merely counsel's assertions…[7]

Article 8 was also used in the challenge by protestors against night flying at Heathrow (the Hatton case). An initial victory by the protestors at the European Court of Human Rights was overturned at the Grand Chamber in July 2003, after an appeal by the UK Government. The appeal was based upon the economic justification for the night flights.[8]

The Hatton case is the nearest that opponents of development have come to preventing development on the basis of Article 8. Courts seem to feel that the whole process of planning decisions should not be overturned just because of the effects of particular decisions on householders who already have rights to make representations to a democratic body within the planning system.

---

6 William Doherty & Ors (Appellant) v Birmingham City Council (Respondent) & Secretary of State for Communities and Local Government (Intervener) (2008) [2008] UKHL 57

7 *Sweet & Maxwell Encyclopedia of Planning Law and Practice, Monthly Bulletin*, September 2002

8 *Hatton v UK* (Grand Chamber of the European Court of Human Rights, 8 July 2003)