

FOCUS

HUMAN RIGHTS LAW

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THE HRA AND THE GOVERNMENT POLICY PRINCIPLE: Part 1

Is the Human Rights Act 1998 (the HRA) really going to make much difference to the way we carry on our legal business? Early indications are that it will make a great deal of difference. Take for example a recent Divisional Court decision on Article 6.1 of the European Convention on Human Rights (the ECvHR) as applied by the HRA. This planning decision deployed the same reasoning on four different appeals before the court. As it has not yet been reported I shall refer to it, by reference to the name of a party in one of the appeals, as the ***Premier Leisure*** decision.

Article 6.1 says: "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 issue raised by the ***Premier Leisure*** decision is whether or not this formula extends to decisions based not on ordinary legal rights but on government policy. Planning cases are a typical example, and were at the heart of the decision.

It is widely accepted that the government of any modern state will have a planning policy concerning projects for land use or development, so to ensure that these best serve the public interest. This regards a nation's land, even though not formally nationalised, as in a sense a public asset in the use of which all inhabitants have a legitimate interest. Such a planning policy is an aspect of general government policy, which may be contrasted with the policy of the law or legal policy.[1] Both are elements in what is known as public policy. Recognition of the former may be called the government policy principle.

Before the recent arrival of the HRA it had been accepted in the United Kingdom that under the government policy principle the executive, which sets planning policy and is answerable to Parliament for it, must be conceded the right, through an appropriate minister or official (usually operating at local level), to take decisions in pursuance of that policy - for example on whether a site should be developed in a particular way. Not any more it seems. By the ***Premier Leisure*** decision the Divisional Court, it is submitted mistakenly, held that Article 6.1 now stands in the way.

Mr Elvin QC, appearing for the Secretary of State for the Environment, Transport and the Regions (the SSETR), sought to resist the attack from Article 6.1 by arguing that our statutory planning structure does in fact provide "an independent and impartial tribunal established by law". In practice, he said, the relevant decisions were taken by a variety of individuals each of whom could be characterised as impartial. This failure to meet the issue head-on was easily parried in the court's judgment, where Lord Diplock was cited-

> "What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the Minister and the other servants of the Crown who serve in the Government Department of which he is the head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. To treat the

[1] For the nature of legal policy see Bennion, ***Statutory Interpretation*** (3rd ed. 1997, supplement 1999) s. 263.

> Minister in his decision making capacity as someone separate and distinct from the department of Government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament, is to ignore not only practical realities but also Parliament's intentions."[2]

To treat the minister in this way is also to ignore constitutional principles, and is obviously unsound. What Mr Elvin should surely have done was seek to demonstrate that the government policy principle is outside the range of Article 6.1 altogether. The reference to "the determination of his civil rights and obligations" is clearly intended to relate, and relate only, to rights and obligations laid down by that major segment of the law which is not concerned with the government policy principle at all, but with straightforward legal rights and obligations. The law's concern with the government policy principle is solely to regulate its exercise to ensure fairness.

The way in which a town and country planning decision is reached is of course subject to law. The whole planning process is constructed around Acts of Parliament, and subordinate legislation made under them. Legal safeguards such as judicial review are available to correct a planning decision that is irrational, or infected by procedural impropriety, or in other ways unlawful. The law holds the ring, and ensures fairness. Subject to that, the planning grounds of a decision have always been viewed as beyond reach of the law. This is recognised by the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. Rule 17(5) of these protects persons who appeared at an inquiry when the SSETR later brings into consideration "any new evidence or new matter of fact ***not being a matter of government policy***".[3] The relevant aspect of the government policy principle was set out by Lord Hoffmann-

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority have regard to all material considerations, they are at liberty (provided they do not lapse into ***Wednesbury*** irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
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> "This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local authority or the Secretary of State."[4]

For the Divisional Court to hold that this long-standing principle has been overturned as a result of the HRA is remarkable. If sustained by the House of Lords on the expected appeal, the decision will have grave consequences.

Some of the arguments which suggest it should not be sustained depend on decisions of the European Court of Human Rights at Strasbourg (ECtHR). An example is ***Bryan v United Kingdom***.[5] This concerned an enforcement notice issued against Mr Bryan requiring him to demolish buildings erected without planning permission. On appeal the inspector upheld the enforcement notice. The ECtHR held that here the statutory planning system, with its right to appeal to a court on points of law, satisfied the requirements of Article 6.1 bearing in mind that "the subject matter of the contested decision by the inspector was a typical example of

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[2] ***Bushell v Environment Secretary*** [1981] AC 75 at 95.
[3] Emphasis supplied.
[4] ***Tesco Stores Ltd v Secretary of State for the Environment*** (1995) 2 PLR 72 at 94.
[5] [1995] 21 EHHR 342.

the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning".[6]

In *Bryan* the ECtHR accepted a distinctive principle laid down in *Albert and Le Comte v Belgium.*[7] This is that the ECvHR calls for one of the two following systems: "either the jurisdictional organs themselves comply with the requirements of Article 6.1, or they do not so comply but are subject to control by a judicial body which has full jurisdiction and does provide the guarantees of Article 6.1". The court laying down the *Premier Leisure* decision said that this so-called principle "was not in issue before us". In my submission it should have been in issue, because it largely overlooks the government policy principle and is therefore unsound.

The *Premier Leisure* decision can also be criticised as having failed to address the central underlying issue, namely the essence of Parliament's intentions in passing the HRA. The Divisional Court begged the question it had to decide by holding that "[i]n terms of Article 6 the decision on the merits, which usually involves findings of fact and planning judgment, has not been determined by an independent and impartial tribunal". Curiously they added that they were not pleased to reach this conclusion since "[t]he system has generally worked well and we should like to think that it was fair". What they should have done was hold *under the HRA* that Article 6.1 had no application to planning cases or other cases based on the government policy principle. I use that italicised phrase because this was not the usual case of a court simply pronouncing on the meaning of a treaty. The HRA gives our courts power if they think fit to reach a result different from that which the ECtHR might reach.

The HRA refers throughout to "the Convention rights" and defines these as the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the Convention "as read with articles 16 to 18".[8] The last words disapply the usual canon of interpretation that a document such as the ECvHR must be read as a whole. Other relevant canons of interpretation are *expressum facit cessare tacitum* (no inference is proper if it goes against the express words) and *expressio unius est exclusio alterius.* (to express one thing is to exclude another thing not expressed). What these various canons mean is that if you say, as here, that the specified articles are to be read with articles 16 to 18, that by implication means they are not be read with any other parts of the ECvHR.

So if the phrase "the Convention rights" was intended to have the same meaning in relation to the HRA as it would have for the ECtHR then the cited articles must have been required to be read along with the *entirety* of the ECvHR, not just articles 16 to 18. To have the meaning the ECtHR would give them they need to be read with the Preamble to the ECvHR, which invokes the Universal Declaration of Human Rights and explains the Convention's purpose. They need to be read with article 1, which demands that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1", making clear that it is the European states themselves, and no one else, who have the duty of obeying the obligations imposed by the Convention. They also need to be read with article 34 (formerly article 25), which states: "[t]he 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 . . ."[9] Even the word "person" in article 34 does not include one of these bodies, which cannot therefore object that "the United Kingdom" has infringed its rights.

Because the presumption from the wording of HRA s. 1 is that the specified articles are *not* to be read with the rest of the Convention it seems that our judges are meant to have a free hand in construing them. This is

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[6] Report, para. 47.
[7] [1983] 18 EHRR 533.
[8] HRA s. 1(1). I ignore the protocols, which do not affect the argument.
[9] The effect of this has been described in D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), page 630, as follows: "While 'non-governmental organisations' and 'groups of individuals' are broad categories they do not cover, for example, bodies such as municipalities, other local government organisations or semi-state bodies."

confirmed by HRA s. 2(1), which requires a court applying an article of the HCvHR to *take into account* rulings on its meaning given by the ECtHR without being bound by them. This is in line with the civil law, which has no doctrine of binding precedent. It permits allowance to be made for the "margin of appreciation" which is permitted to individual states under the jurisprudence of the ECvHR.

The Lord Chancellor said in a debate on the Bill for the HRA that "[o]ur courts must be free to develop human rights jurisprudence by taking into account European judgments and decisions, but they must also be free to distinguish them and to move out in new directions in relation to the whole area of human rights law".[10] This concept of moving out in new directions, which was clearly the intention of Parliament in framing the HRA in the way it did, is totally overlooked in the ***Premier Leisure*** judgment. It is to be hoped it will not also be overlooked when the House of Lords comes to review the decision.

(Case Nos 3062/2000, 3606/2000, 3742/2000 and 3904/2000).

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[10] HL Deb. 24 November 1997, col. 835.