

FOCUS

HUMAN RIGHTS LAW

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THE GOVERNMENT POLICY PRINCIPLE: Part 2

My previous article in this series, published on January 12 2001 (Vol. 9, Issue 1/2001) [2001 (02)], criticised the decision of the Divisional Court in *R an the application of Holding & Barnes plc v Secretary of State for the Environment, Transport and the Regions* [2001] HRLR 23 (Tuckey LJ and Harrison J). This decision, which was delivered on December 13 2000, concerned Article 6.1 of the European Convention on Human Rights (the ECvHR), as applied in the United Kingdom by the Human Rights Act 1998 (the HRA). In the article I argued that the Divisional Court's decision, which concerned what I referred to as the government policy principle, was mistaken and should be reversed by the House of Lords when the "leapfrog" appeal, expected to be brought under the Administration of Justice Act 1969 s. 12, came before them. This reversal has now been effected ([2001] UKHL 23; Times, 10 May 2001. The present article describes what the House of Lords decided, which I think is of great constitutional importance.

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 present case was whether or not this formula extends to determinations based not on ordinary legal rights and obligations but on government policy. Such determinations may well impinge on "civil rights and obligations". Does that mean the decision taker must be "independent and impartial", which obviously government ministers are not?

In my previous article I noted that it is widely accepted throughout Europe that the government of any modern state will have a legally-enforced planning policy concerning projects for land use or development, so to ensure that these best serve the public interest. This political position regards a nation's land, even though not formally nationalised, as in a sense a public asset in the use of which all state inhabitants (that is the public) have a legitimate interest which any democratic system must respect. Such a planning policy is an aspect of general government policy, which may be contrasted with the policy of the law or legal policy. I suggested that recognition of the former may be called the government policy principle.

The House of Lords decision, dated May 9 2001 concerns three appeals, each with the *Secretary of State for the Environment, Transport and the Regions* as the respondent. The respective applicants were (1) Holding and Barnes plc (HB), (2) Alconbury Developments Limited (AD), and (3) Legal & General Assurance Society Limited (LG). Here are the details.

(1) HB applied for planning permission to use land at Canvey Island for the storage and sale of damaged cars. The Health and Safety Executive objected because the development was near to gas storage on neighbouring sites, but were willing to reconsider if modifications to the proposal were made. The local planning authority on 2 May 2000 resolved that it was minded to grant planning permission. On 25 July 2000 the Secretary of State directed, pursuant to the Town and Country Planning Act 1990 s. 77, that the planning application should be referred to him because of (a) the nature of the proposed use, (b) the impact it could have on the future economic prosperity of Canvey Island and (c) the site's location close to hazardous

installations. HB challenged the direction on an application for judicial review. The question was whether this exercise of government policy infringed Article 6.1.

(2) AD agreed with the Ministry of Defence, as owner of a disused airfield at Alconbury, that if planning permission were given AD would redevelop the site as a national distribution centre. AD applied to Huntingdon District Council (HDC) for planning permission for the overall scheme with adjunct facilities, approach road and rail sidings. There were related applications (a) to Cambridge County Council (CCC) as the waste disposal authority for planning permission to construct a temporary recycling depot on part of the site; (b) to HDC for permission to set up a commercial air freight operation, though this was opposed by a group of local residents (Huntsnap) and the application was withdrawn in March 1998; and (c) to the Secretary of State under the Transport and Works Act 1992 s. 1 for permission to build a rail connection. On 4 August 1998 the Secretary of State refused a request to call in the planning application to be determined by him but after the HDC dismissed the overall application for planning permission and the CCC failed to determine the application for the waste recycling depot within the prescribed period, AD's appeals were "recovered" by the Secretary of State for determination by him under the Town and Country Planning Act 1990 Sch. 6 para. 3, rather than by an inspector appointed by the Secretary of State. This was done on the basis that "the appeals relate to proposals for development of major importance, having more than local significance".

An inspector was appointed to hold an inquiry at which for various reasons Huntsnap and an association of Nene Valley residents (NVA) together with English Nature, a statutory body, appeared. Huntsnap and NVA contended that the proceedings were contrary to Article 6(1). AD accordingly applied for judicial review of the Secretary of State's decision in order to clarify the position, contending that the Secretary of State's decisions to take jurisdiction over the planning appeals and the TWA applications were lawful. CCC supported AD; HDC, Huntsnap and NVA opposed it. On the present appeal AD and CCC supported the Secretary of State. HDC and NVA contended that the Divisional Court were right in holding that there was a breach of Article 6(1).

(3) The third case was brought by the Secretary of State at the invitation of LG. The issue related to an improvement scheme at junction 13 of the A34/M4 proposed by the Secretary of State through the Highway Authority. In August 1993, following an inquiry, orders were confirmed for the work to go ahead. The court quashed part of one of the side road orders and new draft orders were published on 17 February 2000, followed by a draft compulsory purchase order on 24 February 2000. Following objections the Secretary of State appointed an inspector to hold a public inquiry into the draft order. LG, which own some land the subject of the draft compulsory purchase order, invited the Secretary of State to seek a ruling of the court as to the compatibility of the proceedings with the Convention. LG decided not to be represented in the proceedings and the Attorney General appointed counsel as amici curiae in that case both before the Divisional Court and before the House of Lords. Again the question was whether this exercise of government policy infringed Article 6.1.

In my previous article I argued that the correct juristic way to achieve the result that Article 6.1 did not apply to a decision taken in exercise of the government policy principle was to hold that such a decision did not constitute a "determination" of a person's "civil rights and obligations". That course was not taken in [2001] UKHL 23. It is true that Lord Hoffmann said (para. 74)-

> "Apart from authority, I would have said that a decision as to what the public interest requires is not a 'determination' of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as article 6 has in contemplation. The reason is not simply that it involves the exercise of a discretion, taking many factors into account, which does not give any person affected by the decision the right to any particular outcome. There are many such decisions made by courts (especially in family law) of which the same can be said . . . but a decision as to the public interest (what I shall call for short a 'policy decision') is quite different from a determination of right. The administrator may have a duty, in accordance with the rule of law, to behave fairly ('quasi-judicially') in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial

act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

However Lord Hoffmann felt that authority, mainly in the form of rulings of the European Court of Human Rights (ECtHR), prevented the House from following this course, and his colleagues concurred. Section 2(1) of the HRA requires an English court, in determining a question which has arisen in connection with a Convention right, to take into account the judgments of the ECtHR and the opinions of the Commission, though they are not binding. Lord Hoffmann said (para. 76) that if he thought the Divisional Court was right to hold that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution he would have considerable doubt as to whether they should be followed. But in his opinion the Divisional Court misunderstood the European jurisprudence, which had never attempted to undermine the principle that, within the limits imposed by the principles of judicial review, policy decisions are a matter for democratically accountable institutions and not for the courts.

This involves a strained construction of the words in Article 6(1) "a fair and public hearing . . . by an independent and impartial tribunal". Where the government policy principle comes into play the "tribunal" is an administrative authority. It cannot be described as independent and impartial when considering the case put to it by say an applicant for planning permission because, as Lord Greene MR said in ***B. Johnson & Co. (Builders) Ltd. v Minister of Health*** [1947] 2 All ER 395 at 399, "there is a third party who is not present, viz, the public and it is the function of the minister to consider the rights and interests of the public".

Lord Hoffmann concluded (para. 129) that the authorities showed that Article 6(1) was not to be so construed as to enable a truly impartial tribunal such as a court of justice to substitute its own opinion for that of the appointed administrative authority. Such a requirement would, he said, not only be contrary to the European jurisprudence but also profoundly undemocratic.

Concurring with this Lord Clyde said (para. 152) that the opening phrase in article 6(1), "in the determination", refers not only to the particular process of the making of the decision but extends more widely to the whole process which leads up to the final resolution. It is possible that in some circumstances a breach in one respect can be overcome by the existence of a sufficient opportunity for appeal or review. Account has to be taken of the context and circumstances of the decision.

Here an important distinction has been made by the ECtHR. It was said in ***Albert and Le Compte v Belgium*** (1983) 18 EHRR 533 (para. 29) that either the jurisdictional organs themselves must comply with the requirements of article 6(1) or they must be subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1). Lord Clyde said (para. 154) that at first sight the expression "full jurisdiction" might seem to require in every case an exhaustive and comprehensive review of the decision including a thorough review of the facts as well as the law. If that were so a remedy by way of a statutory appeal or an application to the supervisory jurisdiction of the courts in judicial review would be inadequate. "But it is evident that this is not a correct understanding of the expression. Full jurisdiction means a full jurisdiction in the context of the case".

We may leave the last word with Lord Hoffmann. The HRA he said (para. 129) "was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers".