



Human Rights Act and Planning

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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* (SN/SC/912)

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A. 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 B, 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. 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. However, it remains unclear just how it would fit in with individual planning applications. Other possible remedies exist, including action for damages in some cases or intervention by Environmental Health Officers to prevent noise nuisance. It seems unlikely that the human rights of a few people would be used to prevent development that would benefit many.

B. 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

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

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:

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

² HC Deb 19 December 2000 cc 119-120W

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

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.⁵

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

C. 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

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

⁵ *Sweet & Maxwell Encyclopedia of Planning Law and Practice* 2-3885

(with which the other Lords concurred) referred to the European Convention on Human 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.⁶

The Government is trying 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, this will take some time. Councils are now being told to make more provision in their development plans, but it will take a year or two for the plans to be prepared and adopted, making the land available. In the meantime, shortage of available sites will leave Article 8 as a consideration in enforcement policy.

D. 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

⁶ "Injunctions must be just and proportionate" *Times Law Report*, 23 May 2003

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

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.

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