THE PROPOSED ASSOCIATED BRITISH PORTS (EASTERN RO-RO TERMINAL) DEVELOPMENT CONSENT ORDER

DEADLINE 5

Appendix to HMH 19

Summary of cases referred to by IOTT in its comments on independence of ABP, harbour master and dockmaster at page 42 of REP4-035 and transcripts of those judgements

submitted on behalf of Captain Firman, Harbour Master, Humber

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Bryan v UK (1996) 21 E.H.R.R. 342

Facts and basis of judgment

- In 1989, the applicant was served an enforcement notice s172 Town and Country Planning Act 1990 (TCPA)requiring the demolition of two buildings erected without planning permission.
- The applicant appealed to the Secretary of State (SoS) for the Environment under s174(2)(a), (b), (g) and (h) TCPA.
- In accordance with the legislation, an inspector was appointed to conduct an inquiry and determine the appeal. The inspector was a Principal Housing and Planning Inspector, a civil servant and a salaried staff member of the Department for the Environment. He had been appointed by the Secretary of State following approval by the Lord Chancellor.
- The inspector rejected the appeal under grounds (a), (b) and (g) but permitted it under ground (h) and extended the compliance period from three to six months
- The applicant appealed against this decision under s289 TCPA. The appeal was dismissed by the High Court in March 1991.
- The applicant applied to the ECHR in October 1991 stating that the inspector did not possess the necessary independence and impartiality to comply with Article 6(1) as inspector was a salaried employee of the SoS and any individual case can be removed from an inspector at any stage, with the decision being recovered by the SoS. The applicant also contended that the review undertaken by the High Court was of insufficient scope to comply with Article 6(1) as it would be limited to points of law and would not deal with any of the alleged inaccurate factual inferences made by the inspector.
- The ECHR noted that inspectors deciding planning appeals do so on behalf of the SoS regardless of whether they are salaried employees or not. It was also noted that whilst the SoS and inspector were not parties to the dispute, that the SoS's policies can be at issue in appeals which means the inspector cannot have the necessary independence to comply with Article 6(1). The ECHR considered it problematic that a case can be removed from an inspector's jurisdiction even after the inspector has been seised of it (see paragraph 42).
- However, the ECHR found that the powers of review by the High Court were sufficiently wide to comply with Article 6(1). The applicant had withdrawn one of the grounds (ground (b) s174(2) TCPA)) from his initial appeal and only pursued the two other grounds. In doing this, the applicant deprived the High Court of any ability to review primary facts and decisions concerning the inspector's initial findings. The High Court can set aside a factual finding of the inspector if it is unsupported by evidence and can set aside inferences if they are not reasonable. If this is found, the High Court could have quashed the decisions of the inspector. The ECHR found this to be an acceptable power of review in the circumstances of this case (see paragraph 43).
- Accordingly, it was found that the High Court's powers, combined with the statutory procedure and powers of review under s289 TCPA concerning the inspector's decisions, were sufficient to meet the requirements of Article 6(1).

The Alconbury Litigation [2003] 2 AC 295

Facts and Basis of judgment

- This joint appeal concerned three matters:
    - R (Alconbury Developments and others) v SoS for Environment, Transport and the Regions

        - A company made applications to the district and county councils for planning permission to develop disused Ministry of Defence land and to the Secretary of State for Transport for an order under the Transport and Works Act to for permission to construct a related rail link. When the district council refused and the county council failed to determine the applications, the SoS recovered the application for determinations to be made by him under para 3, sch 6 TCPA. Groups of local objectors applied for judicial review of the SoS' decision to recover the application on the basis that determination of the applications by the SoS was contrary to Article 6(1) of the ECHR.
    - R (Holding & Barnes plc) v SoS for Environment, Transport and the Regions
        - A company applied for planning permission to use land as a depot for wrecked cars. This was objected by the Health and Safety Executive due to proximity to gas storage facilities. The local planning authority resolved to grant permission, but the SoS called in the application. The company applied for judicial review of the SoS decision on grounds of incompatibility with article 6(1).
    - SoS for Environment, Transport and the Regions v L&G Assurance Society
        - The Highways Agency (for which the SoS had responsibility) proposed an improvement scheme on a major road which would involve compulsory purchase of land belonging to a company. The Highways Act 1980 and the Acquisition of Land Act 1981 provided that the SoS was also the decision-maker for approval of the scheme. At the invitation of the company, the SoS sought a ruling as to the compatibility of the procedure with article 6(1). he Divisional Court declared, pursuant to section 4 of the Human Rights Act 1998 , that all the impugned powers of the Secretary of State were incompatible with the provisions of article 6(1) but that the Secretary of State would not be acting unlawfully in exercising those powers under section 6(1) of that Act because section 6(2)[1] applied.
- The reference in Article 6(1) "in the determination" refers not only to that element of the decision-making process but extends to the entire process that leads up to the final resolutions. Accordingly, a breach in one respect can be overcome by existence of a sufficient opportunity to appeal or review later. The existence of such a right of appeal may provide a remedy in enabling a reasoned decision eventually to be given. The House of Lords stated that in each case there will be a public inquiry before an inspector which will serve as an exploration of the facts. The inquiry will be regulated by rules whose broad intention is to secure fairness in the procedure. The Lords highlighted that as the eventual decision in the present cases is to be taken by the SoS, a remedy by way of judicial review is available (see paragraph 152).
- The Lords referred to the guidance to be found in Bryan v UK that although the SoS is admittedly not independent and the inspector also lacks independence, a remedy would exist if a clear lack of independence of judgment was demonstrated by the inspector. This remedy would also exist if they had acted unfairly or been subject to improper pressure, and such recourse also exists for a decision by the SoS (see paragraph 162).

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[1] Subsection (1) does not apply to an act if—

(a)as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b)in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

- It was determined that the jurisdiction of the High Court by way of judicial review was sufficient to comply with Article 6(1) in respect of the arguments that Ministry of Defence had a financial interest in the Alconbury development, and that Department of Transport had promoted the road improvement scheme
- The Lords stated that a Minister is able to serve in both functions as a policy maker and decision taker as they would be answerable to Parliament with regards to policy aspects and answerable to the High Court via judicial review in terms of the lawfulness and fairness of a decision (see paragraph 198).
- As the Lords stated that the Strasbourg jurisprudence recognised the dual roles government ministers can serve without there being a violation of Article (1), the appeals were allowed

Tsfayo v UK [2007] H.L.R. 19

Facts and basis of judgment

- In 1998, the applicant was provided accommodation by a local council but failed to renew her application for council tax benefits due to her poor English and lack of familiarity with the local council system. After realising the benefits had ceased, she submitted prospective and backdated claims for the benefits.
- The backdated benefit claim was rejected, and the applicant wrote to the local council requesting it to reconsider the refusal. At this time, a housing benefit claim was first considered by local authority officials, if refused the applicant was entitled to a review. First by the local authority and then by the Hammersmith and Fulham Council Housing Benefit and Council Tax Benefit Review Board (HBRB). Regulations prescribed that a review board appointed by a local authority had to consist of at least 3 councillors of that authority.
- In 1999, the applicant sought judicial review of the HBRB decision on the grounds it had acted unlawfully by failing to make adequate findings of fact or provide sufficient reasons for its decision and alleged the HBRB was not independent or impartial under Article (6)1. The High Court rejected the application for leave to apply for judicial review stating the HBRB's decision was neither unreasonable nor irrational.
- The applicant's appeal to the ECHR stated the HBRB was not independent of the parties to this dispute. The applicant highlighted the HBRB was composed of 3 councillors from the same local authority that was concerned with the initial claim, and which would have been required to pay a percentage of the house benefit if awarded. Moreover the applicant stated that the HBRB were not specialist administrators, highlighting that the decisions that were once made by council HBRBs are now made by independent tribunals (see paragraph 38).
- The Court found the HBRB's decisions making process flawed. In contrast to Bryan v UK, the issues to be determined here required a measure of professional knowledge and experience. The HBRB is this context was only determining if there was "good cause" for the applicant's delay in making a claim. They rejected her claim on the basis her explanation was unconvincing, basing this assessment on her credibility. It was also noted that even in the High Court, there was no jurisdiction to rehear evidence nor substitute in a High Court view concerning the applicant's credibility. Thus, there was never the possibility that the appeal would be determined by a tribunal utterly independent of one of the parties to the dispute (see paragraph 47).
- The ECHR also stated the HBRB was not merely lacking in independence from the executive but was directly connected to one of the parties in the dispute since it included five councillors from the local authority which would be required to pay out a sum if the benefit was awarded
- As a result there was no structural independence of the decision-maker and the ECHR identified a clear violation of Article 6(1)

Kingsley v UK (2001) 33 E.H.R.R. 13

Facts and Basis of Judgment

- The applicant was the managing director of London Clubs Limited. The applicant was forced to resign with several other directors in 1992. The Chair of the Gaming Board made a statement implying that the applicant was 'not fit and proper' to serve in his position. However, the Gaming Board alleged that its Chair had been speaking about minority shareholders and no reference to the applicant was intended.
- In 1993, the regulatory authority, the Gaming Board, informed the applicant that they were minded to revoke the applicant's necessary s19 (Gaming Act 1968) certificate and that the applicant would be able to state his case against revocation at an interview before a panel of the Gaming Board.
- The applicant requested an independent tribunal be set up in place of the Gaming Board led appeal as it had already publicly expressed a view that the applicant was not a fit and proper person. This was rejected, a private hearing was conducted, and the applicant's certificate was revoked.
- The applicant's subsequent judicial review of that decision was unsuccessful, with the court finding that the Board has been entitled to reach certain conclusions and the applicant had not established that there was a real danger of injustice having occurred as a result of bias and no unconscious bias on the part of any of the Gaming Board panel members.
- The applicant stated to the ECHR that the Gaming Board already had considerable involvement and knowledge of the matters of the complaint against the applicant and had expressed their view in public before. Moreover, its panel members were not experts and were not qualified legally or in terms of industry experience to make a judgment as to whether he was a fit and proper person.
- The applicant also argued that the High Court was unable to remedy any procedural defect in the initial hearing as to the determination that he was not a fit and proper person.
- The ECHR noted the applicant was now only pursuing the case that the Gaming Board was characterised by apparent bias rather than stating that members were personally biased and acting in bad faith.
- The ECHR noted that at a meeting on 21 January 1993, the Gaming Board had already formed the opinion the applicant was not a fit and proper person to hold the s19 certificate and that the three panel members who adjudicated in the initial revocation hearing of the applicant's licence were present at the 1993 meeting and voted in favour of a decision of the Gaming Board stating there was sufficient evidence to conclude that the applicant was not a fit and proper person to be a casino director
- The ECHR considered this aspect of the proceedings to indicate the Panel did not present the necessary appearance of impartially to constitute an Article 6(1) tribunal (see paragraph 50) and the courts were unable to remit the case for a new first decision to another tribunal (see paragraph 59).
- The ECHR stated the requisite full jurisdiction necessary under Article 6(1) would require a review court to not only consider the complaint but also possess the ability to quash the impugned decision and remit the case for a new decision by an impartial body. That both the High Court and Court of Appeal could not do this meant there had been a breach of Article 6(1).

*342 Bryan v United Kingdom

Positive/Neutral Judicial Consideration

Court
European Court of Human Rights

Judgment Date
22 November 1995

Report Citation
(1996) 21 E.H.R.R. 342

Series A, No. 335-A

Application No. 19178/91

Before the European Court of Human Rights

(The President, Judge Ryssdal; Judges Bernhardt, Matscher, Foighel, Freeland, Lopes Rocha, Makarczyk, Gotchev, Lohmus)

22 November 1995

The applicant was served with an enforcement notice which required him to demolish buildings erected without planning permission. He complained, *inter alia*, that the review by the High Court of the Inspector's decision was insufficient to comply with Article 6(1) of the Convention.

Held, unanimously that there had been no violation of Article 6(1) of the Convention.

1. Civil rights: applicability of Article 6(1).

On the basis of the Court's established case law, the impugned planning proceedings involve a determination of the applicant's "civil rights". [is accordingly applicable to the facts of the present case. [31]

2. Civil rights: "fair hearing"; "independent and impartial tribunal" (Art. 6(1)).

(a) The proceedings before the Inspector ensured the applicant a fair hearing for the purposes of Article 6(1). However, it remains to be ascertained whether the Inspector constituted an "independent and impartial tribunal". [36]
(b) In order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. [37]
(c) Although the Inspector was required to decide the applicant's planning appeal in a quasi-judicial, independent and impartial, as well as fair, manner, the Secretary of State can at any time issue a direction to revoke the power of an Inspector to decide an appeal. In the context of planning appeals the very existence of this power available to the Executive, whose own policies may be in issue, is enough to deprive the Inspector the requisite appearance of independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise was or could have been in issue in the present case. For this reason alone, the review by the Inspector does not of itself satisfy the requirements of Article 6, despite the existence of various safeguards customarily associated with an "independent and impartial tribunal". [38]
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(d) Even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6(1) in some respect, there is no violation of the Convention if the proceedings before that body are subject to

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control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1). The issue in the present case is whether the High Court satisfied the requirements of Article 6(1) as far as the scope of its jurisdiction was concerned. [40]

(e) The appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the Inspector's decision concerning the enforcement notice served on the applicant. In particular, as is not infrequently the case in relation to administrative law appeals in the Council of Europe Member States, there was no rehearing as such of the original complaints submitted to the Inspector; the High Court could not substitute its own decision on the merits for that of the Inspector; and its jurisdiction over the facts was limited. However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural impropriety, independence and impartiality), the Inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the Inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no Inspector properly directing himself would have drawn such an inference. [44]

(f) In assessing the sufficiency of the review available to the applicant on appeal to the High Court, it is also necessary to have regard to such matters as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. In this connection the procedure before the Inspector was subject to uncontested safeguards: the quasi-judicial character of the decision-making process; the duty incumbent upon each Inspector to exercise independent judgment; the requirement that Inspectors must not be subject to any improper influence; and the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. Furthermore, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court. [45]–[46]

(g) The High Court had jurisdiction to entertain all the grounds of appeal pleaded and maintained by the applicant, whose submissions were adequately dealt with point by point. Although it could not have substituted its own findings of fact for those of the Inspector, it would have had the power to satisfy itself that the Inspector's findings of fact or the inferences based on them were neither perverse nor irrational. Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1). It is also frequently a feature of the systems of judicial control of administrative decisions found throughout the Council of Europe Member States. The scope of review of the High Court was therefore sufficient to comply with Article 6(1). Accordingly, the ***344** remedies available to the applicant in relation to his complaints satisfied the requirements of that provision. [47]–[48]

Representation

Mr I. Christie, Foreign and Commonwealth Office (Agent), Mr D. Pannick, Q.C., Mr D. Anderson, Barrister-at-Law (Counsel), Mr D. Russell, Ms E. Dixon, Ms L. M. Aspinall, Department of the Environment (Advisers) for the Government.
Mrs J. Liddy (Delegate) for the Commission.
Mr R. M. Napier (Counsel) for the applicant.

The following cases are referred to in the judgment:

1. *Albert and Le Compte v. Belgium (A/58): (1983) 5 E.H.R.R. 533*.
2. *Langborger v. Sweden (A/155): (1990) 12 E.H.R.R. 416*.
3. *Obermeier v. Austria (A/179): (1991) 13 E.H.R.R. 290*.
4. *Zumtobel v. Austria (A/268-A): (1994) 17 E.H.R.R. 116*.
5. *Zander v. Sweden (A/279-B): (1994) 18 E.H.R.R. 175*.
6. *R. v. Secretary of State for the Home Department Ex parte Brind [1991] A.C. 696*.
7. *Green v. Minister of Housing and Local Government [1963] 1 All E.R. 578*.

The Facts

I. The circumstances of the case

7. The applicant, Mr John Bryan, is a farmer and a contractor. He was born in 1931 and resides in Warrington, Cheshire.

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8. On 4 December 1989 an enforcement notice was issued and served on Mr Bryan by the Vale Royal Borough Council requiring the demolition of two brick buildings on land which the applicant had bought in 1987. The enforcement notice recited that there appeared to the Council to be a breach of planning control in that the two brick buildings had been erected without the necessary planning permission. The notice required the applicant to demolish the buildings and remove the building materials within three months. In doing so, the authorities acted in accordance with section 172 of the Town and Country Planning Act 1990, which consolidated earlier legislation. [1]

9. The applicant appealed to the Secretary of State for the Environment under section 174(2)(a), (b), (g) and (h) TCPA. [2]

10. In accordance with the relevant legislation, [3] an inspector was appointed to conduct an enquiry and determine the appeal. He was a Principal Housing and Planning Inspector, a civil servant and a member of the salaried staff of the Department of the Environment. He had been appointed by the Secretary of State after approval of the Lord Chancellor. In his decision letter of 1 October 1990 the Inspector rejected the appeal under grounds (a), (b), and (g) but allowed it under ground (h) to the extent that the compliance period should be extended from three to six months. He held, *inter alia*, as follows: ***345**

> The appeal on ground (b)
>
> …
>
> (12) What I need to decide in respect of this ground of appeal is whether, as a matter of fact and degree, the buildings could, from their appearance and layout, be considered to have been designed for the purposes of agriculture. I conclude, from examination of photographs taken during construction and from noting the alterations made since, that the Council were right to be concerned that the appeal buildings had the appearance of large detached houses. The size, layout, and original external appearance of the buildings and their detailing did little to change that view.
>
> (13) In my opinion, as originally constructed, the buildings would have led any reasonable person to have concluded that he or she was looking at the start of a small new detached housing estate. Indeed, that appeared to be the widely held view of many local people, supported by the local Member of Parliament, who were concerned to see what was being built on the edge of the village. The more recent construction of an, as yet, uncompleted but similar building close to the two appeal buildings serves to compound the effect.
>
> (14) But it is the original appearance of the two appeal buildings and particularly the first assessment of the Ministry of Agriculture, Fisheries and Food which convinces me that the buildings were not requisite or reasonably necessary for the purposes of agriculture. Numerous features of the buildings were more suited to houses than barns. The original openings in building No. 1 were said to be doorways for a veal calf unit. But this building did not incorporate internal drainage considered necessary for such stock. The doorways appeared to have been more likely to have been useful as window openings, none reached ground level as built; one was almost waist high above outside ground level measured from the lower edge of the unbonded brickwork added later. Other features in both buildings include the extensive use of Georgian style windows and other windows made for domestic use. I understand that Mr Bryan's contacts allowed him to buy these windows cheaply. But whatever their source, they contribute to an impression that the buildings look more like houses than barns. There are other features which add to that view. The use of domestic style eaves and gable barge boarding. The residential look of the 'porch' to No. 1 building. And the [Ministry of Agriculture, Fisheries and Food's] view about the uneconomic layout of both buildings as originally built all add to the impression that these buildings were not designed for agricultural purposes, albeit they have since been modified and adapted for such a use.
>
> (15) You said that the buildings looked like many local old barns. But it is my view that, as originally built, the appeal buildings would have looked much more like houses. They did not look as if they

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had been designed for the purposes of agriculture. My opinion is not altered by my finding them now being used for storing hay. The appeal on ground (b) fails.

The appeal on ground (a)

(16) The appeal buildings lie in part of the green belt … They also lie within the Higher Whitley Conservation Area but outside the village policy area for Higher Whitley shown on the draft Vale Royal Borough Local Plan. In my opinion, the decision turns on the following main issues. Whether, if the development is inappropriate to the green belt, there are any special circumstances to justify the granting of planning permission; secondly, whether the appeal buildings enhance or preserve the character **346* or appearance of the Conservation Area. I shall also consider the effect of the development on the countryside surrounding the village.

(17) …

(18) The appeal buildings have neither enhanced nor preserved the appearance of this part of the Conservation Area, rather the reverse. Much of the pleasant nature of the Area is derived from the grouping of the older housing around the centre and from its rural and agricultural setting. The two appeal buildings look like part of a small estate of detached houses with access roads and suitable garden areas. The third building, not subject of this appeal, exacerbates this impression.

(19) These objections amount to sound and clear cut reasons why planning permission should be withheld. The fact that other buildings or buildings of a broadly similar nature, if considered to be designed for agricultural purposes, could be built under the provisions of the Town and Country Planning General Development Order 1988, does not affect my decision. The appeal on ground (a) fails.

The appeal on ground (g)

(20) You said that demolition of the buildings and the removal of the materials was an excessive requirement. I do not agree. Harm to the purpose of the green belt has been caused. The appearance and character of the Conservation Area has not been either enhanced or preserved. Encroachment on the countryside has occurred. Making the buildings look more like those which might have been permitted development as you suggested could mitigate a little of the harm I have identified. But this is not just a matter of cosmetics. The main objections would remain. In my opinion, the proper and necessary course of action is that required by the notice. That includes removal of materials. Such a requirement would not preclude their re-use on site for any possible future permitted development. The appeal on ground (g) fails.

The appeal on ground (h)

(21) … Mr Bryan wanted more time in order to erect a replacement or replacements before demolition. I see no need to insist on a period which would make undue difficulty for him. I will increase the period to six months. …

(22) I have taken account of all the other matters raised, including the possibility of your client putting up a large steel clad building under permitted development rights, but find they do not affect my decision.

11. The applicant appealed against this decision under section 289 TCPA.[4] In his Notice of Motion, the applicant first alleged that the Inspector had "erred in law in applying the wrong test in deciding whether the buildings were permitted development under the provisions of the … General Development Order" and "in considering that the said buildings were not requisite or reasonably necessary for the purposes of agriculture when there was no evidence upon which any reasonable inspector could so find". The subsequent grounds of appeal dealt expressly with grounds (a) and (g) of the appeal to the Secretary of State.[5] **347*

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12. The appeal was dismissed by the High Court on 8 March 1991, the judge, Mr Lionel Read, Q.C., finding *inter alia* as follows:

> A principal argument on behalf of the applicant at the inquiry under [ground] (b) was that the erection of the two buildings was permitted development under the General Development Order. …
>
> …
>
> The applicant does not challenge the inspector's decision under ground (b). Nevertheless paragraphs 14 and 15 of the decision letter, where he is still dealing with that ground, are relevant to the court's consideration of his decision on grounds (a) and (g) …
>
> …
>
> In my judgment … it cannot be said that the inspector failed to take into account the fact that the applicant might, within his General Development Order rights, erect buildings of a broadly similar nature. He addressed that very consideration in terms at paragraph 19 of his decision letter. Because the applicant had those rights and wanted more time to erect a replacement or replacements, the inspector extended the applicant's time for complying with the enforcement notice under ground (h).
>
> Whether the existence of these General Development Order rights provided sufficient reason for the inspector to grant planning permission for the buildings in fact erected, whether or not conditioned as suggested by the applicant, was a matter for judgment—the inspector's judgment. Whether another decision-maker would have reached the same conclusion as did this inspector is not to the point. Nor is the view of this court, which does not sit on appeal from the judgment of inspectors, relevant. I am unable to say that there was anything irrational in the inspector's decision. In particular, the question whether the alterations proposed to a building were, as he evidently thought, a 'matter of cosmetics' and would not meet the main objections was entirely a matter of planning judgment for him. It is to be remembered that, in order to stay within his General Development Order rights, the applicant must erect replacement buildings which, by their appearance and layout, could be considered as designed for the purposes of agriculture. If they are, their effect on the Green Belt, the countryside and the Conservation Area is irrelevant to the exercise of that right. That does not, however, in my judgment mean that the inspector acted irrationally in concluding that the buildings in fact erected without permission under the General Development Order were objectionable and should be demolished.
>
> In the result, I find no error of law and I dismiss the application.

13. At the hearing held before the European Commission of Human Rights on 14 October 1993, the applicant's representatives stated that, although they had not represented the applicant before the High Court, they surmised that the challenge to the inspector's ground (b) reasoning had been raised in the Notice of Motion and then abandoned at the hearing because of the limited jurisdiction of the High Court. In confirmation of this, the applicant furnished the Court with a statement by the barrister who had represented him in the High Court.

14. Leave to appeal to the Court of Appeal was refused. The Court of Appeal, on 11 June 1991, also refused leave to appeal. ***348**

II. Relevant domestic law and practice

15. Under section 57 TCPA, planning permission is required for the carrying out of any development on land. Section 58 TCPA allows for planning permission to be granted by a development order.

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16. The Town and Country Planning General Development Order 1988 SI No. 1813 [6] sets out classes of development for which permission is automatically granted.

According to Article 3 TCPGDO, and Class A of Part 6 of Schedule 2 to the TCPGDO, planning permission is deemed granted for the following developments:

> A. The carrying out on agricultural land comprised of an agricultural unit of—
>
> (a) works for the erection, extension or alteration of a building, or
> (b) any excavation or engineering operations, reasonably necessary for the purposes of agriculture within that unit.

17. Accordingly, buildings, structures or works *not* designed for the purposes of agriculture require planning permission. [7]

18. Where it appears to the local planning authority that there has been a breach of planning control and the authority consider that it is expedient to do so, they may issue an enforcement notice requiring the breach to be remedied. [8]

19. Section 174(2) TCPA provides that an appeal against an enforcement notice may be made to the Secretary of State on any of the following grounds:

> (a) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged;
> (b) that the matters alleged in the notice do not constitute a breach of planning control;
> …
> (g) that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control or to achieve a purpose specified in section 173(4);
> (h) that the period specified in the notice as the period within which any step is to be taken falls short of what should reasonably be allowed.

20. Section 175(3) TCPA provides that if an appellant or the local authority desires, the Secretary of State shall give each of them the opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose. Where such a person has determined an appeal, his decision shall be treated as that of the Secretary of State. Pursuant to the applicable regulations, appeals against enforcement notices are heard and determined by an inspector. ***349**

21. According to The Planning Inspectorate Executive Agency Framework Document (1992), "staff of the Inspectorate act on behalf of the [Secretary] of State for the Environment … This work includes that of inspectors who, exercising their own independent judgment, decide cases or make recommendations to the … Secretary of State …". [9] The process of decision-making on appeals has a "quasi-judicial character". [10] The Inspectorate, which "upholds the principles of openness, fairness and impartiality", [11] is "subject to the scrutiny of the Courts, the Parliamentary Commission for Administration and the Council on Tribunals …". [12] Among the objectives of the Inspectorate is that of maintaining "the integrity of each Inspector as an independent tribunal, not subject to any improper influence". [13]

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Annex B to the Framework Document adds:

> Each Inspector must exercise independent judgement and must not be subject to any improper influence, nor must it appear that the Inspector may be subject to any such influence.

The basic principles set out in this document had long been applied in practice.

22. In determining planning appeals, inspectors are required to have regard, *inter alia*, to the policies promulgated by the Secretary of State on matters of planning as a "material consideration" [14] and to comply with the various procedural rules for the conduct of enforcement appeals. [15] Like any other person exercising statutory powers, the Inspector must also act in a procedurally fair manner.

23. Decisions by inspectors are not seen by the Department of the Environment in draft before they are promulgated. However, up until the time when the decision letter is issued, the Secretary of State may revoke the power of an inspector to decide an appeal. [16]

24. Section 289 TCPA provides for appeals against a decision of the Secretary of State under section 174. An appeal may be made to the High Court on a point of law, or the Secretary of State may be required to state a case for the opinion of the High Court. [17]

25. It is common ground that an appeal "on a point of law" may be brought on grounds identical to an application for judicial review. It therefore includes a review as to whether a decision or inference based on a finding of fact is perverse or irrational. [18] The High Court will also ***350** grant a remedy if the inspector's decision was such that there was no evidence to support a particular finding of fact; or the decision was made by reference to irrelevant factors or without regard to relevant factors; or made for an improper purpose, in a procedurally unfair manner or in a manner which breached any governing legislation or statutory instrument. However, the court of review cannot substitute its own decision on the merits of the case for that of the decision-making authority. [19]

26. As an appeal to the High Court under section 289(1) is on a point of law, the High Court has no power to receive further evidence on primary facts. [20] Halsbury's *Statutes of England and Wales*, Fourth Edition, Vol. 46 [21] describes many of the cases on the question of whether a point is one of fact or of law as "irreconcilable". [22] Halsbury's *Laws of England* states that "if there is no evidence for a particular finding or if the tribunal does not take into account at all a relevant consideration, there could well be grounds of appeal raising a question of law. The contention that a tribunal has failed to give adequate weight to evidence or sufficient consideration to a particular circumstance does not afford such grounds; and the weight which a tribunal gives to a particular piece of evidence or a particular consideration is a matter for that tribunal". [23]

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Bryan applied to the Commission on 29 October 1991. He relied on Article 1 of Protocol No. 1 to the Convention, arguing that the Vale Royal Borough Council's enforcement notice of 4 December 1989 [24] constituted a violation of his right to the peaceful enjoyment of his possessions. He further submitted that the review undertaken by the High Court was of insufficient scope to comply with Article 6(1) of the Convention.

28. On 14 October 1993 the Commission declared the application [25] admissible only as regards the complaint raised under Article 6(1). In its report of 28 June 1994, [26] it concluded, by 11 votes to five, that there had been no violation of that provision.

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The full text of the Commission's opinion and of the two separate opinions contained in the report follows. *351

Opinion

A. Complaint declared admissible

33. [27] The Commission has declared admissible the applicant's complaint that the review undertaken by the High Court of the decision of the inspector was not of sufficient scope to comply with the requirements of Article 6(1) of the Convention.

B. Point at issue

34. The issue to be determined is whether there has been a violation of Article 6(1) of the Convention.

C. As regards Article 6(1) of the Convention

35. Article 6(1) of the Convention provides, so far as relevant, as follows:

> 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.

36. The applicant considers that Article 6(1) applies to the proceedings, and the Secretary of State's inspector did not satisfy the criteria of independence and impartiality necessary to comply with the provision as he is a salaried employee and an individual case can be removed from him at any stage. He also considers that the review by the High Court, which is limited to points of law, is not able to, and did not in this case, deal with the central factual inferences which the inspector drew from the primary facts.

37. The Government do not accept that the proceedings determined the applicant's civil rights, but consider that even if they did, the quasi-judicial proceedings before the inspector complied with Article 6. They further consider that the subsequent review by the High Court was in any event of sufficient scope to comply with the provision.

38. The Commission recalls that the right of property is clearly a “civil” right within the meaning of Article 6(1) of the Convention, and the enforcement notice issued by the local authority and the subsequent enforcement proceedings were directly concerned with the way in which the applicant was entitled to use his land. [28] Consequently, the proceedings in the present case determined a “civil right”.

39. As to the role of the inspector in the proceedings, the Commission notes that it is not called on to determine whether the inspector conducted the proceedings fairly, as there has been no suggestion from the applicant that the proceedings were unfair. The Commission sees no reason to dissent from the Government's *352 contention that the proceedings before the inspector complied with the requirements of fairness.

40. The Commission must, however, consider whether the inspector in determining the appeal constituted the “independent and impartial tribunal established by law” which Article 6 requires.

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41. The function of the inspector is to determine matters within his competence on the basis of rules of law, following proceedings conducted in a prescribed manner. He therefore comes within the concept of a "tribunal" within the substantive sense of the expression as used in Article 6(1). Moreover, the tribunal was one "established by law", that is, by the Town and Country Planning Act 1990.

42. As to the independence and impartiality of the inspector, the Commission notes that inspectors are chosen from salaried staff of the Planning Inspectorate. The Planning Inspectorate serves the Secretary of State in the furtherance of the Secretary of State's policies. Inspectors deciding planning appeals do so on behalf of the Secretary of State, regardless of whether they are salaried employees or not. Whilst the Secretary of State and his inspector are not parties to the dispute as such, the Commission finds that the fact that the Secretary of State's policies can be at issue in appeals means that the inspector cannot have the independence necessary for Article 6 of the Convention. Moreover, a case can be removed from an inspector's jurisdiction even after he has been seised of it.

43. Given that the proceedings before the inspector did not comply with Article 6 of the Convention because of his lack of independence, the Commission must consider whether appeal to the High Court was consistent with Article 6(1). This will only be the case if the appeal was conducted before "judicial bodies that have full jurisdiction". [29]

44. The Commission recalls that the applicant's appeal against the enforcement notice in the present case was heard by an inspector appointed by the Secretary of State. The inspector was able to consider all matters on that appeal, whether they related to facts or to law, by virtue of section 174(2) TCPA. The subsequent appeal to the High Court, however, was limited to points of law, and the Commission must decide whether, in the present case, that limitation deprived the High Court of the "full jurisdiction" required by Article 6 of the Convention.

45. The Commission notes that the applicant raised the matter of the inspector's reasoning under ground (b) of Section 174(2) TCPA in his Notice of Appeal, but that he appears to have abandoned his challenge before the High Court. Whilst it is true that the judge referred to some of the inspector's ground (b) findings in determining the appeal against the ground (a) and (g) reasoning, he was nevertheless not ultimately required to consider the ground (b) challenge, and so formally did not have to review against the test of perversity or irrationality the ***353*** question whether the "matters" alleged in the enforcement notice did, or did not, constitute a breach of planning control.

46. The Commission recalls that in the *Zumtobel* case the European Court of Human Rights referred to the "respect which must be accorded to decisions taken by administrative authorities on grounds of expediency". [30] The challenge to the inspector's ground (a) reasoning concerned questions which indeed call for respect on the "grounds of expediency" as they involved the application of the panoply of policy matters such as development plans, and the facts that the property was situated in a green belt and a Conservation Area. The ground (b) challenge, by contrast, would have raised matters of a more factual nature in that they would have gone directly to questions of whether the applicant had erected a building which fell within the General Development Order, and so had the benefit of deemed planning permission. The submissions actually relied on before the High Court were dealt with point by point. In the absence of an argued ground (b) challenge, it cannot be assumed that a review of whether or not the inspector's findings of fact were perverse or irrational would have been inadequate. Moreover, given the carefully reasoned nature of the inspector's report, the absence of dispute as to primary facts as distinct from factual inferences and the planning context of the case, there is nothing to indicate that the limited review available was inadequate in the particular circumstances of this case. The ground (g) and (h) challenges, which both expressly leave open a discretion to the local authority (a determination of whether the steps required exceed what was "necessary" under ground (g) or, under ground (h), whether any periods specified fell short of what "should reasonably" be allowed), also involved the consideration by the inspector of matters closely linked to policy considerations.

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Conclusion

47. The Commission concludes, by 11 votes to five, that in the present case there has been no violation of Article 6(1) of the Convention. [31]

Concurring Opinion of Mr N. Bratza

I share the view of the majority of the Commission that, on the facts of the present case, the only challenge to the enforcement notice which the applicant pursued in the High Court related to matters of planning policy and that, consistently with the Court's reasoning in the *Zumtobel* case, Article 6 does not in any event require that a court should have the power to substitute its view for that of the administrative authorities on matters of planning policy or "expediency". It is said that the reason why the applicant did not pursue his appeal under ground (b) of section 174(2) of the 1990 Act ***354** may have been the fact that the Court's powers of review were too limited to justify pursuing the appeal. However, as the Commission correctly notes this is a matter of surmise only. The reason for withdrawing the ground might equally have been a recognition on the part of the applicant that the primary facts found, and the conclusion reached by the inspector on the basis of those facts, were so clearly correct as to be unassailable, however wide the review powers of the High Court.

However, I also find that there has been no violation of Article 6 in the present case on the broader ground that the powers of review of the High Court under section 289 of the 1990 Act are sufficiently wide to satisfy the requirement held by the Court to be inherent in Article 6 that the judicial body determining the applicant's civil rights and obligations should have "full jurisdiction".

It appears to me that the requirement that a court or tribunal should have "full jurisdiction" cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned. Whether the power of judicial review is sufficiently wide to satisfy the requirements of Article 6 must in my view depend on a number of considerations, including the subject matter of the dispute, the nature of the decision of the administrative authorities which is in question, the procedure, if any, which exists for review of the decision by a person or body acting independently of the authority concerned and the scope of that power of review.

In my view the powers of review of the High Court, when combined with the statutory arrangements under the 1990 Act for appealing against an enforcement notice, satisfy the requirements of Article 6(1).

So far as the statutory arrangements are concerned, section 174 of the 1990 Act provides that an appeal against an enforcement notice served by a local authority may be made to the Secretary of State on grounds, *inter alia*, that the matters alleged in the notice do not constitute a breach of planning control. Section 175(3) of the Act provides that if an appellant or the local authority desires, the Secretary of State shall give each of them the opportunity of appearing before and being heard by a person appointed by the Secretary of State ("the inspector") and power is conferred on the inspector to determine the appeal.

In determining planning appeals inspectors act in a quasi-judicial capacity and in accordance with prescribed procedures, full powers being conferred on both parties to appear, with or without legal representation, adduce evidence, both written and oral, and make submissions of both law and fact. Further, the appeal results in a reasoned decision letter.

In paragraph 42 of the Report the Commission, while accepting that ***355** the inspector is a "tribunal" within the substantive sense of the expression as used in Article 6(1) and that such a tribunal is one "established by law", concludes that an inspector does not satisfy the requirement of independence and impartiality: it is correctly pointed out that inspectors are chosen from salaried staff of the Planning

Inspectorate, which serves the Secretary of State in the furtherance of his policies, and that while the Secretary of State and his inspector are not parties to the dispute as such, the fact that those policies can be in issue on appeals means that the inspector cannot have the independence necessary for Article 6 of the Convention.

While this is true, there is equally nothing to suggest that, in finding the primary facts and in drawing conclusions and inferences from those facts, an inspector acts anything other than independently, in the sense that he is in no sense connected with the parties to the dispute or subject to their influence or control; his findings and conclusions are based exclusively on the evidence and submissions before him.

An appeal is from an inspector's decision to the High Court under Section 289 of the Act "on a point of law". As appears from the Commission's Report, this does not mean that the inspector's findings of fact or the inferences drawn by him from those facts are free from review by the Court. The Court cannot substitute its own findings of fact or its own inferences from those facts for those of the inspector. However, the Court can set aside a factual finding by an inspector if that finding is unsupported by any evidence before him. The Court can also set aside inferences drawn by the inspector from those facts if those inferences are perverse or irrational in the sense that no inspector properly directing himself could reasonably have drawn such inferences.

Applying these principles to the circumstances of the present case, the High Court could have quashed the decision of the inspector if it could have been shown that there was no evidence before him on which he could have found that the building did not, as originally built, incorporate the internal drainage necessary for a veal calf unit; that none of the alleged doorway openings reached ground level and that one was almost waist high above outside ground level; that other features included the extensive use of Georgian style windows and other windows made for domestic use; that domestic style eaves and gable barge boarding had been used; and that the building had a residential looking "porch". Equally the High Court could have quashed the decision of the inspector if it had been shown that no inspector properly directing himself could reasonably have concluded on the basis of these primary facts that the building was not, as originally built, designed for the purposes of agriculture.

In my view this power of review of the High Court, combined with the statutory procedure for appealing against an enforcement notice, is sufficient to meet the requirement of "full jurisdiction" inherent in Article 6(1) of the Convention. ***356**

Dissenting Opinion of MM Trechsel, Rozakis, Geus, Reffi and Cabral Barreto

We disagree with the finding of the majority that this case discloses no violation of Article 6 of the Convention.

In the present case, a key element of the applicant's appeal to the Secretary of State and subsequently of his notice of appeal to the High Court was that the building he had erected was indeed a barn designed and intended for agricultural use such that it had the benefit, without further authority, of deemed planning permission under the General Development Order. Whilst it is true that he withdrew his appeal against the inspector's ground (b) reasoning at the hearing before the High Court, he pursued the appeal against the reasoning under grounds (a) and (g) and the High Court judge, in dealing with the challenge to the inspector's conclusions under grounds (a) and (g), affirmed that the inspector's ground (b) reasoning was relevant to his own conclusions. We consider that the judge's comments to the effect that he was not prepared to substitute his opinion for that of the inspector amount to a denial of jurisdiction to reconsider either the primary facts of the case or the question whether the building fell to be regarded as an agricultural building or not. We feel that the applicant's representatives may well have decided not to pursue the contention that the applicant had deemed planning permission because they were unable to invite the court to substitute its own findings for the inspector's findings of fact, and could not maintain an argument that those findings were perverse or irrational: it is unrealistic to expect an advocate to raise arguments which he knows a court will not entertain.

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In the *Zumtobel* case the European Court of Human Rights referred to the "respect which must be accorded to decisions taken by administrative authorities on grounds of expediency". [32] Whilst questions of expediency play a large role in matters relating to, for example, the public interest involved if a particular development is permitted, the present case concerns, at least in part, the fundamental factual issue of whether the building erected by the applicant was, or was not, designed for the purposes of agriculture and so had deemed planning permission. This factual issue was in dispute and in the circumstances of this case the High Court judge was not able to provide a "determination" of it. [33] For us, this deprived the applicant of access to a "tribunal" to which Article 6(1) of the Convention entitled him.

JUDGMENT

Alleged violation of Article 6(1) of the Convention

30. Mr Bryan contended that the proceedings which he had been able to bring under English law, firstly before a Planning Inspector and ***357** then before the High Court, to challenge a planning enforcement notice served on him did not comply with Article 6(1) of the Convention, which, in so far as relevant, provides:

> In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal …

A. Applicability

31. Before the Court the Government did not contest, as they had before the Commission, that the impugned planning proceedings involved a determination of the applicant's "civil rights".

On the basis of its established case law, the Court sees no reason to decide otherwise. [34] Article 6(1) is accordingly applicable to the facts of the present case.

B. Compliance

1. Review by the inspector

32. The applicant first appealed to the Secretary of State against the Borough Council's enforcement notice requiring him to demolish two buildings on his property. [35] The inspector appointed to hear the appeal conducted an enquiry and decided to dismiss the appeal in its essentials. [36]

33. In the applicant's submission the inspector, in carrying out his review, did not fulfil the requirement of independence stated in Article 6(1) of the Convention: the inspector, a member of the salaried staff of the Department of the Environment, exercised delegated authority from the Secretary of State who had the power to withdraw a case from an inspector at any time. [37] In these circumstances, the appeal to the Secretary of State remained an appeal to the Excecutive, and more particularly an appeal from local to central government.

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The applicant further contended that although both High Court judges and inspectors are obliged to have regard to the Secretary of State's planning policy as a material consideration when deciding cases, [38] only inspectors exercise discretionary planning judgment. A High Court judge does not do so and his role of deciding points of law on appeal has been described as one "of supervision, not of review". [39]

34. The Government submitted that the inspector was an independent and impartial tribunal whose quasi-judicial function and independence of judgment are generally recognised. The power of the Secretary of State to withdraw a case from the Inspector was in fact only used in a very small proportion of exceptional cases, involving ***358** very significant housing developments or complex issues of law. The Secretary of State, when in disagreement with the merits of the approach adopted by an inspector, could not legally deprive him of jurisdiction or institute disciplinary action against him since such conduct would very likely be unlawful as an improper interference with the independence of the Inspectorate.

In the Government's submission, the fact that inspectors must have regard to rules, guidance and directions published by the Secretary of State as a material consideration when making decisions in a planning context [40] provides no basis for challenging the independence or impartiality of the inspector. This is the case in many other areas of the law and even the judges of the High Court and the Court of Appeal are under a similar duty.

The Government further argued that the applicant had not suggested, nor could he, that the procedure followed by the inspector in the present case was unfair in any respect. On the contrary, as is apparent from the text of the decision, the inspector decided the matter objectively to the best of his ability on the planning merits of the case. In these circumstances, the applicant's complaint amounted to asking the Court to adjudicate in the abstract on the compatibility of legislation with the Convention, a function which is not the Court's.

35. The Commission, while subscribing in essence to the applicant's arguments, added that "the fact that the Secretary of State's policies can be at issue in appeals means that the inspector cannot have the independence necessary for Article 6 of the Convention".

36. The Court sees no reason to depart from the Government's view, which is shared by the Commission and uncontested by the applicant, that the proceedings before the inspector in the present case ensured the applicant a "fair hearing" for the purposes of Article 6(1). It remains, however, to be ascertained whether, in relation to Mr Bryan's appeal, the inspector constituted an "independent and impartial tribunal".

37. In order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. [41]

38. It is true that the inspector was required to decide the applicant's planning appeal in a quasi-judicial, independent and impartial, as well as fair, manner. [42] However, as pointed out by the Commission in its report, the Secretary of State can at any time, even during the course of proceedings which are in progress, issue a direction to revoke the power of an inspector to decide an appeal. [43] In the context of planning ***359** appeals the very existence of this power available to the Executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice as described by the Government and irrespective of whether its exercise was or could have been at issue in the present case.

For this reason alone, the review by the inspector does not of itself satisfy the requirements of Article 6 of the Convention, despite the existence of various safeguards customarily associated with an "independent and impartial tribunal".

2. Review by the High Court

39. Following the inspector's decision, Mr Bryan appealed to the High Court. The notice of appeal included a challenge to the inspector's findings of fact, [44] but his ground was not pursued at the hearing in the High Court. [45]

40. As was explained in the Court's *Albert and Le Compte v. Belgium* judgment, [46] even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6(1) in some respect, no violation of the Convention

can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)".

The issue in the present case is whether the High Court satisfied the requirements of Article 6(1) as far as the scope of its jurisdiction was concerned.

41. According to the applicant, the High Court had no power to disturb the findings of fact made by the inspector "unless there was a defect which was so great as to go to jurisdiction". Otherwise, an appeal lay to the High Court only on points of law and its scope was narrower than that of the appeal considered by the Court in the cases of *Zumtobel v. Austria* [47] and *Obermeier v. Austria.* [48] This explained why the ground (b) challenge was not pursued in the High Court: it was the professional judgment of counsel experienced in planning law that an invitation to the High Court to substitute its own findings of fact for those of the inspector would have been doomed to failure. [49]

42. The Government pointed out that the High Court could quash the inspector's decision if it was procedurally unfair—for example because of lack of independence—or if it was unreasonable or otherwise contained any error of law. [50] Having particular regard to the ***360** fact that there was no challenge to the factual findings made by the inspector, the Government concluded that the High Court had sufficient power to review the conclusions reached by the inspector in this case. In this respect the present case resembled that of *Zumtobel v. Austria*, [51] where an administrative body, competent to take decisions "on grounds of expediency", was subject to judicial review similarly limited to the legality and procedural fairness of the decision.

Furthermore, if for some reason it were considered that the inspector had shown some lack of independence of judgment or had otherwise not acted fairly or had been subject to improper pressure, then this would have furnished grounds for appeal to the High Court. [52]

43. The Commission observed that the decision by the inspector was carefully reasoned. Although the appeal to the High Court was limited to points of law, all the applicant's submissions as argued before that court were dealt with point by point. In the absence of a ground (b) challenge and, consequently, of dispute as to the primary facts, the Commission found that "there was nothing to indicate that the limited review available was inadequate in the particular circumstances of the case".

44. The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan. In particular, as is not infrequently the case in relation to administrative law appeals in the Council of Europe Member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited. [53]

However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference. [54]

45. Furthermore, in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

46. In this connection the Court would once more refer to the ***361** uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgement; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. [55] Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.

47. In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment by the applicant of his objection to the inspector's reasoning under ground (b). [56] The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and

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his submissions were adequately dealt with point by point. [57] These submissions, as the Commission noted, went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a Conservation Area".

Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the Court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational. [58]

Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe Member States. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgement in the regulation of citizens' conduct in the sphere of town and country planning.

The scope of review of the High Court was therefore sufficient to comply with Article 6(1).

3. Conclusion

48. Having regard to the foregoing considerations, the Court concludes that the remedies available to the applicant in relation to his complaints satisfied the requirements of Article 6(1) of the Convention. ***362**

There has accordingly been no violation of that provision in the present case.

Order

For these reasons, THE COURT unanimously

Holds that there has been no violation of Article 6(1) of the Convention. ***363**

Footnotes

1 "TCPA"—see para. 18 below.
2 See para. 19 below.
3 See para. 20 below.
4 See para. 24 below.
5 See para. 9 above.
6 "TCPGDO".
7 Para. A.1(c) of Class A of Part 6 of Schedule 2 to the TCPGDO.
8 s.172 TCPA.
9 Para. 2.2.
10 Para. 2.4.
11 Para. 2.6.
12 Para. 2.6.
13 Para. 2.7(ii).
14 s.70 TCPA.

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15 The Town and Country Planning (Enforcement Notices and Appeals) Regulations 1981, and the Town and Country Planning (Enforcement) (Inquiries Procedure) Rules 1981.
16 Schedule 6 to TCPA.
17 s.289(1) TCPA.
18 *R. v. Secretary of State for the Home Department Ex parte Brind [1991] A.C. 696* at 764H–765D.
19 See para. 12 above.
20 *Green v. Minister of Housing and Local Government [1963] 1 All E.R. 578* at 616.
21 1990 re-issue.
22 *ibid.,* p. 836.
23 *Halsbury's Laws of England,* Fourth Edition, Vol. 46 (1992 re-issue), p. 698.
24 See para. 8 above.
25 No. 19178/91.
26 Made under Art. 31.
27 The paragraph numbering from here to para. 47 is the original numbering of the Commission's opinion. Then we revert to the numbering of the Court's judgment.—Ed.
28 *cf. Zander v. Sweden (A/279-B): (1994) 18 E.H.R.R. 175*, para. 27, with further references.
29 *Albert and Le Compte v. Belgium (A/58): (1983) 5 E.H.R.R. 533*, para. 29; *Zumtobel v. Austria (A/268-A): (1994) 17 E.H.R.R. 116*, para. 29.
30 *ibid.,* para. 32.
31 Para. 46.
32 *ibid.,* para. 32.
33 *cf. Albert and Le Compte v. Belgium*, *loc. cit.,* para. 29.
34 See, as a recent authority, *Zander v. Sweden*, *loc. cit.,* para. 27.
35 See paras. 8 and 9 above.
36 See para. 10 above.
37 See paras. 10, 20 and 23 above.
38 See para. 22 above.
39 *R. v. Secretary of State for the Home Department Ex parte Brind*, *loc. cit.*
40 See para. 22 above.
41 See, *Inter Alia, Langborger v. Sweden (A/155): (1990) 12 E.H.R.R. 416*, para. 32.
42 See paras. 21 and 22 above.
43 See para. 23 above.
44 Under ground (b) of s.174(2) of the 1990 Act—see paras. 10 and 19 above.
45 See paras. 11–13 above.
46 *Loc. cit.,* para. 29.
47 *Loc. cit.,* paras. 31–32.
48 *Obermeier v. Austria (A/179): (1991) 13 E.H.R.R. 290*, paras. 69–70.
49 See paras. 11–13 above.
50 See para. 25 above.
51 *Loc. cit.*
52 See para. 26 above.
53 See paras. 25 and 26 above.
54 *ibid.*
55 See para. 21 above.
56 See paras. 11 and 13 above.
57 See para. 12 above.
58 See para. 25 above.

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*295 Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions
Regina (Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions
Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
9 May 2001

Report Citation
[2001] UKHL 23; [2001] 2 W.L.R. 1389
[2003] 2 A.C. 295

House of Lords

Lord Slynn of Hadley , Lord Nolan , Lord Hoffmann , Lord Clyde and Lord Hutton

2001 Feb 26, 27, 28; March 1, 5; May 9

Human rights—Right to fair trial—Determination of civil rights and obligations—Use of land—Powers of Secretary of State to decide planning applications etc—Decision challengeable only by way of judicial review—Whether determination by independent and impartial tribunal— Human Rights Act 1998 (c 42), s. 4, Sch. 1, Pt I, art 6(1)

In the first case a company agreed that, if planning permission were granted, it would develop a disused airfield owned by the Ministry of Defence into a national distribution centre. Applications were made to the district and county councils for relevant planning permissions and to the Secretary of State for the Environment, Transport and the Regions, under the Transport and Works Act 1992 , for permission to build a rail connection. When the district council refused and the county council failed to determine the applications made to them the Secretary of State recovered the applications for determination by him under paragraph 3 of Schedule 6 to the Town and Country Planning Act 1990 . Groups of local objectors claimed that determination by the Secretary of State of the applications under both the 1990 and 1992 Acts was contrary to the right to have civil rights and obligations determined by an independent and impartial tribunal guaranteed by article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [1] . The company applied for judicial review of the Secretary of State's decision to entertain the applications.

In the second case a company applied for planning permission to use land as a depot for wrecked cars. The Health and Safety Executive objected because the development was near to gas storage facilities. The local planning authority resolved to grant

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planning permission but the Secretary of State called in the application for determination by him pursuant to section 77 of the 1990 Act . The company applied for judicial review of that decision on the grounds of incompatibility with article 6(1).

In the third case the Highways Agency, a branch of the Secretary of State's department, proposed an improvement scheme to a major road junction, the construction of which would involve the compulsory purchase of land belonging to a ***296** company. The Highways Act 1980 and the Acquisition of Land Act 1981 provided that the Secretary of State was the decision maker who would approve the scheme and the draft compulsory purchase order. At the invitation of the company the Secretary of State sought a ruling as to the compatibility of the procedure with article 6(1).

The Divisional Court declared, pursuant to section 4 of the Human Rights Act 1998 , that all the impugned powers of the Secretary of State were incompatible with the provisions of article 6(1) but that the Secretary of State would not be acting unlawfully in exercising those powers under section 6(1) of that Act because section 6(2) applied.

On appeal by the Secretary of State to the House of Lords—

Held, allowing the appeals, that, having regard to the jurisprudence of the European Court of Human Rights, the disputes concerned involved the determination of "civil rights" within the meaning of article 6(1) of the Convention ; that, although the Secretary of State was not himself an independent and impartial tribunal, decisions taken by him were not incompatible with article 6(1) provided they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required; that when the decision at issue was one of administrative policy the reviewing body was not required to have full power to redetermine the merits of the decision and any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic; that the power of the High Court in judicial review proceedings to review the legality of the decision and the procedures followed was sufficient to ensure compatibility with article 6(1); and that, accordingly, the impugned powers of the Secretary of State were not incompatible with article 6(1) (post, paras 28-29, 43-45, 47-50, 54-57, 59-64, 87, 100, 116-117, 122, 127-130, 134-136, 144, 150, 154, 159, 170, 172, 183-184, 189, 196-198).

B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA , *Albert and Le Compte v Belgium (1983) 5 EHRR 533* and *Bryan v United Kingdom (1995) 21 EHRR 342 considered* .

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in the opinions of their Lordships:

Albert and Le Compte v Belgium (1983) 5 EHRR 533
Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320; [1965] 3 All ER 371, CA
Ashingdane v United Kingdom (1985) 7 EHRR 528
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Balmer-Schafroth v Switzerland (1997) 25 EHRR 598
Benthem v The Netherlands (1985) 8 EHRR 1
Bodén v Sweden (1987) 10 EHRR 367
Bryan v United Kingdom (1995) 21 EHRR 342
Bushell v Secretary of State for the Environment [1981] AC 75; [1980] 3 WLR 22; [1980] 2 All ER 608, HL(E)
Chapman v United Kingdom (2001) 33 EHRR 399
County Properties Ltd v The Scottish Ministers 2000 SLT 965
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Ettl v Austria (1987) 10 EHRR 255
Francis v Yiewsley and West Drayton Urban District Council [1958] 1 QB 478; [1957] 3 WLR 919; [1957] 3 All ER 529, CA

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Fredin v Sweden (1991) 13 EHRR 784
Golder v United Kingdom (1975) 1 EHRR 524
H v France (1989) 12 EHRR 74
Howard v United Kingdom (1984) 9 EHRR 116
ISKCON v United Kingdom (1994) 18 EHRR CD 133 ****297***
Jacobsson (Allan) v Sweden (1989) 12 EHRR 56
James v United Kingdom (1986) 8 EHRR 123
Johnson (B) & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA
Kaplan v United Kingdom (1980) 4 EHRR 64
König v Federal Republic of Germany (1978) 2 EHRR 170
Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1
Moreira de Azevedo v Portugal (1990) 13 EHRR 721
Obermeier v Austria (1990) 13 EHRR 290
Pudas v Sweden (1987) 10 EHRR 380
R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330; [1999] 2 WLR 974, HL(E)
R v Secretary of State for the Home Department, Ex p Turgut [2001] 1 All ER 719, CA
R v Wicks [1998] AC 92; [1997] 2 WLR 876; [1997] 2 All ER 801, HL(E)
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
Ringeisen v Austria (No 1) (1971) 1 EHRR 455
Skärby v Sweden (1990) 13 EHRR 90
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; [1971] 1 All ER 65
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
Tre Traktörer AB v Sweden (1989) 13 EHRR 309
Varey v United Kingdom The Times, 30 January 2001
W v United Kingdom (1987) 10 EHRR 29
X v United Kingdom (1982) 28 DR 177
X v United Kingdom (1998) 25 EHRR CD 88
Zander v Sweden (1993) 18 EHRR 175
Zumtobel v Austria (1993) 17 EHRR 116

The following additional cases were cited in argument:

Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117
De Cubber v Belgium (1984) 7 EHRR 236
Fayed v United Kingdom (1994) 18 EHRR 393
Findlay v United Kingdom (1997) 24 EHRR 221
Franklin v Minister of Town and Country Planning [1948] AC 87; [1947] 2 All ER 289, HL(E)
Jacobsson (Mats) v Sweden (1990) 13 EHRR 79
Kingsley v United Kingdom (2000) 33 EHRR 288
Lafarge Redland Aggregates Ltd v The Scottish Ministers 2000 SLT 1361
Langborger v Sweden (1989) 12 EHRR 416
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA
Lloyd v McMahon [1987] AC 625; [1987] 2 WLR 821; [1987] 1 All ER 1118, HL(E)
McGonnell v United Kingdom (2000) 30 EHRR 289
Oerlemans v The Netherlands (1991) 15 EHRR 561
Piersack v Belgium (1982) 5 EHRR 169
Procola v Luxembourg (1995) 22 EHRR 193
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)
R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Hereford and Worcester County Council, Ex p Wellington Parish Council [1996] JPL 573 ****298***
R v Torquay Licensing Justices, Ex p Brockman [1951] 2 KB 784; [1951] 2 All ER 656, DC
Reid v Secretary of State for Scotland [1999] 2 AC 512; [1999] 2 WLR 28; [1999] 1 All ER 481, HL(Sc)
Sramek v Austria (1984) 7 EHRR 351
Uppal v United Kingdom (No 1) (1979) 3 EHRR 391

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V v United Kingdom (1999) 30 EHRR 121
Wycombe District Council v Secretary of State for the Environment [1988] JPL 111
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

APPEALS from the Divisional Court of the Queen's Bench Division

These were appeals pursuant to section 12 of the Administration of Justice Act 1969 by the Secretary of State for the Environment, Transport and the Regions from decisions of the Divisional Court (Tuckey LJ and Harrison J) given on 13 December 2000 to declare, pursuant to section 4 of the Human Rights Act 1998 , that sections 77, 78 and 79 (excluding the words inserted into section 79(4) by paragraph 19 of Schedule 7 to the Planning and Compensation Act 1991) and paragraphs 3 and 4 of Schedule 6 (in so far as applied to section 79) to the Town and Country Planning Act 1990, sections 1, 3 and 23(4) of the Transport and Works Act 1992 and sections 14(3)(a), 16(5)(a), 18(3)(a) and 125 of and paragraphs 1, 7 and 8 of Part I of Schedule 1 to the Highways Act 1980 and section 2(3) and paragraph 4 of Schedule 1 to the Acquisition of Land Act 1981 were incompatible with the provisions of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms .

In so declaring the Divisional Court was determining (i) an application by Alconbury Developments Ltd supported by Cambridgeshire County Council but opposed by Huntingdonshire District Council and two groups of local residents, Huntingdonshire Says No to Alconbury Proposals ("Huntsnap") and the Nene Valley Association ("NVA"), for a declaration that the powers of the Secretary of State to recover planning applications pursuant to paragraph 3 of Schedule 6 to the 1990 Act and determine applications under the Transport and Works Act 1992 were compatible with article 6 ; (ii) an application by Holding & Barnes plc for a declaration that the powers of the Secretary of State to call in an application for planning permission pursuant to section 77 of the Town and Country Planning Act 1990 were incompatible with article 6 of the Convention; (iii) an application by the Secretary of State, at the instigation of Legal and General Assurance Society Ltd, for a declaration that his powers to make decisions under the Highways Act 1980 and the Acquisition of Land Act 1981 were compatible with article 6.

Holding & Barnes plc, Huntingdonshire District Council, Huntsnap and NVA cross-appealed from the Divisional Court's decision that although the powers were incompatible with article 6 the Secretary of State would not be acting unlawfully in exercising those powers under section 6(1) of the Human Rights Act 1998 because section 6(2) applied.

The Lord Advocate intervened.

The facts are stated in the judgment of Lord Slynn of Hadley.

Jonathan Sumption QC, David Elvin QC, Philip Sales and *James Maurici* for the Secretary of State. Many of the errors in the Divisional Court's decision arise because it tested the roles of the Secretary of State and the ****299*** planning inspector against a judicial authority. The Secretary of State is not a judicial authority. To the extent that he has a duty to act fairly and apply an independent mind having heard the parties, he acts judicially, but he is an administrator responsible to Parliament, and thus the electorate, in a way no judge is. Consequently, his decision making process does not conform to article 6. The essential question is, therefore, whether the English system gives an aggrieved party to a planning decision an adequate right of access to a court.

The English system follows the European model in providing a right to limited judicial review of a decision made by an elected authority. It differs only in giving the parties more opportunities to make representations. Although the court cannot reconsider the facts, article 6 does not require full judicial control of the determination of planning matters. Nor does the Convention require a separation between the formulation and application of policy. That is a misconception arising from regarding the Secretary of State as a court. A state is not required to divide different executive functions between different administrative bodies.

The jurisprudence of the European Court of Human Rights distinguishes between purely administrative or legislative acts which represent no more than the exercise of legal powers, and acts which involve the determination of a "dispute" or "contestation" and are therefore at least in part adjudicatory: see *Kaplan v United Kingdom (1980) 4 EHRR 64* . In many cases, including the instant cases, the determination of a planning application will involve a "dispute" and a "determination of civil rights and obligations". The question of what is a "right" is a matter for national law: see *James v United Kingdom (1986) 8 EHRR 123* . The distinction between civil and other rights broadly corresponds to the difference between public and private law: see *Uppal v United Kingdom (No 1) (1979) 3 EHRR 391* . However, article 6 can apply to public law matters which affect or give rise to civil matters and rights: see *Ringeisen v Austria (No 1) (1971) 1 EHRR 455* ; *Benthem v The Netherlands (1985) 8 EHRR 1* . The rather awkward distinction between pure public law and public law with civil right implications has led the court to define the relevant civil right as the private law right which is adversely affected by the public law decision. In planning cases, the

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relevant civil right is the qualified right to the peaceful enjoyment of property. The court has consistently held that the right to property is engaged by any state action which substantially restricts the practical use that may be made of it, even if the legal rights of ownership and occupation are undisturbed: see *Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35* ; *Fredin v Sweden (1991) 13 EHRR 784* ; *Oerlemans v The Netherlands (1991) 15 EHRR 561* . This is so not only where the state intervenes to deprive the owner of the right to use the land in a way which was previously open to him, but also in cases where there never was a right to use the land in that way without a licence and such licence had been refused: see *Jacobsson (Allan) v Sweden (1989) 12 EHRR 56* ; *Mats Jacobsson v Sweden (1990) 13 EHRR 79* ; *Skärby v Sweden (1990) 13 EHRR 90* . However, planning applicants, or indeed objectors to a planning application, cannot claim to have a civil right to any particular outcome. In this respect their position is quite different from that of parties to private litigation who are generally asserting that a particular outcome represents their legal entitlement. The right to enjoy property is not absolute. Consequently, any civil right to the ***300*** enjoyment of property asserted by applicants or objectors is sufficiently vindicated by a procedure which ensures that the application is decided in a manner which accords with the law and there is recourse to a court if it is not.

The Commission and court have always recognised that some functions are properly made by executive authorities which are not courts provided they are subject to a measure of judicial control. Planning is one such area, it is specialised and requires knowledge on the part of the decision maker beyond the facts of the particular case. Consequently, although the Secretary of State is not an independent tribunal, the real issue is whether the planning system as a whole allows to persons whose civil rights are engaged such access to an independent tribunal as may be required to enable them to vindicate those rights. Recourse to the High Court by way of judicial review sufficiently protects the civil rights of those affected by disputed planning applications as it provides a procedure under which the method by which the decision maker reached his decision is subject to judicial intervention if it is unfair: see *Albert and Le Compte v Belgium (1983) 5 EHRR 533* ; *Kaplan v United Kingdom 4 EHRR 64* ; *Oerlemans v The Netherlands 15 EHRR 561* ; *Zumtobel v Austria (1993) 17 EHRR 116* ; *ISKCON v United Kingdom (1994) 18 EHRR CD 133* ; *Bryan v United Kingdom (1995) 21 EHRR 342* ; *Varey v United Kingdom The Times, 30 January 2001* ; *Chapman v United Kingdom (2001) 33 EHRR 399* . Although not involving planning, see also: *X v United Kingdom (1998) 25 EHRR CD 88* ; *Kingsley v United Kingdom (2000) 33 EHRR 288* . The English cases were all heard by the court prior to the Human Rights Act 1998 coming into force. That makes a difference because now the High Court can take into account the proportionality of a decision: see *R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840* ; *R v Secretary of State for the Home Department, Ex p Turgut [2001] 1 All ER 719* .

The whole justification for a national planning policy is based on the idea that there are wider interests than those of the applicant himself and his neighbours e g environment policy. The limitations on the scope of judicial review reflect a distribution of powers between the executive and legislative branches and the courts. Planning adjudications are not between competing private interests but made in the public interest: see *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* . In the language of the European Court of Human Rights this is a discretionary decision i e one taken on behalf of a wider public interest which outweighs private rights. The role of the Secretary of State makes the planning system coherent and consistent across the country. Local authorities prepare development plans which reflect national policy and must be adhered to. The right of appeal to an inspector and the Secretary of State's right to call in a case are essential features of the scheme. If it is legitimate to have a national planning policy it is also legitimate to have it decided and applied by accountable elected ministers which the courts only oversee to the extent of ensuring decisions are taken lawfully: see *Ashingdane v United Kingdom (1985) 7 EHRR 528* ; *Brown v Stott [2003] 1 AC 681* .

The Divisional Court thought *Brown v Stott* was distinguishable as the Secretary of State failed the test of independence and impartiality as he was both policy maker and decision maker. The Convention only requires judges to be insulated from the executive not administrators. There are good ***301*** reasons why policy making and decision making should go together. It allows for occasional departures from policy in exceptional circumstances. The Secretary of State is not a judge in his own cause as the matter in issue is the particular planning application rather than the planning policy itself. There is no objection to the Secretary of State taking advice from his departmental staff as they are seen as part of his thinking process: see *Bushell v Secretary of State for the Environment [1981] AC 75* . It is consistent with regarding the Secretary of State as the holder of an office rather than an individual. An inspector is no more independent than the Secretary of State: see *Bryan v United Kingdom 21 EHRR 342* . Both are required to act fairly which should be an adequate guarantee of fair findings of fact, and both are subject to judicial review if they art unfairly. There is nothing in the current statutory structure which is unfair. The role of the Secretary of State and the question of principle are the same as in *Howard v United Kingdom (1984) 9 EHRR 116* .

[Submissions were made on the appropriate remedy if there is an incompatibility with article 6. Reference was made to *R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326* and *R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330* .]

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Roderick F Macdonald QC and *Andrew G Webster* (both of the Scottish Bar) for the Lord Advocate. A similar question has arisen in Scotland. In *County Properties Ltd v The Scottish Ministers 2000 SLT 965* it was decided that the process by which the Scottish Ministers take decisions under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 was incompatible with article 6. The case was wrongly decided and is the subject of a reclaiming motion. The arguments of the Secretary of State on conformity with article 6 are adopted. However, article 6 is not applicable because a planning appeal does not raise a dispute. The appeal is merely a re-run of the original application. No civil rights are determined at that stage. A dispute only arises when the decision is challenged in court. The proper approach is to be found in *Kaplan v United Kingdom 4 EHRR 64* and *Zander v Sweden (1993) 18 EHRR 175* . Those principles have never been criticised and *Kaplan* and *Zander* should be approved and followed rather than *X v United Kingdom 25 EHRR CD 88* and *Bryan v United Kingdom 21 EHRR 342* .

Keith Lindblom QC, Craig Howell Williams and *Hereward Phillpot* for Alconbury. The arguments of the Secretary of State are supported. The decision making process in issue reflect an appropriate and mature balance between the general interests of the community and the individual's personal rights. The process considered as a whole is compatible with article 6. The pecuniary benefit to the Ministry of Defence does not render the Secretary of State's decision incompatible in the *Alconbury* case. The approach of the Secretary of State rather than that of the Lord Advocate to *Kaplan v United Kingdom 4 EHRR 64* is adopted.

Gregory Jones and *Paul Hardy* for Cambridgeshire County Council. The position of the Secretary of State and Alconbury is adopted: see *Chapman v United Kingdom 33 EHRR 399* ; *R v Torquay Licensing Justices, Ex p Brockman [1951] 2 KB 784* ; *Sporrong and Lönnroth v Sweden 5 EHRR 35* . It is questionable whether the court appreciated that planning policy ***302** itself is not in issue in a planning appeal when it decided *Bryan v United Kingdom 21 EHRR 342* .

Stephen Hockman QC, Kevin Leigh and *Gordon Nardell* for Holding & Barnes. The process of reaching a decision on the Holding & Barnes planning application is plainly a determination of its civil rights and obligations. The outcome of the application concerns an important incident of its ownership of the land, namely its freedom to carry on a lawful trade there. It acquired the land solely for the purpose of its business and the grant or refusal of permission will determine whether it can make any beneficial use of the land. Moreover, the proceedings before the Secretary of State on the application are decisive as to the grant or refusal of permission so they amount to a determination for article 6 purposes. The proceedings are not prevented from relating to a "right" merely by reason that the grant or refusal of planning permission is a matter of discretionary judgment. What is important is not whether the applicant has a right to planning permission but the impact of the grant or refusal of planning permission on the rights of the applicant in relation to the use of a valuable asset. Even if the focus is placed on the question whether the applicant has a "right" to planning permission for article 6 purposes it need not be established that the right exists at the outset of the decision making process but merely that it arguably exists and that the process will determine that argument. It is not argued that the separate decision of the Secretary of State whether to call in the planning application was itself determinative of a civil right.

The Divisional Court was right in finding that the Secretary of State lacks the necessary independence and objective impartiality in determining planning applications. In particular it was right to emphasise: (1) the importance of assessing not merely the Secretary of State's personal independence but the structural independence of his department; (2) his incompatible functions as policy maker and decision taker; and (3) the inadequacy of existing domestic standards of impartiality, which presuppose that departmental bias is built into the legislative scheme, as a basis for evaluating whether the decision making process meets the requirements of article 6(1) . The inspectorate is acceptable because, although it is not formally independent, it is effectively independent. The Secretary of State, unlike the inspector, is in reality the executive. Also, there are at least some procedural safeguards in inquiry proceedings before the inspector compared to the secretive and one sided process of determination by the Secretary of State following an inquiry.

The Divisional Court was right to find: that the requirements of "full jurisdiction" are to be assessed in the light of the extent of the Secretary of State's lack of independence and impartiality, the absence of procedural safeguards in hearings before him and, in the context, the scope of review under section 288 of the Town and Country Planning Act 1990 ; that, the limited remedy available, namely remission of the case for redetermination by the ex hypothesi non article 6 compliant Secretary of State, renders review by the High Court ineffective to cure the Secretary of State's lack of independence and impartiality; that, in the circumstances, it is impossible to say that an applicant can at any stage submit the merits of its case to a tribunal complying with the essence of article 6; and that it is neither legally nor pragmatically possible to attain the necessary review jurisdiction by ***303** extending, within the existing legislative framework, the scope of the High Court's powers.

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Those submissions are borne out by the case law. A review of the cases in chronological order shows that the Secretary of State's case is a simplification: see *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* ; *Golder v United Kingdom (1975) 1 EHRR 524* ; *Kaplan v United Kingdom 4 EHRR 64* ; *Bodén v Sweden (1987) 10 EHRR 367* ; *Jacobsson (Allan) v Sweden 12 EHRR 56* ; *Zumtobel v Austria 17 EHRR 116* ; *Lafarge Redland Aggregates Ltd v The Scottish Ministers 2000 SLT 1361* ; *ISKCON v United Kingdom 18 EHRR CD 133* ; *Bryan v United Kingdom 21 EHRR 342* ; *Chapman v United Kingdom 33 EHRR 399* ; *Varey v United Kingdom The Times, 30 January 2001* ; *Kingsley v United Kingdom 33 EHRR 288* .

[Submissions were made as to whether section 6(2)(b) of the Human Rights Act 1998 is applicable and whether section 77 of the Town and Country Planning Act 1990 can be read compatibly with article 6 . Reference was made to *Lloyd v McMahon [1987] AC 625* .]

Martin Kingston QC and *Peter Goatley* for Huntingdonshire District Council. The clear object of article 6 is to secure for the citizen a procedure which in respect of all issues (i e fact, policy application and law) provides for an independent and impartial determination: see *Benthem v The Netherlands 8 EHRR 1* . There is no basis for the view that because the case is one which involves some specialism, such as planning, the right to an independent and impartial tribunal to find facts should be abridged: see *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1* ; *Albert and Le Compte v Belgium 5 EHRR 533* .

It is clear that it is permissible for the decision making process to be in two stages and that article 6 does not have to be satisfied at both stages. However, the more serious is the want of independence at the first stage, the greater is the need for judicial intervention at the second stage. In *Bryan v United Kingdom 21 EHRR 342* the court relied on the safeguards built into the inspector's role, hence it found that judicial review was a good enough safeguard at the second stage. It is clear that if it had not been for the existence of the Secretary of State's power to remove proceedings from the inspector the court would have said that the proceedings before the inspector met the requirements of article 6. Consequently, it cannot be said that *Bryan* can be taken to apply to the Secretary of State's decision. The Secretary of State's role cannot be regarded as judicial or quasi-judicial: see *Franklin v Minister of Town and Country Planning [1948] AC 87* . The extent to which he lacks impartiality, or appears to lack impartiality, becomes critical when consideration is given to the extent to which judicial review provides good enough protection for the applicant. When findings of fact are made by the Secretary of State he has not heard the evidence or seen the witnesses.

[Submissions were made on the facts and the decision making process in the *Alconbury* case.]

There are two aspects to the question of independence: (a) independence from the parties, which merges into the requirement of impartiality: see *McGonnell v United Kingdom (2000) 30 EHRR 289* ; and (b) independence from the executive. No adjudicatory decision taker should be able to act as the judge in his own cause: see *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* ; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119* . In seeking to be the decision taker in the *Alconbury* case the Secretary of State has the inexorable difficulty of being connected through Government to the Ministry of Defence which has a material financial interest in the outcome. In relation to the executive the issue is not one of the actual acts and predispositions of the decision maker but of the structures governing the decision making process. In determining whether a body is independent regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to whether it presents an appearance of independence: see *V v United Kingdom (1999) 30 EHRR 121* ; *Langborger v Sweden (1989) 12 EHRR 416* ; *De Cubber v Belgium (1984) 7 EHRR 236* ; *Piersack v Belgium (1982) 5 EHRR 169* ; *Sramek v Austria (1984) 7 EHRR 351* ; *Findlay v United Kingdom (1997) 24 EHRR 221* ; *Procola v Luxembourg (1995) 22 EHRR 193* . In the instant case the Secretary of State is the policy maker, has an interest in the outcome of the decision and is the decision maker. It is appropriate that he should be involved with policy but when it comes to the application of the policy where civil rights are in issue the Convention requires that there should be a process that produces an independent and impartial adjudication on the matter. In domestic law the decision makers position is clear from *Wycombe District Council v Secretary of State for the Environment [1988] JPL 111* . That approach is not consistent with formulating the policy in the process of making the decision. The Secretary of State has a choice of courses to follow in planning proceedings and has chosen to take the one which brings him into conflict with article 6, consequently it will not take much to correct matter and will not affect too many cases.

The availability of judicial review is insufficient as no article 6 compliant tribunal ever deals with the factual issues. The arguments of the amici curiae are adopted on the question whether a contestation arises.

Paul Stanley and *Tim Eicke* for Huntsnap and NVA. The case for Huntingdon is adopted. Civil rights first come into issue at the start of the planning process when a decision is first taken and not just at the stage when that decision is challenged, consequently there is a contestation for article 6 purposes throughout the proceedings: see *Benthem v The Netherlands (1985)*

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8 EHRR 1 . On the problem of policy being in issue in planning decisions: see *R v Hereford and Worcester County Council, Ex p Wellington Parish Council [1996] JPL 573* . Article 6 is flexible; although there has to be a determination of civil rights and obligations before an independent and impartial tribunal, the right is qualified in areas such as planning because not every stage has to be handled by such a tribunal. However, care has to be taken when allowing such qualifications: see *Obermeier v Austria (1990) 13 EHRR 290* . Article 6 does not allow contracting parties to limit the rights it guarantees or trade them off against concepts such as democratic accountability: see *Young, James and Webster v United Kingdom (1981) 4 EHRR 38* . The democratic accountability of the Secretary of State is not an answer to the article 6 complaint but part of the problem. Judicial review in not an adequate safeguard of the article 6 rights as its effectiveness is dependent on the decision maker being honest about the facts which he took into account. A limited review is an adequate safeguard ***305*** only when there is fundamental confidence in the decision making process: see *Kingsley v United Kingdom 33 EHRR 288* .

John Howell QC and *Rabinder Singh* as amici curiae. Article 6(1) applies to all disputes the result of which is directly decisive for private rights and obligations. The dispute may relate to the existence, scope or value of such right or to the manner in which it may be exercised: see *Le Compte, Van Leuven and De Meyere v Belgium 4 EHRR 1* . In relation to compulsory purchase orders: rights of ownership are private, and thus civil rights, which are recognised under domestic law. Once there is an objection to the making of any compulsory purchase order there is a dispute about such rights, the resolution of which will be directly decisive of them.

It is irrelevant whether the dispute turns on a question of law, fact judgment or discretion. As a matter of principle there is no reason in terms of the language used in article 6(1) why the exercise of a discretion may not arise in the determination of a person's rights or in deciding a dispute over such rights: see *W v United Kingdom (1987) 10 EHRR 29* ; *Obermeier v Austria 13 EHRR 290* . There is nothing in the text of article 6(1) to support *Kaplan v United Kingdom 4 EHRR 64* . The decision was wrong as it places a technical meaning on "contestation" which the word will not bear. It rests on a distinction which is a matter of form not substance and which in practice is illusive. The consequences of applying that meaning are paradoxical and repugnant and would produce absurd results. The decision was not followed in *X v United Kingdom 25 EHRR CD 88* . Subsequent cases such as *Kingsley v United Kingdom 33 EHRR 288* have *followed* the *X case 25 EHRR CD 88* rather than *Kaplan 4 EHRR 64* .

Likewise there is no reason in principle why a dispute about civil rights should be limited to the legality, as distinct from the merits, of the measure which decisively determines the right. Although some cases before the European Court of Human Rights might appear to support the conclusion that the ambit of any dispute should be so limited, they are cases which concerned a lack of review as to lawfulness: see, for example, *Oerlemans v The Netherlands 15 EHRR 561* . Thus the court was not asked to consider whether only a review as to lawfulness was sufficient. By contrast, in later cases, the court's decision turned on the fact that the reviewing tribunal had full power to reconsider the merits of the decision: see *Zumtobel v Austria 17 EHRR 116* . Overall, when considering whether the review is adequate, the court is concerned with the procedure by which the decision was reached and not just the matter of dispute.

The essence of the right under article 6 applies to the determination of rights and not a later review of that determination. There is no exemption for administrative decisions. Civil rights must be determined by a body independent of the executive. The views of the executive are entitled to deference but no more.

A limitation on the rights guaranteed by article 6 is permissible where it pursues a legitimate aim, involves a reasonable proportionality between aim and means and does not extinguish the essence of the right: see *Fayed v United Kingdom (1994) 18 EHRR 393* . However, the minimum requirements of article 6(1) are: (1) a fair hearing on the merits before a tribunal which is in fact substantially impartial and independent as to merits; and (2) an effective review by an article 6(1) compliant body. The ***306*** Secretary of State in the *Legal and General* case does not satisfy requirement (1). He is literally judge in his own cause as he is deciding whether or not to grant himself the relevant powers. He is also the promoter of the scheme on which he makes the relevant determination. Claims that the requirements of article 6(1) can be adapted to allow for a democratic model of decision making where private interests are balanced against a wider public interest cannot justify entrusting effective power of decision making to the executive when its interests are so directly involved that it cannot be regarded as independent of the parties or as an impartial tribunal in relation to the merits of the dispute.

In *ISKCON v United Kingdom 18 EHRR CD 133* and *Varey v United Kingdom The Times, 30 January 2001* there was no issue concerning the Secretary of State's impartiality on the merits. Judicial review is limited to a strict legal test of the correctness of a decision: see *Reid v Secretary of State for Scotland [1999] 2 AC 512* ; *Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117* . No review on the merits is possible. Both *Bryan v United Kingdom 21 EHRR 342*

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and *Kingsley v United Kingdom 33 EHRR 288* show that a power of *limited* review will be insufficient if the initial decision is not taken by an independent person in the first place.

Legal and General Assurance Society did not appear and were not represented.

Sumption QC in reply. Article 6 cannot be applied to issues which are discretionary and in the public interest in the same way as it is applied to areas involving purely private issues. Matters which have a broad public reach should not be left for determination to a non-democratic body. The jurisprudence of the European Court of Human Rights shows that the character of the dispute with which article 6 is concerned with is an important issue when considering what will satisfy the requirements of the article. The proceedings as a whole engage article 6 but the court has always recognised that the two stages of the decision making process do not require the same content. The range of the reviewing judicial stage can be less than the range of the original administrative stage: see *ISKCON v United Kingdom 18 EHRR CD 133* ; *Bryan v United Kingdom21 EHRR 342* ; *Chapman v United Kingdom 33 EHRR 399* ; *Varey v United Kingdom The Times, 30 January 2001* ; *X v United Kingdom 25 EHRR CD 88* ; *Kingsley v United Kingdom 33 EHRR 288* . There is no single test for "full jurisdiction" at the reviewing stage. It depends on the circumstances, subject matter of the dispute, etc.

The distinction drawn between an inspector and the Secretary of State is unreal. In both cases the facts are found by the inspector. The Secretary of State can disagree with those findings but he must give an opportunity for representations and act rationally. In making a decision their functions are the same.

The discretionary nature of the decision is crucial to the decision in *Bryan v United Kingdom 21 EHRR 342* . The reason why the *limited* nature of judicial review is acceptable on discretionary decisions is that the major issue at stake is the public interest and not individual rights. The right the individual has under article 6 is the right to have the decision making process, but not the outcome, judicially controlled. The standard which ***307** article 6 imposes on the administrative stage is that the decision maker should be fair or subject to judicial review to the extent that he is unfair. The obligation of fairness does not require that the decision maker should have no prior view on the issue provided that he keeps an open mind until he has heard the parties. Judicial standards are not applied to administrative decision makers. Apparent bias is only relevant when considering a judicial decision maker. It is not relevant to an administrative decision maker who has the broader public interest to consider. The guiding principles regarding administrative decision making are relevance and fairness.

The balance between democratic accountability and the rule of law is in the right place. Private rights are wholly vindicated by access to the courts to test the lawfulness of the decision. The same balance has been made by other Convention countries.

Their Lordships took time for consideration.

9 May. LORD SLYNN OF HADLEY

1. My Lords, these three appeals come direct to the House pursuant to section 12 of the Administration of Justice Act 1969 from decisions of the Divisional Court (Tuckey LJ and Harrison J) in a judgment given on 13 December 2000. Although there are differences between the three cases they raise broadly the same question as to whether certain decision making processes of the Secretary of State for the Environment, Transport and the Regions are compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as incorporated in the Human Rights Act 1998. There was a consequential question as to whether if these processes are not compatible there should be a declaration under section 4 of the 1998 Act .

2. The Divisional Court held that the following statutory provisions were incompatible with article 6 and accordingly made a declaration of incompatibility under section 4 of the 1998 Act: (a) the Town and Country Planning Act 1990 (i) section 77 ; (ii) section 78 and 79 (excluding the words inserted into section 79(4) by paragraph 19 of Schedule 7 to the Planning and Compensation Act 1991); (iii) paragraphs 3 and 4 of Schedule 6 (in so far as it applied to section 79); (b) the Transport and Works Act 1992, sections 1, 3 and 23(4); (c) the Highways Act 1980, sections 14(3)(a), 16(5)(a), 18(3)(a) and 125 and paragraphs 1, 7 and 8 of Part I of Schedule 1; (d) the Acquisition of Land Act 1981, section 2(3) and paragraph 4 of Schedule 1.

3. The Secretary of State appeals against all these decisions and declarations. Since a related question had arisen in Scotland in *County Properties Ltd v The Scottish Ministers 2000 SLT 965* , the Lord Advocate has intervened in support of the application that the decision of the Divisional Court be reversed on the basis that article 6(1) does not apply to the decision-making processes under review and on the basis that they are not in any event incompatible with a Convention right. The role of other parties to

the proceedings will appear in a brief summary of facts to which I turn. I summarise briefly because the facts are more fully set out in the judgment of the Divisional Court to which reference can be made and which it is not helpful to repeat.

4. *Alconbury Developments Ltd* ("AD") has agreed with the Ministry of Defence, the owner of a disused airfield at Alconbury, that if planning ***308** permission is given AD will redevelop the site into a national distribution centre in return for financial payments to the Ministry. AD applied to Huntingdonshire District Council ("HDC") for planning permission for the overall scheme with adjunct facilities and approach road and rail sidings. It also applied under various individual applications for planning permission for parts of the scheme. There were related applications (1) to Cambridgeshire County Council ("CCC") as the waste disposal authority for planning permission to construct a temporary recycling depot on part of the site; (2) 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; (3) to the Secretary of State under section 1 of the Transport and Works Act 1992 for permission to build a rail connection between the airfield and the east coast rail line together with railway sidings within the airfield.

5. 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 paragraph 3 of Schedule 6 to the Town and Country Planning Act 1990 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".

6. 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 . 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 Transport and Works Act 1992 applications were lawful. CCC supported AD; HDC, Huntsnap and NVA opposed it. On the present appeal AD and CCC support the Secretary of State. HDC and NVA contend that the Divisional Court were right in holding that there was a breach of section 6(1) but wrong in their decision on section 6(2) . The Secretary of State was bound to act so as to avoid incompatibility with the Convention and therefore to permit the appeal to be determined by an independent inspector.

7. *Holding & Barnes plc* ("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 some neighbouring sites but the Executive was willing to reconsider the position if modifications to the proposal could be made. The local planning authority on 2 May 2000 resolved that it was minded to grant permission. On 25 July 2000 the Secretary of State directed, pursuant to section 77 of the Town and Country Planning Act 1990 that the 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. It is that direction which HB challenged on an application for judicial review.
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8. *Legal and General Assurance Society Ltd* . These proceedings are brought by the Secretary of State at the invitation of Legal and General Assurance Society Ltd ("L & G"). The issue relates to an improvement scheme at junction 13 of the A34/M4 proposed by the Secretary of State through the Highways Agency. There are complex details of a dual two-lane carriageway all-purpose road, 100 metres to the west of the existing junction 13, together with connected slip and side roads. 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. L & G 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. L & G 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.

9. The Divisional Court set out with clarity the details of the legislation relevant to these cases. I gratefully adopt their account in paras 30 to 52 of the judgment and accordingly I only summarise the essential characteristics with which these appeals are concerned.

10. It is important to make clear that these appeals are not concerned directly with issues which affect the vast majority of applications for planning permission. Those applications are dealt with by elected local authorities and not by the Secretary of

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State even though local authorities have to take into account the development plan for their area which does reflect national policies, guidance and instructions given by the Secretary of State. Nor are the present appeals concerned with the majority of appeals from such local authority decisions which are decided by inspectors on the Secretary of State's behalf even though those inspectors may be full-time officials of the Planning Inspectorate and even though they must have regard to the Secretary of States's policies and the framework document setting out their functions. The present appeals under the Town and Country Planning Act 1990 are concerned only with applications which are "called in" by the Secretary of State under section 77 of the Act and those appeals which are "recovered" by the Secretary of State under paragraph 3 of Schedule 6 to the Act. The Divisional Court found that of some 500,000 planning applications each year about 130 were "called in" by the Secretary of State and of some 13,000 appeals to the Secretary of State each year about 100 were "recovered" by the Secretary of State. In both types of case the Secretary of State followed to a large extent the recommendations of the inspectors. These figures of 130 and 100 are not insignificant and they concern important questions, important both to the individual and to the nation, but the figures do show the limits of the question raised on the appeals.

11. It is therefore important to see what are the statutory powers under these various sections.

12. Under section 77 of the Town and County Planning Act 1990 the Secretary of State may (1) give directions requiring applications for planning permission to be referred to him instead of being dealt with by local planning authorities: ***310**

> "(5) Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose."

13. By the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) the applicant and the local planning authority are entitled to appear before the inspector ("the person appointed") to call and cross-examine witnesses and to make representations.

14. Section 78 of the Town and Country Planning Act 1990 provides for an applicant who has been refused planning permission or granted planning permission subject to conditions to appeal to the Secretary of State. Before determining an appeal, the Secretary of State is required by section 79(2) , if the appellant or the local planning authority wish, to give them an opportunity to be heard by a person appointed by the Secretary of State. By paragraph 1 of Schedule 6 to the Act, the Secretary of State may prescribe classes of appeals to be determined by appointed persons rather than by the Secretary of State. By paragraph 3(1) of Schedule 6 the Secretary of State "may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State". Such direction shall state the reasons for which it is given and it is to be served on the appellant, the local planning authority and any person who has made representations.

15. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000, which replaced the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992 (SI 1992/2039) with effect from 1 August 2000, apply to any local inquiry ordered by the Secretary of State before he determines an application for planning permission referred to him under section 77 or an appeal to him under section 78 of the Act.

16. When an inspector is holding an inquiry leading to an appeal which he will determine himself or when he is holding an inquiry before the Secretary of State decides an application for planning permission called in by him under section 77, or before the Secretary of State determines an appeal under section 78 "recovered" by him, the procedures are broadly the same until the inspector's final report. When an inspector takes a decision he must set out that decision with reasons and notify the parties. When, however, he is holding an inquiry before the Secretary of State takes a decision he must state his conclusions and make his recommendations. There is an important provision in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 :

> "(5) If, after the close of an inquiry, the Secretary of State—(a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or

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> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy), and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an **311* opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the re-opening of the inquiry ...
>
> "(7) The Secretary of State may, as he thinks fit, cause an inquiry to be reopened, and he shall do so if asked by the applicant or the local planning authority in the circumstances mentioned in paragraph (5) and within the period mentioned in paragraph (6); and where an inquiry is reopened (whether by the same or a different inspector)—(a) the Secretary of State shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited; and (b) paragraphs (3) to (8) of rule 10 shall apply as if the references to an inquiry were references to a reopened inquiry."

17. In relation to applications made under the Transport and Works Act 1992 in relation to the construction and operation of a railway and to authorise the compulsory acquisition of land and to grant any necessary planning permission, under the Transport and Works Act, the decision is taken by the Secretary of State. Where an objection is received, a public inquiry must be held if the objector wishes. The provisions of the Transport and Works (Inquiries Procedure) Rules 1992 (SI 1992/2817) are broadly similar to those found in the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

18. The Highways Act 1980 gives to the Secretary of State power to make orders in relation to existing and proposed highways and to empower the highway authorities for trunk roads to stop up or improve highways in prescribed circumstances. If a local inquiry is held, the inspector appointed reports his conclusions and recommendations to the Secretary of State. The Highways (Inquiries Procedure) Rules 1994 (SI 1994/3263) contain similar provision to those in the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The Secretary of State may make an order with or without modification but if he disagrees with his inspector's conclusions or recommendations the Secretary of State must follow a procedure similar to that in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 : see rule 26(4) of the Highways (Inquiries Procedure) Rules 1994 . When exercising his powers under the Highways Act, the Secretary of State is given power to acquire land compulsorily. The Acquisition of Land Act 1981 and the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994 (SI 1994/3264) provide for a public local inquiry to be held if an objection is received. The inspector makes his conclusions and recommendations to the Secretary of State. If the latter disagrees he is required once again to follow a procedure similar to that in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

19. The various statutes provide for judicial review rather than for an appeal on the facts or the merits of the decision. Thus in section 288 of the Town and Country Planning Act 1990 :

> " *Proceedings for questioning the validity of other orders, decisions and directions* 288(1) If any person —(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—(i) that the order is not within the powers of this Act, or (ii) that **312* any of the relevant requirements have not been complied with in relation to that order; or (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—(i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section."

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20. Section 22 of the Transport and Works Act 1992 , the provisions for challenge set out in paragraph 2 of Schedule 2 to the Highways Act 1980 and section 23 of the Acquisition of Land Act 1981 are similar.

21. The essence of the complaints in all these cases is that there is a violation of article 6 of the European Convention for the Protection of Human Rights incorporated in Part I of Schedule 1 to the Human Rights Act 1998. Article 6 provides:

"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."

22. The second and third paragraphs of the article are concerned with criminal offences and are not relevant to the present appeal.

23. The contention in these proceedings is that the processes which I have set out violate article 6. These are civil rights which are determined without a fair and public hearing by an independent and impartial tribunal established by law.

24. There is really no complaint about the inquiry conducted by an inspector or about the safeguards laid down for evidence to be called and challenged and for representations and objections to be heard. It is not suggested that the inspector himself is not independent and impartial even though he is a member of, e g, the Planning Inspectorate in the case of planning appeals. The essential complaint is that when a decision is taken, not by such an inspector but by the Secretary of State or one of the Ministers of State or an Under-Secretary on behalf of the Secretary of State there is such an interest in the decision that the person concerned cannot be regarded as an independent and impartial tribunal. The Secretary of State or his department, it is said, lays down policy and directs what he or the department considers to be the most efficient and effective use of land in what he sees to be the public interest. They issue guidance and framework directions which local authorities, inspectors and officials operating the planning system must follow. All of these are bound to affect the mind of the Secretary of State when he takes decisions on called in applications or on appeals which he recovers, it is alleged. Moreover it is said that in the case of Alconbury there is a particular factor in that the land in question is owned by another government department, the Ministry of Defence.

25. Mr Kingston on behalf of HDC also criticised the correspondence and minutes relevant to the Alconbury project. He contends that the role of the officials involved at the Planning and Transport Division in the Government Office for the Region ("GO") was such that there was a real connection not only with planning matters and planning ministers but also ***313** with transport ministers and officials and their policies. A site visit by the Parliamentary Under-Secretary for Transport may not have been prejudicial to the determination of the application before the matter was taken over by the Secretary of State. It was quite different once he took over the case for his own decision. As it was put in the case, even leaving aside the fact that the Secretary of State was carrying out his own policy "it is quite clear that the structures in place in relation to cases where the Secretary of State has recovered jurisdiction do not preserve any appearance of independence".

26. Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.

27. It is not necessary to refer to all these cases but some statements of principle by the European Court of Human Rights are important in guiding the House in the present decisions. A preliminary question has arisen as to whether a dispute over administrative law matters of the present kind involved the determination of "civil rights". At first sight to a common lawyer there appears a difference and that difference might seem stronger to a lawyer in a civil law country. In *Ringeisen v Austria (No 1) (1971) 1 EHRR 455* , para 94, however, the court said:

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> "For article 6(1) to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of article 6(1) is far wider; the French expression 'contestations sur [des] droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of ... civil rights and obligations', confirms this interpretation. The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence."

See also *Kaplan v United Kingdom (1980) 4 EHRR 64* , 85, *Allan Jacobsson v Sweden (1989) 12 EHRR 56* .

28. In *Fredin v Sweden (1991) 13 EHRR 784* the court accepted that disputes under planning rules could affect civil rights to build on the applicant's land. Despite the submissions of the Lord Advocate that a decision on a called in application is not a "contestation" on the basis of these and a number of other cases it seems to me plain that this dispute is one which involves the determination of "civil rights" within the meaning of the Convention.

29. The European Court of Human Rights has, however, recognised from the beginning that some administrative law decisions which affect civil rights are taken by ministers answerable to elected bodies. Where there is a two-stage process, i e there is such an administrative decision which is ***314** subject to review by a court, there is a constant line of authority of the European court that regard has to be paid to both stages of the process. Thus even where "jurisdictional organs of professional associations" are set up:

> "None the less, in such circumstances the Convention calls at least 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 subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

See *Albert and Le Compte v Belgium (1983) 5 EHRR 533* , para 29. See also *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1* , *Golder v United Kingdom (1975) 1 EHRR 524* .

30. In *Kaplan v United Kingdom 4 EHRR 64* the Commission noted, at para 150, that

> "it is a feature of the administrative law of all the contracting states that in numerous different fields public authorities are empowered by law to take various forms of action impinging on the private rights of citizens."

The Commission referred to its earlier opinion in *Ringeisen v Austria (No 1) 1 EHRR 455* , para 666, where having referred to a number of examples of state regulation the Commission had stated:

> "These examples, to which numerous others could be added, seem to indicate that it is a normal feature of contemporary administrative law that the rights and obligations of the citizen, even in matters which relate very closely to his private property or his private activities, are determined by some public

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> authority which does not fulfil the conditions laid down in article 6(1) with respect to independent and impartial tribunals."

31. The Commission continued, at para 159, in relation to judicial review: "It is also a common feature of their administrative law, and indeed almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited." And, at para 161:

> "An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

32. In *ISKCON v United Kingdom (1994) 18 EHRR CD 133* (a decision of the Commission) a local authority served an enforcement notice on ISKCON alleging a material change of use of the land. ISKCON appealed against the notice under section 174(2) of the Town and Country Planning Act 1990 and after a report by an inspector the Secretary of State largely confirmed the enforcement notice. The High Court and the Court of Appeal rejected ISKCON's appeal. On a complaint under the Convention the Commission recalled that an appeal under section 289 of the Town and Country Planning Act 1990 lay only on a point of law but it took into account that the local authority could only take proceedings within the limits of section 174 of that Act and that in accordance with its own structure plans and the policy guidance laid down by the Secretary of State ***315** ISKCON could then seek a determination as to whether the legal requirements had been met. The Commission concluded, at p 145:

> "The Commission recalls that the High Court dealt with each of ISKCON's grounds of appeal on its merits, point by point, without ever having to decline jurisdiction. Moreover, it was open to ISKCON to contend in the High Court that findings of fact by the inspector and/or the Secretary of State were unsupported by evidence, as they could have argued that the administrative authorities failed to take into account an actual fact or did take into account an immaterial fact. Finally, the High Court could have interfered with the administrative authorities' decisions if those decisions had been irrational having regard to the facts established by the authorities. It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised: article 6 gives a right to a court that has 'full jurisdiction' (cf *Zumtobel v Austria (1993) 17 EHRR 116* , para 32)."

33. In *Bryan v United Kingdom (1995) 21 EHRR 342* , a case which it is necessary to refer to in some detail since it has been followed in later cases, an applicant was served with an enforcement notice requiring him to demolish buildings erected without planning permission. He complained that the inspector's decision did not satisfy article 6(1) . The court and the Commission described the role of the inspector and the procedures to be followed under the Town and Country Planning Act including both his duty under the Planning Inspectorate Executive Agency Framework Document (1992) of the Secretary of State to exercise independent judgment and not to be or to be seen to be subject to any improper influence and to act fairly but at the same time to have regard to the policies promulgated by the Secretary of State on matters of planning. Both the Commission and the court accepted that there had been a fair hearing before the inspector. Because however the inspector's appointment to hear the appeal could be revoked in a situation where the executive's own policies may be in issue, the inspector did not satisfy the requirements of article 6 that there must be an independent and impartial tribunal.

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34. However having set out the national court's powers of review the court like the majority of the Commission concluded that in that case the High Court's powers of review were sufficient to comply with article 6. The court noted, at para 44, that an appeal to the High Court was only on points of law and therefore

> "not capable of embracing all aspects of the inspector's decision ... In particular, as is not infrequently the case in relation to administrative law appeals in the Council of Europe member states, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited."

35. The court continued, in paras 45-47, that in assessing the sufficiency of the review available before the High Court ***316**

> "45 ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.
>
> "46 In this connection the court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. Further, any alleged shortcomings in relation to these safeguards could have been subject to review by the High Court.
>
> "47 ... The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal"—i e other than his contention that as a matter of fact and degree the buildings could from their appearance and layout be considered to have been designed for the purposes of agriculture—"and his submissions were adequately dealt with point by point. These submissions, as the Commission noted, went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a conservation area'.
>
> "Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational.
>
> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1) . It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.
>
> "The scope of review of the High Court was therefore sufficient to comply with article 6(1)."

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36. The respondents contend that this judgment does not assist the Secretary of State since his decision-making process was not of a quasi-judicial nature; he did not have to exercise an independent judgment, there was no obligation to uphold the principles of openness, fairness and impartiality.

37. In *Chapman v United Kingdom (2001) 33 EHRR 399* the question arose as to the refusal of planning permission and the service of an enforcement notice against Mrs Chapman, who wished to place her caravan on a plot of land in the Green Belt. The refusal of planning permission and the enforcement notice were upheld by the inspector. The court like the majority of the Commission held that there had been no violation of article 6: ***317**

> "124. The court recalls that in the case of *Bryan v United Kingdom 21 EHRR 342* it held that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with article 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."

38. It is also to be noted that in *Howard v United Kingdom (1984) 9 EHRR 116* a submission that the power of appeal under section 23 of the Acquisition of Land Act 1981 did not provide an adequate remedy to challenge a compulsory purchase order so was not an effective remedy within the meaning of article 13 of the Convention was rejected as inadmissible.

39. In *Varey v United Kingdom The Times, 30 January 2001* the Commission concluded on the challenge to a planning decision that the fact that an inspector's recommendation had been rejected by the Secretary of State did not mean that there had been a violation of article 6. The Secretary of State had given reasoned decisions on the basis of facts found by the inspector

> "and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court. Consequently in these circumstances the Commission is satisfied that the power of review of the process by the High Court ensures adequate judicial control of the administrative decisions in issue": para 86.

40. The House has been referred to many other cases some involving other member states where the administrative provisions and the judicial control were in different terms. I do not refer to these only because it seems to me that in the recent cases to which I have referred the court has given an indication of the principle to be followed sufficiently for the disposal of the present case.

41. On the basis which I have accepted that the planning, compulsory purchase and other related decisions do affect civil rights even if the procedures and decisions are of an administrative law nature rather than strictly civil law in nature, the first question is, therefore, whether the decision of the Secretary of State which effectively determined these rights in itself constitutes "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

42. "Independent" and "impartial" may import different concepts but there is clearly a link between them and both must be satisfied. It is not suggested that there is actual bias against particular individuals on the part of the Secretary of State or the officials who report to him or who advise him. But it is contended that the Secretary of State is involved in laying down policy and in taking decisions on planning applications in accordance with that policy. He cannot therefore be seen objectively to be independent or impartial. The position is said to be even more critical when roadworks and compulsory purchases are initiated by the Highways Agency or when as in ***318** the Alconbury case the land involved belongs to another ministry of the Crown.

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43. Before the House the Secretary of State did not contend that in dealing with called in or recovered matters he is acting as an independent tribunal. He accepts that the fact that he makes policy and applies that policy in particular cases is sufficient to prevent him from being an independent tribunal and for the same reasons he is not to be seen as an impartial tribunal for the purposes of article 6 in Part I of Schedule 1 to the 1998 Act.

44. But the many decisions of the European Court of Human Rights make it plain that one does not stop there. A choice was recognised as early as *Albert and Le Compte v Belgium 5 EHRR 533* , para 29 that:

> "either the jurisdictional organs themselves comply with the requirements of article 6(1) , or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

45. These judgments also show that the test whether there is a sufficient jurisdictional control is not a mechanical one. It depends on all the circumstances.

46. On the basis of these decisions it is in my view relevant as a starting point to have regard to such procedural safeguards as do exist in the decision-making process of the Secretary of State even if in the end, because he is applying his policy to which these controls do not apply, he cannot be seen as an impartial and independent tribunal. The fact that an inquiry by an inspector is ordered is important. This gives the applicant and objectors the chance to put forward their views, to call and cross-examine witnesses. The inspector as an experienced professional makes a report, in which he finds the facts and in which he makes his recommendations. He has of course to take account of the policy which has been adopted in, e g, the development plan but he provides an important filter before the Secretary of State takes his decision and it is significant that in some 95% of the type of cases with which the House is concerned the Secretary of State accepts his recommendation. The Divisional Court had evidence that other steps are taken to ensure that the contentions of the applicant and the objectors are adequately considered. Thus the Divisional Court quoted evidence, in para 62 of their judgment, as to the way in which it is sought to ensure that all material considerations needed to reach an informed, fair, unbiased and reasonable decision could be arrived at as quickly as practicable. Decisions were taken by ministers who so far as possible had no connection with the area from which the case came, and in respect of the decision officer who dealt with the case it was said, in para 63, that he

> "works separately from the casework team of which he is nominally a part, does not discuss the merits of the planning decisions before him with an individual either within or without GO East, is not copied into or involved in the preparation of the Regional Planning Guidance ('RPG') or the exercise of any of the Secretary of State's powers of intervention under the Town and Country Planning Act, and only has before him the information which the inspector would have had at the inquiry into the particular appeal or called in application, together with any ***319** representation made after the close of the inquiries (all relevant parties are given the opportunity to comment on any such representations where they are material or raise new matters)."

47. On the decision-making process I do not suggest that one can make artificial distinctions between different branches of a government department. I refer to what was said by Lord Diplock in *Bushell v Secretary of State for the Environment [1981] AC 75* , 95. But there is nothing unusual or sinister in the methods provided for planning decisions to be taken by the executive in the United Kingdom. The European Court of Human Rights has recognised that in many European countries planning decisions are made by elected or appointed officers with a limited judicial review even though the extent of this may vary from state to state. In *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , 399 Lord Greene MR recognised the importance of the administrative stage of the decision:

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> "the raising of the objections to the order, the consideration of the matters so raised and the representations of the local authority and the objectors—is merely a stage in the process of arriving at an administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. A moment's thought will show that any such conception of the relationship must be fallacious, because on the substantive matter, viz, whether the order should be confirmed or not, 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 the interests of the public ... It may well be that, on considering the objections, the minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will overrule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands."

48. The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking particular planning decisions and it is easy to overstate the difference between the application of a policy in decisions taken by the Secretary of State and his inspector. As to the making of policy, Wade & Forsyth, Administrative Law, 8th ed (2000) , p 464 says:

> "It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be ***320** impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy."

As Mr Gregory Jones put it pithily in argument it is not right to say that a policy maker cannot be a decision maker or that the final decision maker cannot be a democratically elected person or body.

49. Accepting this method of proceeding, the question, as the European court has shown, is whether there is a sufficient judicial control to ensure a determination by an independent and impartial tribunal subsequently. The judgments to which I have referred do not require that this should constitute a rehearing on an application by an appeal on the merits. It would be surprising if it had required this in view of the difference of function between the minister exercising his statutory powers, for the policy of which he is answerable to the legislature and ultimately to the electorate, and the court. What is required on the part of the latter is that there should be a sufficient review of the legality of the decisions and of the procedures followed. The common law has developed specific grounds of review of administrative acts and these have been reflected in the statutory provisions for judicial review such as are provided for in the present cases. See as relatively straightforward examples *Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320* and *Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281* .

50. It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps—failing

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to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires—the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control. But none of the judgments before the European Court of Human Rights requires that the court should have "full jurisdiction" to review policy or the overall merits of a planning decision. This approach is reflected in the powers of the European Court of Justice to review executive acts under article 230 of the EC Treaty :

> "It shall for this purpose have jurisdiction in actions brought by a member state, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."

51. The European Court of Justice does of course apply the principle of proportionality when examining such acts and national judges must apply the same principle when dealing with Community law issues. There is a difference between that principle and the approach of the English courts in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223* . But the difference in practice is not as great as is sometimes supposed. ***321** The cautious approach of the European Court of Justice in applying the principle is shown inter alia by the margin of appreciation it accords to the institutions of the Community in making economic assessments. I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act 1998 however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied: see *R v Secretary of State for the Home Department, Ex p Turgut [2001] 1 All ER 719* ; *R (Mahmood) v Secretary of State for the Home Department [2000] 1 WLR 840* .

52. This principle does not go as far as to provide for a complete rehearing on the merits of the decision. Judicial control does not need to go so far. It should not do so unless Parliament specifically authorises it in particular areas.

53. In *R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330* , 344-345 I accepted that the court had jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact. I remain of that view, which finds support in Wade & Forsyth, Administrative Law, 7th ed (1994) , pp 316-318. I said:

> "Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to Wade & Forsyth, Administrative Law, 7th ed (1994) , pp 316-318 in which it is said: 'Mere factual mistake has become a ground of judicial review, described as "misunderstanding or ignorance of an established and relevant fact" [*Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* , 1030] or acting "upon an incorrect basis of fact" ... This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a "wrong factual basis" doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law.' de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed (1995) , p 288: 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.' "

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54. I accordingly hold that, in relation to the judicial review of the Secretary of State's decision in a called in application or a recovered appeal under the planning legislation and to a review of the decisions and orders under the other statutes concerned in the present appeals, there is in *322 principle no violation of article 6 of the European Convention on Human Rights as set out in Part I of Schedule 1 to the Human Rights Act 1998. The scope of review is sufficient to comply with the standards set by the European Court of Human Rights. That is my view even if proportionality and the review of material errors of fact are left out of that account: they do, however, make the case even stronger. It is open to the House to rule on that question of principle at this stage of the procedure in the various cases.

55. I do not consider that the financial interests of the Ministry of Defence automatically precludes a decision on planning grounds by the Secretary of State, or that the communication between government departments and site visits by ministers to which reference has been made in argument in principle vitiate the whole process. If of course specific breaches of the administrative law rules are established, as for example if the financial interests of the government were wrongly taken into account by the Secretary of State, then specific challenges on those grounds may be possible on judicial review.

56. I would accordingly allow the appeals, dismiss the cross-appeals and set aside the declarations of the Divisional Court.

LORD NOLAN

57. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Slynn of Hadley. I gratefully adopt his account of the facts and of the issues raised in these appeals.

58. I too would allow the appeals, and would declare that the impugned decision-making procedures are not in breach of or incompatible with the Human Rights Act 1998. The case is one of great practical and constitutional importance for this country, and of importance also for the development of human rights law both in this country and abroad, and argument has ranged over a wide field. The central question, however, is the first of those raised in the agreed statement of facts and issues, namely whether the impugned procedures "are compatible with article 6(1) of the Convention as applied by the Human Rights Act ... having regard to the existence of statutory rights of appeal to the High Court and of supervision of the procedures by way of judicial review". The alternative to these procedures would effectively involve the removal from the appellant Secretary of State of his discretion over the grant of planning permission and other matters related to the ownership and enjoyment of land in the rare and often controversial cases in which he exercises it at present, and its vesting in some other person or body which constitutes "an independent and impartial tribunal" for the purposes of article 6(1). The precise nature of this alternative entity was not formulated by the respondents, but it would presumably be modelled on the Planning Inspectorate either in its present or in some modified form. Understandable, but, I think, also significant, was the absence of any suggestion that the discretion should be vested in the courts.

59. My Lords, this brings me at once to my reasons for concluding that the decision of the Divisional Court cannot be allowed to stand. They can be shortly stated.

60. The first, which reflects the obvious unsuitability of the courts as the arbiters in planning and related matters, is that the decision to be made, as explained by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , *323 399, is an administrative and not a judicial decision. In the relatively small and populous island which we occupy, the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic.

61. Electoral accountability alone is, of course, plainly insufficient to satisfy the rule of law. Are then the rights of the subject in planning and related matters adequately protected by the statutory provisions for appeal to the courts and by the process of judicial review? It is said that these remedies fail to meet the article 6(1) criterion because they do not permit a review of the decision of the Secretary of State on its merits. If this criticism is limited to the absence of a review of the decision on its *planning* merits it is indisputable. But a review of the merits of the *decision-making process* is fundamental to the courts' jurisdiction. The power of review may even extend to a decision on a question of fact. As long ago as 1955 your Lordships' House, in *Edwards*

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v Bairstow [1956] AC 14 , a case in which an appeal (from general commissioners of income tax) could only be brought on a question of law, upheld the right and duty of the appellate court to reverse a finding of fact which had no justifiable basis.

62. The reversal of a finding of fact in the field of planning would no doubt be highly unusual. I mention *Edwards v Bairstow* simply to illustrate the generosity with which the courts, including your Lordships' House, have interpreted their powers to review questions of law. A similarly broad and generous approach has been adopted in the development of judicial review extending as it does not only to points of law in the strict and narrow sense but to such matters as the rationality of the decision and the fairness of the decision-making process. One possibility canvassed in argument was that the powers of review as at present exercised by the courts might be enlarged in order to accommodate the requirements of the Human Rights Act 1998. For my part, at least in the context of the present case, I see no need for that.

63. My Lords, I have found it reassuring to read, in the judgments of the European Court of Human Rights and of the Commission in the cases of *Bryan 21 EHRR 342* , *ISKCON 8 March 1994* , *Chapman (2001) 33 EHRR 399* and *Varey 27 October 1999* the expression of views which to my mind strongly support the contentions of the Secretary of State. If, as I understand to be the case, your Lordships are unanimous in considering that the appeals should be allowed, I trust that the decision of your Lordships' House will be seen, not as in any way inconsistent with those decisions, but on the contrary as a contribution to the growth of Convention jurisprudence.

64. I would only add that the particular grounds of objection taken by some respondents to the role of the Secretary of State, such as the objection in *Alconbury* based on the ground of his having a financial interest in the matter, might if appropriate be raised as objections to the ultimate decision itself. They are insufficient to disqualify him in limine. ***324**

LORD HOFFMANN

The issue

65. My Lords, the issue in these three appeals is whether it is compatible with the Human Rights Act 1998 for Parliament to confer upon the Secretary of State the power to make decisions which affect people's rights to the ownership, use or enjoyment of land. The Divisional Court has decided that article 6 of the European Convention requires such decisions to be made by independent and impartial tribunals. This would mean radical amendment to the system by which such decisions have been made for many years. In view of the importance of the case, your Lordships have given leave for an appeal to be brought directly from the Divisional Court.

The facts

66. Although the principle must be of general application, the contexts in which the question has arisen in these appeals are planning, highway improvement and compulsory purchase. In the first appeal ("the *Alconbury* case"), a company has applied for planning permission to construct a distribution centre of national significance on a disused American air base near Huntingdon. It could generate 7,000 new jobs but would obviously affect the lives of many people living in the neighbourhood. In the second appeal ("the *Holding & Barnes* case"), the respondents have applied for planning permission to use land at Canvey Island for the storage and sale of wrecked cars. Again, the activity will generate employment but the site is close to some gas storage installations and the Health and Safety Executive thinks that this would create a danger to people living in the area. In the third appeal ("the *Legal and General* case"), the respondent owns land near the interchange between the M4 motorway and the A34 trunk road at Newbury. The Highways Agency, a branch of the department of the Environment, Transport and the Regions, has promoted a road improvement scheme which would involve taking the respondent's land.

67. In each of these cases the statutory decision maker is the Secretary of State. In the first two, this is by virtue of his exercise of a statutory discretion. In the *Alconbury* case, the application for planning permission has been refused by the Huntingdonshire District Council and the developer has appealed to the Secretary of State. The appeal could have been determined under Schedule 6 to the Town and Country Planning Act 1990 by an inspector appointed to conduct a public inquiry, but the Secretary of State has exercised his discretion under paragraph 3 of the Schedule to "recover" the appeal and decide it himself. In the *Holding & Barnes* case, the local planning authority was minded to grant permission but the Secretary of State has exercised his power under section 77 of the 1990 Act to "call in" the application and decide it himself. In the *Legal and General* case, the Secretary of State is the only statutory decision maker.

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68. All three cases involve general social and economic issues. They concern the rights of individuals to use, enjoy and own their land. But the number of persons potentially interested is very large and the decisions involve the consideration of questions of general welfare, such as the national or local economy, the preservation of the environment, the public safety, the convenience of the road network, all of which transcend the interests of any particular individual. **325*

Democracy and the rule of law

69. In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example: Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the general or special commissioners or the courts. On the other hand, sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.

70. There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

71. All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of the public interest. This is reflected in the terms of article 1 of Protocol 1 to the Convention :

> "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."

72. Thus, under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest so requires. And, under the second paragraph, the use of property may be restricted without compensation on similar grounds. Importantly, the question of what the public interest requires for the purpose of article 1 of the First Protocol can, and in my opinion should, be determined according to the democratic **326* principle—by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.

73. There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in article 1 of

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the First Protocol that a taking of property must be "subject to the conditions provided for by law". The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament. But this is not the occasion upon which to discuss the limits of judicial review. The only issue in this case is whether the Secretary of State is disqualified as a decision maker because he will give effect to policies with which, ex hypothesi, the courts will not interfere.

The question of principle

74. My Lords, these basic principles are the background to the interpretation of article 6(1) : "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." 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. Such decisions may nevertheless be determinations of an individual's civil rights (such as access to his child: compare *W v United Kingdom (1987) 10 EHRR 29*) and should be made by independent and impartial tribunals. 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.

75. The distinction between policy decisions and determinations of right was put with great clarity by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , 398-399, when speaking of the decision to confirm a compulsory purchase order:

> "the functions of the minister in carrying these provisions into operation are fundamentally administrative ... subject only to the qualification that, at a particular stage and for a particular and limited purpose, there is superimposed on his administrative character a character which is loosely described as 'quasi-judicial'. The language ***327*** which has always been construed as giving rise to the obligations, whatever they may be, implied in the words 'quasi-judicial' is to be found in the duty to consider the objections ... The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz, the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue ... on the substantive matter, viz, whether the order should be confirmed or not, 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 the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect of the public interest that the discretion that Parliament has given to the minister comes into operation ... His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts."

76. In principle, therefore, and apart from authority, I would say that article 6(1) conferred the right to an independent and impartial tribunal to decide whether a policy decision by an administrator such as the Secretary of State was lawful but not to a tribunal which could substitute its own view of what the public interest required. However, section 2(1) of the Human Rights Act 1998 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 European Court of Human Rights ("the European court") and the opinions of the Commission. The House is not bound by the decisions of the European court and, if I thought that the Divisional Court was right to hold that

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they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed. But in my opinion the Divisional Court misunderstood the European jurisprudence. Although the route followed by the European court has been a tortuous one and some of its statements require interpretation, I hope to demonstrate that it has never attempted to undermine the principle that policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts.

The European jurisprudence

77. The main European authorities are four decisions, two of the Commission and two of the European court, which deal specifically with the English planning system. But before I analyse these important cases, I must give a more general account of the development of the jurisprudence on the right to an independent and impartial tribunal.

78. As a matter of history it seems likely that the phrase "civil rights and obligations" was intended by the framers of the Convention to refer to rights created by private rather than by public law. In other words, it excluded even the right to a decision as to whether a public body had acted lawfully, ***328** which English law, with that lack of a clear distinction between public and private law which was noted by Dicey, would treat as part of the civil rights of the individual. Sir Vincent Evans, in his dissenting judgment in *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1* , 36, said that an intention that the words should bear this narrow meaning appeared from the negotiating history of the Convention. In his dissenting judgment in *König v Federal Republic of Germany (1978) 2 EHRR 170* , Judge Matscher said that the primary purpose of article 6(1) was, by way of reaction against arbitrary punishments under the Third Reich, to establish the right to an independent court in criminal proceedings. The framers extended that concept to cases which, according to the systems of the majority of contracting states, fell within the jurisdiction of the ordinary courts of civil law. But there was no intention to apply article 6(1) to public law, which was on the continent a matter for the administrative courts.

79. These views of the meaning of "civil rights and obligations" are only of historical interest, because, as we shall see, the European court has not restricted article 6(1) to the determination of rights in private law. The probable original meaning, which Judge Wiarda said in *König's* case, at p 205, was the "classical meaning" of the term "civil rights" in a civilian system of law, is nevertheless important. It explains the process of reasoning, unfamiliar to an English lawyer, by which the European court has arrived at the conclusion that article 6(1) can have application to administrative decisions. The court has not simply said, as I have suggested one might say in English law, that one can have a "civil right" to a lawful decision by an administrator. Instead, the court has accepted that "civil rights" means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law.

80. The seminal case is *Ringeisen v Austria (No 1) (1971) 1 EHRR 455* . This concerned an Austrian statute which required transfers of agricultural land to be approved by a District Land Transactions Commission with a right of appeal to a Regional Commission. In the absence of approval, the contract of sale was void. The purpose of the law was to keep agricultural land in the hands of farmers of small and medium holdings and the District Commission was required to refuse consent to a transfer which appeared to violate this policy. This was a classic regulatory power exercisable by an administrative body. The court nevertheless held that article 6(1) was applicable to its decision on the ground that it was "decisive" for the enforceability of the private law contract for the sale of land. Thus a decision on a question of public law by an administrative body could attract article 6(1) by virtue of its effect on private law rights. On the facts, the court held that article 6(1) had been satisfied because the Regional Commission was an independent and impartial tribunal.

81. The full implications of *Ringeisen* were not examined by the court until some years later. It led in *König v Germany 2 EHRR 170* to a sharp disagreement between those members of the court who saw it as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals and those who regarded it as a potential Pandora's box and wanted to confine it as narrowly as possible. Dr König was a surgeon charged with unprofessional conduct before a specialist medical tribunal attached to the Frankfurt Administrative Court. It withdrew his right to ***329** practice and run a clinic. He appealed to an administrative Court of Appeal and there followed lengthy and complicated proceedings. His complaint to the European court under article 6(1) was that he had been denied the right to a decision "within a reasonable time". But this raised the question of whether, in principle, article 6(1) applied to disciplinary proceedings before an administrative court. By a majority, the court held that it did. On the *Ringeisen* principle, it affected private law rights such as his goodwill and his right to sell his services to members of the public.

82. Judge Matscher delivered a powerful dissent, saying that it was unwise to try to apply the pure judicial model of article 6(1) to the decisions of administrative or domestic tribunals. They might share some characteristics with courts (e g requirements

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of fairness) but in other respects they were different. For example, one could not apply the imperative of a public hearing to a professional disciplinary body. A private hearing might be more in the public interest. If article 6(1) was going to be applied to administrative law, it would have to be substantially modified.

83. The majority view which prevailed in *König's* case has enabled the court to develop a jurisprudence by which it has imposed a requirement that all administrative decisions should be subject to some form of judicial review. Sweden, for example, has been held to be in breach of article 6(1) on a number of occasions because it lacked any procedure by which a government decision could be challenged in the courts: see *Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35* ; *Bodén v Sweden (1987) 10 EHRR 367* ; *Tre Traktörer AB v Sweden (1989) 13 EHRR 309* ; *Allan Jacobsson v Sweden (1989) 12 EHRR 56* ; *Pudas v Sweden (1987) 10 EHRR 380* ; *Zander v Sweden(1993) 18 EHRR 175* ; *Skärby v Sweden (1990) 13 EHRR 90* . In *Benthem v The Netherlands (1985) 8 EHRR 1* the Netherlands was similarly held to be in breach because in constitutional theory the administrative court to which an appeal lay only tendered advice to the Crown which it was entitled to reject.

84. But the dissent of Judge Matscher in *König's case 2 EHRR 170* has been vindicated in the sense that the application of article 6 to administrative decisions has required substantial modification of the full judicial model. The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision. But the European court, in deciding the *extent* to which such decisions should be open to review, has been in practice fairly circumspect. Its jurisprudence on this point has however been complicated by the apparent breadth of some statements in two cases concerning medical disciplinary proceedings in Belgium.

85. In *Le Compte, Van Leuven and De Meyere v Belgium 4 EHRR 1* three doctors who had been suspended by a disciplinary tribunal sitting in private claimed that their right to a public hearing under article 6 had been infringed. They had a right of appeal to the Cour de Cassation, which did sit in public, but that was only on a point of law. The European court said, at para 51, that this was not good enough:

> "article 6 draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' and the right to a judicial determination of a dispute cover ***330*** questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault. It follows that article 6(1) was not satisfied ..."

86. In the later case of *Albert and Le Compte v Belgium (1983) 5 EHRR 533* , in which a similar situation arose, the court said, at paragraph 29, that although disciplinary jurisdiction could be conferred upon professional bodies which did not meet the requirements of article 6(1) (e g because they were not "established by law" or did not sit in public):

> "None the less, in such circumstances the Convention calls at least 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 subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

87. The reference to "full jurisdiction" has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be reviewable on its merits by an independent and impartial tribunal. It was certainly so relied upon by counsel for the respondents in these appeals. But subsequent European authority shows that "full jurisdiction" does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires.

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88. This emerges most clearly from the decisions on the English planning cases, which I shall analyse later in some detail. But the leading European authority for the proposition that it is not necessary to have a review of the merits of a policy decision is *Zumtobel v Austria (1993) 17 EHRR 116* . The Zumtobel partnership objected to the compulsory purchase of their farming land to build the L52 by-pass road in the Austrian Vorarlberg. The appropriate government committee heard their objections but confirmed the order. They appealed to an administrative court, which said that the government had taken proper matters into account and that it was not entitled to substitute its decision for that of the administrative authority. They complained to the Commission and the European court that, as the administrative court could not "independently assess the merits and the facts of the case", it did not have "full jurisdiction" within the meaning of the *Albert and Le Compte* formula. The European court said, at para 32, that its jurisdiction was sufficient in the circumstances of the case, "Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership."

Enforcement proceedings in English law

89. This background should make it easier to follow the reasoning of the Commission and the European court in the four cases in which they have specifically considered the English planning system. But before I examine these cases, it is necessary to say something more about certain aspects of English planning law. Since the appointed day under the Town and Country Planning Act 1947 (1 July 1948), planning permission has been required in ***331*** respect of any development of land: see section 12(1) of the 1947 Act and now section 57(1) of the 1990 Act . Development without planning permission is a "breach of planning control": see section 171A of the 1990 Act as inserted by section 4 of the Planning and Compensation Act 1991 . But a breach of planning control does not in itself give rise to any criminal or civil liability. It is necessary for the local planning authority to take enforcement proceedings in accordance with Part VII of the 1990 Act.

90. In applying the distinction between policy decisions and the determination of rights, one would expect that, while the question of whether planning permission should be granted was a matter of policy, the question of whether a breach of planning control had taken place would involve a determination of right. It is no different in principle from a determination as to whether a person has contravened any other rule. No questions of policy are involved in the decision as to whether there has been a breach of planning control or not. So prima facie one would think that enforcement proceedings should fall within the category of decisions in which one was entitled to the judgment of an independent and impartial tribunal.

91. This was the view of Parliament when it enacted the 1947 Act. Section 23(1) provided that, if it appeared to a local planning authority that there had been a breach of planning control, it could within a period of four years of the breach serve an "enforcement notice" upon the owner and occupier of the land. The notice could require him to restore the land to its previous condition or discontinue any use of the land. The notice took effect after a specified period of not less than 28 days and, if the owner nevertheless failed to restore the land to its previous condition, the local planning authority could enter, take the necessary steps and require him to pay the cost. If he did not comply with a notice requiring him to discontinue a use of land, he could be prosecuted before the magistrates and fined: see section 24(1) and (3) .

92. These enforcement provisions included a right for a person "aggrieved" by an enforcement notice to appeal to the magistrates on various grounds, including the grounds that planning permission had been granted or that no planning permission was required. There was a further right of appeal to quarter sessions. In addition, a person prosecuted for failure to discontinue a use in accordance with an enforcement notice could challenge the validity of the notice before the criminal court on any ground whatever, including those upon which he could have appealed to the magistrates when it was served upon him: *Francis v Yiewsley and West Drayton Urban District Council [1958] 1 QB 478* .

93. These provisions therefore made the question of whether there had been a breach of planning control entirely a matter for judicial decision. In addition, a person served with an enforcement notice could apply to the local planning authority for permission to retain or continue the offending structures or works, even if he had just applied and been refused. If he was refused (or again refused) by the local planning authority, he could appeal to the minister. An appeal against an enforcement notice (or resistance to a prosecution) proceeded in parallel with the application for planning permission, even though the quashing of the enforcement notice would make the planning application unnecessary and the grant of planning permission would invalidate the enforcement notice.

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94. Enforcement of planning control under the 1947 Act was therefore extremely complicated, time-consuming and expensive. As a result, the whole system was radically recast by Part II of the Caravan Sites and Control of Development Act 1960 . The appeal to the magistrates was abolished and instead, by section 33 , a person served with an enforcement notice was given a right of appeal to the minister on a number of grounds. These included:

> "(a) that permission ought to be granted ... for the development to which the enforcement notice relates ... (b) that permission has been granted ... (c) that no permission was required ... (d) that what is assumed in the enforcement notice to be development did not constitute or involve development ... (e) that the enforcement notice was not served on the owner or occupier of the land within the relevant period of four years"

and some other grounds. Section 33(8) then provided that the validity of an enforcement notice "shall not be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b), (c), (d) or (e) ... except by way of an appeal under this Part of this Act". Section 34(1) gave a right of appeal from the minister's decision to the High Court, but only on a point of law. This right of appeal is now contained in section 289 of the 1990 Act .

95. My Lords, I draw attention to the significant changes made by the 1960 Act. First, it withdrew from the local planning authority the jurisdiction to deal with a planning application made in response to an enforcement notice. All such applications or deemed applications were to be treated as if they had been called in by the minister: section 33(2) . Secondly, it withdrew the right to question an enforcement notice before a court on the grounds that there had in fact been no breach of planning control, because permission (or a deemed permission under the General Development Order) had been granted or because no permission was required. It transferred the right to decide these questions to the minister. Thirdly, it removed the right of a defendant prosecuted for failure to comply with an enforcement notice to challenge the validity of the enforcement notice on certain of the grounds which could have been raised by way of appeal to the minister. For present purposes, the second and third changes are the most important because they effectively vested in the minister, subject only to appeal on a point of law, the exclusive right to decide the question of whether there had been a breach of planning control for which the owner was ultimately, in the event of non-compliance with the notice, liable to criminal sanctions. The changes also meant that the minister could now have the dual function of deciding in the same proceedings the policy question of whether planning permission should be granted and the factual question of whether there had been a breach of planning control.

96. There have been further changes in the enforcement system since 1960 but the essential features, as now contained in the 1990 Act, remain the same. The grounds for challenging the validity of the enforcement notice by an appeal to the Secretary of State under section 174 have been somewhat extended and the grounds for challenge in any other proceedings have been further restricted: see *R v Wicks [1998] AC 92* .

97. The procedure for an appeal against an enforcement notice is prescribed by section 175 of the 1990 Act and Part III of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991 ***333*** (SI 1991/2804, as amended by SI 1992/1492). The appellant and the local planning authority have the right to appear and be heard before an inspector, who makes his report and recommendations to the Secretary of State. If the Secretary of State is minded to disagree with the inspector on any material question of fact, he must notify the parties and give them the opportunity to make representations. Schedule 6 to the 1990 Act, which gives the Secretary of State power to confer power upon inspectors to hear and determine appeals (subject to recovery under paragraph 3), also applies to enforcement notice appeals.

European cases on the English planning system

98. My Lords, this background enables me to discuss the four cases to which your Lordships were referred in which the European court or the Commission have considered the English planning system. The first in time is *ISKCON v United Kingdom (1994) 18 EHRR CD 133* , a decision of the Commission on admissibility. ISKCON was an Hindu religious organisation which owned a large manor house at Letchmore Heath in the Hertfordshire Green Belt near Watford. It entered into a planning agreement with the local planning authority by which it agreed not to allow more than 1,000 visitors on any one day without the consent of the authority, which was given for six festival days in the year. When an average of 1,500 people started coming every Sunday, the planning authority served an enforcement notice. ISKCON appealed to the Secretary of State on ground (a) (that planning

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permission should be granted) and other grounds which were later dropped. The inspector conducting the inquiry considered that the special needs of the organisation did not outweigh the policy of preserving the Green Belt and recommended that the appeal be dismissed. The Secretary of State accepted the recommendation. ISKCON appealed to the High Court under what is now section 289 of the 1990 Act . The points of law relied upon were that the inspector and Secretary of State failed to have regard to relevant considerations and had been under a misapprehension about various facts. The judge dismissed the appeal, saying that the Secretary of State "was entitled to regard the inspector's conclusions as firmly founded".

99. ISKCON's complaint to the Commission alleged the breach of various articles of the Convention including article 6(1) . The Commission assumed that the Secretary of State was an "administrative body" who did not himself comply with article 6 but held that the right of appeal on a point of law was sufficient. It recited the formula from *Albert and Le Compte's case 5 EHRR 533* , para 29 which required an appeal to "judicial bodies with full jurisdiction", went on to describe the principles of judicial review by which the English High Court decided whether the Secretary of State had erred in law and concluded that this jurisdiction was wide enough to satisfy the *Albert and Le Compte* formula. It added, at p 145:

> "It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised: article 6 gives a right to a court that has 'full jurisdiction' (cf *Zumtobel v Austria 17 EHRR 116* , para 32)."

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100. *ISKCON's* case is thus a decision that, at least when the ground of appeal against an enforcement notice is the policy ("expediency") question of whether planning permission should be granted, a decision by the Secretary of State subject to an appeal to the High Court satisfies article 6(1). It is fair to say that it does not address the question of whether this would also do for a decision on the factual question of whether there has been a breach of planning control. But the principle is sufficient for the purposes of the two planning appeals before your Lordships, which are both concerned solely with the question of whether planning permission should be granted.

101. The next case, and the most important of the four, is *Bryan v United Kingdom (1995) 21 EHRR 342* . Mr Bryan was a farmer at Warrington in Cheshire. He built two brick buildings on land in a conservation area without planning permission and the planning authority served an enforcement notice which required them to be demolished. He appealed to the Secretary of State on grounds (a) (that planning permission should be granted), (b) (that there had been no breach of planning control) and two other grounds. The Secretary of State appointed an inspector with power under Schedule 6 to hear and determine the appeal. He rejected the appeal on ground (a) because the buildings did not enhance or preserve the appearance of the conservation area. On ground (b), Mr Bryan contended that the buildings were "designed for the purpose of agriculture" and that planning permission for them was deemed to have been granted under article 3 of the Town and Country Planning General Development Order 1988 (SI 1988/1813). The planning authority said that they were not designed for the purpose of agriculture and drew attention to the fact that they looked like detached houses with Georgian windows and other domestic features. The inspector said that the question was one of fact and degree. He decided that the planning authority's view was correct and dismissed the appeal.

102. Mr Bryan appealed to the High Court under section 289 . His notice of motion challenged the inspector's finding on ground (b) but the point was abandoned on the advice of counsel that, being a matter of fact and degree, it raised no arguable question of law. On ground (a) it was alleged that the inspector had failed to take into account a relevant factor, namely that Mr Bryan was entitled to erect agricultural buildings of much the same size and appearance within the conservation area. The judge said that this was a matter of planning judgment for the inspector and dismissed the appeal.

103. The complaint to the Commission was on the ground that these procedures did not satisfy article 6(1) . The Commission held Mr Bryan's complaint admissible but decided, by a majority of 11 to 5, that there had been no breach of article 6(1). In order to understand the issues, it is convenient to start with the opinion of the minority, at p 356. They were entirely concerned with whether article 6(1) had been satisfied in relation to the question of whether the building "was indeed a barn designed and intended for agricultural use". This, they emphasised, was not a question of "expediency":

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> "In the *Zumtobel case 17 EHRR 110* , para 32 the European Court of Human Rights referred to the 'respect which must be accorded to decisions taken by administrative authorities on grounds of expediency'. ***335*** Whilst questions of expediency play a large role in matters relating to, for example, the public interest involved if a particular development is permitted, the present case concerns, at least in part, the fundamental factual issue of whether the building erected by the applicant was, or was not, designed for the purposes of agriculture and so had deemed planning permission. This factual issue was in dispute and in the circumstances of this case the High Court judge was not able to provide a 'determination' of it. For us, this deprived the applicant of access to a 'tribunal' to which article 6(1) of the Convention entitled him."

104. There is, if I may respectfully say so, considerable force in the reasoning of the minority and, as the history shows, it accords with the view which Parliament took of the appropriate enforcement procedures in 1947. But the purity of the 1947 system had turned out in practice to be unworkable and it therefore had to be replaced with the impure system which we have today. For present purposes, the important point to notice is that the minority had no difficulty in accepting limited judicial review of the "expediency" questions involved in deciding whether planning permission should be granted. There is nothing to suggest that they would have disagreed with the reasoning or decision in *ISKCON's* case.

105. The majority said, at para 46, that no complaint could be made about the limited right of appeal on ground (a) because it called for "respect on the grounds of expediency" and referred to *Zumtobel's* case. As for the ground (b) appeal, they accepted that it "would have raised matters of a more factual nature" but said that, as the point had not been argued, it was impossible to say whether judicial review would have been inadequate.

106. Both the majority and minority judgments proceeded upon the assumption that the inspector was not an "independent and impartial tribunal" and that the question was whether the High Court's jurisdiction under section 289 was a sufficiently "full jurisdiction" to satisfy article 6(1) . But the opinion of Mr Nicolas Bratza, concurring with the majority, needs some attention because it introduced a new and original element into the reasoning, which, as we shall see, influenced the judgment of the European court.

107. Mr Bratza started, at p 353, by saying that the only ground of appeal which Mr Bryan had pursued in the High Court, namely (a), "related to matters of planning policy" and that, in accordance with the reasoning in *Zumtobel's* case, article 6 did not require "that a court should have the power to substitute its view for that of the administrative authorities on matters of planning policy or 'expediency' ". On this point, therefore, all members of the Commission were of the same mind. Mr Bratza then turned his attention to ground (b) and said that, in his view, the power of the High Court under section 289 was sufficient even for the purpose of fact-finding to amount to "full jurisdiction". He said, at p 354:

> "It appears to me that the requirement that a court or tribunal should have 'full jurisdiction' cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned. Whether the power of judicial review is sufficiently wide to satisfy the requirements of article 6 must in my view depend on a ***336*** number of considerations, including the subject matter of the dispute, the nature of the decision of the administrative authorities which is in question, the procedure, if any, which exists for review of the decision by a person or body acting independently of the authority concerned and the scope of that power of review."

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108. Mr Bratza pointed out, at pp 354-355, that an inspector hearing an appeal under section 174 acted in a quasi-judicial capacity and in accordance with prescribed procedures. Both parties were entitled to be heard and he gave a reasoned decision. It was true that, for the purpose of applying policy, the inspectors could not be said to be independent. They were chosen from the salaried staff of the Planning Inspectorate, "which serves the Secretary of State in the furtherance of his policies". But for the purposes of finding and evaluating the facts, he was sufficiently independent:

> "there is ... nothing to suggest that, in finding the primary facts and in drawing conclusions and inferences from those facts, an inspector acts anything other than independently, in the sense that he is in no sense connected with the parties to the dispute or subject to their influence or control; his findings and conclusions are based exclusively on the evidence and submissions before him."

109. Mr Bratza then discussed the breadth of the High Court's judicial review powers and said that this power of review, "combined with the statutory procedure for appealing against an enforcement notice", was sufficient to meet the requirement of "full jurisdiction" inherent in article 6(1) .

110. Mr Bratza's particular insight, if I may respectfully say so, was to see that a tribunal may be more or less independent, depending upon the question it is being called upon to decide. On matters of policy, the inspector was no more independent than the Secretary of State himself. But this was a matter on which independence was unnecessary—indeed, on democratic principles, undesirable—and in which the power of judicial review, paying full respect to the views of the inspector or Secretary of State on questions of policy or expediency, was sufficient to satisfy article 6(1). On the other hand, in deciding the questions of primary fact or fact and degree which arose in enforcement notice appeals, the inspector was no mere bureaucrat. He was an expert tribunal acting in a quasi-judicial manner and therefore sufficiently independent to make it unnecessary that the High Court should have a broad jurisdiction to review his decisions on questions of fact.

111. I have spent some time on Mr Bratza's opinion because I think it is clear that it influenced and illuminates the reasoning of the European court. The court said, at para 38, that although the inspector was required to decide the appeal "in a quasi-judicial, independent and impartial, as well as fair, manner" he was still the creature of the Secretary of State, whose own policies were in issue and who could remove him at any time. Therefore:

> "the review by the inspector does not of itself satisfy the requirements of article 6 of the Convention , despite the existence of various safeguards customarily associated with an 'independent and impartial tribunal'."

112. The court noted, at para 44, that:

> "the appeal to the High Court, being on 'points of law', was not capable of embracing all aspects of the inspector's decision ... In *337 particular, as is not infrequently the case in relation to administrative law appeals in Council of Europe member states, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited."

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113. The question was whether this limited jurisdiction was "full jurisdiction" for the purposes of the *Albert and Le Compte* formula *5 EHRR 533* . The court *considered* grounds (a) and (b) separately. On ground (a) it agreed, at paragraph 47, with the Commission that the applicant's submissions "went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and in a conservation area' ". Judicial review was therefore, on the principle of *Zumtobel's case 17 EHRR 116* , a sufficiently full jurisdiction.

114. On ground (b), the European court noted what, in para 46, it described as:

> "the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality."

115. It went on to say, at para 47, that, if Mr Bryan had pursued his appeal on ground (b), the High Court, while not being able to substitute its own findings of fact, "had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational". This was enough to satisfy article 6 :

> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states."

116. My Lords, I have discussed *Bryan's* case at length because the Divisional Court placed heavy reliance upon it and, in my view, seriously misunderstood it. The Divisional Court treated it as holding that, *whatever the issues* , the "safeguards" which the court enumerated in, para 46, as attaching to the functions of the inspectors were necessary before the existence of an appeal on a point of law or judicial review would satisfy article 6. But this is the very opposite of what the court was at pains to emphasise. It said, in para 45, in language echoing that of Mr Bratza's opinion:

> "in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

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117. If, therefore, the question is one of policy or expediency, the "safeguards" are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the "safeguards" but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been

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a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.

118. My Lords, I can deal much more briefly with the other two cases. In *Varey v United Kingdom The Times, 30 January 2001* the Commission *considered* a complaint by gipsies against whom enforcement proceedings had been taken for stationing caravans on land without planning permission. They had applied three times for permission. On the first occasion, an appeal to the Secretary of State was dismissed. On the second occasion, the inspector said that there had been a change in circumstances and recommended that permission be granted but the Secretary of State disagreed. He said that the new circumstances were insufficient to justify overriding the Green Belt policy. On the third occasion, the inspector again recommended that permission be granted and for similar reasons the Secretary of State rejected his recommendation and dismissed the appeal. In no case did the applicants appeal to the High Court.

119. The Commission, following the *Bryan case 21 EHRR 342* , said that there had been no violation of article 6. The High Court's jurisdiction on appeal from the Secretary of State was sufficient. So the case adds little to *Bryan* itself. I would only comment that I find puzzling a remark of the Commission, at para 78, that:

> "the procedural protection afforded to the applicants' interests by the process of a public inquiry before a planning inspector, who had the benefit of inspecting the site and of receiving written and oral evidence and representations, must be regarded as considerably diminished by the rejection on two occasions by the Secretary of State of the inspector's recommendations."

120. The Secretary of State does not appear to have differed from the inspector on any finding of fact or evaluation of the facts. He disagreed because he did not think that the inspector had given sufficient weight to the importance of maintaining the Green Belt. This is a pure question of administrative policy or expediency. It has nothing to do with the issues on which it is essential for the inspector to be judicial and impartial. However, despite these remarks, the Commission concluded that, even though the safeguards had been diminished, the procedure still complied with article 6 .

121. Finally there is *Chapman v United Kingdom (2001) 33 EHRR 399* , a decision of the Grand Chamber of the European court. This was another case of enforcement proceedings against a gipsy. Her appeal on ground (a) was dismissed by an inspector exercising the power to determine the appeal under Schedule 6. She did not appeal to the High Court and ***339** complained that the High Court would not have been entitled to determine the merits of her claim that she should have planning permission. The court stated briefly that, following the *Bryan* case, the scope of judicial review was sufficient to satisfy article 6.

122. My Lords, I conclude from this examination of the European cases on our planning law that, despite some understandable doubts on the part of some members of the Commission about the propriety of having the question of whether there has been a breach of planning control determined by anyone other than an independent and impartial tribunal, even this aspect of our planning system has survived scrutiny. As for decisions on questions of policy or expediency such as arise in these appeals, whether made by an inspector or the Secretary of State, there has never been a single voice in the Commission or the European court to suggest that our provisions for judicial review are inadequate to satisfy article 6.

The judgment of the Divisional Court

123. My Lords, I must now examine the reasoning of the Divisional Court. It considered the way in which decisions are made by the Secretary of State and came to the conclusion that he was not independent or impartial. Even though the department has elaborate procedures to ensure that the decision-making process is not contaminated by reliance on facts which had not been found by the inspector or fairly put to the parties, the decision is bound to be influenced by the departmental view on policy. Mr Kingston, who appeared for the Huntingdonshire District Council, spent a good deal of time making this proposition good by examining the documents showing how the department was, at various levels, involved in the development of policy for Alconbury. But this was entirely what I would have expected. It is the business of the Secretary of State, aided by his civil servants, to develop national planning policies and co-ordinate local policies. These policies are not airy abstractions. They are

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intended to be applied to actual cases. It would be absurd for the Secretary of State, in arriving at a decision in a particular case, to ignore his policies and start with a completely open mind.

124. For these reasons, the Divisional Court said that the Secretary of State was not impartial in the manner required by article 6: "What is objectionable in terms of article 6 is that he should be the judge in his own cause where his policy is in play." (See para 86.) I do not disagree with the conclusion that the Secretary of State is not an independent and impartial tribunal. He does not claim to be. But the question is not whether he should be a judge in his own cause. It is whether he should be a judge at all.

125. The Divisional Court then considered whether the requirements of article 6 were satisfied by the right to have an application for judicial review determined by a court. This was rightly described by Tuckey LJ as the crucial question. The answer he gave was that the procedure by which the Secretary of State arrived at his decision did not contain "sufficient safeguards to justify the High Court's restricted power of review". The Secretary of State, having complied with the requirements of natural justice, was "free to make his own decision" and to take account of legal and policy guidance and recommendations from within the department "which are not seen by the parties". Therefore, said Tuckey LJ, at para 95: ***340**

> "In 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 or anyone approaching this, but by someone who is obviously not independent and impartial."

126. There are three strands of reasoning here. First, there is the fact that the parties are not privy to the processes of decision making which go on within the department. These contain, on the one hand, elaborate precautions to ensure that the decision maker does not take into account any factual matters which have not been found by the inspector at the inquiry or put to the parties and, on the other hand, free communication within the department on questions of law and policy, with a view to preparing a recommendation for submission to the Secretary of State or one of the junior ministers to whom he has delegated the decision. The latter is standard civil service procedure and takes place, as Lord Greene MR said in *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , after the Secretary of State's quasi-judicial function has been concluded and when he is acting in his capacity as an administrator making a public policy decision. The constitutional relationship between the Secretary of State and his civil servants was analysed by Lord Diplock in *Bushell v Secretary of State for the Environment [1981] AC 75* , 95:

> "To treat the 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 intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head."

127. Thus the process of consultation within the department is simply the Secretary of State advising himself. If the Secretary of State was claiming to be, in his own person, an independent and impartial tribunal, the fact that he received confidential advice and recommendations from civil servants in his department might throw some doubt upon his claim. But, since he not only admits but avers that his constitutional role is to formulate and apply government policy, the fact that both formulation and application require the advice and assistance of his civil servants is no more than one would expect.

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128. The second strand concerns the facts. These are found by the inspector and must be accepted by the Secretary of State unless he has first notified the parties and given them an opportunity to make representations in accordance with rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 . This is the point upon which, in my opinion, the *Bryan case 21 EHRR 342* is authority for saying that the independent position of the inspector, together with the control of the fairness of the fact-finding procedure by the court in judicial review, is sufficient to satisfy the requirements of article 6.
***341**

129. Finally, the third strand is that of planning judgment. In this area the principle in the *Zumtobel case 17 EHRR 116* , as *applied* in the *ISKCON* and *Bryan* cases to questions of policy, does not require that the court should be able to substitute its decision for that of the administrative authority. Such a requirement would in my opinion not only be contrary to the jurisprudence of the European court but would also be profoundly undemocratic. The Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.

130. For these reasons I respectfully disagree with the Divisional Court's conclusion that decisions by the Secretary of State in planning cases are incompatible with Convention rights. Equally, the fact that the Department of Transport has promoted the road improvement scheme in the *Legal and General* case does not mean that judicial review cannot satisfy aticle 6 unless the court can itself decide whether the scheme is a good idea. Nor do I think it makes any difference that in the *Alconbury* case the Ministry of Defence, another emanation of the Crown, has a financial interest in the proposed development. Once again, this is something which might be significant if the Secretary of State was claiming to be an impartial tribunal. But, as he is not, the remedy available by way of judicial review to quash a decision on the ground that the Secretary of State has taken irrelevant matters into account is sufficient to satisfy article 6 .

The Lord Advocate's intervention

131. Your Lordships were referred to the decision of the Court of Session in *County Properties Ltd v The Scottish Ministers 2000 SLT 965* in which it was decided that a decision on listed building consent by the Scottish Ministers was inconsistent with article 6 because they were not, as they acknowledged, an independent and impartial tribunal, and a court could not substitute its own decision on the questions of planning and aesthetic judgment which were central to the decision. This decision is on appeal to the Inner House but the Lord Advocate intervened in the argument before your Lordships and appeared by counsel to put forward arguments as to why the case was wrongly decided.

132. For the reasons I have already given, I would accept this submission. The very notion that such questions should be decided by a court or any other independent tribunal rather than by ministers accountable to the Scottish Parliament seems to me contrary to the democratic principle. I must however deal with a separate argument put forward by Mr Macdonald on behalf of the Lord Advocate, which he said provided a shorter route to the same answer.

133. Mr Macdonald submitted that article 6 has no application to the decision by the Scottish Ministers (or the Secretary of State in England). Their decisions do not involve the determination of anyone's civil rights or obligations. They are simply the exercise of legal powers which affect, perhaps change, civil rights and obligations, but do not determine them within the meaning of article 6. The point at which rights or obligations are determined is in the proceedings by way of judicial review, which decide whether the exercise of power by the administrator was lawful or not. As that question is decided by a court which is undoubtedly independent and impartial, that is the end of the case. Mr Macdonald said that this analysis ***342** was supported by the opinion of the Commission in *Kaplan v United Kingdom (1980) 4 EHRR 64* , which concerned a decision by the Secretary of State that the applicant was not a fit and proper person to be involved in running an insurance company. The Commission said, in para 154 of its opinion, that article 6 lays down

> "guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a 'civil' character) are to be resolved. A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or

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'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

134. My Lords, this reasoning is in accordance with the way in which, at the outset of this speech, I suggested to your Lordships that, apart from European authority, the case ought to be decided. But it provides a short answer only if it is assumed that article 6 requires no more than that judicial review proceedings be decided by an independent and impartial tribunal. If, however, article 6 is construed as going further and mandating some minimum content to the judicial review jurisdiction, then it is necessary to ask, as I have done at some length, whether the extent of the judicial review jurisdiction available in England and Scotland is sufficient to satisfy the requirements of the European court jurisprudence. As appears from my analysis of that jurisprudence, there is no doubt that the European court has construed article 6 as requiring certain minimum standards of judicial review. This appears most clearly from the Swedish cases to which I have referred.

135. Once one accepts this construction, it makes little difference whether one says, as in *Kaplan* , that the administrative act does not fall within article 6 at all and the question is concerned only with the adequacy and impartiality of the judicial review, or whether one says, as the European court and Commission have done in other cases, that the administrative act does in theory come within article 6 but the administrator's lack of impartiality can be cured by an adequate and impartial judicial review. The former seems to me a more elegant analysis, but the latter may be necessary in order to explain, in the context of civilian concepts, why the administrative process can be treated as involving at any stage a determination of civil rights and obligations. So, tempting as it is, I am unable to accept Mr Macdonald's short cut.

Conclusion

136. I would therefore allow the appeals and declare that the impugned powers are not in breach of or incompatible with the Human Rights Act 1998. ***343**

LORD CLYDE

137. My Lords, by section 77 of the Town and Country Planning Act 1990 the Secretary of State for the Environment, Transport and the Regions may give directions requiring applications for planning permission to be referred to him instead of being dealt with by local planning authorities. Section 78 provides for the making of appeals to the Secretary of State against planning decisions or the failure to take such decisions and section 79 provides for the opportunity of a hearing before a person appointed by the Secretary of State for that purpose. By paragraph 3 of Schedule 6 to the Act the Secretary of State may direct that a planning appeal which would otherwise be determined by a person appointed by him shall instead be determined by the Secretary of State. By paragraph 4 he may revoke such a direction. Provision is made in sections 14, 16, 18 and 125 of the Highways Act 1980 for the making of orders by the Secretary of State with regard to certain roadways and by paragraphs 1, 7 and 8 of Part I of Schedule 1 to that Act provision is made for the hearing of objections at a local inquiry and the subsequent making or confirmation of the order by the Secretary of State. Section 2(3) of the Acquisition of Land Act 1981 and paragraph 4 of Schedule 1 to that Act provide in relation to the making of a compulsory purchase order by a minister for the hearing of objections at a public local inquiry and the subsequent making of the order by the minister. Under sections 1 and 3 of the Transport and Works Act 1992 the Secretary of State may make orders in relation to among other things railways and waterways and section 23(4) disentitles an inspector hearing objections to such orders from authorising compulsory acquisitions or the compulsory creation or extinguishment of rights over land. The Divisional Court has held that these provisions are incompatible with article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms . That decision is challenged in the present appeals.

138. At the heart of the challenge is the objection that the Secretary of State cannot compatibly with article 6(1) himself determine the various issues to which these statutory provisions can give rise. No complaint is made where the decision is made by an inspector appointed by him. The objection is levelled against his taking upon himself the direct function of being the decision maker.

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The planning context

139. The general context in which this challenge is raised is that of planning and development. The functions of the Secretary of State in the context of planning may conveniently be referred to as "administrative", in the sense that they are dealing with policy and expediency rather than with the regulation of rights. We are concerned with an administrative process and an administrative decision. Planning is a matter of the formation and application of policy. The policy is not matter for the courts but for the executive. Where decisions are required in the planning process they are not made by judges, but by members of the administration. Members of the administration may be required in some of their functions to act in a judicial manner in that they may have to observe procedural rules and the overarching principles of fairness. But, while they may on some occasions be required to act like judges, they are not judges and their determinations on matters affecting civil rights and obligations are not to be seen as judicial ***344** decisions. Even although there may be stages in the procedure leading up to the decision where what used to be described as a quasi-judicial character is superadded to the administrative task, the eventual decision is an administrative one. As was long ago observed by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , 399:

> "That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."

Moreover the decision requires to take into account not just the facts of the case but very much wider issues of public interest, national priorities. Thus the function of the Secretary of State as a decision maker in planning matters is not in a proper sense a judicial function, although certain qualities of a judicial kind are required of him.

140. Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems. As is explained in paragraph I of the Government's publication Planning Policy Guidance Notes, the need to take account of economic, environmental, social and other factors requires a framework which provides consistent, predictable and prompt decision making. At the heart of that system are development plans. The guidance sets out the objectives and policies comprised in the framework within which the local authorities are required to draw up their development plans and in accordance with which their planning decisions should be made. One element which lies behind the framework is the policy of securing what is termed sustainable development, an objective which is essentially a matter of governmental strategy.

141. Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament. The whole scheme of the planning legislation involves an allocation of various functions respectively between local authorities and the Secretary of State. In placing some functions upon the Secretary of State it is of course recognised that he will not personally attend to every case himself. The responsibility is given to his department and the power rests in the department with the Secretary of State as its head and responsible for the carrying out of its work. Within his department a minister may well take advice on law and policy (*Bushell v Secretary of State for the Environment [1981] AC 75*) and the Secretary of State is entitled to seek elucidation on matters raised by the case which he has to decide, provided always that he observes the basic rules of fairness. In particular he should in fairness give the parties an opportunity to comment if after a ***345** public inquiry some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry.

142. There may be various agencies which will advise him on particular aspects of planning, as for example an agency skilled in the conservation of historic buildings. But it is a false analysis to claim that there is a lis between a developer and such an agency which will be heard and determined by the minister. As Lord Greene MR observed in the *Johnson case [1947] 2 All ER 395* , 399, in relation to objections to a compulsory purchase order proposed by a local authority:

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> "it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation ... on the substantive matter, viz, whether the order should be confirmed or not, 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."

The minister is not bound to follow the view of any agency, nor is he bound to follow the desires or interests of any other government department. He is not bound to apply a particular policy if the circumstances seem to him inappropriate for its application. He is not independent. Indeed it is not suggested that he is. But that is not to say that in making the decisions on the matters in issue in the present appeals he is both judge and party. It does not seem to me correct to say of the Secretary of State that he is judex in sua causa, at least in any strict sense of that expression. He is, as I have already sought to explain, not strictly a judge. Moreover the cause is not in any precise sense his own. No one is suggesting that he, or the officials in his department, have any personal financial or proprietary interest in these cases. The concern of the Secretary of State and his department is to manage planning and development in accordance with the broad lines of policy which have been prepared in the national interest.

143. One criticism which is levelled at the system is that the minister has the functions both of making planning policy and of applying the policies which he has made. But that combination of functions does not necessarily give rise to unfairness. The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers. Nor is this a point which can be made solely in relation to the Secretary of State. In a variety of administrative functions, in addition to planning, local authorities may devise and implement policies of their own.

144. It is now argued that the planning process is flawed in so far as the decision maker is the Secretary of State. It is said that where he is making the decision the case falls foul of article 6 of the Convention. One possible ***346** solution which is proposed is that in the cases where at present the Secretary of State is himself the decision maker, cases for the most part which are likely to give rise to issues of widespread or even national concern, which may well have a wide impact on the lives of many and involve major issues of policy, the decision should be removed from the minister, who is answerable to Parliament, to an independent body, answerable to no one. That would be a somewhat startling proposition and it would be surprising if the Convention which is rooted in the ideas of democracy and the rule of law should lead to such a result.

Applicability of the Convention

145. The first question is whether article 6 applies at all to decisions by planning authorities or by the Secretary of State. An attractive argument was presented on behalf of the Lord Advocate to the effect that article 6 was as regards civil matters concerned with the securing of justice in the resolution of a legal claim or dispute and not with the acts of an administrative body exercising a discretionary power. Article 6 would only come to affect matters of administrative discretionary decisions at the stage when a dispute arose on the grounds that the decision maker had acted unlawfully, exceeding the parameters of his lawful discretion and erring in law. This argument looks to the whole terms of article 6(1) , which can readily be seen as designed to cover judicial proceedings. Counsel pointed to the French text of the article and the use of the word "contestations" which could be understood as relating to a dispute on civil rights and obligations and to litigation before a court of law. In support of this approach reference was made to a decision of the Commission in *Kaplan v United Kingdom (1980) 4 EHRR 64* , para 154 where, after referring to claims and disputes concerning legal rights and obligations of a civil character, the Commission stated:

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> "A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

146. This approach provides a clean and simple solution to the present problem. But I do not consider that it is sound. The observations in *Kaplan* on which the argument was supported have not been taken up by the court and reflect an earlier stage in the development of the jurisprudence on the scope and application of article 6(1). In the developing jurisprudence of the European Court of Human Rights it became recognised that a narrow view of the scope of article 6(1) was inappropriate. In *X v United Kingdom (1982) 28 DR 177* , 186 the Commission held that a compulsory purchase order affected the applicant's private rights of ownership, that these were "civil rights", and that in challenging the making of the order she was ***347** entitled to the protection of article 6(1). Counsel recognised the difficulty which that decision presented for his argument and was constrained to contend that the decision was wrong. His proposition involves a narrow understanding of the scope of the article.

147. In considering the scope of article 6(1) it is proper to take a broad approach to the language used and seek to give effect to the purpose of the provision. In *Ringeisen v Austria (No 1) (1971) 1 EHRR 455* , para 94 the phrase was taken to cover "all proceedings the result of which is decisive for private rights and obligations". This included cases where the proceedings concerned a dispute between a private individual and a public authority. In *Golder v United Kingdom (1975) 1 EHRR 524* , para 32 the court *considered* the French and English text of the article and concluded that the article covered a right of access to a court or "tribunal" without there being already proceedings pending. The court held, in para 36, that " article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal". These two cases predate the decision in *Kaplan* . In *Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1* , para 45 the court *observed* of the word "contestation":

> "Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning besides, it has no counterpart in the English text of article 6(1)."

The court held that, even if the use of the French word implied the existence of a disagreement, the evidence showed that there was one in that case where there were allegations of professional misconduct which were denied. The reference to a determination reflects the necessity for there to be a dispute. But it does not require to be a dispute in any formal sense. In *Moreira de Azevedo v Portugal (1990) 13 EHRR 721* the court *followed* the approach taken in *Le Compte* and held that article 6(1) applied where the applicant had joined as an assistant in criminal proceedings with a view to securing financial reparation for injuries which he claimed he had suffered at the hands of the accused but had not filed any claim in civil proceedings. The distinction noticed by the Commission in *X v United Kingdom (1998) 25 EHRR CD 88* , 96 is not to be overlooked, that is the distinction between:

> "the acts of a body which is engaged in the resolution of a dispute ('contestation') and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute."

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But at least from the time when a power has been exercised and objection is taken to that exercise the existence of a dispute for the purpose of article 6(1) can be identified.

148. The scope of article 6 accordingly extends to administrative determinations as well as judicial determinations. But, putting aside criminal proceedings with which we are not here concerned, the article also requires that the determination should be of a person's civil rights and obligations. The concept of civil rights in article 6(1) is an autonomous one: *König v Federal Republic of Germany (1978) 2 EHRR 170* . In *H v France (1989) 12 EHRR 74* , para 47 the court stated: ***348**

> "It is clear from the court's established case law that the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent state's domestic law and that article 6(1) applies irrespective of the parties' status, be it public or private, and of the nature of the legislation which governs the manner in which the dispute is to be determined; it is sufficient that the outcome of the proceedings should be 'decisive for private rights and obligations'."

It relates to rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law": *James v United Kingdom (1986) 8 EHRR 123* , para 81. The rights with which the present appeals are concerned are the rights of property which are affected by development or acquisition. Those clearly fall within the scope of "civil rights". But there is no issue about the existence of these rights and no determination of the rights in any strict sense is raised.

149. The opening words of article 6(1) are: "In the determination of his civil rights and obligations or of any criminal charge against him ..." Here again a broad interpretation is called for. The decision need not formally be a decision on the rights. Article 6 will still apply if the effect of the decision is directly to affect civil rights and obligations. In *Le Compte, Van Leuven and De Meyere 4 EHRR 1* , para 46 the court *observed* : "it must be shown that the 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was 'decisive' for such a right." The dispute may relate to the existence of a right, and the scope or manner in which it may be exercised (*Le Compte* , at para 49, also *Balmer-Schafroth v Switzerland (1997) 25 EHRR 598* . But it must have a direct effect of deciding rights or obligations. The court continued, at para 47:

> "As regards the question whether the dispute related to the above-mentioned right, the court considers that a tenuous connection or remote consequences do not suffice for article 6(1) , in either of its official versions ('contestation sur'; 'determination of'): civil rights and obligations must be the object—or one of the objects—of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right."

That case was followed in *Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35* , where, at para 80, the court noted that article 6(1) extended to a dispute concerning "an administrative measure taken by the competent body in the exercise of public authority". It is also said that the dispute must be "genuine and of a serious nature": *Benthem v The Netherlands (1985) 8 EHRR 1* , para 32. In that case a genuine and serious dispute was held to have arisen "at least" from the date when the licence which the applicant had earlier obtained from the local municipality was cancelled by the Crown.

150. It is thus clear that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature. It applies then to the various exercises of discretion which are raised in the present appeals. But, while the scope of the article extends to cover

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such discretionary decisions, the particular character of such decisions cannot be *349 disregarded. And that particular factor has important consequences for the application of the article in such cases.

Compatibility with the Convention

151. If one was to take a narrow and literal view of the article, it would be easy to conclude that the respondents are correct and that the actions of the Secretary of State are incompatible with the article. It is accepted that he does not constitute an impartial and independent tribunal. In the context of a judicial proceeding that may well be fatal.

152. The first point to be noticed here, however, is 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. In *Zumtobel v Austria (1993) 17 EHRR 116* , para 64 the Commission under reference to *Ettl v Austria (1987) 10 EHRR 255* , paras 77 et seq, recalled that:

> " article 6(1) of the Convention does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the determination of civil rights by the tribunal envisaged in article 6(1) of the Convention."

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. While the failure to give reasons for a decision may in the context of some cases constitute a breach of the article, the existence of a right of appeal may provide a remedy in enabling a reasoned decision eventually to be given and so result in an overall compliance with the article. In the context of criminal cases article 6 will bite when a charge has been made, which could be long in advance of the trial or any subsequent appeal at which the actual resolution of the issue of guilt or innocence is made. In the civil context the whole process must be considered to see if the article has been breached. Not every stage need comply. If a global view is adopted one may then take into account not only the eventual opportunity for appeal or review to a court of law, but also the earlier processes and in particular the process of public inquiry at which essentially the facts can be explored in a quasi-judicial procedure and a determination on factual matters achieved.

153. Next, account has to be taken of the context and circumstances of the decision. Here an important distinction has been made by the European Court of Human Rights. The distinction was explained in the context of medical disciplinary proceedings in *Albert and Le Compte v Belgium (1983) 5 EHRR 533* . In its the judgment the court observed, at para 29:

> "In many member states of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where article 6(1) is applicable, conferring powers in this manner does not in itself infringe the Convention. None the less, in such circumstances the Convention calls at least 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 subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

*350 The court has recognised that planning decisions fall into a "specialised area" (*Chapman v United Kingdom (2001) 33 EHRR 399*) and has *applied* this distinction in relation to such decisions.

154. As regards the first of the two systems referred to in *Albert and Le Compte* , where the "jurisdictional organ" is the Secretary of State, it cannot be said that the requirements of article 6(1) are met. So it is the second system which falls to be considered in the present context. In the first place consideration has to be given to the expression "full jurisdiction". At first sight the expression might seem to require in every case an exhaustive and comprehensive review of the decision including a thorough

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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. As Mr N Bratza stated in his concurring opinion in the decision of the Commission in *Bryan v United Kingdom (1995) 21 EHRR 342* , 354:

> "It appears to me that the requirement that a court or tribunal should have 'full jurisdiction' cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned."

The nature and circumstances of the case have accordingly to be considered before one can determine what may comprise a "full jurisdiction". In the very different context of disciplinary proceedings a more exhaustive remedy may be required in order to satisfy article 6(1). In *Le Compte, Van Leuven and De Meyere v Belgium 4 EHRR 1* in the context of medical disciplinary proceedings the court stated, at para 51:

> "For civil cases, just as for criminal charges, article 6(1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law."

In that case the article was held not to be satisfied since the Court of Cassation had no jurisdiction to rectify factual errors or to examine whether the sanction was proportionate to the fault.

155. I turn then next to consider whether in the circumstances of the present cases as they presently stand the opportunities for appeal and review are such as to constitute a full jurisdiction. Guidance here may be found in *Bryan v United Kingdom 21 EHRR 342* where the court, echoing a passages from the opinion of Mr N Bratza in the Commission (see p 354), stated, at para 45, that in assessing the sufficiency of the review available

> "it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

***351** These three matters may be considered separately.

156. First, the subject matter of the decisions are in each case matters of planning determination in relation to proposed developments which are of some considerable public importance. As planning decisions, even if they were not of some size and importance, they fall within what the court has recognised as a specialised class of case: *Chapman v United Kingdom 33 EHRR 399* . The rights affected are principally rights to use land, which may be the subject of development or of compulsory acquisition. Moreover the right to use land is not an absolute right. It is under the domestic law subject to the controls of the planning regime, whereby permission may be required for the carrying out of a development or for the making of some change of use. Planning permission is not in general a matter of right.

157. So far as the manner in which the decisions will be taken is concerned it is to be noticed that in each case there will be a public inquiry before an inspector. That will be an occasion for the exploration of the facts, including the need and desirability

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of the development. The inquiry will be regulated by rules whose broad intention is to secure fairness in the procedure. The eventual decision in the present cases is to be taken by the Secretary of State. A remedy by way of appeal or judicial review is available, and there may be opportunities for judicial review at earlier stages as indeed is demonstrated in the present appeals.

158. So far as the content of the dispute is concerned, the present point is that the Secretary of State should not be the decision maker. The challenge is advanced substantially as one of principle, although in relation to the Huntingdonshire case a variety of particular points were raised regarding the interest or involvement in the Alconbury proposals on the part of various persons connected with the department or the government. But I find it unnecessary to explore these in detail. The Secretary of State is admittedly not independent for the purposes of article 6(1) . I do not consider that it can be decided at this stage whether the interest or involvement of these other persons is going to provide grounds for challenging the legality of the eventual decision. Grounds for challenge which are at present unpredictable may possibly arise in due course. As matters presently stand the issue is whether article 6(1) is necessarily breached because the decision is to be taken by the Secretary of State with the assistance of his department. The challenge is directed not against the individual but against the office which he holds. The question which arises is whether the Secretary of State or some person altogether unconnected with the Secretary of State should make the decision.

159. As I indicated at the outset, Parliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity in national planning can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not of law. They are primarily matters for the executive and not for the courts to determine. Moreover as matter of generality the right of access to a court is not absolute. Limitations may be imposed so long as they do not so restrict or reduce the access that the very essence of the right is impaired: *Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249* , para 72. Moreover the ***352** limitation must pursue a legitimate aim and the relationship between the means employed and the aim sought to be achieved must be reasonably proportionate: *Ashingdane v United Kingdom (1985) 7 EHRR 528* . In the context of the present cases the aim of reserving to a minister answerable to Parliament the determination of cases which will often be of very considerable public interest and importance is plainly a legitimate one. In light of the considerations which I have already canvassed it seems to me that there exists a reasonable balance between the scope of matters left to his decision and the scope of the control possessed by the courts over the exercise of his discretionary power.

160. Accordingly as matters presently stand I find no evident incompatibility with article 6(1). That view seems to me to accord fully with the decisions of the European Court of Human Rights. A consideration of the cases on the specialised area of town and country planning to which I now turn suggests that the court has recognised the sufficiency of a limited appeal and the decisions fully support the view which I have expressed. It was correctly pointed out that the court is always careful to relate its decisions to the facts of the case before it. But that does not mean that the cases do not or cannot provide guidance by way of close precedent or principle. I turn first to *Bryan v United Kingdom 21 EHRR 342* .

161. *Bryan* concerned an enforcement notice for the demolition of two agricultural buildings which had the appearance of large detached houses. The scope of the appeal open to the applicant was on points of law. One ground of his complaints, referred to as ground (b), was on the decision as matter of fact and degree, whether the buildings could be considered to have been designed for the purposes of agriculture. That ground was not pursued before the High Court on appeal. It was a question of fact and degree. The European Court of Human Rights held that the other grounds had all been dealt with by the High Court, and continued, at para 47:

> "Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational."

It is evident from this decision that where there was an inquiry before an inspector who could not be regarded as "independent", but nevertheless with "uncontested safeguards" attending the procedure which were open to review by the High Court, the limitations of the eventual remedy by way of appeal, limitations which equate with those attending a judicial review, did not mean that the requirements of article 6(1) were not satisfied.

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162. I do not consider that *Bryan* can be put aside as distinguishable on its facts, nor that its importance is confined to its own particular circumstances. The Divisional Court made a distinction between a decision taken by an inspector and one taken by the Secretary of State. That appears to have been one of the three considerations which weighed with the Lord Ordinary (Macfadyen) in *County Properties Ltd v The Scottish Ministers 2000 SLT 965* in distinguishing the case. It seems to me that this difference is too slight to be of serious consequence. The Secretary of State is admittedly not independent. The inspector also lacks independence. As was pointed out by the Commission in their opinion in *Bryan* , at para 42, he was chosen ***353** from the staff of the Planning Inspectorate which served the Secretary of State in the furtherance of the Secretary of State's policies, he was making the decision on behalf of the Secretary of State, and the Secretary of State's policies could be at issue in the appeal. The court held, at para 38, that the very existence of a power in the Secretary of State was "enough to deprive the inspector of the requisite appearance of independence". But that is not to say that the institutional link with the Secretary of State is not also of significance. The court in *Bryan,* at para 42, noted that a remedy would lie if the inspector showed some lack of independence of judgment, or had otherwise not acted fairly, or had been subjected to improper pressure. Those grounds should also apply to a review of a decision by the Secretary of State. In so far as the Divisional Court sought to distinguish *Bryan* I am not persuaded that it was correct. But in any event the case does not stand on its own.

163. In *ISKCON v United Kingdom (1994) 18 EHRR CD 133* , an enforcement notice had been served by the local authority on the grounds of an alleged change of use of land. Again the complaint was made by the applicant before the Commission that the review by the High Court was limited to questions of law. The Commission noted that the discretion of the local authority in taking enforcement proceedings was subject to certain statutory limitations, that the High Court had dealt with each of ISKCON's grounds of appeal and that a challenge was available on the grounds that the findings of fact were unsupported by the evidence, that actual facts had not been taken into account, or that account had been taken of immaterial facts, or that the decision was irrational. The Commission held that review by the High Court satisfied the requirements of article 6(1) .

164. The decision in *Bryan* was followed in *Varey v United Kingdom The Times 9 January 2001* , where the Secretary of State had overruled recommendations made by inspectors after a public inquiry. Recalling *Bryan* the Commission, at para 86, had regard "in particular to the court's finding that in the specialised area of town planning law full review of facts may not be required by article 6(1)" and held that the scope of review available in the High Court was sufficient to comply with that article. The Commission stated: "the Secretary of State gave reasoned decisions on the basis of the facts found by the inspectors, and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court."

165. The recent decision in *Chapman v United Kingdom 33 EHRR 399* is of particular interest because the complaint there was expressly that the High Court could not review questions of fact, nor questions of the weight given to the needs of the applicant and her family. The court however held, at para 124, following *Bryan* , "that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention" and that the opportunity to challenge the decision "on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors" afforded adequate judicial control of the administrative decisions in issue.

166. Two other cases may be mentioned where the concern was about the sufficiency of a remedy in the context of the compulsory acquisition of land. *Howard v United Kingdom (1985) 49 EHRR 116* concerned the ***354** requirement in article 13 of the Convention that everyone whose rights and freedoms are violated should have "an effective remedy before a national authority". The complaint was that in relation to a compulsory purchase order neither the statutory remedy nor judicial review extended to the content or substance of the decision, which was the object of the attack. The Commission took account of the opportunities which the applicants had of challenging the decision to make the order by way of judicial review, of making representations to an inspector at a public inquiry, and of making a statutory challenge to the confirmation of the order. They held that the limited review which was available satisfied the requirements of article 13.

167. *Zumtobel v Austria 17 EHRR 116* concerned an order to expropriate land for the construction of a highway. The court held that the opportunity for challenge before the Constitutional Court was not sufficient to overcome the objection that the applicants had had no right to a fair and public hearing, because the jurisdiction of that court only extended to testing the constitutionality of the order. But the opportunity to challenge the order before the Administrative Court was sufficient, because (in distinction from *Obermeier v Austria (1990) 13 EHRR 290* , para 70) that court could consider whether a statutory precondition for the validity of the order had been met and were able to meet and deal with all the points raised by the applicants in their challenge.

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168. It is also of significance that as matter of generality the state parties to the Convention treat a limited review as an appropriate remedy in administrative matters. In *Kaplan 4 EHRR 64* the Commission recognised that where an individual's right had been adversely affected by action taken by a public authority article 6(1) entitled him to access to a court for such remedy as the domestic law might allow. The question then arose whether the limited right of judicial review was sufficient. The Commission noted that the limit to control of the lawfulness of the decision was fairly typical of many of the contracting states, and indeed the scope of protection afforded under article 173 of the EEC Treaty was similarly limited. The Commission observed, at para 161:

> "An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

In *Bryan 21 EHRR 342* the court *observed* that while the High Court could not have substituted its own findings of fact for those of the inspector it was able to determine whether the findings or the inferences from them were perverse or irrational. The court continued, at para 47:

> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states."

***355**

The scope of judicial review

169. The suggestion was advanced that, if the respondents were correct in their contention that the present proceedings are in breach of article 6(1), the scope of judicial review might somehow be enlarged so as to provide a complete remedy. The point in the event does not arise, but I consider that it might well be difficult to achieve a sufficient enlargement to meet the stated purpose without jeopardising the constitutional balance between the role of the courts and the role of the executive. The supervisory jurisdiction of the court as it has now developed seems to me adequate to deal with a wide range of complaints which can properly be seen as directed to the legality of a decision. It is sufficient to note the recognition of the idea of proportionality, or, perhaps more accurately, disproportionality, and the extent to which the factual areas of a decision may be penetrated by a review of the account taken by a decision maker of facts which are irrelevant or even mistaken: *R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330* , 344-345. But consideration of the precise scope of the administrative remedies is not necessary for the purposes of the present appeals.

The Divisional Court

170. The Divisional Court recognised that the Secretary of State could not disagree with the material findings of fact made by the inspector without giving the parties an opportunity of making representations. But what gave rise to concern, at para 94, was the consideration that he was then "free to make his own decision and does so after taking account of internal legal and policy 'elucidation' and the recommendation of the decision officer ... which are not seen by the parties". It appears to be that consideration which led the Divisional Court to reach its conclusion. These matters bring me back to what I said at the outset of this speech. The Secretary of State is not entirely free to make his own decision. He cannot ignore what has passed at the inquiry. He cannot act in an arbitrary way. He has to proceed upon a reasonable assessment of the material before him. He has to respect the necessity to produce a decision which is not open to attack on grounds of legality. Nor is there anything wrong

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in seeking or taking into account advice which he may obtain from within his department, at least where that advice is sought to clarify or elucidate law or policy. If his decision is materially affected by some error of law or misconstruction of policy that may be open to review. The precise mechanics of the decision-making process in a large department are necessarily more complex than the process in which an inspector would engage if he was to make the actual decision. What is required is that there should be a decision with reasons. Provided that these set out clearly the grounds on which the decision has been reached it does not seem to me necessary that all the thinking which lies behind it should also be made available, whether the decision is made by an inspector or by the head of a government department.

Prematurity

171. The European Court of Human Rights tends to express its decisions in relation to a complete and concluded case. In the present appeals we are asked to form a view at a preliminary stage. It is not yet known what the **356* decisions will be. Far less is it known what grounds, if any, will emerge for dissatisfaction with the decision. But the practical advantages of testing the issue at this early stage are obvious. A very considerable expenditure of effort, time and money would have been spent in vain if the decision of the Divisional Court was correct. The Divisional Court followed the view taken by the Lord Ordinary in the *County Properties case 2000 SLT 965* that to wait until the eventual decision after the whole planning process has run its course would be unsound and impractical. That view seems to me to be correct. It can at least at this stage be affirmed that for the purposes of section 6(1) of the Human Rights Act 1998 it is not necessarily unlawful for the decisions in question to be made by the Secretary of State.

172. I would accordingly allow the appeals. The cross-appeal which raised an issue regarding the application of section 6(1) and (2)(b) of the Human Rights Act 1998 does not then arise for determination.

LORD HUTTON

173. My Lords, in their applications to the Divisional Court the respondents submitted that the respective procedures whereby the Secretary of State for the Environment, Transport and the Regions "called in" and "recovered" planning applications and decided whether to make a compulsory purchase order were not in compliance with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This submission was accepted by the Divisional Court and the Secretary of State now appeals directly to this House pursuant to section 12 of the Administration of Justice Act 1969 .

174. Article 6(1) of the Convention provides: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

175. Prior to the incorporation of the European Convention into the law of England by the Human Rights Act 1998, the law in relation to the functions of a government minister in respect of planning applications and objections to compulsory purchase orders, as stated in the classic judgment of Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* , was clear. It was that, whilst a quasi-judicial duty to consider objections was superimposed on the minister, the functions which he performed were essentially of an administrative nature and his decision would be arrived at on grounds of public policy. Thus Lord Greene MR stated, at p 399:

> "The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz, the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."

See also p 397g-h.
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176. Therefore the minister was entitled to overrule the objections of an individual citizen whose property was affected because of his views as to what the public interest required. But this did not mean that the citizen was subject to the decision of a minister which might be arbitrary and without oversight because, as Lord Greene MR observed, at p 399g-h, the minister was subject to the control of Parliament and he might have to defend his views and his decision in Parliament.

177. The respondents' submissions to the Divisional Court were that, when the Secretary of State made his decisions whether to uphold or reject their objections to a planning scheme and whether to make a compulsory purchase order, those decisions constituted determinations of their civil rights within the meaning of article 6(1) . They further submitted that the Secretary of State was not an independent and impartial tribunal because he would come to his decisions in the light of the policy which he had formulated or adopted on behalf of the government and was duty bound to promote.

178. The Divisional Court accepted these submissions. The reasoning of the court can be seen in the following passages of its judgment delivered by Tuckey LJ:

> "71. It is common ground that the independence required by article 6(1) is independence from the executive and from the parties.
>
> "72. The Secretary of State is part of the executive as are all or any of his ministerial team or the civil servants involved in the decision-making process. The contrary is, we think, unarguable which no doubt explains the Secretary of State's stance in these proceedings ...
>
> "84. There is no dispute about the position under domestic law. It is well stated in passages from Supperstone & Goudie, Judicial Review, 2nd ed (1997) , para 9.21: 'In many administrative situations the possibility of bias is built into the system. Proposers of a scheme may have strong and carefully thought out views on the subject, and yet may have to hear and rule on objections to it. Administrators may have guidelines to help them in their day to day application of legislation. In such situations the concept of a fair trial may be impossible and indeed undesirable to achieve. It has been pointed out ... that the more indifferent to the aim in view the less efficient is the minister or civil servant likely to be. After all, it his job to get things done. So, while the obvious prejudgment of an issue is not allowed, a challenge to a decision on the grounds of departmental bias is unlikely to succeed. It is a minister's job to have a policy and to support it in public' ...
>
> "85. But the question we have to answer is whether the position under domestic law can withstand the unqualified procedural right conferred by article 6 . We do not think it can. The common law approach has inevitably been determined by the constraints imposed by legislation. The logic is that if legislation vests a decision in a person who is biased or provides for a decision to be taken in a manner which is not compatible with the requirements of independence and impartiality, no breach of the requirements of fairness can be found. Such requirements of fairness as there may be must be accommodated to the relevant statutory scheme. But the question now is not how article 6 can best be accommodated in the interests of fairness given the existing statutory scheme, but rather ***358** whether the scheme itself complies with article 6. To accept that the possibility of common law bias is inherent in the system and mandated by Parliament is merely to admit that the system involves structural bias and requires determinations to be made by a person who is not impartial.
>
> "86. It must follow from these conclusions that the Secretary of State is not impartial in the manner required by article 6 because in each case his policy is in issue. This is not of course to say that there is anything wrong with his role as a policy maker. What is objectionable in terms of article 6 is that he should be the judge in his own cause where his policy is in play. In other words he cannot be both policy maker and decision taker."

179. The Divisional Court then turned to consider whether the procedures involved in these cases were saved by the High Court's powers of review. It observed, at paras 87-95 of its judgment, that decisions of this House have made it clear that the

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High Court is only concerned with the legality of the Secretary of State's decision; the merits of the case and questions of planning judgment are for the determining authority, not for the High Court. The court drew a distinction, at para 94, between the decision of an inspector and the decision of the Secretary of State, and, referring to the process followed where the Secretary of State makes the decision, it said, at para 95:

> "We do not think this process contains sufficient safeguards to justify the High Court's restricted power of review. In 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 or anyone approaching this, but by someone who is obviously not independent and impartial."

180. In arriving at its decision the Divisional Court found support in the judgment of the Court of Session in *County Properties Ltd v The Scottish Ministers 2000 27 SLT 965* , which had come to a similar decision in a case concerning a "called in" application for listed building consent under Scottish planning legislation similar to the Town and County Planning Act 1990. In his judgment the Lord Ordinary (Macfadyen) stated, at para 26:

> "It is the petitioners' Convention right to have their civil rights determined by an independent and impartial tribunal. In my view the respondents' decision to call in the application for their own decision has brought about a situation in which the determination of the petitioners' civil rights will be made by the respondents, who are admittedly not independent and impartial, and against whose decision there is only a limited right of appeal to this court. The limitations on the right of appeal are such that it may well be impossible for this court, although indisputably an independent and impartial tribunal, to bring those qualities to bear on the real issues in the case."

181. Before this House Mr Sumption, for the Secretary of State, accepted that the determination of planning applications involved a "determination of civil rights and obligations" within the meaning of article 6(1) . Mr Roderick Macdonald, for the Lord Advocate, who intervened on behalf of the Scottish Ministers, submitted that article 6(1) only ***359** applied to claims or disputes concerning legal rights and obligations to be resolved by a judicial process, and not to the administrative process carried on by a minister when he decides a planning application. Viewed in the light of the common law there would have been obvious force in this submission. In addition there is support for the submission in some passages in the opinion of the European Commission of Human Rights in *Kaplan v United Kingdom (1980) 4 EHRR 64* , the Commission stating, at para 154:

> "In the Commission's view the essential role of article 6(1) in this sphere is to lay down guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a 'civil' character) are to be resolved. A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

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See also paras 151-153.

182. However I think it is clear that the Commission and the European Court of Human Rights ("the European court") have departed from this view and have held in a number of subsequent cases that the determination of a planning application by an official or a minister falls within the ambit of article 6(1). In *Bryan v United Kingdom (1995) 21 EHRR 342* in proceedings before the European court the applicant complained that the review by the High Court of an inspector's decision upholding an enforcement notice was insufficient to comply with article 6(1). Before the Commission the United Kingdom government had contended that the enforcement notice proceedings did not involve a determination of the applicant's "civil rights", but this contention was rejected by the Commission, which stated, at para 38:

> "The Commission recalls that the right of property is clearly a 'civil' right within the meaning of article 6(1) of the Convention, and the enforcement notice issued by the local authority and the subsequent enforcement proceedings were directly concerned with the way in which the applicant was entitled to use his land. Consequently, the proceedings in the present case determined a 'civil right'."

183. In its judgment the European court stated, at para 31:

> "Before the court the government did not contest, as they had before the Commission, that the impugned planning proceedings involved a determination of the applicant's 'civil rights'. On the basis of its established case law, the court sees no reason to decide otherwise. Article 6(1) is accordingly applicable to the facts of the present case."

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184. A similar view has been taken in *Chapman v United Kingdom (2001) 33 EHRR 399* and other decisions of the European court and this view is now clearly established in the jurisprudence of the court.

185. The decisions of the Divisional Court and the Court of Session that there would be non-compliance with article 6(1) in the proceedings which they were considering were largely influenced by the judgment of the European court in *Bryan v United Kingdom 21 EHRR 342* and counsel for the respondents placed strong reliance on that judgment in their submissions to the House.

186. The reasoning of the European court in *Bryan* contained a number of stages which I enumerate as follows.

(1) Notwithstanding that the inspector was required to decide the applicant's planning appeal in a quasi-judicial, independent and impartial manner, the Secretary of State could at any time revoke his power to decide the appeal. In the context of planning applications the very existence of this power available to the executive, whose own policies might be in issue, was enough to deprive the inspector of the requisite appearance of independence, and, for this reason alone, the review by the inspector did not of itself satisfy the requirements of article 6(1) (para 38).

(2) The court then stated, in para 40:

> "As was explained in the court's *Albert and Le Compte v Belgium judgment 5 EHRR 533* , even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide

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> the guarantees of article 6(1)'. The issue in the present case is whether the High Court satisfied the requirements of article 6(1) as far as the scope of its jurisdiction was concerned."

(3) The court noted, in paras 41-44, that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan and, in particular:

> "as is not infrequently the case in relation to administrative law appeals in the Council of Europe member states, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited."

However the court then observed that in addition to the classic grounds of unlawfulness under English law the High Court had power to quash the inspector's decision if the inspector had taken into account irrelevant factors or had omitted to take into account relevant factors, or if the evidence was not capable of supporting a finding of fact or if the decision was perverse or irrational.

(4) The court stated, in paras 45-46, that in assessing the sufficiency of the review available on appeal to the High Court, it was necessary to have regard to matters such as "the subject matter of the decision appealed against" and the manner in which that decision was arrived at, and the court referred to the uncontested safeguards attending the procedure before the ***361** inspector designed to ensure that the inspector came to his decision in accordance with principles of openness, fairness and impartiality.

(5) The court then stated, in para 47:

> "In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment by the applicant of his objection to the inspector's reasoning under ground (b). The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point. These submissions, as the Commission noted, went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a conservation area'.
>
> "Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational.
>
> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1) . It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning."

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The court therefore concluded that the scope of review by the High Court was sufficient to comply with article 6(1) and held that there had been no violation of that article.

187. There were two strands in the reasoning of the European court. One strand referred to the independent position of the inspector and to the procedure designed to ensure openness, fairness and impartiality on his part. The other strand laid emphasis on the consideration that it was a frequent feature throughout the Council of Europe member states that in specialised areas of the law, such as judicial control of administrative decisions, the review by a court of law did not extend to a review of a decision on its merits.

188. Counsel for the respondents submitted that the decision in *Bryan* was distinguishable from the present case because in this case the Secretary of State lacked the independence of an inspector and his decision-making process did not have the safeguards which related to the decision-making process of an inspector. In relation to the decision-making process of the Secretary of State counsel pointed to the input of views and recommendations from civil servants of which the objectors were unaware and to which they had no opportunity to reply. Counsel submitted that in *Bryan* the European court's reliance on the independence of the inspector was a crucial part of its reasoning and that, as the requisite independence did not exist when the Secretary of State made the decision, there would be non- ***362*** compliance with article 6(1) in the present cases; the consideration that it was a common feature of European systems of justice that a court did not review a planning decision on its merits was not sufficient to prevent a violation of article 6(1).

189. Whilst there is some weight in these submissions I do not think that they are of sufficient force to distinguish *Bryan* from the instant case. It is clear from para 47 of the judgment that it was in relation to fact finding that the European court referred to the safeguards attaching to the procedure before the inspector, and I consider that the second strand of the court's reasoning was the more important one. Moreover, the judgment cannot be viewed in isolation but must be considered in the light of other opinions of the Commission and judgments of the European court. I consider that the Strasbourg jurisprudence recognises that, where an administrative decision to be taken in the public interest constitutes a determination of a civil right within the meaning of article 6(1), a review of the decision by a court is sufficient to comply with article 6(1) notwithstanding that the review does not extend to the merits of the decision. Because it is a common feature of the judicial systems of the democratic member states of the Council of Europe that a court does not decide whether an administrative decision was well founded in substance, the Commission and the European court have held that article 6(1) does not guarantee a right to a full review by a court of the merits of every administrative decision affecting private rights, but that there is compliance with the article where there is a right to judicial review of such a decision of the nature exercised by the High Court in England.

190. This approach is clearly set out and explained in the opinion of the Commission in *Kaplan v United Kingdom 4 EHRR 64* :

> "159. The Commission has already noted that in the contracting states discretionary powers are frequently conferred on public authorities to take actions affecting private rights. It is also a common feature of their administrative law, and indeed almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited. In the *Ringeisen case 1 EHRR 455* the majority of the Commission drew attention to this. They observed as follows: 'It is true that there is in all countries a legitimate concern to protect the citizen against arbitrary administrative action. This concern may result in the adoption of legislative or other rules concerning administrative procedure. It may result in the introduction of judicial review of administrative action, and the states members of the Council of Europe have for historical and other reasons adopted widely divergent systems of such judicial review. One common feature, however, seems to be that there are certain elements of administrative discretion which cannot be reviewed by the judge. If the administrative authority has acted properly and within the limits of the law, the judge can very rarely, if ever, decide whether or not the administrative decision was well founded in substance. To that extent, there is no possibility of bringing the case before an independent and impartial tribunal, even if there is a dispute ("contestation") between the citizen and the public authority.'
>
> "160. Following the court, the Commission does not conclude that article 6 is therefore altogether inapplicable. However, this factor cannot be left out of account in considering the content or scope of the rights ***363*** which article 6 guarantees. The Commission also recalls that its minority in the same case considered that it guaranteed only a right to judicial control as to the 'lawfulness' of administrative decisions affecting civil rights. It notes further that the limited scope of judicial review

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> in many contracting states is also reflected in the scope of the jurisdiction afforded to the European Court of Justice under article 173 of the EEC Treaty . Under that provision the court has jurisdiction to review the legality of acts of the Council and Commission of the European Communities only on grounds of 'lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers'. These limited grounds of action appear fairly typical of those existing in a number of the contracting states.
>
> "161. An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

191. As I have observed in considering the submissions of Mr Macdonald, the Commission in *Kaplan* gave a narrower meaning to the words "In the determination of his civil rights" than has been given in subsequent decisions, but the approach stated in *Kaplan* , in paras 159-161, has been adopted in a number of subsequent decisions, notwithstanding that those decisions have recognised that the administrative decisions of which the applicants complained involved the determination of civil rights within the meaning of article 6(1).

192. In *X v United Kingdom (1998) 25 EHRR CD 88* , where the applicant complained of the decision of the Secretary of State that he was not a fit and proper person to be the chief executive of an insurance company, the Commission held that the scope of judicial review by the Court of Session was sufficient to comply with article 6(1), and the Commission stated, at p 97:

> "The subject matter of the decision appealed against in the present case was a classic exercise of administrative discretion. The legislature had charged the Secretary of State with the express function of ensuring, in the public interest, that only appropriate persons would become chief executive of certain insurance companies, and the contested decision in the present case was the exercise of that discretion."

193. In *Varey v United Kingdom The Times, 30 January 2001* the applicants appealed against refusals of planning permission and inspectors held public inquiries and recommended that the appeals be allowed, but the Secretary of State decided to dismiss the appeals. The applicants complained that the decisions of the Secretary of State overruling the inspectors' recommendations concerning their appeals disclosed a violation of article 6(1) as the High Court was unable to substitute its own decision on the merits for that of the Secretary of State. In its response the government relied on the decision in *Bryan 21 EHRR 342* as showing that the procedures complained of complied with the requirements of article 6(1). The Commission found that there had been no violation of article 6(1) and, in para 86 of its opinion, after referring to the decision in *Bryan* it stated: ***364**

> "While the applicants argue that the scope of review prevents examination of the merits of their claims, the Commission notes that this does not contradict the position, as stated by the court, that the domestic courts will examine whether the Secretary of State had regard to all relevant factors. It is true that the procedures by the inspectors do not themselves satisfy the requirements of article 6(1) , the inspectors being appointed by the Secretary of State who retains the power of decision, and that the safeguards provided by their quasi-judicial role in the process have been diminished in this case by the Secretary of State's dismissal of the applicants' appeals notwithstanding the inspectors' recommendations to the contrary (see para 78). However, the Secretary of State gave reasoned decisions on the basis of the facts found by the inspectors, and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court. Consequently in these circumstances the Commission is satisfied that the power of review of that process by the High Court ensures

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> adequate judicial control of the administrative decisions in issue. It finds that the applicants have not in the circumstances been deprived of a fair hearing by an independent and impartial tribunal in the determination of any of their civil rights and obligations. It would observe that matters concerning the compatibility of the subject matter of the planning decisions with the requirements of the Convention fall to be examined under its substantive provisions."

194. In *Chapman v United Kingdom 33 EHRR 399* the applicant was refused planning permission and enforcement notices were issued against her. She appealed against the enforcement notices and after an inquiry an inspector dismissed her appeal. She claimed that there had been a violation of article 6(1) on the ground that she had no access to a court to determine the merits of her claims. Before the European court she argued that the court's case law did not support any general proposition that the right of appeal to the High Court on points of law caused planning procedures to be in compliance with article 6(1) and she submitted that *Bryan* was decided on its particular facts.

195. The European court did not accept the applicant's argument and held that there had been no violation of article 6(1) and stated, at para 124:

> "The court recalls that in the case of *Bryan 21 EHRR 342* , paras 34-47 it held that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with article 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."

196. A central element in the argument advanced on behalf of the respondents, which was supported by Mr Howell as amicus curiae, was that, where there was the determination of a civil right within the meaning of ***365** article 6(1) , the article required that the determination should be carried out (whether initially or on review by a court) by an independent and impartial tribunal which had power to consider the merits of the case, and that this requirement included discretionary matters to be decided by an official or a government minister and which involved matters of government policy. I am unable to accept that submission and I consider that the decisions of the Commission and the European court make clear that the ambit of the review required by article 6(1) does not extend to the merits of such decisions.

197. I am further of opinion that the jurisdiction of the High Court by way of judicial review is sufficient to comply with article 6(1) in respect of any arguments that the Ministry of Defence has a financial interest in the Alconbury development and that the Department of Transport has promoted the road improvement scheme at Newbury.

198. Therefore I consider, with respect, that the Divisional Court erred in concluding that article 6(1) prohibited the Secretary of State from being both a policy maker and a decision taker. In *B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395* Lord Greene MR recognised that in the democratic system of government in England a minister could properly perform both functions because he was answerable to Parliament as regards the policy aspects of his decision and answerable to the High Court as regards the lawfulness and fairness of his decision-making process. In my opinion the jurisprudence of Strasbourg also recognises that in a democracy, where the courts have jurisdiction to conduct a judicial review of the lawfulness and fairness of a decision, a government minister can be both a policy maker and a decision taker without there being a violation of article 6(1), and accordingly I would allow these appeals.

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Appeals allowed. Cross-appeals dismissed. Declaration that "The impugned decisions of the original appellant are not in breach of or incompatible with the Human Rights Act 1998."

Representation

Solicitors: Treasury Solicitor ; Marrons, Leicester ; Solicitor to Cambridgeshire County Council, Cambridge ; Jennings Son & Ash ; Sharpe Pritchard for Head of Legal Services, Huntingdonshire District Council, Huntingdon ; David Barney & Co, Stevenage .

B L S

Footnotes

1 Human Rights Act 1998, s. 4: "(2) If the court is satisfied that [a provision of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility."S 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if ... (b) in the case of ... provisions ... which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."Sch 1, Pt I, art 6(1): see post, para 21.

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*284 Tsfayo v United Kingdom

Positive/Neutral Judicial Consideration

Court
European Court of Human Rights

Judgment Date
14 November 2006

Report Citation
[2007] H.L.R. 19

Application No. 60860/00

European Court of Human Rights (Fourth Section)

Judge Casadevall (President)

November 14, 2006

Administrative decision-making; Entitlement; Housing benefit; Housing Benefit Review Boards; Right to independent and impartial tribunal;

Introduction

Housing Benefit

H1. Section 123 of the Social Security Contributions and Benefits Act 1992 (*Encyclopedia* , para.2–2104 *et seq.*) makes general provision for the scheme of housing benefit to be provided by local housing authorities, by way of rent rebate (where rent is payable to a local housing authority), or, in any other case, rent allowance (see Social Security Administration Act 1992, s.134 , *Encyclopedia* , para.2–2131 *et seq.*).

H2. A person is entitled to housing benefit if, *inter alia* , he is liable to make payments in respect of a dwelling which he occupies as his home: s.130(1)(a) of the Social Security Administration Act 1992 .

H3. Prior to March 6, 2006, detailed provision for the assessment and payment of housing benefit was governed by the Housing Benefit (General) Regulations 1987 (SI 1987/1971). With effect from that date, the 1987 Regulations, as amended, were consolidated into the Housing Benefit Regulations 2006 (SI 2006/231, the 2006 Regulations) and the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (SI 2006/214, the 2006 Pensioners' Regulations).

H4. Prior to April 5, 2004, an authority were required to award housing benefit for a specified period, after which a successful claimant would have to submit a fresh claim for housing benefit: reg.66 of the 1987 Regulations. Authorities were entitled to decide the relevant period, subject to a maximum of 60 weeks: reg.66(3) . With effect from that date, authorities are no longer required to fix a benefit period.

H5. The time and manner in which claims are to be made were formerly governed by reg.72 of the 1987 Regulations. (See now *285 reg.83 of the 2006 Regulations; reg.64 of the 2006 Pensioners' Regulations). Regulation 72(15) provided for backdated claims, whereby an applicant could claim housing benefit in respect of a maximum of 52 weeks prior to the claim if he could show that he had "continuous good cause" for not making a claim during that period. (See now reg.83(12) of the 2006 Regulations; reg.64(12) of the 2006 Pensioners' Regulations).

H6. Under the 1987 Regulations, a determination of entitlement was, in the first instance, made by the authority: reg.76(1) . (See now reg.89 of the 2006 Regulations; s.70 of the 2006 Pensioners' Regulations). Prior to July 2, 2001, a claimant who was aggrieved by a decision under the Regulations could ask the authority to review their determination (reg.79(2) of the 1987 Regulations); if still dissatisfied, he had a right to a further review by a housing benefit review board: reg.81 of the

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1987 Regulations. A review board appointed by a local authority (other than the Common Council of the City of London) had to consist of at least three councillors of that authority: 1987 Regulations, Sch.7 .

H7. From July 2, 2001, a claimant may ask the authority to revise their decision and, if still dissatisfied, may appeal to an independent appeals tribunal operating under the auspices of the Appeals Service: Child Support, Pensions and Social Security Act 2000, s.68 and Sch.7 (*Encyclopedia* , paras 2–2788 and 2–2797 *et seq.*).

Human Rights Act 1998

H8. By s.3(1) of the Human Rights Act 1998 (*Encyclopaedia* , para.2–2700.8 *et seq.*), which came into force on October 2, 2000, all legislation must, so far as possible, be read and given effect in a way which is compatible with those rights in the European Convention on Human Rights in Sch.1 of the Act (the convention rights): see s.1(1) .

H9. It is unlawful for a public authority to act in a way which is incompatible with a convention right: s.6(1) . A "public authority" includes a court and any person whose functions are functions of a public nature: s.6(2) .

Article 6: the right to a fair trial

H10. Article 6(1) of the Convention provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …".

H11. Article 6 applies to the determination of civil rights rather than administrative decision-making: Konig v Federal Republic of Germany (1978) 2 E.H.R.R. 170 . Administrative decisions may nonetheless be subject to the requirements of Art.6 if the outcome is decisive of private rights and obligations: *Stran Greek Refineries and Stratis Andreadis v Greece (1994) 19 E.H.R.R. 293* and *Jacobson v Sweden (1990) 13 E.H.R.R. 79* . See also *R. (on the application of Holding & Barnes and Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions [2001] UKHL 23; [2003] 2 A.C. 295, HL* , *per* Lord Hoffmann at [79].

H12. In order to satisfy Art.6 , a tribunal must be independent both from the executive and from the parties: *Campbell and Fell v United Kingdom (1984) 7 E.H.R.R. 165* . In *Findlay v United Kingdom (1997) 24 E.H.R.R. 221* , the ***286** ECtHR held that there were two aspects to the question of impartiality: (i) the tribunal must be subjectively free of personal prejudice or bias; and, (ii) the tribunal must be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt about its impartiality.

H13. Even if a tribunal fails to conform to each of the elements required by Art.6(1) , however, the right to a fair hearing will not be violated if the applicant has access to an independent judicial body with full jurisdictional control over the procedure and which itself provides the rights guaranteed by Art.6 : *Albert and Le Compte v Belgium (1983) 5 E.H.R.R. 533* . Accordingly, the availability of judicial review may be sufficient to cure a deficiency, although whether it will in fact do so will require consideration both of the applicant's complaints and of the context: Bryan v United Kingdom (1995) 21 E.H.R.R. 342 .

H14. In Bryan , the European Court considered whether the scheme of planning appeals in the UK was compatible with Art.6(1) . It was concluded that the scheme followed a quasi-judicial procedure which was regulated by rules and that planning inspectors were required to make not only findings of fact but also to make policy decisions and exercise a discretion in relation to a "specialist area of the law". In those circumstances, judicial review provided access to a court with full jurisdiction, even though the court had only limited powers to investigate the facts. Bryan was applied by the House of Lords in Alconbury , above.

H15. In *Runa Begum v Tower Hamlets LBC [2003] UKHL 5; [2003] 2 A.C. 430; [2003] H.L.R. 32* , the House of Lords held that the county court, on hearing an appeal against an authority's review decision in respect of an application for assistance by a homeless person under Pt 7 of the Housing Act 1996 , possessed full jurisdiction such as to guarantee compliance with Art.6 . Lord Hoffmann said, at [59]:

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> "In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact."

H16. In *R. (on the application of Bewry) v Norwich CC [2001] EWHC (Admin) 657* , Moses J. held that an authority's housing benefit review board was not independent and impartial because it was made up of councillors of the authority and that the lack of impartiality could not be remedied by the availability of judicial review because the High Court had limited jurisdiction to determine findings of fact. In *R. (on the application of Kershaw) v Rochdale MBC [2002] EWHC 2385 (Admin); [2003] H.L.R. 34* , however, it was held that the review board's lack of independence did not compromise the applicant's rights under Art.6 because, on the undisputed facts in that case, the review board was entitled to reach the decision that it made. ***287**

European Court of Human Rights

H17. Where an applicant succeeds before the European Court of Human Rights in establishing that one of his rights has been violated, the Court had power to "afford just satisfaction to the injured party": Art.41 .

Facts

H18. In 1993, the applicant—an Ethiopian national—came to the United Kingdom seeking asylum. Initially, she was provided with accommodation by a local authority. In April 1997, she was accommodated by a housing association. As she did not speak English, an employee of the association assisted her in making an application for housing benefit, which application was successful.

H19. The local authority required housing benefit claimants to complete new applications for housing benefit on an annual basis. The applicant was unaware of this and, in April 1998, her housing benefit payments ceased. In September 1998, the association wrote to her telling her that her she owed approximately £1,000 in rent arrears. She sought advice and discovered that her housing benefit payments had stopped. In October 1998, she made a fresh claim for housing benefit. At the same time, she made a claim for backdated housing benefit in respect of the period from April to September 1998. Her housing benefit payments were reinstated from October 1998 but her claim for backdated benefit was refused because she had failed to show good cause for not making her claim earlier.

H20. The association commenced possession proceedings on the ground of rent arrears. The applicant requested a review in respect of the authority's decision to refuse backdated housing benefit but the authority upheld their decision. She requested a review by the authority's housing benefit review board, which comprised three councillors from the authority. In September 1999, the review board upheld the authority's decision, finding as a fact that the applicant would have received some form of notification between April and September 1998 that her benefit payments had stopped.

H21. In January 2000, the applicant sought judicial review, contending that the review board:

(i) had acted unlawfully by failing to give adequate reasons and by making a perverse finding of fact; and,
(ii) was not an independent and impartial tribunal so that she had been denied her right to a fair trial under Art.6, European Convention on Human Rights .

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H22. Permission to claim judicial review was refused on the grounds that: (a) the review board had provided adequate reasons for its decision, which decision could not be said to be perverse; and, (b) the European Convention had not been incorporated into domestic law at the relevant time.

H23. The applicant applied to the European Court of Human Rights, contending that her rights under Art.6 had been violated because the review board was not an independent and impartial tribunal and she had therefore been denied a fair trial. She sought compensation by way of just satisfaction for the violation. ***288**

H24. The UK government accepted that the review board was not an independent and impartial tribunal but argued that there was no violation of Art.6 because, as the applicant had the right to apply for judicial review of the review board's decision, she had access to a court of full jurisdiction which could provide judicial control.

H25. **Held (allowing the application):**

H26. (1) Judicial review of the decision of the housing benefit review board did not provide the applicant with access to a court of full jurisdiction for the purposes of Art.6(1) of the European Convention on Human Rights for the following reasons:

(i) The question for the review board to decide was whether there was good cause for the applicant's delay in making a claim; that question was a simple question of fact that did not require a measure of professional knowledge or specialist experience; the review board's factual findings were not merely incidental to broader judgments of policy or expediency [45];

(ii) The review board not merely lacked independence from the executive but was directly connected to one of the parties to the dispute as it included councillors from the local authority; the connection of the councillors to one of the parties might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review as the High Court on a claim for judicial review did not have jurisdiction to rehear the evidence or substitute its own views on the facts [46].

H27. (2) The applicant had suffered non-pecuniary damage as a result of the circumstances in which her claim for benefits was determined by the HBRB, which damage was not sufficiently satisfied by the mere finding of a violation; accordingly, it was appropriate to award €2,000, by way of just satisfaction [55].

H28 Representation

Mr Richard Drabble Q.C. for the applicant.
Mr James Eadie for the United Kingdom government.

Judgment

Procedure

1. The case originated in an application (No.60860/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Art.34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) by an Ethiopian national, Ms Tiga Tsfayo (the applicant), on July 25, 2000.

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2. The applicant was represented by Mr P. Draycott, a lawyer practising in Manchester. The British Government (the Government) were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office. ***289**

3. The applicant complained under Art.6, §1 of the Convention about the lack of independence and impartiality of the Housing Benefit Review Board.

4. The application was allocated to the Fourth Section of the Court (r.52, §1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Art.27, §1 of the Convention) was constituted as provided in r.26, §1.

5. By a decision of August 24, 2004, the Court declared the application admissible.

6. On November 1, 2004 the Court changed the composition of its Sections (r.25, §1). This case was assigned to the newly composed Fourth Section (r.52, §1).

7. The applicant and the Government filed observations on the merits and on the applicant's claim for just satisfaction (r.59, §1).

8. An oral hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on November 22, 2005.

8. There appeared before the Court:

(a) for the Government	
Mr John GRAINGER	*Agent*
Mr James EADIE	*Counsel*
Ms J. KENNY	*Adviser*
Ms A. POWICK	*Adviser*
(b *) for the applicant*	
Mr Richard DRABBLE Q.C.	*Counsel*
Mr Paul DRAYCOTT	*Solicitor*

The Court heard addresses by Mr Eadie and Mr Drabble, as well as their answers to questions put by Judge Bratza.

The Facts

I. The Circumstances of the Case

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9. In 1993, the applicant arrived in the United Kingdom from Ethiopia and sought political asylum. She was initially provided with accommodation by the social services department of Hammersmith and Fulham LBCouncil (the Council). On April 21, 1997, the applicant moved into accommodation owned by a housing association. A member of the housing association's staff assisted the applicant to complete her application for housing and council tax benefit which was submitted to the Council in April 1997. This application was successful.

10. The applicant was required by law to renew her application for housing and council tax benefit on an annual basis. Because of her lack of familiarity with the benefits system and her poor English, the applicant failed to submit a benefit renewal form to the Council by the required time. In September 1998, the applicant received correspondence from the housing association about her rent arrears. As the applicant did not understand the correspondence, she sought assistance from the Council's advice office. After obtaining this advice the applicant realised that her housing and council tax benefit had ceased. She therefore ***290*** submitted a prospective claim as well as a backdated claim for both types of benefit to June 15, 1998.

11. The prospective claim was successful and the applicant began to receive housing benefit again from October 4, 1998, but on November 4, 1998 the Council rejected the application for backdated benefit because the applicant had failed to show "good cause" why she had not claimed the benefits earlier.

12. During the period from June 15–October 4, 1998 the applicant lost housing benefit of GBP £860.00, and since her rent in any event exceeded the benefit to which she had been entitled, her rent arrears amounted to GBP £1,068.86. The housing association commenced possession proceedings, seeking the applicant's eviction for non-payment of rent, and the Council also brought proceedings based on the applicant's failure to pay council tax of GBP £163.36 for the year 1998/99. On October 19, 1998 a court order was made allowing the Council to deduct GBP £2.60 per week from the applicant's income support of GBP £35.87.

13. On November 9, 1998, the applicant's legal advisers wrote to the Council requesting that they reconsider their refusal. However, by letter dated February 4, 1999, the Council informed the applicant that they were upholding their initial decision to refuse council tax and housing benefits.

14. The applicant appealed. The case was heard on September 10, 1999 by Hammersmith and Fulham LBC Housing Benefit and Council Tax Benefit Review Board (the HBRB). The HBRB consisted of three Councillors from the Council. It was advised by a barrister from the Council's legal department. The applicant was represented by Fulham Legal Advice Centre and the Council was represented by a Council benefits officer. The HBRB rejected the applicant's appeal, finding that the applicant must have received some correspondence from the local authority during the period from June 15–October 4, 1998 concerning the council tax she owed, although no such correspondence was produced to it.

15. On September 13, 1999 the housing association's possession proceedings against the applicant concluded with a court order requiring her to pay off the rent arrears at GBP £2.60 a week (in addition to the GBP £2.60 per week for council tax arrears).

16. On December 6, 1999, the applicant sought judicial review of the HBRB's decision. She complained that the HBRB had acted unlawfully because it had failed to make adequate findings of fact or provide sufficient reasons for its decision. The applicant also alleged that the HBRB was not an "independent and impartial" tribunal under Art.6, §1 of the Convention.

17. On January 31, 2000, the High Court dismissed the applicant's application for leave to apply for judicial review on the grounds that the Convention had not yet been incorporated into English law, and further dismissed the application on the merits, on the grounds that the HBRB's decision was neither unreasonable nor irrational. The applicant was unable to appeal because legal aid was refused. The applicant subsequently obtained Counsel's opinion that the appeal had no prospects of success. ***291***

II. Relevant Domestic Law

A. Housing benefit

18. Housing benefit (HB) is a means-tested benefit payable towards housing costs in rented accommodation. It is not dependent on or linked to the payment of contributions by the claimant.

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19. The HB scheme is administered by the local authority. Payments of HB are subsidised by central Government, normally to the extent of 95 per cent, although where HB is paid as a result of a decision that the claimant had good cause for a late claim the subsidy is only 50 per cent.

20. HB is awarded for "benefit periods" and entitlement for each period is dependent on a claim being made in time in accordance with the statutory rules. If a claimant makes a late claim, any entitlement to arrears of HB depends on the claimant establishing "good cause" for having missed the deadline. The case-law establishes that the concept of "good cause" involves an objective judgment as to whether this individual claimant, with his or her characteristics such as language and mental health, did what could reasonably have been expected of him or her.

B. The Housing Benefit Review Board

21. At the relevant time, a claim to housing benefit was first considered by officials employed by the local authority and working in the housing department. If the benefit was refused the claimant was entitled to a review of the decision, first by the local authority itself, then by a HBRB, which comprised up to five elected councillors from the local authority. Since July 2, 2001, HBRBs have been replaced by tribunals set up under the Child Support, Pensions and Social Security Act 2000 .

22. The procedure before the HBRB was governed by the Housing Benefit (General) Regulations 1987 . Regulation 82 provided, as relevant:

> "(2) Subject to the provisions of these Regulations
>
> (a) the procedure in connection with a further review shall be such as the Chairman of the Review Board shall determine;
>
> (b) any person affected may make representations in writing in connection with the further review and such representations shall be considered by the Review Board;
>
> (c) at the hearing any affected person has the right to
>
> (i) be heard, and may be accompanied and may be represented by another person whether that person is professionally qualified or not, and for the purposes of the proceedings at the hearing any representative shall have the rights and powers to which any person affected is entitled under these regulations;
>
> (ii) call persons to give evidence;
>
> (iii) put questions to any person who gives evidence; ***292**
>
> (d) the Review Board may call for, receive or hear representations and evidence from any person present as it considers appropriate."

23. The Review Board's Good Practice Guide provided, *inter alia* , that "the general principle underlying the proceedings" was the observance of natural justice. The HBRB should "be fair and be seen to be fair to all parties at all times". The HBRB was "in law, a separate body from the authority" and "independent". Before the hearing of a case checks were carried out to ensure that Board Members "have had no previous dealings with the case, and that they have no relationship with the claimant or any other person affected".

C. The scope of judicial review of administrative decision-making

24. In the *House of Lords' judgment in R. v Secretary of State for the Environment Ex p. Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd [2001] UKHL 23* (*Alconbury*), Lord Slynn of Hadley described the scope of judicial review as follows (§50):

> "It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps — failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness or natural justice requires, the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control." …

Lord Slynn continued that he was further of the view that a court had power to quash an administrative decision for a misunderstanding or ignorance of an established and relevant fact (§§51–53 of the judgment, and see also Lord Nolan at §61, Lord Hoffman at §130 and Lord Clyde at §169) and, where human rights were in issue, on grounds of lack of proportionality.

25. In *Runa Begum (FC) v Tower Hamlets LBC [2003] UKHL 5* (see para.[29] below), Lord Bingham of Cornhill made it clear that a court on judicial review (§§7–8):

> "… may not only quash the authority's decision … if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact … It is plain that the … judge may not make fresh findings of fact and must accept apparently tenable conclusions on credibility made on behalf of the authority …." ***293**

D. Consideration of administrative decision-making under the Human Rights Act 2000

26. Since the coming into force of the Human Rights Act 2000 , the English courts have considered on a number of occasions the extent to which judicial review can remedy defects of independence in a first instance administrative tribunal.

27. In Alconbury (cited above), the House of Lords considered the procedure whereby the Secretary of State had the power himself to determine certain matters of planning and compulsory purchase, subject to judicial review. Following the Court's judgment in Bryan v United Kingdom, No.19178/91 , §§44–47, Series A No.335-A, the House of Lords held unanimously that since the decisions in question involved substantial considerations of policy and public interest it was acceptable, and indeed desirable, that they be made by a public official, accountable to Parliament. Although the Secretary of State was not an independent and impartial tribunal, he (or rather, his Department's decision-making process) offered a number of procedural safeguards, such as an inspector's inquiry with the opportunity for interested parties to be heard, and these safeguards, together with the availability of judicial review (see paras [24]–[25] above) was sufficient to comply with the requirement for "an independent and impartial tribunal" in Art.6, §1 .

28. Lord Hoffmann explained the democratic principles underlying this approach as follows (§§69 and 73):

> "In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject-matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example; Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the General or Special Commissioners or the courts. On the other hand, sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case

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> basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.
>
> … There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in Article 1 of Protocol No. 1 that a taking of property must be 'subject to the conditions provided for by law'. The principles of judicial review *294 give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament. …"

29. The House of Lords returned to these issues in Runa Begum (cited above). The appellant had been offered a flat by the local authority, but considered it unsuitable for herself and her children because, she alleged, it was on a housing estate known for drugs and crime and in close proximity to a friend of her ex-husband. She requested a review of the local authority's decision. The reviewing officer was a re-housing manager employed by the same local authority but who had not been involved in the original decision and who was senior to the original decision-maker. She found that there were no serious problems on the estate and that the relationship between Runa Begum and her husband was not such as to make it intolerable for them to risk meeting each other.

30. It was accepted that the case involved the determination of civil rights and that the reviewing officer was not, in herself, an "independent and impartial tribunal". The House of Lords held unanimously that the existence of judicial review was sufficient in this context for the purposes of Art.6, §1 . In reaching this conclusion, Lord Bingham of Cornhill considered three matters as "particularly pertinent": first, that the legislation in question was part of a far-reaching statutory scheme regulating the important social field of housing, where scarce resources had to be divided among many individuals in need; secondly, that although the council had to decide a number of factual issues, these decisions were "only staging posts on the way to the much broader judgments" concerning local conditions and the availability of alternative accommodation, which the housing officer had the specialist knowledge and experience to make; thirdly, the review procedure incorporated a number of safeguards to ensure that the reviewer came to the case with an open mind and took into account the applicant's representations. Lord Bingham commented, generally, on the inter-relation between the Art.6, §1 concept of "civil rights" and the requirement for an "independent and impartial tribunal", that (§5):

> "the narrower the interpretation given to 'civil rights', the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to 'civil rights', the more flexible must be the approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided …"

31. It was argued before the House of Lords that when, as in Bryan and Alconbury , the decision turned upon questions of policy or "expediency", it was not necessary for the appellate court to be able to substitute its own opinion for that of the decision-maker; that would be contrary to the principle of democratic accountability. However, where, as in Runa Begum , the decision turned upon a question of contested fact, it was necessary either that the appellate court should have full jurisdiction to review the facts or that the primary decision-making process should be attended with sufficient safeguards as to make it virtually judicial. *295 In response, Lord Hoffmann (§§37–44) underlined that the fact-finding in Bryan had been closely analogous to a criminal trial, since the inspector's decision that Mr Bryan had acted in breach of planning control would be binding on him in any subsequent criminal proceedings for failing to comply with the enforcement notice. Lord Hoffmann continued:

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> "A finding of fact in this context seems to me very different from the findings of fact which have to be made by central or local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare such as [housing the homeless]. The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision-maker (see De Cubber v. Belgium [judgment of 26 October 1984 , Series A no. 124-B]).
>
> But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament. This case raises no question of democratic accountability. …
>
> On the other hand, efficient administration and the sovereignty of Parliament are very relevant. Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes …"

32. Following the House of Lords' judgment in Alconbury , but before that in Runa Begum, the High Court examined whether the HRRB procedure at issue in the present application was compliant with Art.6 , in a case where the determination of the central issues of fact depended on an assessment whether the claimant was telling the truth: *R. (on the application of Bewry) v Norwich CC [2001] EWHC Admin 657* . The Secretary of State conceded that the HBRB lacked the appearance of an independent and impartial tribunal. On the question whether judicial review proceedings were sufficient to remedy the problem, Moses J. observed:

> "There is however, in my judgment, one insuperable difficulty. Unlike an inspector [in a planning case], whose position was described by Lord Hoffman [in *R. v. Secretary of State for the Environment, ex parte Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd, [2001] UKHL 23; [2001] 2 All ER 929* : see Holding and Barnes plc v. the United Kingdom (dec.), no. 2352/02 , ECHR 2002] as independent, the same cannot be said of a councillor who is directly connected to one of ***296*** the parties to the dispute, namely the Council. The dispute was between the claimant and the Council. The case against payment of benefit was presented by employee of the Council and relied upon the statement of an official of the Council (the Fraud Verification Officer in the Council's Revenue office) …
>
> The reasoning carefully set out by the Board enables the court to ensure that there has been no material error of fact. Even in relation to a finding of fact, this court can exercise some control if it can be demonstrated that the facts found are not supported by the evidence. But, in that respect, the court can only exercise limited control. It cannot substitute its own views as to the weight of the evidence … In my judgment, the connection of the councillors to the party resisting entitlement to housing benefit does constitute a real distinction between the position of a [planning] inspector and a Review Board. The lack of independence may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by this court. One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts …

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> Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence. This court cannot cure the often imperceptible effects of the influence of the connection between the fact finding body and a party to the dispute since it has no jurisdiction to reach its own conclusion on the primary facts; still less any power to weigh the evidence. Accordingly, I conclude that there has been no determination of the claimant's entitlement to housing benefit by an independent and impartial tribunal. The level of review which this court can exercise does not replenish the want of independence in the Review Board, caused by its connection to a party in the dispute."

The Secretary of State was granted leave to appeal against this judgment but, in the event, decided not to appeal.

32. The Bewry judgment was approved and followed, after the House of Lords' judgment in Runa Begum , by the *High Court in R. (on the application of Bono) v Harlow DC [2002] EWHC 423* .

E. The Council on Tribunals' recommendations

33. In each of its annual report between 1988/89 and 1997/98, the Council on Tribunals (a statutory advisory committee which reports to the Lord Chancellor) recommended the abolition of the HBRB system, because of concerns about lack of independence and the potential for injustice. ***297**

The Law

I. Alleged Violation of Article 6, §1 of the Convention

34. The applicant complained that the HBRB was not an independent and impartial tribunal, as required by Art.6, §1 :

> "In the determination of his civil rights and obligations … , everyone is entitled to a fair … hearing … by an independent and impartial tribunal established by law."

A. The parties' submissions

35. The Government accepted that the applicant's civil rights were determined in the domestic proceedings, so that Art.6 was applicable. They further accepted that the HBRB did not itself satisfy the requirements of Art.6 , since it included up to five elected councillors of the same council that would be paying the benefit. However, the Government stressed that the principle of review rather than substitution by the second tier body was of fundamental importance, since it recognised the legitimacy of States conferring decision-making power, particularly on questions of fact, to first-tier administrative bodies. The domestic and Strasbourg case-law showed that Art.6 would not be violated where the second-tier tribunal had "full jurisdiction", and that this concept was to be flexibly applied, depending on the nature of the case. The concept of "civil rights" under Art.6 was wide, and the State should be allowed more flexibility as regards the manner of determining disputes which many legal systems had for many years considered as falling within the administrative sphere. Housing benefit and council tax benefit were examples of such rights, and it fell within the margin of appreciation to decide that it was in the public interest to save resources by deciding such disputes administratively.

36. In the present case, there was no reason to suppose that the councillors who sat on the applicant's appeal were anything other than impartial; the problem concerned only the appearance of lack of independence. Moreover, it was necessary and appropriate in considering the overall fairness to have regard to the procedure before the HBRB, which included, *inter alia* , the requirement to take into account the applicant's written observations and to hold an oral hearing (see paras [22]–[23] above). The HBRB was advised and assisted by a lawyer and its Good Practice Guide reminded members of the need to decide the case on the basis of the evidence alone, to afford a fair and equal opportunity to both sides to put their case and to record the reasons for their decision and any findings of fact. Judicial review was then available of the HBRB's decision. A

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court on an application for judicial review could scrutinise the fairness of the procedure and also, *inter alia* , examine whether there was sufficient evidence to support a finding of fact, whether all relevant matters had been taken into account and all irrelevant maters disregarded, and whether there had been a misunderstanding or ignorance of an established and relevant fact (see paras [24]–[25] above).

37. The applicant emphasised that housing benefit was administered by the local authority and subsidised by Government. Where the benefit was paid following a ***298*** decision that the claimant had good cause for a late claim, the subsidy was only 50 per cent as opposed to the usual 95 per cent, presumably because of a deliberate desire by central Government to ensure that assertions of "good cause" were rigorously examined. The determination of "good cause" involved an objective judgment as to what could reasonably have been expected of the individual claimant (see para.[20] above), and for this purpose domestic law demanded an oral hearing. Under the system as it applied to the applicant, this hearing had taken place before a tribunal consisting of members of the same local authority which would be required to pay 50 per cent of the benefit awarded in the event of a finding in her favour.

38. The applicant argued that the present case was distinguishable from Bryan and Alconbury (see paras [27]–[28] above) because, unlike a planning inspector or even the Secretary of State in a planning matter, the HBRB could not be said to be independent of the parties to the dispute or thus impartial. Judicial review could not correct any error or bias in the assessment of primary facts, particularly where the witnesses had been heard in person by the HBRB but not by the Administrative Court. Moreover, the councillors who sat on HBRBs were not specialist administrators. The decisions that they used to make were now routinely made by independent tribunals. The problems with the HBRB system had been recognised domestically, by the Council on Tribunals and by the High Court in Bewry and had, eventually, led to the abolition of HBRBs (see paras [21], [32] and [33] above). The present case was also distinguishable from Runa Begum (paras [29]–[31] above), where the fact-finding had formed part of a broad judgment about the claimant's entitlement and the availability of suitable housing in the area. Fundamental to the House of Lords' judgment was the view that the issues were appropriate for a specialised form of adjudication by an experienced administrator. This reasoning did not apply to housing benefit disputes, and the councillors in the HBRBs were not experienced administrators.

B. The Court's assessment

39. The Court recalls that disputes over entitlement to social security and welfare benefits generally fall within the scope of Art.6, §1 (see Salesi v Italy, judgment of February 26, 1993 , Series A No.257-E, §19; Schuler-Zgraggen v Switzerland, judgment of June 24, 1993 , Series A No.263, §46; Mennitto v Italy [GC], No.33804/96 , §28, ECHR 2000-X). It agrees with the parties that the applicant's claim for housing benefit concerned the determination of her civil rights and that Art.6, §1 applied. The applicant therefore had a right to a fair hearing before an independent and impartial tribunal.

40. The HBRB was composed of five elected councillors from the same local authority which would have been required to pay a percentage of the housing benefit if awarded, and the Government conceded on these grounds that the Board lacked structural independence. They contended, however, that the High Court on judicial review had sufficient jurisdiction to ensure that the proceedings as a whole complied with Art.6, §1 . ***299***

41. The Court recalls that even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Art.6, §1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Art.6, §1 " (Albert and Le Compte v Belgium, judgment of February 10, 1983 , Series A No.58, §29).

42. In Bryan v United Kingdom, judgment of November 22, 1995 , Series A No.335-A, §§44–47, the Court held that in order to determine whether the Article 6 -compliant second-tier tribunal had "full jurisdiction", or provided "sufficiency of review" to remedy a lack of independence at first instance, it was necessary to have regard to such factors as the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal. In Bryan , the inspector's decision that there had been a breach of planning controls involved some fact-finding, namely that the buildings which Mr Bryan had erected had the appearance of residential houses rather than agricultural barns. However, the inspector was also called upon to exercise his discretion on a wide range of policy matters involving development in a green belt and conservation area, and it was these policy judgments, rather than the findings of primary fact, which Mr Bryan challenged in the High Court. The inspector lacked the requisite appearance of independence from the executive, since the Secretary of State had the power, albeit applied only in exceptional circumstances, to withdraw a case from him. The inspector followed a quasi-judicial procedure, and was under a duty to exercise independent judgment. Any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court,

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which also had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational. The Court concluded that there had been no violation of Art.6, §1 and added that:

> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 § 1. It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning."

43. The Convention organs followed the approach set out in Bryan to find that there had been "sufficiency of review" in a number of cases against the United Kingdom (see, for example, X v the United Kingdom, No.28530/95, Commission decision of January 19, 1998 , concerning a determination by the Secretary of State that the applicant was not a fit and proper person to be chief executive of an insurance company; Stefan v. the United Kingdom, no. 29419/95, Commission decision of December 9, 1997 , concerning proceedings before the General ***300*** Medical Council (GMC) to establish whether or not the applicant was mentally ill and thus unfit to practise as a doctor; Wickramsinghe v United Kingdom (dec.), No.31503/96, December 9, 1997 , concerning disciplinary proceedings before the GMC; and see also Kingsley v United Kingdom [GC], No.35605/97 , §32, ECHR 2002-IV).

44. The domestic courts have also applied the principles in Bryan , notably the House of Lords in Alconbury and Runa Begum (see paras [27]–[31] above). In the latter case, the House of Lords found that judicial review of a housing officer's decision that the claimant had been unreasonable in rejecting the accommodation offered to her provided "sufficiency of review" for the purposes of Art.6, §1 . The House of Lords stressed that although the housing officer had been called upon to resolve some disputed factual issues, these findings of fact were, to use the words of Lord Bingham in that case, "only staging posts on the way to the much broader judgments" concerning local conditions and the availability of alternative accommodation, which the housing officer had the specialist knowledge and experience to make. Although the housing officer could not be regarded as independent, since she was employed by the local authority which had made the offer of accommodation which Runa Begum had rejected, statutory regulations provided substantial safeguards to ensure that the review would be independently and fairly conducted, free from improper external influences. Any significant departure from the procedural rules would have afforded a ground of appeal.

45. The Court considers that the decision-making process in the present case was significantly different. In Bryan , Runa Begum and the other cases cited in para.[43] above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the HBRB was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit ***301*** was the receipt of a notice from her landlord—the housing association—seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see para.[21] above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.

46. Secondly, in contrast to the previous domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded. As Mr Justice Moses observed in Bewry (para.[32] above), this connection of the councillors to the party resisting entitlement to housing benefit might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure (paras [22]–[23] above) were not adequate to overcome this fundamental lack of objective impartiality.

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47. The applicant had her claim refused because the HBRB did not find her a credible witness. Whilst the High Court had the power to quash the decision if it considered, *inter alia* , that no there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that the HBRB had misunderstood or been ignorant of an established and relevant fact (see paras [24]–[25] above), it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute.

48. It follows that there has been a violation of Art.6, §1 .

II. Application of Article 41 of the Convention

49. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary Loss

50. The applicant claimed the sums of housing and council tax benefit owing to her for the period from June15–October 4, 1998, amounting to GBP £1,023.36, together with the GBP £271.10 costs of the various summonses issued by the local authority in respect of unpaid council tax and the housing association in respect of unpaid rent, which the HBRB ordered her to pay after rejecting her claim to "good cause".

51. The Government contended that, even if the Court were to find a violation of Art.6, §1 , it would not be in a position to speculate as to what the outcome of the applicant's claim might have been if a procedure consistent with the Convention had been followed. No award should therefore be made under this head.

52. Having regard to all the circumstances, and in accordance with its normal practice of avoiding speculation in such cases, the Court does not consider it appropriate to award financial compensation to the applicant in respect of loss allegedly flowing from the outcome of the domestic proceedings (see Kingsley v United Kingdom [GC], No.35605/97 , §43, ECHR 2002-IV).

B. Non-pecuniary Loss

53. The applicant claimed already to have been in a depressive state at the time the HBRB rejected her claim, because two of her friends had recently committed suicide. The HBRB's decision and the failure of her judicial review application ***302** exacerbated her medical condition, anguish and distress, and she should be awarded GBP £10,000 in compensation.

54. The Government submitted that the applicant had not proved that her depression was caused by the alleged breach of Art.6, §1 , rather than by her vulnerable position as an asylum seeker and the distressing events which she had recently experienced.

55. The Court does not find it established that her medical condition, or the consequent anguish and distress relied on by the applicant, were exacerbated by the fact that the proceedings for back-dated benefits were determined by a tribunal which lacked independence and impartiality. However, it considers that the applicant undoubtedly sustained non-pecuniary damage as a result of the circumstances in which her claim for benefits was determined by the HBRB, which is not sufficiently satisfied by the mere finding of a violation (cf. Pescador Valero v Spain, judgment of June 17, 2003 , ECHR 2003—VII, p.119, §33). Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 under this head.

C. Costs and expenses

56. The applicant claimed costs for the proceedings before this Court of GBP £3,882.47 (approximately EUR 5,800)

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57. The Government had no comment as regards this part of the claim.

58. The Court considers that the above costs were actually incurred and are reasonable as to quantum. It therefore awards EUR 5,800, together with any tax that may be payable.

D. Default interest

59. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

Order

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Art.6, §1 of the Convention;

2. *Holds* :

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Art.44, §2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 5,800 (five thousand, eight hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points; ***303**

3. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on November 14, 2006, pursuant to r.77, §§2 and 3 of the Rules of Court.

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*288 Kingsley v United Kingdom

Positive/Neutral Judicial Consideration

Court
European Court of Human Rights

Judgment Date
7 November 2000

Report Citation
(2001) 33 E.H.R.R. 13

Application No. 35605/97

Before the European Court of Human Rights

(The President , Judge Costa ; Judges Loucaides , Kuris , Tulkens , Jungwiert , Bratza , Greve)

7 November 2000

H1. The applicant was the managing director of a company which owned and controlled six casinos licensed to operate in London. Following a hearing before a Gaming Board Panel under section 19 of the Gaming Act 1968 , the Board decided that he was not a fit and proper person to hold its certificate of approval. Relying on Article 6(1) of the Convention , the applicant complained that he had not had a fair hearing before the Panel and that review of the Board's decision by the High Court was inadequate because of the restricted nature of judicial review. He also claimed just satisfaction under Article 41 .

Held,

H2. (1) unanimously that here had been a violation of Article 6(1) of the Convention;

H3. (2) by six votes to one that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

H4. (3) unanimously:

(a) that the respondent State should pay the applicant, within three months from the date on which the judgment became final acording to Article 44(2) of the Convention, for costs and expenses, £13,500, plus any VAT due;
(b) that simple interest at an annual rate of 7.5 per cent be payable from the expiry of the above-mentioned three months until settlement;

H5. (4) unanimously that the remainder of the applicant's claims for just satisfaction be dismissed.

1. Right to a fair hearing: “determination of civil rights and obligations”; “independent and impartial tribunal”; judicial review (Art. 6(1)).

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H6. (a) The Court must first ascertain whether or not Article 6(1) of the Convention is applicable to the proceedings; that is, whether the proceedings determined the applicant's "civil rights and obligations". [42]

H7. (b) The Court notes the parties' agreement that Article 6(1) is applicable and recalls the Commission's decision in *X v. United Kingdom* where the applicant was prevented from taking up the position of chief executive of a large insurance company because of ***289** the Secretary of State's decision that he was not a fit and proper person to hold such a position. The Commission found that the decision deprived him of the opportunity to accept a specific post which had been offered on terms which had been agreed and that the procedure by which the Secretary of State intervened to prevent the applicant's appointment to the post which he had been offered amounted to a determination of the applicant's civil rights. In the present case, the withdrawal of the applicant's section 19 certificates, although relating to specific premises, in effect prevents him from holding any management position in the gaming industry. Accordingly, the proceedings before the Panel and the High Court determined the applicant's "civil rights and obligations". [43]–[45]

H8. (c) The Court must next determine whether the Panel which adjudicated at the section 19 hearing was an "independent and impartial tribunal" for the purposes of Article 6(1). [46]

H9. (d) In order to establish whether a body can be considered independent, regard must be had, *inter alia* , to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence. As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it is sought to establish the personal conviction of a given adjudicator in a given case, and an objective test, aimed at ascertaining whether the adjudicator offered guarantees sufficient to exclude any legitimate doubt in this respect. [47]

H10. (e) During the judicial review proceedings the applicant abandoned the allegation that the Panel was personally biased and had acted in bad faith. Accordingly, he cannnot now bring such a complaint before the Court. [48]

H11. (f) At the meeting on 21 January 1993, the Gaming Board had already formed the opinion that the applicant was not a fit and proper person to hold a section 19 certificate of approval. The three Panel members who adjudicated in the section 19 proceedings in April 1994 were all present at the 1993 meeting and voted in favour of the Board's decision that there was sufficient evidence to conclude that the applicant was not a fit and proper person to be a casino director. This aspect of the section 19 proceedings alone indicates that the Panel hearing did not present the necessary appearance of impartiality to constitute an Article 6(1) tribunal. [49]–[50]

H12. (g) Even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6(1), there is no breach of that Article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and provides the necessary guarantees. The issue in the present case is whether the High Court and the Court of Appeal satisfied the requirements of Article 6(1) as far as the scope of their jurisdiction was concerned. [51]

H13. (h) In *Bryan v. United Kingdom* , the Court gave examples of the matters which were relevant to assessing the adequacy of the review on a point of law in that case: the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. [52]

H14. (i) The present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular ***290** monitoring. In the United Kingdom, monitoring is undertaken by the Gaming Board pursuant to the relevant legislation. The subject matter of the decision appealed against was a classic exercise of administrative discretion. To this extent the present case is analogous to the cases of *Bryan* and *X* . The Court does not accept the applicant's contentions that, because of what was at stake for him, he should have had the benefit of a full court hearing on both the facts and the law. Even though the members of the Panel were not experts in the gaming industry, they were advised by officials who were experts, and the Court finds administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure. [53]

H15. (j) Futhermore, the Panel's decision was arrived at after quasi-judicial proceedings with a seven and a half day hearing at which evidence was called by the applicant, who was represented by senior counsel. The applicant was given ample opportunity to consider the various elements of the case against him, and to comment on the way in which the proceedings should take place. Further, it was open to the applicant to make a wide range of procedural complaints in the context of the judicial review proceedings which he subsequently brought. [54]

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H16. (k) The question remains whether, in a case such as the present where the applicant's primary complaint was that the Board, as the sole decision-making body, was actuated by bias, the extent of the High Court's review was sufficient to amount to "subsequent control by a judicial body that has full jurisdiction". In determining this question, the Court must consider the way in which the case developed on judicial review. [55]

H17. (l) It is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" requires that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body. [58]

H18. (m) In the present case the domestic courts were unable to remit the case for a first decision by the Board or another independent tribunal. Accordingly, in the particular circumstances of the case, the High Court and the Court of Appeal did not have "full jurisdiction" within the meaning of Article 6 when they reviewed the Panel's decision. Consequently, there has been a breach of Article 6(1) of the Convention. [59]

2. Just satisfaction; damage; costs and expenses; default interest (Art. 41).

H19. (a) The Court cannot speculate about the outcome of the domestic proceedings had those proceedings been in conformity with Article 6(1). In any event, no causal link has been established between the violation found and the damage claimed. Accordingly, the Court dismisses the claim for pecuniary loss. Moreoever, the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained. [63]

H20. (b) Costs and expenses are awarded on an equitable basis. No award is made in respect of the costs of the domestic proceedings. [66] ***291**

H21. (c) The statutory rate of interest applicable in the United Kingdom is 7.5 per cent per annum. [67]

Representation

Mr C. A. Whomersley , Foreign and Commonwealth Office (Agent) for the Government.
Professor C. Greenwood Q.C. , Mr N. Valner , Ms J. Stratford (Counsel) for the applicant.

H22. The following cases are referred to in the Court's judgment:

1. *Bryan v. United Kingdom (A/335-A): (1996) 21 E.H.R.R. 342* .
2. *Langborger v. Sweden (A/155): (1990) 12 E.H.R.R. 416* .
3. *Application No. 28530/95, X v. United Kingdom, Dec. 19.1.98* .
4. *R. v. Gough [1993] A.C. 646* .
5. *R. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139* .

The Facts

I. The circumstances of the case
8. Between 1984 and 1992 the applicant was the sole managing director of London Clubs Limited ("LCL"), a company which owned and controlled six of the twenty casinos licensed to operate in London. LCL was a subsidiary company of London Clubs International plc ("LCI") of which the applicant was also managing director. Both companies will hereafter be collectively referred to as London Clubs.

9. In June 1991 a raid took place at the various premises of LCL. The raid was carried out by the police in the presence of officials of the Gaming Board for Great Britain ("the Gaming Board"), a statutory body which inspects and monitors the gaming industry. A large quantity of documents were seized. In March 1992 the Gaming Board lodged objections with the clerk to the Licensing Magistrates, with regard to LCL's annual application for renewal of the licences it held in respect of each of its casinos. The Gaming Board also made cancellation applications in respect of the existing licences held by LCL.

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9. A meeting was held between the Gaming Board and the non-executive directors of LCL and their legal advisers on 26 March 1992. As a result of this meeting, the applicant and the other executive directors (with the exception of the finance director) resigned with effect from 30 April 1992, on the understanding that such resignation was involuntary and constituted dismissal by London Clubs.

9. Subsequently an agreement was reached between the Gaming Board and London Clubs, whereby LCL would apply for new licences for the casinos, via re-constituted operating companies, to which application the Gaming Board would not object. If the applications were successful and new licences were granted by the Licensing Magistrate, LCL would undertake to surrender its existing licences, thereby avoiding the necessity for the application for cancellation or renewal to be heard. ***292**

9. The Gaming Board issued LCL with certificates of consent, which LCL were statutorily obliged to obtain from the Gaming Board as a pre-requisite to making an application to the Licensing Magistrates for new licences. Objections to the issuing of new licences were made by a rival casino owner. However these objections were rejected and new licences were granted in October 1992, after a three day hearing before the Licensing Magistrates. The Gaming Board was represented at the hearing and expressed to the Licensing Magistrates its support for the application of LCL, explaining the grounds on which the Gaming Board itself had granted LCL certificates of consent in the following terms:

> In determining that it should issue certificates of consent the Board took into consideration, amongst other relevant factors, the degree to which LCI had addressed the Board's grave concerns at the matters of complaint referred to above, and in particular had in mind the following: Those executive directors of LCI and of [LCL] who in the Board's view carried the principal responsibility for the matter of complaint … [the applicant was named along with nine others] have left the company and relinquished their management shares: (…)
>
> The Board and Police viewed the matters raised in their cancellation applications extremely seriously. However they are satisfied that the practices that were unacceptable have now been eradicated and that those individuals responsible for encouraging or tolerating them have been removed.

10. In November 1992 the Chairman of the Gaming Board, Lady Littler, addressed the British Casino Association at their annual luncheon. Her speech referred to London Clubs and commented:

> We [the Gaming Board] satisfied ourselves that the practices we and the Police had regarded as unacceptable had ceased, that persons regarded by the Board and Police as not fit and proper had been removed ….

11. As a result of this speech, the applicant's legal advisers entered into correspondence with the Gaming Board's solicitors, on the basis that the speech was defamatory. The Gaming Board alleged that the "persons" referred to were minority shareholders and no reference to the applicant was intended. The applicant did not accept this explanation, however defamation proceedings were not commenced.

12. By a letter of 22 December 1992, the applicant's legal advisers received written notice that the Gaming Board was considering whether the applicant personally was a fit and proper person to hold the Board's certificate of approval, as required by section 19 of the Gaming Act 1968, in order to hold a management position in the gaming industry. By a letter dated 23 April

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1993, the Gaming Board informed the applicant formally that it was "minded to revoke" the applicant's section 19 certificates and that the applicant would be given the opportunity to state his case against revocation either in writing or orally at an interview before the Gaming Board ("a section 19 hearing").

12. The letter detailed the matters which the Gaming Board wished to **293* discuss with the applicant and also referred to the particulars of the Gaming Board's complaints in the application for cancellation of LCL's licences (the hearing of which had, in fact, never taken place). The complaints, numbered B1 to B9, claimed, *inter alia* , that there had been breaches of section 17 of the Gaming Act 1968, in that cheques had been accepted without any expectation that they would be met promptly (B1); that the applicant had been involved in granting cheque cashing facilities to members without proper investigation of their creditworthiness (B2); that cheques had been accepted which exceeded the authors' cheque cashing facility (B3); that third party cheques had been accepted in a way which would permit circumvention of 1984 Guidelines of the British Casino Association (B4); that Japanese players had been assisted in breaching Japanese exchange control regulations (B5); that gifts or hospitality had been made to substantial players in breach of further 1984 Guidelines (B7); and that the method for computing the "cash drop" in casinos produced inaccuracies, and was open to abuse (B9). Examples were given.

13. The applicant's legal advisers objected to the Gaming Board presiding over the section 19 hearing, suggesting that an independent tribunal be set up as an alternative. The applicant's principal objection was based on the fact that the Gaming Board had already publicly expressed the view (at the hearing before the Licensing Magistrates) that the applicant was not a fit and proper person to remain as an executive director of London Clubs. As such, the applicant contended, the Gaming Board could not be considered an impartial tribunal appropriate to consider the issue of whether the applicant's section 19 certificates should be revoked.

14. The Gaming Board rejected the request for an independent tribunal and a section 19 hearing commenced on 11 April 1994 before a panel of three, all members of the Gaming Board ("the Panel"). The hearing was conducted in private and lasted for seven and a half days. The applicant was represented by senior counsel. The Gaming Board's solicitors, a senior Gaming Board official and a representative of the Gaming Board's accountants also attended the hearing.

14. By a letter dated 28 May 1994, the applicant was informed that the Gaming Board did not consider the applicant to be a fit and proper person to continue to hold the Board's certificates of approval and that, accordingly, the Board would revoke his section 19 certificates within 21 days of receipt of the letter. This letter detailed the matters which had concerned the Gaming Board and the complaints that it deemed were established against the applicant.

15. The effect of the revocation of the section 19 certificates was that the applicant was unable to obtain employment in any sector of the gaming industry in the United Kingdom or in any jurisdiction which had a relationship with the United Kingdom gaming authorities.

16. By an application dated 23 August 1994, the applicant sought leave **294* to apply for judicial review of the decision of the Gaming Board to revoke his section 19 certificates. The decision was challenged on the grounds that the Panel was biased, or had the appearance of bias, and that its findings were vitiated by errors of law and were irrational.

17. In the course of the judicial review proceedings a document entitled "Confidential Annex to Minutes of the 281st Board Meeting of the Gaming Board for Great Britain", dated 21 January 1993, was exhibited to an affidavit sworn by the Chairman of the Gaming Board. This document recorded that the Gaming Board had taken a decision at its meeting on 21 January 1993 that it had:

> sufficient evidence before it to conclude that [the applicant] … was not a fit and proper person to be a director of a casino company.

18. All the members of the Panel who presided over the section 19 hearing were present at the Board meeting and were parties to this decision, which was made prior to the hearing itself.

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19. The application for judicial review was dismissed on 11 January 1996 by Mr Justice Jowitt after a hearing lasting over 16 days. He delivered three separate judgments in respect of the applicant's appeal. The first judgment dealt with the scope of the phrase "a fit and proper person" in Schedule 5 of the Gaming Act 1968. The second judgment considered the applicant's claim that he had a "legitimate expectation" that the Gaming Board would be precluded from taking account of any breaches of its guidelines unless the breaches were unlawful. The third judgment which dealt with "Wednesbury" challenges and allegations of bias runs to 165 pages. The judgment of Jowitt J. stated that the ambit of judicial review was such that he was not concerned to review findings of fact as on an appeal, but rather to assess whether the findings of the Panel disclosed illegality, irrationality (referred to as "Wednesbury unreasonableness") or procedural impropriety.

20. On pages 28 to 93 of the third judgment, Jowitt J. dealt with the applicant's "Wednesbury" challenges to the findings in respect of the various complaints made of him.

21. By way of example, it was accepted that cheques drawn by one player, a Mr S, on a Spanish and a Swiss bank were not cleared within 21 days after payment into a British bank, as would be the normal course of events. Rather, the average time for clearance was 179 days. The Board found that this practice breached section 16 of the 1968 Act, which prohibits credit betting save when a cheque is exchanged for tokens. The applicant alleged that the cheques he accepted were not shams, as none of the Spanish cheques were ever dishonoured. The judge found that the Board's conclusion—that what took place amounted to an agreement between Mr S and LCL, such that section 16 was breached—was a conclusion it was entitled to reach.

22. Fifty-seven pages of the third judgment were devoted to the issue of ***295** bias. Jowitt J. described the test of bias under English law in the following terms [1] :

> [Counsel for the applicant] submits that the decision to revoke the applicant's section 19 certificates of approval should be quashed because the Panel was biased. The grounds on which leave to move for judicial review were granted asserted first that the Board could not and did not approach its decision with objectivity and impartiality. Secondly, it was asserted that whether or not there was actual bias the applicant reasonably believed there was and that the Board should have had regard to the appearance of bias which had been created by its actions …
>
> There was no disagreement between the parties as to the approach the court should adopt when bias is alleged. It is a two stage test. The applicant has first to show from the evidence that there is an appearance of bias. [2] [Counsel for the Gaming Board] properly and realistically accepts that in the light of the available evidence the applicant has surmounted this hurdle. Having done so, he has to go on to show that on a proper examination by the court of the evidence before it there is demonstrated a real danger of injustice having occurred as a result of bias … [The analysis in that case of] the decision of the House of Lords in *R. v. Gough* [3] … illuminates my task in relation to this second stage.
>
> (1) Any court seized of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts. …
>
> (3) In reaching its conclusion the court 'personifies the reasonable man'.
>
> (4) The question on which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.
>
> (5) Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue'.

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> (6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased.
>
> (7) … the court is [not] concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias. …
>
> (9) It is not necessary for the applicant to demonstrate a real possibility that the … decision would have been different but for the bias; what must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decide the merits, unfairly.

23. Jowitt J. then applied the test of bias which he had set out to the facts of the case, and concluded that, on the evidence before him, he could ***296** not say that the applicant had established that there was a real danger of injustice having occurred as a result of bias. He concluded that there was no unconscious bias on the part of any of the Panel members.

24. Jowitt J. stated, further, that if, contrary to his finding, there was unconscious bias on the part of the Panel, the "doctrine of necessity" fell to be considered. He said:

> When a body is charged by statute with the power or duty, which cannot be delegated, to make a decision in circumstances in which a question of bias arises because:
>
> (i) in pursuance of that statutory power or duty an initial view has been formed upon a matter affecting the interests of someone in respect of whom the body in the exercise of its statutory power or duty has thereafter to make a decision, or final decision, after receiving and considering representations which he is entitled to make or
> (ii) in the exercise of a statutory power or duty to make a decision a conflict arises between the interests of another or others which have to be taken into account and the body's own interests:
>
> the decision will not be liable to be impugned on account of bias provided that:
>
> (i) if only some of those charged with the power or duty to decide are potentially affected by bias such of them as can lawfully withdraw from the decision making do so and
> (ii) those of the decision makers who are potentially affected by bias but cannot lawfully withdraw use their best endeavours to avoid the effect of bias and, consistently with the purpose for which its decision has to be made the body takes what reasonable steps are open to it to minimise the risk of bias affecting them …

24. Jowitt J. indicated that if, contrary to his finding, there was unconscious bias on the part of the Panel, the doctrine of necessity would apply, and the decision of the Panel would stand. Counsel for the applicant submitted before Jowitt J. that the Board had failed to take the reasonable step of appointing an independent panel to hear evidence and report to the Panel. Jowitt J. rejected the submission, on the grounds that no useful reference could have been made to an independent tribunal which did not involve an impermissible delegation.

25. In respect of all other allegations brought by the applicant, Jowitt J. concluded that the applicant had failed to establish that the Panel's decision was irrational or unreasonable or to make out any sufficient ground for judicial review. Jowitt J. noted

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that, by trying to frame his allegations in the context of Wednesbury unreasonableness, the applicant was in fact making an impermissible attempt to re-argue the case as though on appeal in order to re-examine the factual merits of the case.

26. The Court of Appeal, after an oral hearing on 4 July 1996, refused an application for leave to appeal from Jowitt J.'s decision. Morritt L.J. (with whom Hobhouse L.J. agreed) held, on the "doctrine of necessity", as follows:

> I am prepared to assume in favour of [the applicant] that he would have an arguable case sufficient to justify leave to appeal, that there was a real **297* risk that the decision of the Tribunal had been actuated by bias even though they were not in fact biased against him. That would leave the question of how the doctrine of necessity would be applied to the facts of the case.
>
> [Counsel for the applicant] did not seek to suggest that the propositions of law which Jowitt J. enunciated, and which I have quoted, were not accurately formulated by him, but he sought to challenge the final conclusion, to which I have just referred, that there could have been a useful reference to an independent Tribunal which did not involve an impermissible delegation. The question of bias, therefore, depends on the very limited point on whether it is arguable that Jowitt J. was wrong in that respect. I am bound to say that, on that limited point, I think he was manifestly right. The decision for the Board was, at the end of the day, whether or not Mr Kingsley was a fit and proper person. That could not be delegated to an independent panel and if they were actuated by bias, apparent or real, then the decision would still have to be made by them. Therefore, on the doctrine of necessity, which is accepted, there could have been no meaningful independent panel and the decision would stand because the decision has to be made by the Board and could not be delegated to the independent tribunal. It seems to me that there is no arguable point, susceptible on this part of the case, which would justify giving leave to appeal.

II. Relevant domestic law

27. The Gaming Board for Great Britain ("the Gaming Board") is a statutory body, established under section 10 of the Gaming Act 1968 ("the 1968 Act") to inspect and monitor the gaming industry. In order for any company to obtain the requisite gaming licence for premises, a certificate must first be issued by the Gaming Board consenting to the company applying for such a licence. [4]

28. Under section 19 of the 1968 Act the Gaming Board issues certificates to individuals in order that they be permitted to hold certain positions in the gaming industry. A certificate, once issued, continues in force unless and until it is revoked. The Gaming Board may revoke the certificate at any time if it appears to the Board that the person to whom it relates is not a fit and proper person to perform the specified function or act in the specified capacity. [5] Twenty one days written notice of the revocation must be given to the certificate holder. The Gaming Board has developed a procedure whereby an individual is sent a letter in which the Board states that it is minded to revoke his certificate. This is followed by the submission of written representations and/or an oral hearing. **298*

JUDGMENT

[6]

I. Alleged violation of Article 6(1) of the Convention

29. The applicant complains that he did not receive a fair hearing in the determination of his civil rights and obligations by the Gaming Board and that the review by the High Court of the Gaming Board's decision could not adequately remedy any deficiencies in the section 19 hearing because of the restricted nature of judicial review.

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30. Article 6(1) of the Convention provides, so far as relevant, as follows:

> In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal ….

31. The Government accepts the applicant's submission that the section 19 hearing and the subsequent judicial review proceedings determined the applicant's civil rights or obligations within the meaning of Article 6(1) of the Convention.

32. However, it submits that the applicant had a fair hearing before the Panel which was an independent and impartial tribunal within the meaning of Article 6(1) of the Convention. The functions of the Gaming Board are divided between its Inspectorate and Secretariat so that the investigation and prosecution phases are separate. The refusal by the Gaming Board to accept the applicant's suggestion that an independent tribunal should be established to hear the section 19 proceedings was because the Gaming Board, as a staturory body, cannot delegate its ultimate decision-making function. The context of the meeting on 21 January 1993 was that the Gaming Board was considering whether it could defend the defamation proceedings threatened by the applicant against the Chairman by asserting the truth of her comments. The applicant never asked the Gaming Board to hold the section 19 hearing in public or to make public its decision. The members of the Board are not appointed on an *ad hoc* basis, as the applicant suggests, but for a term of three years which may be extended to five.

33. The Government points out that the applicant maintains his complaint that the Panel members were actually biased against him whereas, in the domestic proceedings, he disclaimed any allegation that the Panel was actually biased and sought only to prove that the Panel had the appearance of bias or was unconsciously biased. If the applicant had wanted to pursue a claim of actual or bad faith, he could have done so by applying for judicial review on the basis of such grounds, but he chose not to because the test of apparent or unconscious bias is easier to meet. They consider that he has therefore ***299*** not exhausted the domestic remedies available in respect of this complaint, as required by Article 35(1) of the Convention.

34. Even if the applicant did not receive a fair hearing before the Panel, the Government submits that the judicial review proceedings were sufficient to correct any earlier deficiencies and ensure compliance with Article 6 of the Convention. The Government maintain that Jowitt J. adopted an objective approach towards the question of apparent or unconscious bias and not a "Wednesbury" approach. [7] Given that the Gaming Board conceded that the Panel failed the test under English law of such apparent or unconscious bias, the judge went on to make his own careful and detailed examination of the factual and legal merits of the applicant's allegation to decide whether there was a "real danger" of injustice having occurred as a result of apparent or unconscious bias. Using affidavit evidence, the judge investigated the merits of the allegation of bias.

35. The Government add that, if their submission regarding the test for bias is wrong and the High Court's review involved a more limited, "Wednesbury" approach, such a review would still satisfy the requirements of Article 6(1) because of the judgment of the European Court of Human Rights in the case of *Bryan* , where it found that in judicial review proceedings the High Court does have the power to quash decisions not made independently and impartially. [8]

36. The Government contends that Jowitt J.'s reference to the "doctrine of necessity" was obiter , and therefore not determinative of the outcome of the applicant's application for judicial review, but that in any event the operation of the doctrine in the present case would have been in accordance with Article 6(1) because the purpose of the doctrine is to prevent a "failure of justice" in circumstances where there is no alternative body which can take a decision. Thus, it submits that the public interest in having gaming regulated, by the Panel making a decision in respect of the applicant's section 19 certificates, would have outweighed the harm to the applicant in the decision being made by an apparently biased Panel. It submits further, that the doctrine is applicable only in relation to a finding of apparent bias, and that if the applicant had pursued an allegation of actual bias, and succeeded, the doctrine would have had no application.

37. The applicant contends that the procedures adopted by the Gaming Board to decide on the revocation of his certificates of approval failed to provide him with the necessary protection to ensure a fair hearing within the meaning of Article 6(1) of the

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Convention. The applicant alleges that the Panel members were already committed publicly and privately to concluded views which made a fair hearing impossible, and that this was compounded by the fact that no reasons for the revocation decision were given to the applicant or pronounced in public. ***300**

38. The applicant notes the Government's submission that the Gaming Board's functions are allocated between the Inspectorate and the Secretariat but submit that, in his case, the members of the Gaming Board already had considerable involvement in and knowledge of the matters of complaint against the applicant at the hearing, and had expressed their views in public before the Licensing Magistrates and at the British Casino Association luncheon. Further, the members were not experts or specialists who were qualified either legally or in terms of industry experience. The applicant argues that, although he was not able to prove actual bias on the part of the Panel members on judicial review, this does not mean that there was no actual bias. The applicant denies the Government's suggestion that the possibility of a full and public hearing was open to him, as well as the suggestion that he wished to avoid a public hearing.

39. The applicant further submits that the limited review of the High Court did not remedy the procedural defects of the section 19 hearing. The applicant argues that he wanted to challenge the merits of the Panel's decision before the High Court and would have asked the High Court to consider for itself whether or not he was a fit and proper person. The applicant was prejudiced by the limitation of judicial review because he was unable to do this. His only chance was to persuade the High Court that his case on these matters was so strong that the decision of the Panel was perverse. Any attempts by the applicant to raise primary issues of fact before Jowitt J. were rejected as impermissible attempts to challenge the Panel's findings of fact, against which there was no right of appeal. The applicant submits that it was not open to the High Court to substitute its own decision for that of the Panel.

40. The applicant argues that the judgment of the European Court of Human Rights in the case of Bryan is distinguishable from the present case in that the initial decision in Bryan was taken by an expert tribunal, the inspector's decision was reasoned, there was no dispute about the primary facts, the inspector was independent and the consequences of the Panel's decision for the applicant in the present case were much more serious than the consequences of the inspector's decision for the applicant Mr Bryan.

41. The applicant also refers to the fact that the Court of Appeal was prepared to assume, for the purposes of the application for leave to appeal, that the applicant had an arguable case on the issue of apparent bias, but that the Court of Appeal nevertheless refused leave to appeal on this ground, in reliance on the "doctrine of necessity".

42. The Court must first ascertain whether or not Article 6(1) of the Convention is applicable to the proceedings in the present case, that is, whether the proceedings determined the applicant's "civil rights and obligations" within the meaning of that provision.

43. In this respect, the Court notes the parties' agreement that Article 6(1) is applicable and recalls the European Commission of Human ***301** Rights' decision in the case of *X v. United Kingdom* [9] where the applicant was prevented from taking up the position of chief executive of a large insurance company because of the Secretary of State's decision that he was not a "fit and proper" person to hold such a position. The Commission found that the Secretary of State's decision deprived him of the opportunity of accepting a specific post which had been offered on terms which had been agreed and that the procedure by which the Secretary of State actively intervened to prevent the appointment of the applicant to the post which he had been offered amounted to a "determination of [the] civil rights" of the applicant for the purpose of Article 6(1).

44. In the present case, the withdrawal of the applicant's section 19 certificates, although relating to specific premises, in effect prevents him from holding any management position in the gaming industry, as he would not be granted the requisite section 19 certificate necessary for a management post at any other premises.

45. The Court considers that the proceedings before the Panel and the High Court determined the applicant's "civil rights and obligations".

46. The Court must next determine whether the Panel which adjudicated at the section 19 hearing was an "independent and impartial tribunal" for the purposes of Article 6(1) of the Convention.

47. The Court recalls that in order to establish whether a body can be considered "independent", regard must be had, *inter alia* , to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence. As to the question of impartiality, a distinction

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must be drawn between a subjective test, whereby it is sought to establish the personal conviction of a given adjudicator in a given case, and an objective test, aimed at ascertaining whether the adjudicator offered guarantees sufficient to exclude any legitimate doubt in this respect. [10]

48. As a preliminary point, the Government argues that the applicant is precluded from raising before the Court a claim of actual bias since he disclaimed any such allegation during the domestic proceedings. The Court notes in this regard that it was open to the applicant to seek judicial review of the Panel's decision on the ground that the Panel was personally biased and had acted in bad faith. During the judicial review proceedings, the applicant abandoned this allegation in favour of a claim of apparent bias. It is therefore not now open to the applicant to bring such a complaint before the Court.

49. The Court notes that at the meeting on 21 January 1993 the Gaming Board had already formed the opinion that the applicant was not a fit and proper person to hold a section 19 certificate of approval. The three Panel members who adjudicated in the section 19 proceedings in April 1994 were all present at the 1993 meeting and voted in favour of ***302** the decision of the Gaming Board that there was sufficient evidence to concede that the applicant was not a fit and proper person to be a casino director. The Government's argument that the decision was taken so that the Gaming Board could be confident that it had evidence to support the Chairman's statements at the British Casino Association luncheon, if the applicant were to bring defamation proceedings against her, only confirms that the Gaming Board had already come to a conclusive decision in respect of the applicant one year prior to his section 19 hearing.

50. The Court considers that this aspect of the section 19 proceedings alone indicates that the Panel did not present the necessary appearance of impartiality to constitute an Article 6(1) tribunal.

51. However, even where an adjudicatory body determining disputes over “civil rights and obligations” does not comply with Article 6(1), there is no breach of the Article if the proceedings before that body are “subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)”. The issue in the present case is whether the High Court and the Court of Appeal satisfied the requirements of Article 6(1) as far as the scope of jurisdiction of those courts was concerned. [11]

52. In the case of *Bryan* , the Court gave examples of the matters which were relevant to assessing the adequacy of the review on a point of law in that case: “the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal” . [12]

53. The Court notes that the present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular monitoring. In the United Kingdom, the monitoring is undertaken by the Gaming Board pursuant to the relevant legislation. The subject matter of the decision appealed against was thus a classic exercise of administrative discretion, and to this extent the current case is analogous to the case of *Bryan* , where planning matters were initially determined by the local authority and then by an inspector, and to the above-mentioned case of *X v. United Kingdom* , [13] in which the applicant was held by the Secretary of State not to be a fit and proper person to be the chief executive of an insurance company. The Court does not accept the applicant's contentions that, because of what was at stake for him, he should have had the benefit of a full court hearing on both the facts and the law. Even though the members of the Panel were not experts in the gaming industry, they were advised by officials who were experts, and the Court finds administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure. ***303**

54. The Court further notes that the Panel's decision was arrived at after quasi-judicial proceedings with a seven and a half day hearing at which evidence was called by the applicant, who was throughout the proceedings represented by senior counsel. The applicant was given ample opportunity to consider the various elements of the case against him, and to comment on the way in which the proceedings should take place. Further, it was open to the applicant to make a wide range of procedural complaints in the context of the judical review proceedings which he subsequently brought.

55. The question remains, however, whether, in a case such as the present where the applicant's primary complaint was that the Board, as the sole decision-making body, was actuated by bias, the extent of the High Court's review was sufficient to amount to “subsequent control by a judicial body that has full jurisdiction …”. In determining this question, the Court must consider the way in which the case developed on judicial review.

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56. On the question of bias, Jowitt J. noted the acceptance by counsel for the Gaming Board that there was an "appearance of bias". However, he went further to examine whether this appearance of bias was such as to give rise to a real danger of injustice. Having examined the evidence in detail and having, in particular, drawn attention to the preparations made to give the applicant a fair and open-minded hearing, to the time devoted to the hearing, to the findings in favour of the applicant on certain issues and to the way in which the Panel distinguished between the different impact of their various findings on the "fit and proper person" issue, as well as to the calibre and experience of the Panel members, it was his view that no real danger of injustice arose in the present case. Jowitt J. further concluded that, even if there had been unconscious bias on the part of the Panel, the Panel's decision had to stand because of the application of the doctrine of necessity. [14]

57. The Court of Appeal, for its part, was prepared to assume that the applicant had an arguable case, sufficient to justify leave to appeal, that there was a real risk that the decision of the Panel had been actuated by bias but, applying the doctrine of necessity, held that the decision had to stand, since the decision had to be made by the Board and could not be delegated to an independent tribunal.

58. The Court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the *304 ability to quash the impugned decision and to remit the case for a new decision by an impartial body.

59. In the present case the domestic courts were unable to remit the case for a first decision by the Board or by another independent tribunal. The Court thus finds that, in the particular circumstances of the case, the High Court and the Court of Appeal did not have "full jurisdiction" within the meaning of the case-law on Article 6 when they reviewed the Panel's decision.

59. Consequently, there has been a breach of Article 6(1) of the Convention.

II. Application of Article 41 of the Convention

60. Article 41 of the Convention provides:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

A. Damages

61. The applicant claims £1,868,000 in respect of loss of salary and £2,500,000 in respect of loss of pension rights. He contends that he has suffered these losses as a direct result of the unfair procedures adopted by the Gaming Board. He also asks the Court to make an award of damages for non-pecuniary loss on the basis of reputation and distress which he has suffered as a consequence of the withdrawal of his section 19 certificates.

62. The Government submits that the losses claimed by the applicant were caused by the decision of LCL in April 1992 to press for the applicant's resignation and the sale of his shares. It contends that it was only in May 1994, after the section 19 hearing, that the Gaming Board decided to withdraw the applicant's section 19 certificates, and that it was this decision which the applicant contended was tainted with bias, and challenged in the judicial review proceedings before Jowitt J. They submit that the applicant's loss was incurred well before the occurrence of the events of which he complains in the application of the Court. Further, the Government contends that the Court should not speculate about what the outcome of the section 19 hearing might have been had there been no violation of Article 6(1).

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63. The Court cannot speculate about the outcome of the domestic proceedings had those proceedings been in conformity with Article 6(1) of the Convention. In any event, it considers that no causal link has been established between the violation found and the damage claimed. Accordingly, the Court dismisses the claim for damages for pecuniary loss. Moreoever, the Court considers that the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. ***305**

B. Costs and expenses

64. The applicant seeks a total of £31,380.01 in respect of the costs of the application to the Commission and the Court. He also seeks £202,977.70 in relation to the costs of the section 19 hearing, and £254,982.72 in relation to the costs of the judicial review proceedings.

65. The Government contends that the costs claimed in respect of the application to the Commission and the Court are excessive, and suggests that a reasonable amount would be in the order of £10,000 including value added tax. It submits that the Court's normal practice is to disallow costs incurred in the domestic proceedings, and that the applicant has suggested no reason why this practice should not be followed in the present application.

66. Making its assessment on an equitable basis, the Court awards the applicant £13,500 in respect of the application to the Commission and Court, plus any relevant value added tax. No award is made in respect of the costs of the domestic proceeedings.

C. Default interest

67. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5 per cent per annum.

For these reasons, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6(1) of the Convention;
2. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44(2) of the Convention, for costs and expenses, £13,500, plus any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 7.5 per cent shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Partly dissenting opinion of Judge Loucaides

O-I1. [15] I fully agree with the judgment of the Court except as regards the finding that an award of non-pecuniary damage is not justified in this case. The majority held that the “finding of a violation constitutes in ***306** itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant”. I am unable to accept this approach.

O-I2. The Court found a violation of Article 6(1) of the Convention in that the three Panel members who adjudicated in the proceedings—which resulted in a revocation of the certificate allowing the applicant to hold a management position in the gaming industry—did not present the necessary appearance of impartiality. The Court further found that there was no domestic remedy in respect of that defect.

O-I2. The applicant claimed an award of damages for non-pecuniary loss on the basis of loss of reputation and distress suffered as a consequence of the withdrawal of the certificate in question.

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O-I3. In my view this is a proper case for awarding non-pecuniary damages to the applicant for his feelings of distress and frustration as a result of living through proceedings affecting his professional status, which did not offer the safeguards of impartiality required by Article 6 of the Convention.

O-I3. The Court has on many occasions awarded non-pecuniary damages in order to compensate applicants for their feelings of disappointment and frustration in respect of violations even of a procedural nature, such as excessive length of proceedings, irrespective of whether the particular violation resulted or not in actual pecuniary damage.

O-I4. I cannot understand in what way the mere finding of a violation in this case "constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant" as found by the majority. I believe that such a finding does not take into account the feelings of the applicant. In any case the Convention gives the Court the right to award "just satisfaction" which implies more than the mere finding that there has been a violation. A declaration of such a finding by itself, without any compensation, is of no consequence for the applicant's complaint, which was found by the Court to be justified and for which he had no remedy in the domestic legal system—even though the domestic Courts were prepared to accept that there was an appearance of bias on the part of the Panel.

O-I5. For the above reasons I am in favour of awarding an amount of money for the non-pecuniary damage sustained by the applicant. ***307**

Footnotes

1 See pp. 93–96 of the judgment.
2 *R. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139* .
3 *[1993] A.C. 646* .
4 Schedule 2, para. 3(1) of the 1968 Act.
5 Schedule 5, para. 6 of the 1968 Act.
6 This judgment is not final. Pursuant to Art. 43(1) of the Convention, any party to the case may, within three months from the date of the judgment of a Chamber, request that the case be referred to the Grand Chamber. The judgment of a Chamber becomes final in accordance with the provisions of Art. 44(2) of the Convention.
7 See para. 19 above.
8 See *Bryan v. United Kingdom (A/335-A): (1996) 21 E.H.R.R. 342* , paras 44 and 46.
9 App. No. 28530/95, Dec. 19.1.98.
10 See *Langborger v. Sweden (A/155): (1990) 12 E.H.R.R. 416* , para. 32.
11 See *Bryan v. United Kingdom* , loc. cit., para. 40, with further references.
12 *ibid.* para. 45.
13 *Loc. cit.*
14 See paras 24 and 26 above for the manner in which the domestic courts described and applied the doctrine.
15 Paragraph numbers added by publisher.

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