

Recent Trends in Judicial Control

By the Hon. Mr Justice Keene

The idea seems to have caught on in some circles that the judges have, in planning cases, been intervening to a greater extent than occurs in other fields of judicial review of public decision-making. I believe this idea to be ill-founded. So far as I am aware, both from personal experience and from examining recently-decided cases, the courts have been applying their normal degree of self-restraint. Of course, there will sometimes be exceptions, where a judge who has specialised in planning law at the Bar feels tempted to do more than perform the essentially supervisory role of the court and gives way to that temptation. But speaking for myself I believe that such instances are and should remain exceptional. Let us look at the area of planning policy.

1. Planning policy

Questions of planning policy will inevitably come before the courts. They always have, but section 54A makes development plan policy and its interpretation of crucial importance in many cases. Likewise, the Secretary of State's own nationally applicable policies will have been relied on at public inquiry, often by opposing sides. The meaning of such policies will frequently be raised by the losing party by way of judicial challenge.

Section 54A, however, has not changed the function of the court. Note what was said by the House of Lords in *City of Edinburgh v. Secretary of State for Scotland* (1997) 3 P.L.R. 71. While their Lordships made it clear that the section (or rather its Scottish equivalent, section 18A) gave rise to a presumption, that presumption was said to be simply one of fact; the function of the court remained the limited one of review. As Lord Hope stated:

“The only questions for the court are whether the decision taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control.”

Lord Clyde went further to state that the presumption created by the statutory provision did not affect the issue of matters that lay within the jurisdiction of the courts and matters that were for the decision-maker. In his speech he states:

“the section has not touched the well established distinction in principle between those matters which are properly within the jurisdiction of the decision maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision maker. It is for him to assess the relative weight to be given to all the material considerations. . . .”

As everyone here will know, that decision was considered by the English Court of Appeal in *R. v. Leominster D.C., ex parte Potheary* (1997) 3 P.L.R. 91, and seen as representing the law of England as well as Scotland. So there is no basis for seeing section 54A as providing scope for greater judicial

[30]

intervention *into the merits* of planning decisions than before the section was enacted. The development plan carries greater weight than before, but the balancing exercise as between all the different factors is still one for the decision-maker.

Of course, if a decision-maker fails to take into account the presumption created by the section, the court will be entitled to intervene. That happened, for example, in *R. v. Canterbury City Council, ex parte Springimage Ltd* (1993) 3 P.L.R. 58 where an Inspector's report indicated a failure to have regard to the presumption by referring only to a requirement "to have regard to the provisions of the Development Plan". Later decisions have made it clear that the decision-maker, although not required to incant the words of section 54A by way of magical formula in order to legitimise the decision-making process, must at least make clear in the decision the outcome of applying the presumption by indicating whether a proposal is, or is not, in accordance with the relevant development plan: see, e.g. *Spelthorne B.C. v. Secretary of State for the Environment* (1994) 68 P. & C.R. 211. The Court of Appeal in *R. v. Selby D.C., ex parte Oxtun Farms* [1997] E.G.C.S. 60 stressed the importance of having section 54A in mind and reaching a clear finding. Malcolm Spence Q.C. sitting as a Deputy Judge in *Jones v. Secretary of State for the Environment and another* (1998) 1 P.L.R. 33 stated (at 36H):

"... if an inspector makes no conclusion as to whether or not a proposal is in accordance with the development plan, it may, depending upon a full reading of the decision letter, be difficult to infer that he has determined the case properly upon the basis of section 54A. In order to be helpful, I would urge that it is safer in those cases where regard is to be had to the development plan, which in practice is a majority of cases, that a conclusion should be reached in the decision letter as to whether or not the proposal is in accordance with it."

Whilst there may be limited scope for challenge on the application of section 54A, the increased importance given to the development plan policies by virtue of the provision means that the meaning of the policies themselves will often be questioned by judicial challenge. Many challenges are brought where a disappointed party alleges that the decision-maker has erred in law by misconstruing policy rather than simply not attaching to it sufficient weight.

On the face of it, most aspects of policy interpretation are issues of fact for the LPA or Secretary of State, e.g. is the site in the "countryside"? But such terms may themselves be further defined by the policy document, such as a Structure Plan: e.g. Hants. S.P., Policy R2. If such further definition is overlooked by the decision-maker, he will have left out of account a relevant consideration and his decision may be upset on conventional judicial review grounds.

But the courts will not simply apply their own interpretation of a policy, as they would with a conveyance or a will or even a planning permission. In those latter cases, the courts are interpreting the law or at least a document conferring legal rights. A planning policy, whether in a development plan or in a PPG or other statement of Ministerial policy, is not such a document. I do not agree with a passage in the decision of the Deputy Judge in *HJM Caterers Ltd v. Secretary of State* [1993] J.P.L. 337. There it was said that the meaning and effect of a development plan policy is "a matter of pure construction and therefore of law, which was eminently for the Court to determine". The meaning of a planning policy is something, in my view, which is in the first instance at least for the decision-maker, whether Minister, Inspector or LPA: see *Ex parte Puhlhofer* [1986] A.C. 484 at 517-518. That was not a planning case, but one which was dealing with the homelessness legislation. In that statutory situation the House of Lords considered how the courts should approach the task of establishing the meaning of the word "accommodation". Lord Brightman said that what was to be seen as accommodation was "a question of fact to be decided by the local authority". His Lordship did note that some places clearly would not be regarded as accommodation at all: "It would be a misuse of language to describe Diogenes as having

occupied accommodation within the meaning of the Act.” But, subject to such extreme cases, the issue was to be determined by the authority. That is, of course, a basic principle of administrative law, applicable wherever a measure of judgment is to be exercised by a decision-maker. That same principle was in due course applied to the interpretation of planning policy by Auld J. in *Northavon D.C. v. Secretary of State* [1993] J.P.L. 761, where he had to deal with the meaning of Green Belt policy as set out in PPG 2 and, in particular, what was meant by the words “an institution standing in large grounds”. There he held that:

“Whether a proposed development met the description was in most cases likely to be a matter of fact or degree and planning judgment. He said in most cases, because it was for the court to say as a matter of law whether the meaning given by the Secretary of State or one of his officers or inspectors to the expression (an institution standing in large grounds) when applying it was outside the ordinary and natural meaning of words in their context. The test to be applied by the Court was that it should only interfere when the decision-maker’s interpretation was perverse in that he has given the words a meaning that they could not possibly have or restricted their meaning in a way that the breadth of their terms could not possibly justify.”

The one reservation I have about that statement is that the language and concepts used in policies are sometimes ones derived from the discipline of town and country planning and will not always possess the same meaning as they would in ordinary lay usage. Perhaps one needs to stress the phrase “in their context” in the passage quoted from Auld J.’s judgment.

George Bartlett Q.C., sitting as a Deputy Judge in *Virgin Cinema Properties Ltd v. Secretary of State* [1998] P.L.C.R. 1, adopted Auld J.’s approach, which has also been followed in *Cooper v. Secretary of State* (1995) 71 P. & C.R. 529. In the *Virgin Cinema* case, the court moved somewhat away from reference to the “ordinary and natural meaning” of words in a policy. The Deputy Judge said that some policies “may require for their interpretation an understanding of the thinking and purposes that underlie them . . . how the policy is to be interpreted may well involve a consideration of its purposes and its proper functioning alongside other policies in the plan—matters which are clearly for the Secretary of State rather than the court.”

In that case, there were two equally feasible meanings put forward, both of which could be respectably argued. The court decided that neither of those meanings was outside the range of acceptable meanings of the words in question.

Thus the court there adopted the test of asking whether the decision-maker has attributed to the policy a meaning which he could not reasonably have attributed to it. A broadly similar approach is to be found in the recent Court of Appeal decision in *R. v. Derbyshire C.C., ex p. Woods* [1997] J.P.L. 958. There it was said that the court will only intervene if the meaning adopted below was perverse or otherwise bad in law. Therefore if the policy wording is capable of bearing more than one meaning and the decision-maker applies one of those meanings, that is a legitimate decision. Clearly this approach implies that the courts will at least determine what meaning or meanings a policy wording is *capable* of bearing. If the decision-maker adopts a meaning which is not one that the words are capable of bearing, then there will have been an error of law justifying judicial intervention. This is the explanation given for the decision in *Horsham D.C. v. Secretary of State* (1992) 1 P.L.R. 81, which might be thought to be a case where the court came close to adopting its own interpretation of policy. (It may, of course, simply have been the result of skilled advocacy on behalf of Horsham D.C.!)

The approach set out in *ex parte Woods* seems to me to be a proper and defensible one in relation to planning policy. Of course, the courts will be far readier to intervene whenever there is perceived

unfairness, at least in the procedures adopted by the decision-making body. And they will regard the construction of documents affecting legal rights, such as planning permissions, as a matter of law where the courts are entitled to become involved at first hand and not merely in a supervisory role. This difference in approach to planning policy matters on the one hand and documents affecting rights on the other is sometimes attacked. The criticisms are twofold:

- (1) Permitting decision-makers a discretion in interpretation will result in inconsistency as to the way policy or guidance is applied and so uncertainty in the planning system; this is of real concern where national planning policy guidance is concerned.
- (2) Planning policy/guidance may often be equally relied upon as those documents which are said to affect legal rights and may, in turn, give rise to a legal right such as that of legitimate expectation that the policy/guidance will be applied in a certain way.

For an answer to the first criticism, I look to the judgment of the Court of Appeal in *Woods*. Brooke L.J. referred to the judgment in *Cooper*:

“[it was] said correctly [in *Cooper*] . . . that the need for consistency in the construction of policies as between two policy sources might be a relevant consideration when determining the meaning which the words in a policy document were capable of bearing. But the decision whether a dangerous inconsistency might in fact exist on one interpretation of the words (so as to suggest that a particular meaning should be afforded to them in the circumstances) would be a matter in the first instance for expert planning judgment, and not a matter of law. A court would only intervene if that judgment was demonstrated to be perverse, or otherwise bad in law.”

As to the second criticism, I accept that a legitimate expectation is, at the least, a developing legal right which is capable of protection by the courts. It must also be remembered, however, that one of the prerequisites for such a right to arise is that the policy, guidance or representation relied upon must be “clear, unambiguous and devoid of relevant qualification” see Bingham L.J. in *R. v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 W.L.R. 1545 at 1569G. The issue of the correct interpretation of wording in policy or guidance only arises when there is ambiguity. In all other cases, interpretation should be a matter of simplicity. In cases of ambiguity there certainly is the risk of different decisions by different decision-makers: see *Virgin Cinema*. However this difference should not frustrate any legitimate expectation: in such cases, the wording is *ex hypothesi* ambiguous and so lacking the requisite clarity to give rise to any type of legitimate expectation.

As a small postscript to these criticisms, the recent decision of Carnwath J. in *R. v. Flintshire County Council, ex parte Somerfield Stores Limited* [1998] E.G.C.S. 53 appears to represent yet further judicial reluctance to intervene, even where the construction of planning permissions is concerned. The applicants sought to quash a decision of the local planning authority to grant planning permission and not to enforce against development on the ground that the authority had erred in law in concluding that the development had been lawfully carried out pursuant to a 1991 planning permission. The applicant’s case was that the 1991 planning permission had, as a matter of law, expired. The LPA’s decision necessarily depended on its view of the status of this permission. Carnwath J. ruled that what the LPA had to do:

“was take a view as to the weight to be given to the 1991 planning permission in the planning balance relevant to the current application before it, bearing in mind the questions which had been raised as to its validity.

The question for the court reviewing that decision is not whether it would have reached the same conclusion, but whether the approach taken by the council was ‘irrational’ or to use the

preferred modern formula 'beyond the range of responses open to a reasonable decision maker' (see *R. v. The Ministry of Defence, ex parte Smith* [1996] Q.B. 517 at 546). Of course, if the decision depends on a conclusion on a clear cut legal issue, and the court decides the authority has that wrong, that may be a ground for interfering under the head of illegality. But it will still be a matter for the court, in the exercise of its discretion, to weigh the significance of the legal error in the decision as a whole. Where, as is usually the case in planning matters, the decision is one of mixed law, policy and fact, the policy and factual elements are subject to review only on *Wednesbury* grounds."

I conclude that the principles on which the courts will operate in respect of planning policy and its interpretation are now tolerably clear. Fears of excessive judicial intervention are not justified, at least not if the principles set out in *ex p. Woods* are observed.

Indeed, it may even be that the courts have been showing somewhat greater restraint over planning policy matters than in some other areas of judicial review. For example, the scheme produced by the Criminal Injuries Compensation Board has been handled in a far more interventionist fashion: see *ex parte Schofield* [1971] 1 W.L.R. 926; and in *R. v. Ministry of Defence, ex parte Walker* (February 9, 1998, unreported), Latham J. said that it was for the courts to construe the words in the statement of policy and to determine whether the Ministry had correctly applied them. That was a case concerning the Criminal Injuries Compensation (Overseas) Scheme.

Therefore I find it difficult to accept that planning policy is becoming subject to excessive judicial interference. Certainly there is no discernible trend in that direction.

2. Other recent trends

Delay

Recently we have seen a spate of judicial decisions placing increased emphasis on the need for leave applications challenging the grant of permission to be made promptly in accordance with the requirements under Order 53.

Once again, the planning field seems to have developed its own principles in this area. In the cases of *R. v. Swale Borough Council, ex parte RSPB* (1991) 1 P.L.R. 6 and *R. v. Exeter City Council, ex parte JL Thomas & Co. Ltd* [1991] 1 Q.B. 471 Simon Brown J. (as he then was) stressed the importance of acting with the greatest possible urgency where planning permissions were to be challenged and giving affected persons the earliest warning of an intention to proceed (at 484F). Both these requirements have continued to be stressed in cases since and both cases are almost invariably cited where an application is challenged on the grounds of delay.

Significantly, Simon Brown J. in the *JL Thomas* case drew attention to the absence of a statutory right of challenge to an authority's grant of planning permission and the existence of a six-week statutory time-limit on a challenge to a ministerial decision. These factors informed his approach that a would-be applicant to the court challenging planning decisions must act with the greatest possible celerity.

The principles articulated by Simon Brown J. have been taken up and have begun to form something of a rule in practice. In my own decision *R. v. London Docklands Development Corporation, ex parte Sister Christine Frost* (1996) 73 P. & C.R. 199, I indicated that I would have been minded to reject the application as a matter of discretion due to delay combined with the applicant's conduct. The principle that an applicant must act with the utmost promptness, particularly where third parties' rights are concerned, and not simply within three months had already been affirmed by the Court of Appeal in a

non-planning case: see *R. v. Independent Television Commission, ex parte TV NI Ltd*, *The Times*, December 30, 1991. In *ex parte Sister Christine Frost* the prejudice to the respondent developers was significant and the applicant had failed to notify relevant parties.

More recently in *R. v. Cotswold District Council, ex parte Barrington Parish Council* (1997) 75 P. & C.R. 515, it was held that the time for bringing a judicial review ran from the date of the relevant decision and *not* from the date of the subjective knowledge of the applicant (although clearly subjective knowledge would be relevant to the issue of good reason for delay). In applying this to judicial review of planning applications, the court referred to the six-week statutory time-limit under section 288 for challenges to ministerial decisions and noted that it would be strange if the criterion of “promptly and in any event within three months” were to be judged by reference to the applicant’s state of knowledge when the permission had been granted by a LPA, when such knowledge forms no basis for the time-limit which operates in relation to challenging planning permission granted by the Secretary of State or one of his Inspectors.

In more extreme terms, it has been suggested that it is nearly impossible to conceive of a case where leave to move for judicial review would be granted to attack a planning permission where such an application was lodged more than six weeks after the planning permission had been granted. Laws J. in *R. v. Ceredigion County Council, ex parte McKeown* [1998] P.L.C.R. 90 stated that he could see:

“no rhyme nor reason in permitting the common law remedy of judicial review to be enjoyed upon a timescale in principle more generous to an applicant than Parliament has seen fit to fix in relation to those who desire to challenge a refusal of permission or its grant of conditions. I do not say there cannot be such a case, but in my judgment it would be a wholly exceptional one.”

This goes further than the principles set out by Simon Brown J. and those which were applied in the *ex parte Sister Christine Frost* and the *Barrington Parish Council* cases. Potential applicants who may have feared that this was a new statement of principle which would harden into a procedural rule may have been relieved to notice that Laws J. recently had occasion to find a case which justified bringing the application outside the six-week period: in *R. v. Essex County Council, ex parte Tarmac Roadstone Holdings Ltd* (1998) 1 P.L.R. 79 at 88H, Laws J. appears to have moderated the principle as follows:

“Normally there will not be any excuse for bringing it later than the six-week period prescribed for a statutory appeal against a decision of the Secretary of State on appeal to him. In this case, however, on the facts, there are not such pressing third party interest, as is often the case with challenges to a planning permission.”

Whilst the courts will be anxious to enforce the duty to act promptly and will often have regard to the six-week period by way of contrast, it is true that a potential applicant on a judicial review application may often be in much less substantial state of readiness to bring a challenge than after a ministerial decision has been made following an appropriate inquiry. In those circumstances, the courts should at least be wary of applying the statutory framework without regard to the facts of each individual case.

Other examples of where the Court has urged promptness and adherence to the six-week period include *R. v. Sevenoaks District Council, ex parte Wickham*, CO 3906/97 (unreported April 9, 1998), where there was a delay of eight weeks, and waiting for the issue of committee meeting minutes was rejected as a reason for delay in issuing proceedings and *R. v. Breckland D.C., ex parte Budgen Stores Limited*, CO/51/98 (unreported) April 8, 1998 where Owen J. emphasised that the applicant cannot sit back to obtain a commercial advantage.

Good reason for time extension

Where a grant of permission is not under challenge, but some other decision is, the courts will apply the normal judicial review rules and in appropriate cases will grant extensions of time beyond the three months. For an unusual example of a substantial extension, see *R. v. Somerset County Council, ex parte Morris and Perry Ltd*, unreported, judgment April 29, 1998.

Administrative law principles

Generally in judicial review planning proceedings the courts will adopt their normal approach, including such principles as fairness and reasonableness. The Court of Appeal illustrated this in the case of *R. v. Warwick C.C., ex parte Powergen Plc* (1997) 3 P.L.R. 62 which concerned a refusal by the Highways Authority to enter into a section 278 agreement after planning permission for a proposal had been granted by the Secretary of State. The refusal was held to be *Wednesbury* unreasonable, notwithstanding the Highways Authority's ostensible discretion to enter into such contracts, because the Highways Authority's objections had been considered and aired at the planning inquiry and rejected. To permit such refusal would frustrate the planning process. Forbes J. at first instance was prepared to hold that the section 278 discretion had become curtailed or limited following the inquiry.

This decision in the planning law field has now been applied by the Court of Appeal in an immigration context: see *R. v. Secretary of State for the Home Department, ex parte Danaei* [1998] Imm.A.R. 84.

The *Powergen* decision must be treated with a degree of caution. In *R. v. Cardiff County Council, ex parte Sears Group Properties Ltd*, *The Times*, April 30, 1998, Carnwath J. distinguished the *Powergen* case in circumstances where a different highway authority had resolved to defer the signing of a section 278 agreement until an updated traffic analysis had been submitted. Carnwath J. said that the principle in *Powergen* applied *a fortiori* in a case where, at the time the planning permission had been granted originally, the local highway authority had raised no objection; but he was unable to apply the *Powergen* doctrine on the facts of that case without qualification because the decision was not to reject the agreements outright but to require the submission of a comprehensive report on the problems affecting the proposed highway works which were to be subject to the section 278 agreement. Carnwath J. held that this decision of postponement could not be regarded as wholly perverse, given that changes had occurred since the previous Highway Authority had indicated its views.

Reasons

It is noteworthy that there is no inclination on the part of the courts to require reasons to be given for a change of mind by a LPA, so long as the change is not irrational: see the Court of Appeal in *R. v. Aylesbury Vale D.C., ex parte Chaplin* (1997) 3 P.L.R. 55. In this case, an application for planning permission for erection of a house was refused contrary to a recommendation from the planning officer. An appeal was lodged. In preparation for the appeal, a site visit was carried out, following which the sub-committee resolved to invite the applicant to resubmit the application on a without prejudice basis. The identical application was approved. Pill L.J. giving the judgment of Court of Appeal said there was no obligation to give reasons in such circumstances. It was argued by counsel for the applicant that there was a developing common law duty to give reasons for administrative decisions, as illustrated by such cases as *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 W.L.R. 242, *R. v. City of London Corporation, ex parte Matson* (1996) 8 Admin.L.R. 49 and *R. v. East Hertfordshire D.C., ex parte Beckman*, unreported, June 26, 1997. In particular, reliance was placed on the comments of Swinton Thomas L.J. in the case of *ex parte Matson*, that it would not have been "unduly difficult or arduous" for the decision-makers to have given a collective reason for their decision, and the case of

North Wiltshire D.C. v. Secretary of State for the Environment [1992] J.P.L. 955 where a planning Inspector who was taking a different view from a previous Inspector in respect of the same site, was held to be under a duty to take into account the earlier decision and explain why a different view was being taken, bearing in mind the importance of consistency in the planning field. The Court of Appeal was not persuaded that any such developing duty to give reasons required the local planning authority in the case of *Chaplin* to give reasons for its change of heart. It was stressed that the appeal site was one where it could be readily be accepted that different people, acting in good faith, might form opposing views.

The Court of Appeal did recognise, however, that there might be cases where such a duty could arise. Judicial reluctance to extend the duty to give reasons in the absence of statutory requirements in planning contexts is unlikely to be changed by statutory reform in the near future. A Government Consultation Paper “Modernising Local Government: A New Ethical Framework”, published in April 1998, draws on observations from the Nolan Committee and provides Government Comment in Annex CC.

The Nolan Committee recommended that “the reasons given by planning committees for refusing or granting an application should be fully minuted, especially where these are contrary to officer advice”, Annex CC: para. 10–11. The Government response was that it “agrees that it is good practice for planning committee meetings to be properly minuted. In particular, where elected members decide to grant permission against the officers’ written recommendation, the minutes should record their reasons for doing so.” But the view remained that “there should not be any general requirement for reasons to be given for granting planning permission since such decisions are not subject to any appeal process . . . We believe that a requirement to give reasons for granting permission would not only make planning committees’ work more difficult but would put permissions at increased risk of legal challenge on purely technical grounds.”

The courts’ reluctance to impose reason-giving duties in the absence of statutory provisions was reasserted by the Court of Appeal recently in *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Marson*, *The Times*, May 18, 1998 (Nourse, Pill and Mummery L.JJ). This case concerned decisions by the Secretary of State to require Environmental Impact Assessments. Whilst the Secretary of State is required to give reasons under the 1988 Regulations where an EIA is required, no reasons need be given if the Secretary of State refuses to make such a direction. The Court of Appeal once again noted the absence of a common law duty or a duty under Community law.

Conclusion

It should be borne in mind that one of the mechanisms by which the courts have developed the powerful weapon of judicial review has been the requirement on a decision-maker to give reasons for his decision. Yet we see the courts in the area of planning law refraining from imposing such a requirement where Parliament has not itself already imposed a duty to give reasons. This too should give some comfort to those who think that the courts have started to exceed their proper role in planning cases. Any over-involvement by a High Court judge in the merits of planning decisions or planning policies is any event likely to receive short shrift in the Court of Appeal or the House of Lords. Those at this Conference who regularly deal with such matters can sleep soundly in their beds—there is no judicial ogre lurking around the corner.