Development and Democracy: The Place of Human Rights in Our Planning System After Alconbury

By Keith Lindblom Q.C.

Introduction

1. I must begin by expressing my gratitude to Hereward Phillpot, who worked with me in the *Alconbury* proceedings in the Divisional Court and the House of Lords, and to Gregory Jones,[1] who appeared for Cambridgeshire County Council in those proceedings, for the thoughts they have contributed on the issues with which I am going to deal this morning.

2. Having been the author of the application which was made to the court in the *Alconbury airfield* case nearly a year ago, I am pleased to have been asked to present some reflections of my own on the outcome.

3. The question I shall be asking and at least attempting to answer in this paper is whether, in the light of the outcome in the *Alconbury* group of cases, we can now put aside any concerns we may have entertained about the impact of the Human Rights Act 1998 on our planning system and rest secure in the belief that "business as usual" will prevail. Ought we to regard their Lordships' decision as having brought to an end the controversy which surrounded the compatibility of the planning system with the European Convention on Human Rights? Have Lord McCluskey's "crackpots"[2] had their day?

4. Not surprisingly, in the four months or so that have passed since it was delivered, the House of Lords' decision has been widely reviewed. Most of the commentary has been sensible. No useful purpose would be served at this stage by my attempting to explain why I believe their Lordships were right. Although some commentators have criticised the reasoning to be discerned in their opinions—David Holgate Q.C. and Iain Gilbey, for example, have described it as "... a skilful use of smoke and mirrors"[3]—I shall not seek to rekindle that debate today.[4]

5. What I should like to do instead is to offer a short summary of the reasons why the House of Lords reached the decision it did, and then to consider whether that reasoning would apply equally well to other aspects of the planning system which have already been, or might become, the subject of similar challenge. I am not the first to have tackled that task.[5] Nor do I expect to deter others from doing the same. I have sought to assemble, and to comment upon, some of the thoughts that have been expressed so far, to add my own, and then to try to bring matters up to date by referring to a number of challenges currently treading their path through the courts.

6. I should perhaps make it clear at the outset that I do not propose to become embroiled in discussing

[1] Both Barristers, 2 Harcourt Buildings.

[2] During the debate on the Human Rights Bill in 1997, Lord McCluskey predicted that it would be "... a field day for crackpots, a pain in the neck for judges and a goldmine for lawyers".

[3] "Business as usual", *Estates Gazette*, May 19, 2001, p. 218.

[4] For a useful analysis of the arguments raised in that debate, I would recommend the recently published article by David Elvin Q.C. and James Maurici: "The Alconbury Litigation: Principle and Pragmatism" [2001] J.P.L. 883.

[5] See, *e.g.* Robert McCracken's eloquent and insightful article "Alconbury: The Lords Light the Lamp of Judgment" [2001] J.P.L. B17; and the two excellent papers delivered by Rabinder Singh and William Upton to the seminar organised by the Centre for Law and the Environment with the Bartlett School of Planning at UCL, "Planning and Human Rights: Life After Alconbury", and Elvin and Maurici's article *op. cit.*

the arguments for and against the inauguration of an Environmental Court in this country. A good deal of cerebral energy has already been spent on that and I am content to turn my mind to an exercise that is rather more mundane.

The Scope of the *Alconbury* Proceedings

7. Before examining in very broad terms what the House of Lords decided in the *Alconbury* cases and why, it is worth recalling that the scope of the decision was, and was acknowledged to be, limited. As Lord Slynn said (at para. 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 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 State's policies and the framework document setting out their functions. The present appeals under the Town and Country Planning Act 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."

The Divisional Court's Decision

8. In December 2000, the Divisional Court had held that the processes involved in the four cases before it were not compatible with Article 6 of the Convention, but that the Secretary of State had not acted, and would not in due course have acted, unlawfully under section 6(1) of the Human Rights Act, because section 6(2) applied. In essence, whilst accepting that the "two-stage" approach adopted by the European Court of Human Rights in *Albert and Le Compte v. Belgium*[6] was applicable to decisions taken by the Secretary of State, the court found that the absence of many of the "safeguards" relied upon by the European Court of Human Rights in *Bryan v. United Kingdom*[7] rendered the restricted right of review by the High Court insufficient to secure compliance with Article 6.

The House of Lords' Decision

9. The House of Lords disagreed.

10. All five of their Lordships issued an opinion. The fullest exposition of what would once have been

[6] (1983) 18 E.H.R.R. 533.
[7] (1995) 21 E.H.R.R. 342.

referred to as the "*ratio decidendi*" of the decision is to be found in the speeches of Lord Slynn of Hadley and Lord Hoffmann.

11. Lord Slynn approached the matter in the following way.

12. As his Lordship observed, it was accepted by the Secretary of State that he was not himself an independent and impartial tribunal. The fact that the Secretary of State makes policy and applies it in particular cases was enough to prevent him from being so.

Moving on to consider the decision-making process as a whole, however, Lord Slynn said this:

> "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. . . ."[8]

It was, said Lord Slynn, easy to overstate the difference between the Secretary of State and his inspectors in the application of policy in the taking of particular planning decisions.[9] Against that background it was necessary for there to be a "sufficient" power of review by the court of the legality of the decisions and the procedures followed.[10] And to be sufficient, it was not necessary for the court's power of review to embrace a complete rehearing on the merits.[11]

14. Lord Hoffmann characterized the underlying subject matter of the cases before their Lordships as involving "general social and economic issues".[12] The number of persons potentially interested in the outcome of those cases was very large and the decisions were said to 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."[13]

In a democratic society, Lord Hoffmann continued, decisions of that sort were made by elected bodies or persons accountable to them. This he described as being to do with the preservation of "the democratic principle". Town and country planning and road construction were "archetypal examples" of cases where what the general interest requires falls to be determined on a case by case basis.[14] There was no conflict between human rights and the democratic principle. In democratic societies, rights attaching to the ownership of property were heavily qualified by considerations of the public interest. The question arising in relation to Article 1 of the First Protocol to the Convention—namely what controls over the use of property are justified in accordance with the general interest—could and should be determined, in accordance with the democratic principle, by elected local or central bodies or by ministers accountable to them. The Divisional Court had misunderstood the European jurisprudence in finding that policy decisions within the limits imposed by the principles of judicial review could not be left to democratically accountable institutions.[15]

15. In Lord Hoffmann's judgment, the European jurisprudence, properly understood, does not require a full review of the merits of individual decisions by the courts. What is required is full jurisdiction to deal with the case as the nature of the decision requires. Where the question is one of policy, or

[8] Lord Slynn at para. 46.
[9] Lord Slynn at para. 48.
[10] Lord Slynn at para. 49.
[11] Lord Slynn at para. 52.
[12] Para. 68.
[13] *ibid*.
[14] This is a view which Lord Hoffmann has expressed in terms previously in *Tesco Ltd v. Secretary of State for the Environment* [1995] 2 All E.R. 636.
[15] Para. 76.

expediency, a decision by the Secretary of State subject to an appeal to the High Court had been held to be sufficient to satisfy Article 6(1).[16] In decisions of that nature, the presence or absence of "safeguards" was described by his Lordship as being "irrelevant"[17]:

> "The reason why judicial review is sufficient in both cases [decisions made either by an inspector or by the Secretary of State] 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."

16. However, the existence of "safeguards" was said by Lord Hoffmann to be "essential" for the acceptance of the limited powers of review by the court when the issue concerns findings of fact.[18] That conclusion was, I suggest, of some significance; I shall return to it in a moment.

17. Accepting the approach taken by the House of Lords, I suggest there are two fundamental questions to be borne in mind when gauging the compatibility of any particular aspect of our planning procedures with Article 6 of the Convention.

18. First, does the procedure engage the human rights of those involved? Answering that question will often be comparatively straightforward, for example in the case of an applicant for planning permission or the recipient of an enforcement notice. But the position may be less clear in the case of third parties and those participating in the development plan making process.

19. Secondly, having regard to the nature of the issues under consideration, does the procedure afford those whose rights may be affected a hearing which is adequate for the purposes of Article 6? I say "having regard to the nature of the issues under consideration" because what constitutes an adequate hearing will vary according to the circumstances. A "fair" hearing need not always involve a full rehearing on the merits before an independent and impartial tribunal, and may comprise a combination of hearings of differing character.

The Implications of *Alconbury* for the Rest of the Planning System

20. If, following their Lordships' decision, the exercise by the Secretary of State of his powers of "calling-in" an application and of recovering appeals is neither incompatible with Article 6 nor unlawful, and if decisions taken by inspectors are to be regarded as similarly lawful and compliant following the European Court of Human Rights' judgment in *Bryan v. United Kingdom*, what of the remainder of the planning system? Is there any reason to believe that the same basic reasoning will not apply equally to those other aspects of the system which might have looked vulnerable upon the coming into force of the Human Rights Act,[19] and possibly moribund in the aftermath of the Divisional Court's judgment in *Alconbury*?

The "Rights" of Third Parties

21. There can be little doubt that the issue of third party "rights" remains the largest unresolved question in this area of the law.

22. In the "Comment" section of the *Journal of Planning Law* for February 2001, following the Divisional Court's decision in *Alconbury*, it was confidently asserted that:

[16] *ISKCON v. United Kingdom* Application No. 20490/92, March 8, 1994; *Bryan v. United Kingdom* (1995) 21 E.H.R.R. 342.
[17] Para. 117.
[18] Para. 117.
[19] For an examination of the possible implications of the Act for the planning system written before the decision of the Divisional Court, see Professor Malcolm Grant's article in [2000] J.P.L. 1215, "Human Rights and Due Process in Planning"; and the impressive survey of the law provided by Robin Purchas Q.C. and Joanna Clayton in their article in [2001] J.P.L. 134, "A Field Day for Crackpots? The Human Rights Act, Development Projects and Control".

> "The next issue, of course, will be whether the granting of planning permission by local planning authorities is equally subject to Article 6, where the decision affects the rights and civil obligations of close neighbours who have no right of appeal."

23. Professor Malcolm Grant had elaborated on this important point in an article published in the *Journal of Planning and Environment Law* for December 2000.[20] His language was characteristically forceful and elegant. He said this:

> "In terms of legal rights, the British planning system is wholly one-sided. This reflects its historical roots in a closed regulatory system, rather than the contemporary realities of a modern participative democracy. In taking decisions on planning applications, the primary relationship is still that between the applicant and the decision-maker. Third parties have the right to make representations, and local planning authorities have a correlative duty to take such representations, if properly made, into account. But such third parties have no right of appeal against the grant of planning permission. They may participate in an appeal brought by the applicant against a refusal of permission, or conditions imposed, by the local planning authority, but they have no power to initiate a merits appeal themselves. They are restricted to making a claim for judicial review. This imbalance is troubling from the perspective of the Convention. To treat the Convention as protecting only rights arising from property ownership of applicants would be to restrict its provisions significantly."

Professor Grant's conclusion was this:

> "To the extent . . . that planning decisions are capable of determining the civil rights not only of applicants, but also of third parties, it is clear that the present system is incompatible with Article 6. Local planning authorities cannot themselves provide the necessary guarantees: they are a part of executive government, not independent from it. In some cases, they are directly financially interested in the outcome. If third parties have no right of appeal against their decisions, the defect is not corrected. Third parties are denied an independent and impartial tribunal for the determination of their civil rights."

24. More recently, Rabinder Singh has described the absence of third party rights of appeal as raising: "[the] most pressing question which remains after *Alconbury*."[21]

25. As I have already said, the first thing that needs to be considered is whether the civil rights and obligations of third parties are actually engaged at all in decisions by local planning authorities, and, if so, to what degree?

26. In the *Alconbury* cases the Lord Advocate—without the support of the Secretary of State—sought to persuade the House of Lords that decisions on the substantive merits of planning proposals were not determinative of civil rights. That argument, whilst clearly tempting, was rejected. As Lord Slynn said (at para. 28):

> "In *Fredin v. Sweden* [1991] 13 E.H.R.R. 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."[22]

[20] "Human Rights and Due Process in Planning" [2000] J.P.L. 1215 at 1216; see also the editorial in [2001] J.P.L. p. 752

[21] "Planning and Human Rights: Life after Alconbury"—paper delivered to the seminar organized by The Centre for Law and the Environment with the Bartlett School of Planning at UCL, June 19, 2001.

[22] See also per Lord Hoffmann at paras 78–83.

27. Violation of the right to the protection of property under article 1 of the first protocol to the Convention includes interferences that affect the financial value of property.[23] In *Ortenberg v. Austria*[24] the European Court of Human Rights accepted that a challenge to the grant of planning permission for the development of neighbouring land was potentially decisive of the applicant's private rights in that it would directly affect the enjoyment of her property and lead to a depreciation in its value.

28. *Ortenburg* was a relatively clear-cut case. But when one examines the European case law as a whole, it is not altogether easy to delimit the circumstances in which third party rights are likely to be held to have been determined by a planning decision.

29. This question is closely related to, and overlaps with, the need for a third party to establish his status as a "victim".

30. There are numerous European cases concerning the status of potential "environmental" litigants as "victims".[25] The law on this point is evolving. Every case turns on its own facts.[26] In general terms, however, the class of "victims" under Article 34 of the Convention has so far been confined to those who can show they have been directly affected by the act or omission concerned. The aggrieved third party must show that the outcome of the proceedings is directly decisive of the right in question, and that his challenge is not based simply on hypothetical effects or remote consequences.[27] In order to do so, he must produce reasonable and convincing evidence of the likelihood of a violation affecting him personally. Mere suspicion or conjecture will not do.[28]

31. In *Alconbury*, the House of Lords was not invited to reach any conclusion on this issue—notwithstanding the active involvement of an unincorporated organization representing local residents opposing the scheme of regeneration for Alconbury airfield.

32. When considering the range of potential "victims" in the planning context it is not sufficient simply to consider those affected by positive decisions made by local planning authorities, such as a decision to grant planning permission. The tolerance of the activities of one citizen, which are such as to interfere with or to prejudice the rights of another to the enjoyment of his home or his private or family life under Article 8 of the Convention, may equally well give rise to complaint. In the case of Article 8, the duty of the public authority is not merely to avoid direct interference with the right on its own account; it is also to secure the right in an active way. It follows that a failure to take action to enforce planning control may in certain circumstances give rise to a breach of a neighbour's rights.

33. If the result of a land use planning process is such as to be decisive of private rights and obligations, the character of the legislation which governs the fashion in which the matter is to be determined and the character of the authority which is invested with jurisdiction in relation to it (including administrative bodies) have been held by the European Court of Human Rights to be "... of little consequence".[29]

34. As the House of Lords has made clear, there are limits to the right to a hearing that is conferred by

[23] See, *e.g. Rayner v. U.K.* (1986) 47 D. & R. 5; *S v. France* (1990) 65 D. & R. 250.

[24] (1994) 19 E.H.R.R. 524. See also *Sporrong v. Lonnroth v. Sweden* (1982) 5 E.H.R.R. 35; *Fredin v. Sweden* (1991) 13 E.H.R.R. 784; *Jacobsson v. Sweden* (1990) 12 E.H.R.R. 56; and *Zander v. Sweden* (1994) 18 E.H.R.R. 175.

[25] See, for example, *Lopez Ostria v. Spain* [1995] 20 E.H.R.R. 277; *Guerra v. Italy* [1997] 26 E.H.R.R. 357; *Powell and Rayner v. U.K.* [1990] E.H.R.R. 355; *Zander v. Sweden* (1993) 18 E.H.R.R. 175.

[26] The rather unclear and therefore unsatisfactory nature of the law on this issue points to the wisdom of the amendment argued for by Lord Lester during the debate on the Bill in the House of Lords. His Lordship (supported by Lords Woolf, Hoffmann, Slynn and Ackner) suggested that the European Law on standing should be excluded and the Bill aligned with the rather more flexible test of standing in domestic law. As he pointed out, the effect of the Bill would be to result in five different tests of standing in judicial review proceedings.

[27] *Balmer-Schafroth v. Switzerland* (September 1997).

[28] *Tauiria v. France* (1995) D.& R. 83-A 113.

[29] *Ringeisen v. Austria (No. 1).* (See also per Lord Slynn in *Alconbury* at para. 27).

Article 6(1). Even for an applicant for a development consent it is not a right to a full appeal on the merits of the administrative decision taken in respect of his application (*cf. Kaplan v. United Kingdom*).[30] A two-stage process in which the decision on the merits is taken by a body that is neither independent nor impartial may nevertheless be compliant if that decision is subject to limited review by a court which does satisfy those requirements.

35. The decisions of local planning authorities are, of course, susceptible to judicial review in accordance with principles that are well known and long established. Challenges to such decisions are not infrequently brought by interested third parties; and the approach of the courts to their standing has for some time now been relatively generous. If an interested party has an otherwise meritorious challenge and an interest in the decision beyond simply being a busy-body, the court will rarely refuse permission to apply for judicial review or the substantive relief itself on the grounds of insufficient standing.

36. On the face of it, therefore, the system of local authority decision-making in the sphere of land use planning should be regarded as compatible with the requirements of Article 6 for the same basic reasons as led the House of Lords in *Alconbury* to find the Secretary of State's decision-making powers acceptable in the context of that provision. Local planning authorities are also democratically accountable—certainly no less so than the Secretary of State—and the lawfulness of their actions is subject to the supervisory jurisdiction of the High Court.

37. When questions of "expediency" or planning merit are in issue, the approach adopted by Lord Hoffmann in *Alconbury* suggests that any procedural differences between the making of a decision by the Secretary of State after a public inquiry and the making of a decision by a local planning authority following discussion in committee are immaterial. As Lord Hoffmann made plain, if the question is one of policy or expediency, the "safeguards" are irrelevant. If the House of Lords was untroubled by the dilution of "safeguards" in cases where the Secretary of State, rather than his inspector makes the decision, logically, it seems to me, the same reasoning may be expected to apply to decisions taken by local planning authorities.

38. However, that attractively simple proposition must, I think, be tempered by a note of caution.

39. In *Alconbury* Lord Clyde said (at para. 152):

> "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*." (emphasis added).

Lord Clyde's observations at paras 157, 164 and 170 are also germane, in particular his comment (at para. 170) that what is required is that:

> ". . . there should be a decision with reasons . . . [that] set out clearly the grounds on which the decision has been reached".

40. When a local planning authority is considering a planning application it does not undertake the kind of fair and public hearing that is involved in an inquiry presided over by an inspector; nor is it required to give any reasons for its decision to grant permission. In some cases, third parties are afforded a limited opportunity to address planning committees on the matters in dispute. However, it generally lies within the discretion of the individual committee whether to allow such representations to be made, and

[30] 4 E.H.R.R. 64.

objectors, if allowed to speak at all, are usually given only a very short time in which to do so. There is usually no opportunity to ask questions. Even these meagre levels of participation are denied to those whose rights may be determined by an officer acting under delegated authority.

41. Furthermore, if the giving of reasons for planning decisions is indeed of critical importance, the compatibility with Article 6 of the processes by which local planning authorities make decisions on planning applications would necessarily be called into question. The contrast between the absence of any duty for local planning authorities to state their reasons when granting planning permission and the general trend in administrative law is striking. As Lord Clyde said when summarizing the position at common law prior to the coming into force of the Human Rights Act:

> "The trend of the law has been toward an increased recognition of the duty upon decision-makers of many kinds to give reasons . . . There is certainly a strong argument for the view that . . . the cases where reasons are not required may be taking on the appearance of exceptions."[31]

Article 6(1) of the Convention is consistent with that trend in so far as it implies a duty to give reasons for a decision,[32] a duty which is reinforced where an interference with human rights requires to be justified.[33]

42. As Messrs Elvin and Maurici have commented in their recent article in the *Journal of Planning and Environment Law*,[34] these issues require clarification and are likely to receive it in further proceedings where the safeguards may be less complete than those which obtain in the procedures considered by the House of Lords in *Alconbury*.

43. A further observation which I think it is right to make is that the analysis which led to the appeals being allowed in the *Alconbury* cases might very well not apply in a situation where a local planning authority is deciding whether or not to take enforcement action, unless the question were simply whether enforcement action would be expedient. As Lord Hoffmann acknowledged:

> ". . . when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are *essential* for the acceptance of a limited review of fact by the appellate tribunal."[35] (emphasis added).

44. When a local planning authority is determining whether or not there has been a breach of planning control, an interested third party, who may be a directly affected "victim" of the unlawful use or development of the land, has no recourse to a fair and public hearing at which disputes of fact can be resolved, unless the matter ultimately proceeds to an enforcement appeal inquiry.

45. Commenting on the Commission's decision in *ISKCON* (at para. 100), Lord Hoffmann said this:

> "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."

and (at paragraph 105):

> "As for the ground (b) appeal, they [the Commission] 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."

The view expressed by Nicolas Bratza Q.C. (as he then was) in *Bryan* was that judicial review would be

[31] *Stefan v. GMC* [1999] 1 W.L.R. 1293.
[32] *Stefan v. GMC*, *op. cit.*, at 1300F–1301B.
[33] *R. v. MoD, ex p. Smith* [1996] Q.B. 517, *per* Lord Bingham M.R. at 554.
[34] *op. cit.*
[35] Para. 117.

sufficient on a ground (b) appeal. However, that observation was made in the context of the quasi-judicial procedure of the initial inquiry before an inspector. Mr Bratza emphasised the prescribed procedures, the right to be heard and the giving of a reasoned decision. The European Court of Human Rights adopted the same approach (see paras 46 and 47 of its judgment). Although Lord Hoffmann concluded (at para. 122) that "even this aspect of our planning system has survived scrutiny", that was only in respect of the position of those with a right of appeal against an adverse decision. The same reasoning would not necessarily apply in all circumstances to third parties in the same way as it would to applicants for planning permission.

46. So far, most attention has been focused on the question of whether the absence of a right of appeal for third parties constitutes a breach of Article 6. Rabinder Singh, in his paper for the University College, London conference which took place on June 19, 2001, has raised the possibility of an alternative route of challenge, namely a potential incompatibility with Article 14 of the Convention. That provision prohibits discrimination in securing the enjoyment of the rights and freedoms enshrined in the Convention. The prohibition on discrimination extends beyond the familiar confines of sex, race, colour, language and religion. It is expressed to be a proscription of discrimination "on any [such] ground", and includes the catch-all phrase "or other status".

47. An illustration of the use of Article 14 in the planning context is to be found in the case of *Pine Valley Developments v. Ireland*.[36] A planning permission granted in 1977 was declared a nullity by the Irish Supreme Court in 1982. By then the claimant had expended considerable sums in reliance on the permission that had been granted. A statute was subsequently enacted providing for compensation to be paid in respect of other consents affected by the court's ruling, but it did not extend to the claimants. Although the claimants' Article 1 argument failed, they succeeded by arguing that there was no objective justification for the difference in treatment between them and other developers affected by the ruling. Success for the claim in that case flowed from the claimants' reliance on a synthesis of the rights enshrined in Articles 1 and 14.

48. Rabinder Singh has argued that if the same approach were to be adopted in the case of third party appeals, the fact that only the developer has a right of appeal might be held to constitute a breach of Article 14. As he has pointed out, if that is so it would then be for the Government to justify the differential treatment as being proportionate. In my view, however, this is precisely where an argument based simply on Article 14 is likely to run into difficulties.

49. Those who argue with the greatest vigour against the introduction of statutory rights of appeal for third parties tend to invoke the spectre of administrative gridlock which, they contend, would be bound to result. Unless such rights were heavily restricted, a flood of third party appeals of dubious merit might reasonably be expected to follow. In the absence of a simple and workable means of differentiating between those directly affected by a proposed development and those only indirectly or possibly affected, a limited right of third party appeal would be difficult, if not impossible, to devise. I hope I shall not disappoint the protagonists in the battle which continues to rage over those issues if I decline to join the fray.

50. The courts have already had an opportunity to consider the issue of the absence of a right of appeal for third parties against the decisions of a local planning authority to grant planning permission.

51. On June 11, 2001 Jackson J. heard a renewed application which had been made by two individuals for permission to bring judicial review against a decision by Kennet District Council to grant planning permission on neighbouring land.[37] Collins J. had refused permission on March 20, 2001 (after the

[36] (1991) 14 E.H.R.R. 319.
[37] *R. (on the application of McCallon) v. Kennet District Council and others* (unreported) CO/608/2001.

Divisional Court's judgment in *Alconbury* had been given but before the House of Lords' decision was known). In his reasons for refusing the application on paper, Collins J. dealt with the Article 6 issue only briefly, dismissing it as being unarguable for the reasons set out by the defendant in its acknowledgement.[38] At the hearing of the renewed application (after the House of Lords had delivered its decision in *Alconbury*), the claimants maintained their ground of challenge under Article 6, arguing that the compatibility of local planning authority procedures was not directly in issue in the *Alconbury* cases, and that the limited right of review was accepted as being adequate by the House of Lords only on the basis of the safeguards available when the Secretary of State or his inspector was the decision-maker. It was contended by the claimants that that reasoning had no application where, as in that case, there was nothing resembling a hearing before the administrative body which was to determine the planning merits. Jackson J. rejected that argument, stating:

> "The final limb of the claimants' claim is an assertion that the Council's decision involves a breach of Article 6 of the European Convention on Human Rights. In my view that contention is no longer arguable in the light of the decision of the House of Lords in [the *Alconbury* cases]. I have in mind, in particular, the speech of Lord Slynn at paragraphs 48 and following and the speech of Lord Hoffmann at paragraphs 123 and following. It seems to me that, in the light of the reasoning of the House of Lords generally and in particular in the light of the reasoning in those passages, the claim outlined in the grounds of application for judicial review in respect of Article 6 of the [ECHR] is unarguable."

It is somewhat tantalising that the reasons the judge gave for reaching that conclusion were expressed so tersely. Whilst a local planning authority does not lack the necessary independence and impartiality simply because of its dual role as policy maker and decision taker, Jackson J.'s reasoning in the *Kennet* case offers no clue as to whether he accepted that human rights were in issue, or, if so, whether, bearing in mind the clear differences from the procedures considered in *Alconbury*, the procedures by which the decision to grant permission was taken were adequate for the purposes of Article 6.

52. On June 14, 2001 Sullivan J. rejected a challenge to the decision of Hampshire County Council's Planning and Transportation Committee to grant permission for the construction of an energy recovery facility and waste transfer station on a site at Marchwood Industrial Park, close to Southampton Docks. The challenge was brought, in part, upon the basis that the planning authority's decision contravened Article 8 of the Convention by infringing the claimants' right to respect for their private and family lives and homes; and, in part, upon the basis that the absence of a public inquiry at which evidence could be tested was such as to deny the claimants the fair and public hearing to which it was said they were entitled under Article 6.[39]

53. The judge held that the claimants' case had failed to get off the starting blocks on the facts and that accordingly it would not be appropriate for him to attempt to resolve the wider issues raised under Articles 6 and 8. However, he went on to indicate that in his judgment the Convention-related grounds of attack were ill-founded. As to the Article 8 point the judge referred to the decisions of the European Court of Human Rights in *Lopez Ostra v. Spain*,[40] *Asselbourg and Others v. Luxembourg*[41] and *Niemietz v. Germany*[42] and held that the claimants' case amounted to:

[38] In its acknowledgement, the defendant had said that "This is a frivolous application. It asserts that all planning decisions made by Planning Authorities are in breach of Article 6. . . . In the *Alconbury* case . . . the Divisional Court refused an express request (from Cambridgeshire County Council) to make a declaration that such decisions by Local Planning Authorities are contrary to Article 6".

[39] *R. (on the application of Vetterlein) v. Hampshire County Council.*

[40] [1994] 20 E.H.R.R. 277.

[41] Appeal No. 29121/95.

[42] 16 E.H.R.R. 97.

> "no more than a generalised concern as to the effects of the incinerator in terms of increased nitrogen dioxide emissions. Such generalised environmental concerns [he said] do not engage Article 8, which is concerned with an individual's right to enjoy life in his own home".

54. Disposing of the claimants' Article 6 point, Sullivan J. referred to the decisions of the European Court of Human Rights in *Balmer Schaforth v. Switzerland*[43] and *Zander v. Sweden*[44] and said that the contrast with the claimants' position in the present case could not be more stark. Reliance by the claimants merely on their entitlement to participate in the planning process and to benefit from the World Health Organization guidelines relating to air quality did not serve to differentiate them from most, if not all, of the citizens of Southampton. There was, said the judge, no "genuine and serious dispute" such as to bring the potentially relevant civil rights into play. He then went on to say this:

> "The grant of planning permission is not 'directly decisive' of such rights as the claimants may have. The claimants' connection with the decision to grant planning permission is tenuous at best, and the environmental consequences for them on the agreed factual information are remote in the extreme. . . . Thus the question of a fair and public hearing does not arise, but even if it did it should not be assumed that arranging a public inquiry would have been the only way in which such a hearing could have been provided. The special meeting was held in public. The agenda was available to members and to the public beforehand. In deciding whether there has been a breach of Article 6(1) the procedures have to be looked at in their entirety, including the earlier opportunities to make representations during the consultation process and the subsequent right to seek relief by way of judicial review if the Council errs in law. A 'fair' hearing does not necessarily require an oral hearing, much less does it require that there should be an opportunity to cross examine. Whether a particular procedure is 'fair' will depend upon all the circumstances, including the nature of the claimants' interest, the seriousness of the matter for him and the nature of any matters in dispute. . . . [The] claimants' interest in this matter is remote and on the evidence it could not be said that the consequences of the decision to grant planning permission will be significant, much less serious for them.
>
> [Counsel for the claimants] drew a distinction between matters of planning policy which he accepted, in the light of the House of Lords' decision in *Alconbury*, could be decided through the democratic process, questions of legality, which can be determined on an application for judicial review of a decision to grant planning permission, and questions of fact. Where there was a dispute falling into the last category he submitted that 'the quasi judicial safeguards' of a public inquiry were necessary in the interests of fairness. Although the Town and Country Planning Act did not make provision for a public inquiry prior to the grant of planning permission, it was always open to the planning authority to arrange a non-statutory inquiry prior to determining an application.
>
> Assuming for present purposes that it was open to the County Council to arrange to hold a non-statutory inquiry, were there any significant factual disputes to be resolved at such an inquiry? I have looked at the lengthy correspondence between the claimants' solicitors and the County Council prior to the special meeting, at the summary of objections set out in the report and at the text of the first claimant's 10 minute speech to the Council. There were certainly disputes as to matters of policy, as to the adequacy of the HWS research and as to the implications to be drawn from information about other plants, including the ESSO refinery at Fawley. As summarised in the report, the disputes are not really disputes about facts, but disputes about the implications which should be drawn, in policy terms, from the available facts. Critically, there was no

[43] 25 E.H.R.R. 598.
[44] [1993] 18 E.H.R.R. 175.

> suggestion that the environmental statement erred in its treatment of the background levels of nitrogen dioxide. As I mentioned when dealing with ground 1 above, Mr Watson and Mr Barrowcliffe are not in dispute about the underlying data. They disagree as to the conclusions to be drawn from that data. These are very much questions of professional judgment and I can see no reason why they should not have been adequately explored in written representations following publication of the environmental statement.
>
> Given the nature of their interest and the nature of the points in issue, the opportunity to make detailed representations during the public consultation process and to address the committee, I am satisfied that even if Article 6(1) did entitle the claimants to a fair and public hearing, the procedures adopted by the County Council when looked at in totality did afford them just that opportunity. . . ."

55. A similar approach is apparent in the decision of Richards J., on July 6, 2001, to dismiss a claim for judicial review of the decision of Rhondda Cynon Taff County Borough Council to promote on its own land a "lifelong learning project" comprising two Welsh medium community schools, community lifelong learning facilities, a day nursery, a culture and arts centre, youth facilities, all-weather sports facilities, new outdoor sports pitches and associated development. The challenge in that case was brought by objectors to the proposed development. It was founded, in part, on Articles 6 and 8 of the Convention, the claimants' assertion being that they lived sufficiently close to the development site to be directly affected by the proposals, whose consequence, they said, would be to impair their enjoyment of their homes and to cause the value of those homes to drop. It was conceded on behalf of the authority that the claimants enjoyed the relevant rights under Article 8 and Article 1 of the first protocol and that a decision on the planning application would be a determination of the claimants' civil rights for the purposes of Article 6; but, the authority argued, the grant of planning permission would not infringe those rights.

56. In turning the claim away, Richards J. followed the approach adopted by the House of Lords in *Alconbury*. Having distilled from their Lordships' speeches the reasoning which had guided them to their decision, the judge said this:

> "Looking at the overall tenor of the speeches in *Alconbury* and at the underlying decisions of the Strasbourg court, however, I accept that the finding that the Secretary of State's decision-making process was compatible in principle with Article 6 was based to a significant extent on the fact-finding role of the inspector and its attendant procedural safeguards. By contrast, there is no equivalent in the decision-making process of a local planning authority. That process includes a right to make representations and to submit evidence, and persons may be heard orally at a meeting of the relevant committee. But there is nothing like a public inquiry, no opportunity for cross-examination and no formal procedure for evaluating the evidence and making findings of fact. The report of the planning officer to the committee generally contains an exposition of relevant facts, including any areas of factual dispute, but does not serve the same function as an inspector's report. In general there will be no express findings of fact by the committee itself. All of this considerably reduces the scope for effective scrutiny of the planning decision on an application for judicial review. It makes it more difficult, if not impossible, to determine whether the decision has been based on a misunderstanding or ignorance of an established and relevant fact, or has been based on a view of the facts that was not reasonably open on the evidence.
>
> For those reasons there is in my view a real possibility that, in certain circumstances involving disputed issues of fact, a decision of a local planning authority which is not itself an independent

and impartial tribunal might not be subject to sufficient control by the court to ensure compliance with Article 6 overall.

As in *Alconbury*, however, the issue in the present case is not whether a particular decision *might* be in breach of Article 6, but whether the procedures are such as to lead *inevitably* to a breach of Article 6. If at the end of the day there were no factual issue, or any factual issue were one in relation to which, in the particular circumstances, the court was able sufficiently to adjudicate, then there would be no relevant gap in the court's supervisory jurisdiction and no breach of Article 6. As the court said in paragraphs 45 and 47 of its judgment in *Bryan*, in assessing the sufficiency of judicial review—

> '. . . 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. . . .
>
> In the present case there was no dispute as to the primary facts. Nor was there 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. . . .'

An important point about the present case is that, although much has been made in the claimants' submissions about the problem of fact-finding on traffic and the associated issue of parking, it is not clear that there will be any factual issue at all on those matters when the decision is ultimately made. The report to committee for the meeting that was due to be held on February 22, 2001 stated that no substantial evidence had been provided by the objectors to support their concern about the conclusion of the traffic impact assessment that no significant traffic flow problems associated with the proposed development were likely to occur. In a letter dated February 20, 2001, apparently post-dating the preparation of the report, the claimant Community Council did provide a critique, based on a consultant's report, of the traffic impact assessment, concluding that the effects on the existing highway network and surrounding community had not been adequately assessed and that further analysis was required. I cannot say whether there will be further analysis or whether at the end of the day there will be any significant factual dispute about it. Nor can I say how any dispute will be resolved or what issues might be canvassed before the court on an application for judicial review of the ultimate decision.

In those circumstances it is quite impossible to conclude that the absence of a fact-finding procedure equivalent to the Secretary of State's decision making process will result in an inevitable breach of Article 6 in that the decision of the defendant council will not be subject to sufficient judicial control. The claimants' pre-emptive strike on the ground that the procedure is inherently in breach of Article 6 or will inevitably give rise to such a breach cannot succeed. Whether judicial review is adequate for the purposes can only be assessed in the light of the actual decision and by reference to the particular grounds, if any, upon which it is sought to challenge that decision.

It is only in relation to fact-finding that the position of the local planning authority differs materially from that under consideration in *Alconbury*. In other respects it seems to me that the reasoning of the House of Lords applies and that the present challenge under Article 6 must fail on the same basis as the *Alconbury* challenge failed.

Those conclusions make it unnecessary for me to consider the potentially difficult issues that

would have arisen in relation to the question of relief if I had found that the defendant could not proceed to a decision on the planning application without a breach of Article 6."

57. A similar dispute is to receive consideration by the court very soon. An application has been submitted by two individuals for permission to bring an application for judicial review in respect of a decision by the London Borough of Tower Hamlets Council to grant planning permission for a seven storey building comprising retail and restaurant units and 37 flats at a site in Whitechapel.[45] In that case the claimants have argued that the grant of planning permission in circumstances where there is no right of appeal, and where it is asserted that the claimant's Article 8 rights are affected, is in breach of their rights under both Article 6 and Article 14. In respect of Article 6 it is alleged that the local planning authority's "multiplicity of functions", in particular its plan making and decision taking roles, is sufficient to vitiate its impartiality as decision maker. The ground of challenge under Article 14 asserts that the claimants are in an analogous position to the applicant for planning permission, whose property rights will also be affected by the proposal, but that, unlike the applicant for planning permission, they have no right to appeal and any complaint centred on the merits of the decision would not be entertained by the courts. The claimants allege that in the particular circumstances of their case this different treatment had no reasonable or objective justification. Whether the judicial response to that argument will be as cool as it was in the two cases to which I have just referred remains to be seen.

Decisions of the Secretary of State not to call in Applications for Planning Permission

58. One of the more intriguing human rights challenges due to come before the courts is the challenge which has recently been launched to the Secretary of State's decision not to interfere with the approval by the London Borough of Hammersmith and Fulham Council of Fulham Football Club's proposals for the redevelopment of its ground at Craven Cottage. In *William Adlard and Others v. Secretary of State for the Environment*[46] a group of local residents have made a claim for judicial review of the Secretary of State's decision not to call in for his own determination the club's application for planning permission for a 30,000 seat stadium. As will be recalled, the Secretary of State had called in an earlier application for a smaller (15,000 seat) stadium on the same site.[47]

59. A number of inter-related grounds of challenge have been advanced, including an alleged incompatibility with Articles 6 and 8 of the Convention.

60. The claimants argue that they have been denied their right to a fair hearing in that, they say:

- the development will affect their Article 8 rights;
- the local planning authority's standing orders did not permit them to address the committee responsible for the "minded to grant" resolution;
- unlike the developer, they had no right to appeal and thus to secure a hearing;
- the Secretary of State was in a position to rectify these failings by calling the application in, and in fact was under a duty to do so pursuant to his statutory obligation not to act in a way that is incompatible with the Convention; and
- irrespective of the Human Rights Act, the Secretary of State was under a duty to exercise his

[45] *Professor Tim Oliver and Jessica Strang v. London Borough of Tower Hamlets* CO/2499/01.
[46] CO/1934/01.
[47] The resulting grant of planning permission was eventually quashed by the House of Lords (*Berkeley v. The Secretary of State for the Environment* [2000] 3 W.L.R. 420).

powers so as to avoid putting the U.K. in breach of its international treaty obligations under the Convention without displaying any proper consideration of the seriousness of such a course of action.

61. This last point relates to a separate but related ground of challenge based upon the allegation that the Secretary of State gave no or no proper reasons for his decision. In his letter notifying the interested parties of his decision, the Secretary of State had explained his general approach to the calling-in of applications and then went on to say that on the information before him he had concluded it was right to leave the application with the local planning authority. The claimants argue that following the coming into force of the Human Rights Act, and particularly in the light of Lord Clyde's observations in *Alconbury* and European authority,[48] the giving of proper and intelligible reasons for administrative decisions is necessary to enable judicial review to be an effective remedy.

62. The Secretary of State is going to resist that argument. He contends that there is no obligation on him to give reasons for a call-in decision under section 77 of the Act[49]; that the position is unaffected by the introduction of the Human Rights Act; and that there is no unlawfulness in his decision. The Secretary of State's stance is that his decision whether or not to call in an application is not decisive of any relevant rights and obligations and does not engage Article 6 of the Convention. It is pointed out by the Secretary of State that in the *Alconbury* case those seeking to demonstrate that the system was incompatible with Article 6 had expressly disavowed any argument that decisions whether or not to call in applications themselves engaged Article 6. In respect of the local planning authority's decision it is said that although the local planning authority is not in itself a compliant tribunal for the purposes of Article 6, the availability of judicial review (following the approach in *Bryan v. U.K.*[50]) renders the process as a whole Article 6 compliant. In applying the approach taken in *Bryan* the Secretary of State will argue that there is no requirement for the local planning authority to hold any hearing. The local planning authority will say the same. Permission to bring the application for judicial review was granted by Forbes J. on the papers in June 2001. The substantive hearing will take place next month.

Development Plan Preparation

63. The commonly perceived unfairness in the local plan making process is the position of the local planning authority as both promoter and decision-maker. An objector may have the right to a hearing before an inspector, but even if he persuades the inspector that a particular policy or allocation should be changed, the local planning authority is free to reject the inspector's recommendation provided that it does so in a lawful manner. Thus in the plan-making process the local planning authority is ultimately the judge in its own cause.

64. In that respect the position of a local planning authority is of course different from that of the Secretary of State where his policies are in issue. In the first place, the Secretary of State is not a party to an appeal. Secondly, whilst he too is at liberty to disagree with his inspector provided that he gives proper and adequate reasons for doing so, if the disagreement relates to a point of fact he must offer the parties a further opportunity to comment.[51]

65. The compatibility or otherwise of the plan-making system with the requirements of Article 6 has been considered by Professor Grant in the article in the *Journal of Planning and Environment Law* to which

[48] Particularly *Stefan v. General Medical Council* [1999] 1 W.L.R. 1293.

[49] *R. v. The Secretary of State for the Environment, ex p. Newprop* [1982] J.P.L. 386; *R. v. The Secretary of State for the Environment, Transport and the Regions, ex p. Carter Commercial Developments Ltd* [1999] P.L.R. 1; *R. v. The Secretary of State for the Environment, Transport and the Regions, ex p. Save Britain's Heritage* unrep., Keene J. October 13, 2000.

[50] (1996) 21 E.H.R.R. 101.

[51] Rule 17(5), Town and Country Planning (Inquiries) Procedure (England) Rules 2000.

I have already referred.[52] He analysed the five constituent elements of the right. The first of those elements is that in the civil context the right only arises in respect of proceedings that involve the direct determination of private rights or obligations.

66. It is obvious enough that a favourable or unfavourable allocation of an individual's land or the land of his neighbour can affect the value of his property. A loss in value may form the basis for a claim that the decision to make the allocation in question was an interference with that individual's right to peaceful enjoyment of his possessions under Article 1 of the first protocol.

67. In *James Moore v. United Kingdom*[53] the European Court of Human Rights said that:

> "... insofar as the local authority's proposed amendments to the structure plan, which were approved by the Secretary of State, have affected the applicant's ability to dispose of his property, [it was] prepared to assume that this may constitute an interference with his right to the peaceful enjoyment of his possessions."[54]

As to the nature of that interference, I agree with Robin Purchas Q.C. and Joanna Clayton who, in their lucid article in the *Journal of Planning and Environment Law* for February 2001,[55] have said that:

> "... probably the better view is that the imposition of the designation in itself would constitute a control over the use of property for the purposes of Article 1, rather than a deprivation."

68. The issue here is whether the allocation of that land in a development plan is "determinative" of any civil rights or simply part and parcel of the democratic process of policy making by an elected authority: a step which will affect the making of subsequent "determinations" but not a "determination" in itself. If, given the requirements of section 54A of the Town and Country Planning Act 1990, the effect of designation can be shown to result in a direct depreciation in the value of the land in question, I consider it to be arguable that in certain circumstances an authority's decision to allocate or not to do so would constitute a determination. However, given that the fact that a particular allocation in the development plan does not preclude planning permission being given for development incompatible with that allocation,[56] the better view, I believe, is that an allocation in a development plan does not constitute a determination for the purposes of Article 6.

69. Article 1 of the first protocol, it should be remembered, provides only a qualified right to the peaceful enjoyment of possessions. It is in these terms:

> "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." (emphasis added).

70. The European Court of Human Rights has acknowledged the wide margin of appreciation available to the legislature in implementing social and economic policies.[57] In practice, the requirement that any interference must be in the public or general interest is usually found to have been satisfied. There must, however, be a reasonably proportionate relationship between the means employed and the aim pursued.[58]

71. In my view, the existence of the procedural safeguards associated with the local plan inquiry process

[52] [2000] J.P.L. 1215.
[53] (1999) (App. No. 40425/98 (admissibility)—ECHR).
[54] See also *M. De Geouffre de la Pradelle* (1992) Series A, No. 253-V.
[55] [2001] J.P.L. 134 at 147.
[56] Section 54A allows for the existence of other material considerations which may outweigh the development plan presumption.
[57] See, *e.g. James v. U.K.* (1986) A 98, p. 20.
[58] Where the interference takes the form of a "control" of the use of property, rather than "deprivation", no compensation need necessarily be paid, see *Baner v. Sweden* 60 D.R. 128 (1989) para. 6..

and the duty placed upon a local planning authority to give reasons for departing from the inspector's recommendation, taken together with the existence of a right of challenge under section 287 of the 1990 Act, are likely to prove sufficient for the purposes of Article 6.[59]

72. A different view is possible, however, in respect of supporters of parts of the deposit draft plan, who have no right to be heard at the local plan inquiry. They are unlikely to have any cause for complaint if the local planning authority's position remains constant. But if the relevant allocation is removed or altered after receipt of the inspector's report, and the local planning authority decides that a further inquiry is not to be held into the modifications, the unlucky supporter has been denied the procedural protection enjoyed by the original objectors. Here too, Article 14 is likely to be resorted to by the party aggrieved.

73. The possible correctives, namely giving supporters the right to appear and be heard at the local plan inquiry, or making a modifications inquiry compulsory rather than optional, may be administratively inconvenient, but in my view would be somewhat less likely to cause the sort of difficulties which might ensue from conferring upon third parties a statutory right of appeal against individual development control decisions on their merits.

The Enforcement of Planning Control

74. When an enforcement notice is served, the person upon whom it is served has a right of appeal to the Secretary of State (under section 174 of the 1990 Act). Those procedures fall within the scope of the House of Lords' decision in *Alconbury*, in which the European Court of Human Rights' decision in *Bryan* was approved and followed. I have already said something about the distinctions to be drawn in this context between expediency and fact finding.

75. Where it appears to a local planning authority that there has been a failure to comply with a condition attached to the grant of planning permission, the authority may serve a breach of condition notice under s.187A, specifying what steps ought to be taken in order to bring about compliance. If those steps are not taken within the specified period, the person responsible is guilty of an offence. There is no statutory right of appeal against a breach of condition notice. The steps required to comply with such a notice, by their very nature, involve an interference with the enjoyment of the property of the recipient of the notice, albeit that the interference will usually involve a control over the use of the property, rather than a deprivation of it. In extreme cases the effect of compliance with a breach of condition notice could result in the loss of the recipient's home. Failure to comply being a criminal offence, breach of condition notices will therefore bring into play the requirements of Article 6 and the right to a fair trial. The burden of proving the constituent elements of the offence, namely that the defendant is the "person responsible" and that there has been a breach of condition, lies upon the prosecution.[60] Not only can the defendant seek to establish one of the two statutory defences in subsection (11),[61] he may challenge the validity of the administrative acts that led to his prosecution. The defendant may bring an application for judicial review of the decision to serve the notice, the notice itself or the decision to prosecute. An attack upon the validity of the notice may also be made as a defence before the magistrates.[62] The absence of an appeal to the Secretary of State may be thought to place a question mark over the compatibility of the s.187A procedure with Article 6, but, when the process as a whole is considered, that deficiency is unlikely to prove fatal. None of the available responses to the service of a notice allows the defendant to challenge the merits of imposing the

[59] I note that the same view has been taken by Messrs Elvin and Maurici in their recent article *op. cit.* at 901.
[60] *R. v. Ruttle, ex p. Marshall* (1988) 57 P.& C.R. 299.
[61] Either that he took all reasonable measures to secure compliance with the conditions, or that he no longer has control of the land.
[62] *R. v. Wicks* [1997] 2 P.L.R. 97; *Boddington v. British Transport Police* [1998] 2 All E.R. 203; *Dilieto v. Ealing LBC, The Times*, April 10, 1998.

condition. However, that is unlikely to be held to matter given that an application may be made under section 73 of the 1990 Act for permission to carry out the development of the land in question without compliance with the relevant condition. If such an application is refused the applicant may appeal to the Secretary of State in the usual way.

76. Although there are some rather more obscure planning enforcement procedures in the legislation which might well fail to satisfy Article 6,[63] the safeguards attendant upon the various measures available to local planning authorities for dealing with breaches of planning control under the 1990 Act are in my opinion sufficient to ensure their compliance with the Convention.

Future Challenges Under the Human Rights Act

A number of Human Rights Act challenges to local plans are progressing through the courts at present. Some of them will have been heard at first instance by the time this paper is published.[64] If I am right in my view that the remaining scope for challenges to the structure and procedures involved in our planning system is relatively slender, where are we likely to see the residual effects of the Human Rights Act manifesting themselves? In my opinion the main changes that are likely to emerge will have to do with the way the current system is operated. Future litigious activity may be concentrated in two areas in particular: first, the principle of proportionality, and, secondly, the handling of human rights issues by local authority officers.

Proportionality

78. Certain Convention rights, such as the right to life and the prohibition on torture, are absolute. The rights most commonly engaged in the planning system, however, are qualified rights, with which interference is justified in appropriate circumstances in the public interest. Proportionality is the principle governing the balance that must be struck between protecting the rights of the individual and the interests of the wider community.[65]

79. In my view one may now expect the issue of proportionality to come to the fore not just in relation to Human Rights Act cases, but also as a ground of challenge in judicial review in its own right. It is worth recalling what Lord Slynn said in his speech in the *Alconbury* cases (at para. 51):

> "I consider that even without reference to the Human Rights Act the time has come to recognise that this principle [of proportionality] 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."[66]

80. Proportionality as an issue often arises in enforcement notice appeals, albeit not usually in that obvious guise. Enforcement notices can already be appealed on the basis of what is effectively an assertion that the requirements of the notice are disproportionate. Ground (f) in s.174(2) allows the recipient of a notice to appeal on the basis that:

[63] In particular the enforcement powers provided under section 11 of the London Local Authorities Act 1995. Section 11 allows London local authorities to serve a notice in relation to any unauthorized advertisement in their area, requiring the recipient to take the advertisement or hoarding down within a prescribed period of time. Failure to comply allows the authority to enter onto the land, take down the advertisement itself and charge the recipient of the notice for the expense it has incurred. There is no right of appeal. This issue too is due to come before the courts for consideration later this year.

[64] For example, in *Mansard County Homes v. Surrey Heath Borough Council* (CO/4789/00), a challenge has been brought under section 287 of the 1990 Act on the basis that the position of the local planning authority as promoter and decision maker is such as to deny the claimant the right to a fair hearing under Article 6. That case was due to be heard on September 5, 2001.

[65] See, *e.g. Sporrong and Lonroth v. Sweden* 1983 5 E.H.R.R. 36.

[66] The other Law Lords refrained from expressing a similar sentiment. In this respect it is interesting to note Lord Hoffman's view expressed in an article contributed to "The Principle of Proportionality in the Laws of Europe" (ed. Evelyn Ellis, Hart, 1999) at 114: "I see little future for proportionality in this country as a freestanding principle".

> "... the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach."

That, however, is not the only instance in which issues of proportionality may arise. In *New Forest District Council v. (1) The Secretary of State for the Environment, Transport and the Regions, (2) Mr. Ken Duffy*, for example, an Inspector decided that it would be disproportionate not to grant planning permission for an unauthorized dwelling on an enforcement notice appeal. He accepted that the erection of the building in question had seriously harmed the character and appearance of what he described as a "vulnerable rural area", but he nevertheless granted planning permission because a refusal to do so would have deprived the appellant of his home and potentially left him homeless, thus breaching his Article 8 rights. The local planning authority appealed to the High Court on a number of grounds, one of which was that the Inspector had failed to consider whether allowing the appellant's ground (g) appeal would have avoided the risk of making him homeless. Unfortunately for the purposes of this paper, the Secretary of State consented to his inspector's decision being quashed on the grounds that the reasons given for the decision were inadequate, and so the wider issue of whether the approach adopted was lawful was not in the end litigated. The issue is unlikely to go away, however, and although that attempt by an inspector to apply the principle of proportionality in an enforcement context went awry, I doubt that it will prove to be the last.

81. The issue of proportionality is also about to come to the fore in the context of applications for injunctions under section 187B of the Town and Country Planning Act 1990. It has arisen because of enforcement action taken by a number of local authorities in respect of gypsy caravans stationed on land in breach of planning control.[67] The injunctions will involve a breach of the recipient's rights under Article 8(1), albeit one that may be justified under Article 8(2). At issue is the extent to which a judge considering an application for an injunction under section 187B must himself examine the balancing exercise already undertaken by the local authority. Sedley L.J. granted permission to appeal to the Court of Appeal in four conjoined appeals[68] where injunctions were obtained. In his order, Sedley L.J. noted that the *Chapman*[69] judgment:

> "... while entitled to great respect, is not binding (Human Rights Act 1998, s.2). The strong minority judgment can also be taken into account in our courts. Moreover the majority judgment on Article 8 is heavily orientated in favour of subsidiarity, with the consequence that what has been held to fall within the national authorities' margin of appreciation may be for that very reason require a closer and less deferential approach by the courts to planning decisions with Article 8 implications than has hitherto been the case."[70]

The conjoined appeals were due to be heard by the Court of Appeal on September 4, 2001.

Planning Officers' Reports to Committee

82. Although local planning authorities are not currently under any duty to give reasons for granting planning permission, the officer's report, where its recommendations are accepted, is often treated by the court as if it were a statement of the reasons for the authority's decision.

[67] The decision of the European Court of Human Rights in *Chapman v. United Kingdom* (Application No. 27238/95) has evidently not ended the question of the impact of the Human Rights Act on the position of gypsies within the development control system.

[68] *Hertsmere Borough Council v. Harty and others* (A2/2001/0731); *Chichester District Council v. Searle* (A2/2000/2742); *Wrexham London Borough Council v. Berry* (A2/2001/0751); and *South Bucks District Council v. Porter* (A2/2000/5512).

[69] *Chapman v. United Kingdom* (Application No. 27238/95)

[70] See "Planning Law Update" by Gregory Jones and Gunnar Beck, Solicitors Journal, May 4, 2001, at 405.

83. Since the coming into force of the Human Rights Act, many local authorities have modified their approach to the production of such reports to include reference to "Human Rights" considerations. In a recent article in the *Journal of Planning and Environment Law*,[71] Peter Stockall and Huw Thomas of Cardiff University reported that the vast majority of the 60 per cent of authorities that had modified their procedures, or intended to do so, had done so, or would do so, by:

> ". . . the inclusion of standard headings relating to the HRA or one of the Articles of the ECHR in all committee reports, reports on cases involving delegated powers, or checklists used in evaluating applications."

84. Messrs Stockall and Thomas have raised two concerns about this approach. The first relates to the absence of agreement as to what the considerations will be, the second is that without rigorous monitoring the change will result in nothing more than a ritual. I agree, and I would add two further comments.

85. First, in many cases the section of the report addressing the "human rights" implications of the decision to be taken is likely to be written by a non-lawyer (not necessarily a disadvantage in itself). Advising an authority on the human rights implications of a decision involves making legal judgments, often quite finely balanced ones, in a complex and rapidly evolving area of the law. It seems fair to assume that on occasion mistakes are going to be made.

86. Secondly, for a lawyer seeking to identify some basis upon which to challenge a decision of a local authority, the inclusion of such a section in a committee report may prove to be a godsend, enabling him to discern in a trice that the implications of the decision for the human rights of his client have not properly been taken into account. If the officer has simply gone through the routine of stating in a perfunctory way, under a heading such as "Human Rights Implications", "No human rights implications are considered to arise", there will be little room for manouvre left to a defendant council whose decision is assailed on that ground.

Conclusions

87. In the illumination provided by a decision as important as the one that has been reached by the House of Lords in *Alconbury*, it is always tempting to draw radical conclusions as to what that decision is likely to mean for the procedures which lie within its ambit. That is an enticement I have resisted in this paper, because I think the true importance of the result of those appeals lies in its having served to confirm the existing constitutional balance rather than presaging some sort of shift. Although the supervisory role of the courts has undoubtedly increased since the advent of the modern system of town and country planning in this country half a century ago, the broad constitutional balance underpinning that system remains essentially unchanged today. As Professor Grant once wrote of the 1947 Act:

> "It places the administration of British land use planning entirely in the hands of politicians. It is thus deliberately established as a process of political decision making, through local government agencies under the general supervision of central government. It is 'political' in the broadest sense of the word, involving the making of policy and accepting responsibility for its implementation through the accountability of the democratic process. The planning system, then, is created as an instrument of government, as a means of restricting private land use rights in the interests of the

[71] Local Planning Authority responses to the Human Rights Act [2001] J.P.L. 910.

> community as a whole. That does not imply that ballot box accountability should be the only measure of political choice, and that the powers conferred may be used for whatever ends those who are exercising them deem popular or expedient. It does mean, however, that the objectives sought for planning and the values applied in decision making have ultimately no greater rationality than the degree of public support which they command. It is a system of politically based decision making which operates within a series of constraints laid down by law."[72]

88. In overturning the Divisional Court's decision in *Alconbury*, the House of Lords has effectively reaffirmed that position. It has also, in my view, largely overcome the doubts about the compatibility of our town and country planning system with the European Convention on Human Rights. The scope of their Lordships' decision may necessarily have been narrow, but the reasoning which shines from it is far wider in its relevance and application.

89. I share the view, expressed by others, that the issue of third party rights awaits some kind of definitive resolution. As many here will be aware, a Private Members Bill is currently being promoted by Nigel Evans M.P., to introduce

> ". . . a right of appeal against the grant of consent for planning applications for certain persons and in certain circumstances; and for connected purposes."

The Bill received its First Reading on July 18, 2001. Even if it does not in the end find its way onto the statute book,[73] it may prove a catalyst for change. Ultimately, much will depend on the approach taken by the courts in the cases I have mentioned and others like them.

90. The title of this paper contains the word "democracy". In view of the way in which their Lordships expressed themselves in their decision on the *Alconbury* appeals that seemed to me to be right. I think the final word should belong to one of the great luminaries of this conference in its early days, the late Sir Desmond Heap. In the Preface to the first edition of his introduction to the scheme of planning law in England and Wales which was instituted by the 1947 Act[74] he spoke in typically trenchant terms, not, I suppose, overly influenced by the concept of human rights:

> "Planning at its best must, if it is to be effective, come very near to being a sort of benevolent despotism. At its worst it could, of course, develop into an objectionable dictatorship. The most energetic enthusiasts of the new Act are not likely to agree with this view, but whatever may be one's attitude to the disposition of planning powers under the new Act, it is indisputable that one of its outstanding features . . . is its concentration of an increasing number of powers in a decreasing number of persons. The ultimate implications of a policy of that kind are manifestly important. If the enhanced planning powers which the new Act creates ever got into unenlightened hands an unsatisfactory state of affairs would arise in which the private individual would find himself more planned against than planning. . . .
>
> With an imperfect understanding of what is happening the little man of this country is now setting out on a planning expedition into what are to him uncharted seas. For the welfare of his ship as a whole he has surrendered a great deal of his own individual freedom. His voyage is one of discovery and he will want to discover something really worth while . . . or he will be profoundly dissatisfied. He is going to weigh critically the gains with the losses, and the gains must be substantial or the voyage will not be worth the price of the ticket."

[72] M. Grant, *Urban Planning Law*, (Sweet & Maxwell, 1st edn. 1982, p. 6).
[73] It is twelfth in the list and time is unlikely to be found for it to complete its passage into law.
[74] D. Heap, *An Outline of Planning Law* (1949).