Infrastructure Planning Commission: Challenge or Opportunity?

Robert McCracken Q.C.*

> ''We all share the task of ensuring that our world will remain fit and capable of sustaining us and those who will come after us... Bringing about the necessary changes will not be easy, particularly if it involves restraints and sacrifices. But it must be done, and we can all help in one way or another, individually or collectively. Gradually, we are waking up to the challenges... there is no time to spare. It is your future that is at stake.''
>
> HM the Queen, Commonwealth Day Message 1992

Introduction: from technocratic paternalism to participatory democracy and back again?

HM the Queen has identified the fundamental challenge of our time. Is the Infrastructure Planning Commission (IPC) a little welcomed, but real, opportunity or a hindrance? The controversy surrounding the introduction of the IPC and the associated changes brought about by the Planning Act 2008 (the 2008 Act) is too well known to warrant further discussion here. Some have seen the Act as an unwelcome reversal of the previous trend since Rio[1] of the transition from technocratic paternalism (experts on top) towards participatory democracy[2] (experts on tap: well informed public contributions to the debate about individual decisions). Some no doubt would characterise the new system as ''technophiliac populism'' (experts on top: enthusiastic for major projects making no distinction between informed and manipulated opinion). For these critics the reforms are at best kaleidoscopic restructuring as an alternative to substantive decision making. Many quote Lord Nolan in *Alconbury*[3]:

> ''To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would also be profoundly undemocratic.''

Suffice it to say that in answer to the question ''Do you believe in the necessity for these structural reforms?'' most worldly professionals may be tempted to answer as Talleyrand might have done if

* MA Oxon, LARTPI, Barrister of Francis Taylor Building, Temple EC4Y 7BY, Visiting Fellow of the Centre for European Law, King's College, London. I am grateful to Mrs Annabel Graham Paul, and other colleagues in my chambers and elsewhere, for their help in preparation of this paper. I would also like to express my appreciation to Angus Walker and his colleagues at Bircham Dyson Bell LLP for their excellent recently published ''Practical Guide to National Infrastructure Projects''. Opinions, and errors, in this paper are of course my own. This paper is general: those who wish to take decisions on matters related to it should not rely on it alone, but, of course, seek formal advice in the usual way.

[1] Principle 10 of the Rio de Janeiro Declaration: ''environmental issues are best handled with the participation of all concerned citizens'' UN Doc A/CONF.151.5 June 14, 1992.

[2] Aarhus Convention art.1 provides that: ''In order to contribute to the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.'' (The United Kingdom has a reservation, unimportant in this context, to the use of the term ''right'' in the first part of this sentence). Article 3(2) provides that: ''Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public ... in facilitating participation in decision making ... .'' Despite the observations of the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 the Aarhus Convention may be directly effective in the United Kingdom because the EC, as well as the United Kingdom, is a party; the European Court of Justice has held that international agreements made under art.300(7) of the EC Treaty are capable of being directly effective in member states: *Syndicat Professionnel Coordination des Pecheurs de l'Etang de Berre et de la Region v Electricite de France (EDF)* (C-213/03) [2004] E.C.R. I-7357 (but see also for a contrary judicial trend *International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport* (C-308/06) [2008] 3 C.M.L.R. 9.

[3] *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [2001] UKHL 23.

asked by a noblewoman whether he believed in God: ''I have the same view as all thinking people. Like all thinking people I never disclose it.''

I propose in this paper rather to examine some of the challenges which these ambitious reforms will face and to suggest opportunities for the relevant professionals to contribute to the more effective operation of the new system in the interests of the common weal.

The key aim of the 2008 Act was described at last year's Conference[4] by Bernadette Kelly, Executive Director, Planning Directorate in DCLG as being,

> ''to transform the regime for major infrastructure projects in order to achieve outcomes that are both faster and fairer; both more efficient and more accountable; and which both ensure more timely delivery, and improve the ability of communities and individuals to participate in the system''.

She characterised as the twin pillars of the planning system a duty to support sustainable development and a manner of operation which commands legitimacy. The nature of the first pillar will continue to be the subject of lively debate beyond the scope of this paper for many years. A useful definition was presented to this conference in the Holywell Music Room in the Review and Summary of 1993[5]:

> ''[D]evelopment which tends towards the establishment of a way of life that could be sustained indefinitely if it were adopted by all people who aspire to it in the United Kingdom and elsewhere.''

That second pillar consisted, she said, of a manner of delivery that was democratic, respected private property and human rights, and involved citizens and communities in the decisions which affect them.

Few of those present in the Oxford Union today will question the desirability of these aspirations as worthy goals. There is, however, an obvious tension between the objective of *speedy* decision making and the objectives of *sustainable* development and *participatory* democracy. Our professions have a collective professional experience which enables us to add useful practical detail to the appreciation of, and hence successful resolution of, the challenges presented by this tension.

Key Elements of the Practical Task

It is possible to summarise key elements of the practical task of the IPC and the new system as being:

(i) to facilitate the expeditious approval of nationally desirable infrastructure projects;
(ii) to promptly reject bad schemes;
(iii) to impose implementation requirements which ensure that schemes provide (a) the anticipated benefits; and (b) the accompanying mitigation measures (c) without unanticipated harm;
(iv) and to do so in such a way that unwelcome decisions are generally accepted by the disappointed as fairly made.

[4] Bernadette Kelly, The Planning Bill: Implications of the Proposals for a New Regime for Major Infrastructure for Democracy and Delivery, [2008] J.P.L. [2].

[5] Robert McCracken, Review and Summary, [1992] J.P.L. [89] (a definition preceded by an observation on ''the danger that 'sustainability' will become a magic formula whose ritual incantation will ward off the necessity to take any action)''.

The envisaged general removal of cross examination by professional advocates from the streamlined system would not only deprive the decision making process of the material disclosed by skilled questioning but also, more importantly, remove the deterrent to spinning in publicity and evidence preparation which the prospect of public, personal scrutiny ensures. The avoidance of this result is a key challenge for Commissioners. One of their most important tasks will be to ensure that well informed members of the public have adequate opportunities to test projects and propose alternatives.

Importance of Culture

The language of the 2008 Act is somewhat convoluted. Three characteristics stand out. The first is that the new system is front loaded. Much more is expected before applications are submitted. The second feature is the amount of important detail to be supplied by delegated legislation and guidance.[6] The third feature is the great degree of discretion given to the IPC. Much will depend on the culture which develops within the Commission. That will in practice determine the extent to which the IPC is able to achieve its practical tasks in a manner which respects the second pillar of legitimacy. It will need at the outset to demonstrate a firm resolve to make decisions which may lead to an individually undesirable result but which creates a disciplined atmosphere in which both the development community and its opponents feel confident that compliance with, not defiance of, the expectations of the new approach is advantageous.

An instructive illustration of the importance of individually harsh decisions to the formation of a healthy culture is the radical transformation in the approach to Environmental Impact Assessment (EIA) of both developers and planning authorities as a result of the decision of the House of Lords in *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)*.[7] The House quashed the Fulham Football Club (FFC) permission because of a non compliance with the EIA Directive and Regulations.[8] Before that decision the culture was of a ''relaxed'' attitude to compliance with the EIA Directive. Courts would exercise their discretion to excuse breaches.[9] But after the FFC permission was quashed at a late stage, developers and planning authorities began to take its requirements seriously. This facilitated more informed and effective contributions from the public. The IPC has it in its power to create a culture of information sharing, responsible debate and open, transparent decision making. But it will have to have the courage to make decisions which are unpopular with powerful commercial interests and may in individual cases lead to results which promotes regard as harsh.

I wish to summarise some of the important provisions of the new system and to focus attention on some of the areas where potential problems may arise on which the IPC and practitioners will have to advise and may contribute to the greater effectiveness of the new system than is envisaged by its many critics.

[6] Planning Act 2008 s.237: ''The Secretary of State may by order make - (a) such supplementary, incidental or consequential provision or (b) such transitory, transitional or saving provisions as the Secretary of State thinks appropriate . . . .''

[7] *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603 HL.

[8] Environmental Impact Assessment Directive 85/337, now amended, and Town and Country Planning (Environmental Assessment) (England & Wales) Regulations 1988, now replaced.

[9] For example, *R. v Poole BC Ex p. Beebee* [1991] 2 P.L.R. 27; *R. v Rotherham MBC Ex p. Rankin* [1990] 1 P.L.R. 93; and *Wychavon DC v Secretary of State for the Environment* [1994] Env. L.R. 239.

Scope of the New System

The 2008 Act introduces a single development consent replacing the variety of consents[10] that would otherwise be required, for ''nationally significant infrastructure projects'' (NSIPs).

This is a key concept. Section 14(1) lists a series of projects which, subject to further detailed definition later in Pt 3, fall within it. These are in broad terms[11]:

(a) construction or extension of a generating station (to 50MW onshore, 100MW offshore);
(b) installation of above ground electric line (132 KV);
(c) underground gas storage facility development (of 43 M m3 capacity or 4.5 M m3 flow per day;
(d) construction or alteration of a Liquefied Natural Gas facility (adding 43 M m3 capacity or flow 4.5m3 per day);
(e) construction or alteration of a gas reception facility (adding 4.5m3 flow per day);
(f) construction of a gas pipeline (either 40km at 800mm or ''likely to have a significant effect on the environment'';
(g) construction of a non gas pipeline (if cross country);
(h) highway related development (for the S of S's highways, and in the case of an improvement it ''is likely to have a significant effect on the environment'';
(i) airport-related development (adding 10 M passengers per year, or 10,000 air cargo movements per annum);
(j) construction or alteration of harbour facilities (adding 500 K container ships, 250 K ro-ros, 5 M other ships);
(k) construction or alteration of a railway (other than permitted development or rail freight interchanges);
(l) construction or alteration of a rail freight interchange (four trains per day, adding 60ha);
(m) construction or alteration of a dam or reservoir (adding 10 M m3 volume);
(n) water resource transfer development (100 M m3 per annum between river basin or water undertakers' areas, excluding drinking water);
(o) construction or alteration of a waste water treatment plant (adding 500,000 population equivalent capacity);
(p) construction or alteration of a hazardous waste facility (adding 100 K tpa landfill/deep storage or otherwise 30 K tpa).

The first practical question which inevitably arises is whether any particular project is a NSIP and therefore subject to the new regime. What potentially difficult or controversial issues may arise? This leads to the next two questions. Who is to decide whether a project is a NSIP? How and at what stage can a legal challenge be made to such a decision? What are the consequences of a legally challengeable decision? The many criticisms of the new system and the limitations on opportunities for the traditional means of testing projects is likely to increase the propensity of opponents of projects to seek to defeat projects by means of legal challenge.

Some of the provisions defining NSIP call for judgement. For example, gas pipelines and highway related developments only fall within a NSIP category if they are ''likely to have significant

[10] Planning Act 2008 s.33.
[11] This paper does not attempt set out all the qualifications within the detailed definitions in Pt 3 Planning Act 2008, in particular those that apply to projects affecting Scotland and Wales. Figures in my broad summary are minima.

environmental effects'' (SEE). This is a far from straightforward phrase. It is familiar to us because it is the test for the need for environmental assessment under the EIA Directive 85/337. It would be strange if schemes could be categorised as having SEE for the EIA Directive, but not for the NSIP test. However there is a powerful argument to that effect. The ECJ decided in the *Waddenzee*[12] case that the degree of likelihood required is no more than the *possibility* of significant effects. The ECJ has held that likelihood does not, for the purposes of the EIA or Habitats Directive, require, as we would expect, a greater than 50 per cent chance. The precautionary principle, enshrined in art.174 of the EC Treaty, played a large part in the reasoning. This approach cannot necessarily be used to justify inclusion within a regulatory regime that many critics regard as providing a less rigorous system of scrutiny than that of those systems which it replaces. Parliament may well not have intended such a result.

It is only ''to the extent that development is or forms part of a NSIP'' that the new regime applies.[13] Thus two separate regimes may be governing what the promoter regards as one development project. This will be unpopular with some project promoters. However the temptation otherwise might be for the artificial inclusion as part of projects of elements of commercial value but no national significance. One of the collision points under the new system will arise from the power to grant consent for ''associated development''.

The ambit of that concept is probably a mixed question of law and planning judgement. Draft Guidance is that associated development,

> ''should not be an aim in itself but should be subordinate in scale and necessary for the development and effective operation to its design capacity of the NSIP which is the subject of the application''.

Does a superstore at the station of a new railway line qualify? Would one adjoining the station car park of a new line be ''associated'' merely because it was needed for the viability of the construction of the line? That is probably a question of judgement. Dwellings are specifically excluded. The need for express exclusion of residential development suggests that the concept of ''associated development'' is intended to be wide.

The Secretary of State may direct[14] that any applications, considered on their own or with others, for planning permission or other equivalent consent be treated as NSIP for general or specific purposes if (a) he thinks they are of national significance and (b) they are in the field of [15]:

- energy;
- transport;
- water;
- waste water; or
- waste.

He may direct that consideration of such applications be suspended while he makes up his mind. There is no time limit on the period of such suspension.

[12] *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2004] E.C.R. I-7405.

[13] Planning Act 2008 s.31.

[14] Planning Act 2008 s.35.

[15] Planning Act 2008 s.35(2).

The IPC may give advice about potential applications but it may not[16] give advice about ''the merits of any particular application or proposed application''. This prohibition is probably limited to the substantive planning merits; it probably does not apply to advice about whether a project would be a NSIP. The IPC is proposing to keep separate those who give such advice from those who ultimately make decisions on applications. This separation may give rise to some difficulties for promoters. Pre-application advice is merely that. Regulation 12 of the draft Infrastructure Planning (Applications and Procedure) Regulations 2009 require it to be immediately published on the web. It is not equivalent to a screening opinion under EIA Regulations. Later, after much work has been done, the IPC has a duty[17] to reject an application if it decides that it is not a NSIP.

National Policy Statements

These are intended to be at the heart of the new system. The Secretary of State has a discretionary power[18] to designate documents as NPS but a duty to review them ''whenever the Secretary of State thinks it appropriate to do so''.[19] Once they have been issued by the Secretary of State under the procedure laid down in Pt 2 of the 2008 Act then the IPC is able to make decisions on a NSIP without recourse to the Secretary of State. NPS may[20] in particular:

(a) set out the appropriate *amount, type* or *size* of a specified type of development either nationally or *for a specified area*;
(b) set out *criteria* for deciding on the suitability or potential suitability of a location for a specified type of development;
(c) set out the *relative weight* to be given to specified criteria;
(d) identify *one or more locations* as *suitable* or unsuitable for a specified type of development;
(e) identify one or more statutory undertakers as appropriate persons to carry out a specified type of development;
(f) set out circumstances in which specified mitigation measures would be appropriate for specified development.

They must[21] set out criteria to be taken into account in the design of the types of development to which the NPS relates. The Secretary of State must act with ''the objective of contributing to the achievement of sustainable development''.[22]

He must have regard to the desirability of:

- ''mitigating, and adapting to, climate change'';
- ''achieving good design''.[23]

The general procedural requirements set out in Pt 2 include duties to:

[16] Planning Act 2008 s.51(2).
[17] Planning Act 2008 s.55(3)(c).
[18] Planning Act 2008 s.5(1).
[19] Planning Act 2008 s.6(1).
[20] Planning Act 2008 s.5(5).
[21] Planning Act 2008 s.5(6).
[22] Planning Act 2008 s.10(2).
[23] Planning Act 2008 s.10(3).

- "carry out an appraisal of the sustainability of the policy"[24];
- "give reasons for the policy"[25];
- give "an explanation of how the policy. . . . . takes account of Government policy relating to the mitigation of, and adaptation to, climate change"[26];
- comply with public and parliamentary consultation requirements.[27]

Once a NPS has been designated the Commission,[28] rather than the Secretary of State, will normally decide applications for consent for NSIPs.[29] During the examination of the project and the decision making process, objections to the merits of a NPS may be disregarded.[30] The Commission must decide in accordance with any relevant NPS unless:

(1) that would lead to a breach of law, international obligation, domestic legal duty; or
(2) "the Panel or Council [of the Commission] is satisfied that the adverse impact of the proposed development would outweigh its benefits".[31]

This latter is a remarkable exception. It empowers the Commission effectively to override NPSs. It provides a great opportunity both for the Commission and those concerned about particular NSIPs to redress deficiencies in the national level process for designating NPSs. It sits somewhat uneasily with the power to disregard objections to the merits of NSIPs. Interestingly there is no express general duty to have regard to all material considerations. There is however a duty to have regard to matters ". . .which the [decision maker] thinks are both important and relevant to its decision".[32]

The combination of the subjective test and the distinction between relevant and important matters is, no doubt, intended to reduce the prospects of successful legal challenges on the basis of disregard of material consideration. Whether it is successful in that aim remains to be seen. It is arguable that a material consideration (which, ultimately, is one that might have made a difference to the outcome) must be considered important by a rational decision maker. It is also arguable that he must at least think about a consideration before deciding that it is not important. Two things, however, are clear. First it will not deter attempts by well funded opponents to bring challenges.[33,34] Secondly

[24] Planning Act 2008 s.5(3).

[25] Planning Act 2008 s.5(7). This may well be an onerous duty notwithstanding the restrictive approach of the House of Lords in *South Buckinghamshire DC v Porter (No. 2)* [2004] UKHL 33 where Lord Brown of Eaton under Heywood said with the agreement of the other Lords of Appeal: "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

[26] Planning Act 2008 s.5(8). The Climate Change Act 2008 and the views expressed by the Committee on Climate Change in its Advices and Reports must therefore be addressed.

[27] Planning Act 2008 s.5(4).

[28] Planning Act 2008 Pt 6.

[29] Planning Act 2008 Pt 6 ss.109–113.

[30] Planning Act 2008 ss. 87(3)(b) and 106(1)(b).

[31] Planning Act 2008 s.104(7).

[32] Planning Act s.104(2)(d) and 105(2)(c).

[33] Some will with justification be pessimistic about the prospects of the Aarhus Convention, the Sullivan Report or the Jackson Review to make more than a small difference to the deterrent effect of the English costs regime.

[34] Which must be by way of judicial review and brought within six weeks of the designation or publication thereof (s.13). See later section.

the Commission has power to remedy defects in the process or outcome of the NPS designation process. An interesting area for early exploration will be the way in which:

(1) the Commission makes its decisions as to the disregarding of objections to a NPS; and
(2) the extent to which the courts imply into the legislation a duty to have regard to certain matters is so doing.

In my view the courts are likely, and the Commission would be wise, to be interested in the degree of effective scrutiny of a NPS before designation in the making of such decisions.

The central importance, and potential locational specificity, of these documents means that entrepreneurs, undertakers, industrialists, councils, conservationists and community groups cannot passively await the emergence of these documents, but must actively engage in the process of their formulation. The trend towards primary legislation which omits much of substantive importance is manifest in ss.7 and 8 which require such consultation:

(a) as is prescribed;
(b) as the Secretary of State considers appropriate where particular locations are identified as potentially suitable for development (which must itself be decided after consultation with relevant local authorities).

Lawyers and others involved in the development planning process must develop national lobbying skills. Parliament would well serve the nation, and be well advised, to hold hearings before Select Committees at which they engage, or invite others' professional advocates to test the arguments advanced in favour of NPSs.

There will, of course, be particular difficulties from art.6 ECHR (right to a fair hearing) where location specific NPS are proposed. They will be acute where art.8 ECHR (respect for home) or art.1 of the First Protocol (right to property) is engaged. This extends beyond compulsory acquisition of, to seriously adverse effects, on homes. The problem is made more difficult by the removal of rights to bring proceedings for nuisances caused by development authorised by this process.[35] The Secretary of State must give reasons. He may suspend the consideration of such applications while he makes up his mind. No time limit is imposed, even provisionally, on such suspensions.

National Policy Statements will generally be subject to the requirements of the Strategic Environmental Assessment Directive[36] and may be subject to a requirement for appropriate assessment under the Habitats Directive.[37] Where, however, they are locationally specific then unless they have been subject to assessment pursuant to the EIA Directive 85/337 it would be contrary to EC law for the IPC to give them the weight which the new regime is intended generally to give to them. The ECJ in *Luxembourg v Linster*[38] made clear that even where there was a specific authorisation by legislation the express exemption under art.2(3) could only apply where the purposes of the Directive had been achieved during the legislative process. The limited scope of art.2(3) was highlighted in the ECJ decision condemning the Irish provisions for retrospective grant of permission for EIA

[35] Planning Act s.158.
[36] Strategic Environmental Assessment Directive 2001/42.
[37] Habitats Directive 92/43.
[38] *Luxembourg v Linster* (C-287/98) [2000] E.C.R. I- 6917.

development in *Commission v Ireland*.[39] The adequacy of such environmental assessments is likely to be a collision point, giving rise to challenges.

The consultation process: Equivalent to the first half of an inquiry?

The consultation process imposes a substantial burden on developers. They must, before submitting an application, consult with every main council for the development site. For developments covering a large geographical area, such as roads and pipelines, this may be formidable. They must also consult all occupiers of the application land, all persons with a proprietary interest in the land, or who might be able to make a claim for compensation and other prescribed persons. Consultation documents must be served on the Commission as well as the consultees. Twenty-eight days minimum must be allowed for responses. The applicant must consult with all the local authorities about his proposed method of consultation with people living in the vicinity of the project land. There is scope for disagreement about many aspects of this. Surprisingly it is left to the promoter to make these decisions. Draft Guidance, to which the applicant must have regard,[40] suggests that there should be a focus on local authorities. A short document is suggested. Workshops, drop in sessions, telephone advice lines, direct engagement with community groups are encouraged.

It is easy to be cynical about such flexible consultation obligations under the control of applicants. There is enormous scope for manipulation. But properly undertaken there could be real benefits to both promoter and the wider community. The Commission will, however, have to be resolute in establishing appropriate principles, and rejecting applications which have not been the subject of full, fair and effective consultation, impartially reported. This reduces the quality of decision making and reduces acceptance of unwelcome decisions. Ultimately this puts the rule of law under pressure (and imposes considerable policing and justice burdens on society). There is a real risk that people will feel justified in both lawful and unlawful protest.

The IPC will need to be astute to appreciate the importance of distinguishing between improvements in the engagement of those currently marginalised from the planning process and adequate opportunities for well informed individuals and groups, both local and special interest, to test schemes and the technical assumptions on which they are based. Both are needed. The achievement of the former must not be at the expense of the latter. It easily could be; if it were, not only would the quality of decision making suffer, but also confidence in the system would be diminished.

The developer is required to take account of the responses to consultation when deciding whether to proceed with the project and, if so, on what terms.[41] The early highlighting of a problem may, it is hoped, lead to the overcoming of what could otherwise be an insurmountable obstacle to the grant of approval and the avoidance of unnecessary problems that might not be capable of being removed from the scheme at a later stage.

The IPC will have both a great opportunity and great responsibility to ensure that the new system leads to effective scrutiny and participation. If it is to succeed it will need to be innovative. For example, it will have to consider how to ensure that relevant experts answer questions and are confronted by challenging views. A method used with success elsewhere within the Commonwealth is that of ''hot tubbing'' where opposing experts debate with one another. The IPC could issue

[39] *Commission of the European Communities v Ireland* (C-215/06) [2009] Env. L.R. D3.
[40] Planning Act 2008 s.50(3).
[41] Planning Act 2008 s.49(2).

practice guidelines indicating what will generally be expected. Failure to provide such opportunities in accordance with the guidelines before submission of an application could lead to a rejection.

The Application

The application (made in a prescribed form and accompanied by documents and information of a prescribed description)[42] must be accompanied by a ''consultation report'' giving details of what has been done to consult, any relevant responses and the account taken of any relevant responses (i.e. received before the imposed deadline) (s.37(7)). A fee is likely to be charged. Regulations to this effect have not yet been published.

The draft Infrastructure Planning (Environmental Impact Assessment) Regulations provide for the environmental assessment of a NSIP. There is provision for screening and scoping opinions. The process is front loaded. Thus advertisement and consultation on the Environmental Statement (ES) is to take place before the application is submitted. The ES may well prove to be a collision point. The adequacy of the process is one which may well be the subject of frequent early litigation.

A noticeable feature of the system is that the power of the Commission, the Examining Authority (EA) and the Secretary of State to require EIA where a negative screening opinion[43] has been given appears to be limited to situations where the relevant later authority considers that the body issuing a negative opinion failed to have regard to a material factor. This is intended to exclude the possibility of a simple difference of judgement leading to a decision to require EIA. This intention is difficult to reconcile with the precautionary principle approach to the Directive taken by the ECJ and the House of Lords in cases such as *Wells*[44] and *Barker.*[45]

If the IPC accept the application, the burden is again on the developer to notify all the authorities and individuals consulted of the acceptance and tell them of the deadline to make representations; and make available a copy of the application and supporting documents (s.56). In addition, the applicant must publicise the application.[46] The applicant must certify to the IPC that he has complied with this requirement,[47] it being a criminal offence to make a false certification. There is much scope for controversy and dissatisfaction with consultation and publicity. The courts have tended[48] to be unsympathetic to those who seek to quash permissions where developers or authorities have failed to comply with notification or advertisement requirements failure. The IPC, as guardian of the public interest, will bear a heavy responsibility for ensuring that the promoter fulfils his obligation to notify individuals and publicise applications.

As one of the concessions to Clive Betts MP, the IPC (rather than the developer) must invite all the relevant local authorities to submit a Local Impact Report (LIR) giving details of the likely impact of the proposed development on their area (s.60). LIRs are among the matters to which the IPC or the Secretary of State must have regard in making its decisions.[49] The relationship between

[42] See draft Infrastructure Planning (Applications and Procedure) Regulations 2009.

[43] The ECJ has recently held that reasons must be available on demand for decisions not to require EIA. *R. (on the application of Mellor) v Secretary of State for the Communities and Local Government* (C-75/08) [2009] 18 E.G. 84 (C.S.).

[44] *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (C-201/02) [2004] E.C.R. I 723.

[45] *R. (on the application of Barker) v Bromley LBC* (C-290/03) [2006] E.C.R. I-3949.

[46] See draft Infrastructure Planning (Applications and Procedure) Regulations 2009.

[47] Planning Act 2008 s.56

[48] For example, *Main v Swansea City Council* (1985) 49 P. & C.R. 26; *R. (on the application of Gavin) v Haringey LBC* [2003] EWHC 2591 (Admin).

[49] Planning Act 2008 ss.104(2)(b) and 105(2)(a).

the LIR and a local authority's representations is unclear. No doubt the LIR is intended to be objective and neutral. There is a danger, however, that the LIR will be drafted with a tone and emphasis that reflects the local authority's support or opposition to the scheme. Those interested in supporting or opposing schemes are likely to wish to lobby local authorities. The procedures which authorities adopt for the preparation of these documents will be important. The IPC will have to devise strategies to minimise this risk of any bias and ensure the fairness of the preparation of such documents. It would be tempting to suppose that the IPC will not need to look beyond the LIR in assessing local impact, but in practice it will have so to do. For the LIR is likely to be said to be exaggerated or underestimated by at least one of the parties; the IPC will have to resolve this dispute.

Following the submission of representations, the Chair of the IPC (or a Deputy) will decide whether the application will be dealt with by a panel of three or more commissioners or an individual commissioner (s.61).

The Examination Process

The term chosen to describe the process by which projects are tested is significant. It is the term which is familiar from its use for many years for the testing of Structure Plans. It is intended to take no more than six months. The term suggests that it is to be predominantly written rather than oral. It is to be led by one or a small number of experts. The distinction between evidence and submission is likely to be limited.[50] There is not expected to be much, if any, cross examination. The safeguard, however, is that it is for the EA to decide how to examine the application (s.87) (having regard to any Secretary of State or IPC guidance). It is therefore within the power of the IPC to ensure that the worst fears of opponents are not realised.

After an initial assessment of the issues, the EA must hold a ''Preliminary Meeting'' with the applicant and each other interested party to allow invitees to make representations about how the application should be examined (s.88). The importance of this meeting should not be underestimated: it may be the most important, or even only, opportunity the parties have to meet the EA face-to-face. It is of much greater significance than a pre-inquiry meeting, and should be well-used to maximise the chance of the EA making a favourable ''procedural decision'' about how the application is to be examined.

The presumption is consideration of written representations (s.90). The IPC must however hold the following hearings, which have to be in public and over which a member of the EA must preside (s.94(2)):

(a) an open floor session; and hearings for
(b) compulsory acquisition; or
(c) if a hearing is necessary to ensure ''adequate examination of the issues''; or
(d) [to ensure] ''that an interested party has a fair chance to put the party's case''.

Subject to the requirements for hearings in the above circumstances the EA may, however, decide that neither written representations nor considerations of oral representations at a hearing are appropriate,[51] in which case it may decide on another process. This is an enigmatic provision. It has

[50] The problems associated with the controversial approach, promoted by the Bar Council, to the practice of the Planning Bar's close involvement in the preparation of non factual evidence may well become even more apparent.

[51] Planning Act 2009 s.90(2)(b).

the potential to enable the IPC to be imaginative in its approach. Could it, for example, decide that a recorded deposition of evidence by the promoter's experts be taken either by one or more of its own appointed lawyers or opposing parties' representatives? Could it commission research?

At the ''open floor'' hearing (s.93) each interested party is entitled to make oral representations. It includes persons who have made a relevant representation including evidence.

It seems likely that ''open-floor'' hearings could in theory take a considerable amount of time, on a par with a large-scale inquiry. To stop this, however, the Act provides that it is for the EA to decide how the hearing is to be conducted, for the EA to decide whether the person making oral representations may be questioned and if so on what, and for the EA to decide the amount of time to be allowed for the representations and questioning (s.94).

The EA must undertake all oral questioning unless it considers that questioning by another person is necessary to ensure:

(a) adequate testing of any representation;
(b) that a person has an adequate chance to put the person's case.

The first makes possible cross examination. The second makes possible examination in chief or re-examination. The latter should not be ignored. It can be important for unsophisticated people, who may face the loss of their homes, to be re-examined by a knowledgeable professional who is able to bring out material which is likely to be considered important by the examiner; the individual's lawyer will be likely, of course, to be aware of material of which the examiner is likely to be unaware. Generally planning inspectors have found it helpful to have the assistance of advocates who can discriminate between the relevant and irrelevant.

The IPC has a great responsibility. The challenge will be particularly acute in the examination of schemes involving novel technology or practices such as CCS (carbon capture and storage) or deep underground nuclear waste storage. Inquiries have performed an important role in improving the level of understanding among operators, regulators and the general public. The Chair of the IPC will have to be willing to extend the deadline for examination and encourage not only an innovative approach to testing but also the traditional methods of adversarial cross examination. Parliament wisely, after debate, rejected the original intention of Government that cross examination should only be permitted ''exceptionally''. Cross examination not only exposes weaknesses in material; the prospect of it acts as a powerful deterrent to unjustified assertions. The temptation to make such assertions is likely to prove irresistible without that safeguard.

The test will not be whether the IPC faces successful challenges. It is only in extreme cases that unfairness can be demonstrated to the satisfaction of the courts[52] even in compulsory purchase cases. The test will be the judgements of contemporaries and posterity both on the quality of the projects it approves and the public's acceptance of the process leading to unwelcome decisions.

The EA's powers may not be exercised so as to deprive the person entitled ''of *all* benefit of the entitlement'' to speak, implying that the EA may deprive them of a good degree of the benefit (s.94(6)). This wording appears to have been drafted as a result of a fear that the courts here or in

[52] See later section and *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin).

Strasbourg might hold that where art.6 rights to a fair hearing were engaged and one person[53] was prevented from speaking then ''the very essence of the right''[54] [to a fair hearing] had been denied.

It is not clear from the wording of the Act if parties may be represented at a hearing by anyone they choose—the Act refers only to the parties making oral representations. The Government voted down Opposition amendments in Public Bill Committee expressly to allow parties to appear by their counsel, solicitors or agents (cols 463–464). It is difficult to contemplate, however, that the courts would hold that refusal to allow people to be represented by lawyers, other professionals or other responsible persons was fair. Nor is it easy to contemplate the IPC refusing to allow people to be represented. It would, indeed, be impossible for councils and companies to appear in person. It would, for example, work very harshly on servicemen or businessmen working overseas. It would be easy to list groups who would be unfairly disadvantaged. The list would probably have to include everyone other than planning consultants and lawyers. Even they would be disadvantaged if the critical point which they wanted to put across was a specialist technical one. The only effect of restriction on representation would be to increase the advantages which the well educated and well connected already enjoy. This would be contrary to the spirit and intendment of the legislation.[55]

The Chair of the IPC may (at the request of the EA) appoint a legal adviser. He may carry out oral questioning on behalf of the EA (s.101). The role of such an advocate requires neutrality. There is a tension between neutrality and effective testing. Insofar as testing is effective it may give rise to suggestions or suspicions of bias. The IPC Chair can appoint an assessor to assist the EA (s.100): such appointments would be expensive.

Surprisingly although the EA has been given power to awards costs, the power under s.250 of the Local Government Act 1972 to summon witnesses and require the production of documents has not been given. This is likely to be a more serious problem than the historically rare exercise of the power suggests. The prospect of the exercise of the power is usually enough to persuade parties to disclose material and proffer as witnesses those with relevant knowledge.

Since the potential for giving oral evidence is limited, the focus of all parties' submissions must be on written submissions. There is no express provision in the Act for the applicant to submit further written representations after the initial application (for example rebuttal proofs). The Commission will have to devise procedures to ensure distribution of submitted material to all interested parties,[56] and that there is both an opportunity for rebuttals and an end to exchanges between opposing parties. It may be difficult for the IPC to decide between competing expert opinions. It can appoint assessors. There are two problems with that. First it would be expensive. Secondly that would not in itself provide any public testing of any expert's views. Innovative pre-application consultation requirements[57] and ultimately cross examination by opposing parties' advocates is a potential solution which the IPC would probably find both efficient and economical.

[53] Although the art.6 right to a fair hearing does not necessarily include a right to an oral hearing *Alconbury* [2001] UKHL 23 it does require ''equality of arms'': that may not exist where one party enjoys more opportunities for oral submissions than another.

[54] An impressive sounding phrase used by the ECtHR in Strasbourg with an unhelpfully wide range of potential meanings.

[55] If legal representation is so important in divorce cases that art.6 ECHR requires that legal aid be provided (*Airey v Ireland* [1979-80] 2 E.H.R.R. 305) then it certainly would be hard to justify refusal even to allow a person to be represented by a lawyer where there are technical matters in issue and his home is at stake. In *Pascoe* ([2006] EWHC 2356 (Admin)), where the absence of full legal representation was held not to be a breach of art.6 ECHR, it should be remembered that some pro bono legal representation had been available.

[56] Even if the High Court correctly held in relation to written representations in *Eley v Secretary of State for the Communities and Local Government* [2009] EWHC 660 (Admin) that PINS do not need to distribute written representations to ''third parties'' this approach could not be applied to NSIP examinations.

[57] See above.

There is no obvious provision[58] for the applicant nor any other person to make closing submissions when all the other material, whether factual or expert opinion, has been presented. Those who have been involved in decision making in important and complex cases (which NSIPs undoubtedly are) will probably find this omission disappointing. The IPC is likely to need to make provision for some equivalent, even if it is a predominantly written closing submission, if it is to do its work effectively. If the IPC is to command confidence this must, at least in part, be in open session. The (perhaps adjourned) open floor session would provide an opportunity for such submissions, or summaries of them, to be made orally. The examination must be completed within six months[59] of the end of the Preliminary Meeting unless the IPC Chair extends this deadline.

Decision Making

The Chair decides whether the application is to be handled by a Panel or single Commissioner (s.61) who becomes the EA. A Panel consists of three or more Commissioners (s.65 (1)).If there is no NPS a report is made by the EA to the Secretary of State. If there is a NPS then the Commission makes the decision. If a single commissioner is the EA then he reports to the council (which consists of at least five members) (s.83). If a Panel is the EA then it makes the decision (s.74(1)).The factors that are relevant to, and the importance of the NPS to, decision making have been discussed above. The decision must be within three months of the completion of the examination unless the IPC Chair or the Secretary of State extends the period. Reasons for the decision must be given.[60]

''Requirements'' may be imposed. These are the equivalent of conditions. The draft Model Requirements suggested at one time that large areas be left for later determination by local planning authorities. This was likely to cause delay. It would have created problems with the EIA Directive of the kind which led in *Hardy*[61] to the quashing of a permission because surveys for bats had been deferred until after the grant of permission. It is by no means clear what mechanism would have existed for appealing against decisions by local planning authorities. The Town and Country Planning Act 1990 s.78(1)(a) mechanism does not appear to apply. Even if it did the planning appeals procedure would seem inconsistent with the underlying philosophy of the new regime.

There is a broad ranging power to ''apply, modify or exclude'' statutory provisions relating to any matter for which provision can be made. There is power to amend repeal or revoke local statutes insofar as the decision maker considers it ''necessary or expedient'' (s.120(5)).

Compulsory acquisition may include not only land required for the development, but also replacement land, land which is required to facilitate the development and land which is ''incidental to [the authorised] development''.

[58] This may be remedied if procedure rules are made under Planning Act 2008 s.97.

[59] Planning Act 2008 s.98.

[60] Planning Act 2008 s.116.

[61] *R. v Cornwall CC Ex p. Hardy* [2001] Env. L.R. 25; *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262 ''(third)...the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given.....As Harrison J put it in *Hardy*:- ....., 'If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a ''full knowledge'' of the likely significant effects of the project'...(fourth).(and here as it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the *final* details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case.'' [Per Waller L.J. (emphasis added)].

The broad statutory authority defences provided by s.158 to nuisance make it necessary to cover problems with a lesser degree of likelihood than would justify a planning condition. This is because it is not possible for the IPC or the Secretary of State to leave it to the nuisance regime to deal with unlikely problems, as would often be the appropriate course of action for the granter of planning permission. The statutory authority defence to nuisance creates a risk that unexpected problems will be without a legal remedy.

Legal Challenges

Opponents of a project, including perhaps local planning authorities, may wish to bring legal challenges. One such decision is that of the IPC decision that a project is a NSIP. Absent express statutory provision the House of Lords decision in *Burkett*[62] suggests that such a challenge could either be brought at the time an application was accepted by the IPC or be deferred until the outcome of the consent process was known. The preclusive provisions of s.118 suggest however, not only that challenges can be brought at the conclusion of the decision making process, but that they cannot be brought at an earlier stage. This applies to ''anything else done, or omitted to be done. . ..in relation to an application for an order granting development consent''. In relation to such matters s.118(7) and (8) restricts challenges to the period after the final determination of an accepted application.

It will be little consolation to promoters to know that the period for challenges is restricted to a non-extendable[63] period of six weeks. It will not, of course, provide much of a problem to well organised, sophisticated operators. It will however undoubtedly make more expensive and more difficult effective enforcement of such rights as they have by ordinary citizens. It will favour commercial organisations which have access to large law firms. Campaign groups relying on advice centres, seeking legal aid,[64] or pro bono advocacy services will be severely disadvantaged. The restriction from the usual period for judicial review (of three months, extendable for good reason,) and the inability to extend the period will, no doubt, be said by challengers not to comply with the Aarhus Convention art.9(4) which requires procedures for access to justice to be ''fair''. There could, absent the direct effect of Aarhus,[65] be no extension of time if someone who faced loss of his home happened to be in hospital when the potentially impugnable decision was made.

Legal challenges are to be by way of judicial review. The basis for judicial intervention is therefore limited to the usual grounds[66] —for example:

- failure to take account of material considerations, or vice versa;
- procedural unfairness;
- irrationality; or

[62] *R (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23.

[63] *R. v Secretary of State for the Environment* 93 L.G.R. 322. It may however be a period which is shortened if the application for judicial review is not made ''promptly'' (see CPR Pt 54, and *R. (on the application of Finn Kelcey) v Milton Keynes* [2008] EWCA Civ 1067).

[64] Planning aid is apparently to receive an extra £1.5 million.

[65] See fn.2 regarding *Syndicat Professionnel Coordination des Pecheurs de l'Etang de Berre et de la Region v Electricite de France (EDF)* (C-213/03) [2004] E.C.R. I-7357. Arguably s.3 of the Human Rights Act 1998 *might* require the reading in to the statute of words permitting exceptions in such cases of s.118 so as to be consistent with the Convention (as in the context of EC law words have been read into domestic legislation apparently inconsistent with EC law through the process of convergent construction (to use Sedley L.J.'s felicitous phrase from *R. v Durham CC Ex p. Huddlestone* [2000] 2 C.M.L.R 229 (e.g. *Lister v Forth Dry Dock & Engineering Company Ltd* [1990] 1 A.C. 546)). The difficulty is that the statute appears to be unambiguous and therefore a declaration of incompatibility with the ECHR under ss.4 and 5 Human Rights Act 1998 is probably the only (but ineffective) remedy available under domestic law.

[66] See cases such as *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374; *Ashbridge Investments Ltd v Minister of Housing and Local Government* (CA) [1965] 1 W.L.R. 1320; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P. & C.R. 26 and *R. v North and East Devon HA Ex p. Coughlan* [2001] Q.B. 213.

- error of law; including,
- breach of EC law; or
- non compliance with ECHR.

The question of whether something is a NSIP could sometimes be regarded as a question of law. Generally it is reasonable to anticipate that the courts will regard questions of fact or planning judgement (such as whether some project is likely to have a certain size or SEE) as questions of specialist judgment to be left to the IPC or the Secretary of State. If the question is ''What is the meaning of this word or phrase in the Act or Regulations?'' then the courts are likely to regard it as a question of law.[67] An example legal question would be the meaning of the word ''extension'' of a generating station. Does this require an enlarged site? What would constitute the site? Would it encompass merely an increase in developed open area? Must it be a building with a larger floor area? Would an increase in height qualify? Would a mere increase in generating capacity be enough? Whereas if the question is ''What are these facts?'' or ''What is the appropriate judgement as to the application of the accepted meaning of the term apply to these facts?'' then the courts are likely to leave them to specialist bodies such as the IPC and the Secretary of State.[68]

Human Rights Act 1998

Article 6 of the European Convention on Human Rights, the right to a fair hearing, will often be engaged.[69] It might give those aggrieved by IPC decisions a ground for challenge. It will no doubt be invoked often in the early days of the IPC. However neither the Strasbourg nor the English courts have taken an approach which is sympathetic to challengers who claim that their right to a fair hearing has been infringed. The principal difficulty is that a right to a fair hearing has quite a limited meaning.

It does not necessarily mean a right to call or cross examine witnesses or even an oral hearing.[70] The likely approach of the English courts is well characterised in the observations of Sullivan J., as he then was, in *Vetterlein*:[71]

> ''68. . .. . . 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 claimant's interest, the seriousness of the matter for him and the nature of any matters in dispute.''

If someone's owner-occupied home or other property is taken then art.6 certainly will be engaged, as property rights are protected by art.1 of the First Protocol. Sometimes interference with economic

[67] As with the categories of development potentially subject to EIA: *R. (on the application of Goodman) v Lewisham LBC* [2003] EWCA Civ 140.

[68] As in *Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1)* [2001] 2 A.C. 603.

[69] Where compulsory acquisition of, or ability to use or enjoy land, is in issue *Alconbury* [2001] UKHL 23. There is some uncertainty about the extent to which art.6 is engaged where minor or remote damage to a person's home is threatened. Thus in *Balmer-Schafroth v Switzerland* (1998) 25 E.H.R.R. 598 the ECtHR held by a 12:8 majority that the risk from a nuclear power station was too remote for the art.6 right to a fair hearing to be engaged. Common law principles of fairness, however, may restrict the extent to which promoters and potentially compelled vendors of land can enjoy better opportunities for presenting their case than those whose interest is in the protection of the environment of their homes or communities.

[70] *Alconbury* [2001] UKHL 23; *R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735.

[71] *R. (on the application of Vetterlein) v Hampshire CC* [2001] EWHC 560 (Admin). This passage was described by Richards J., as he then was, as ''uncontroversial'' in *West v First Secretary of State* [2005] EWHC 729 (Admin). See also *R. (on the application of Kathro) v Rhondda Cynon Taff CBC* [2001] EWHC 527 (Admin) (Richards J.) and *R. (on the application of Cummins) v Camden LBC* [2001] EWHC Admin 1116 (Ouseley J.). The approach of the Court of Appeal in *Runa Begum v Tower Hamlets LBC* [2002] EWCA Civ 239 that compliance with art.6 ECHR is to be judged by examination of systems as a whole must also be carefully considered.

interests[72] or someone's home will engage the Convention even if there is no expropriation of property. Respect for the home required by art.8 may also be engaged, for example, where major projects have potentially seriously harmful effects on the health of people in their home.[73] Interferences are permissible so long as they are proportionate. The ordinary process of making planning and related decisions is readily held to involve the necessary assessment of the proportionality of interference with such rights.[74] Courts are not astute to find infringements of property rights.[75]

Importantly the entitlement to a fair hearing imposes an obligation to ensure equality of arms.[76] The European Court of Human Rights at Strasbourg has even gone so far as to hold that this may require legal aid.[77] The High Court adopted a restrictive approach to the implications of this in *Pascoe*.[78] It should be remembered however that Mrs Pascoe had had the benefit of pro bono representation by specialist counsel during part of the inquiry into the compulsory acquisition of her home as part of the Government Pathfinder programme.[79]

The IPC should, of course, approach its task on the basis that a commitment on its part to rigorous scrutiny of projects and fairness between well resourced promoters and individual citizens or community groups is likely to be a more effective protection for people's legitimate interests than subsequent decisions of the courts.

Conclusion

Ultimately the culture which the Commission imposes, or allows to develop, will be critical. If it encourages informed public participation and a healthy scepticism of grandiloquent self interest it will have done much of what is necessary. Many who are here today are, however, I have no doubt, sceptical about the new system. The challenges are certainly there. It remains to be seen whether the opportunities will be taken. But all of us, whether sceptics or enthusiast for the new system, must remember the task so well described by HM the Queen in her Commonwealth Day Message 1992.

The Chairman of the IPC, who is with us today might well find some encouragement in the words of the then Princess Elizabeth on her 21st birthday in April 1947 broadcasting from Cape Town to Empire and Commonwealth, who, after observing that:

> ''This is a happy day for me; but it also one that brings serious thoughts, thoughts of life looming ahead with all its challenges and with all its opportunity. . .. I am sure that you will see our difficulties, in the light that I see them, as the great opportunity for you and me.''

expressed optimism provided that:

> ''. . .we all go forward with an unwavering faith, a high courage and a quiet heart. . .''

[72] *R. (on the application of Friends Provident Life Office)v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 820 (Forbes J.).

[73] *Guerra v Italy* (1998) 26 EH.R.R. 357; *Lopez Ostra v Spain* (1995) 20 EHRR 277.

[74] *Lough v First Secretary of State* [2004] EWCA Civ 905.

[75] *James v United Kingdom* (1986) 8 E.H.R.R. 123; *R. (on the application of Clays Lane Housing Cooperative Ltd) v Housing Corp* [2005] 1 W.L.R. 2229.

[76] *Neumeister v Austria (No.1)* (1979-80) 1 E.H.R.R. 91; *Dombo Beheer BV v Netherlands* (1994) 18 E.H.R.R. 213.

[77] *Airey v Ireland* (1979-80) 2 E.H.R.R. 305.

[78] *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin).

[79] A name perhaps suggested by a subversive civil servant because of its association with the planes which led the way for the bombers whose task was to destroy German cities during World War II.