Environmental Law Foundation

CASES BRIEFING

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HUMAN RIGHTS AND THE ENVIRONMENT by Dr. Wendy Le-Las

The European Convention on Human Rights (ECHR) may seem remote from the concerns of local communities but after ten years of battling with the planning system on their behalf, I can assure you it is not. It has the potential to change the balance of power between the state and the individual.

In 1950 the allied powers signed up to ECHR. It can be seen as a response to the horrors of the Second World War and the perceived evils of communism as the Cold War began. Although the British Government was a signatory to ECHR it was never incorporated by statute into English law: for many decades there were debates about how to do it without jeopardising the role of the Parliament.

Meanwhile, anyone complaining of a violation had to apply to the European Commission of Human Rights. Its task was to weed-out claims that were outside the remit of ECHR, procedurally incorrect, or ill founded. If there was a case to answer, the commission tried to facilitate a friendly settlement between the aggrieved citizen and the relevant government. Thus, in any given year, only around 10% of claims proceeded to the Court in Strasbourg. In 1998, the Commission and the Court were merged into a new full-time court in order to streamline the procedures under ECHR.

In order to qualify to go to Strasbourg, one is required to have exhausted all other possibilities first. The problem has been that British legislation does not necessarily conform to the spirit of ECHR because it has a different history.

PRINCIPLES

What are the principles enshrined in the ECHR, which are of particular interest to those fighting for a good environment? -- Article 2 (1) reads, "Everyone's right to live shall be protected by law. No one shall be deprived of life intentionally…"

It should be noted that this means physical life rather than quality of life. However in cases where people's health is seriously threatened by pollution it could be invaluable. It would be essential to be able to establish the link between the pollutant and the health risk. Although one can think of situations where this is difficult to establish e.g. between overhead power-lines and ill health, usually these things are well documented.

"One would hope that no government or public body in this country would intentionally damage the health of the population..."

One would hope that no government or public body in this country would intentionally damage the health of the population, but this clause could also mean "turning a blind eye" or not enforcing proper standards.

-- Article 6 (1) reads "In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal…"

It has been said that the issue of the fair trial applies to all parties to a dispute. This includes developers and those operating premises under licences granted by the Environment Agency. It is said that EA officers are undergoing a course on the ECHA and the 1998 Human Rights Act to make sure they abide by Article 6 when trying to mount a prosecution: they don't want their best efforts confounded by accusations of covert surveillance or withholding vital information.

Article 6(1) is particularly important with regard to planning matters. It is widely predicted amongst lawyers that this will bring with it third party rights of appeal. The need for third party rights has been made all the more urgent by the introduction of so-called 'cabinet government' in local planning authorities. The temptation to abuse their power and ignore the relevant planning policies will be overwhelming in certain instances. Local people cannot afford to go to judicial review and in any case the courts cannot deal with matters of substance. The very lack of a forum, in which to examine the merits of a case, is why it is thought that the law will have to be changed to conform to article 6(1).

However, just a word of caution: it safeguards the right of the individual rather than the community. That said it is unlikely to be too difficult to find a willing "victim" who conforms to the requirements of Article 25 i.e. is directly affected. The narrowness of the latter is bound to lead to litigation because, under UK law, what is know in the trade as locus standi has, over the years, broadened out from the individual to collective groups with a genuine interest in the issue e.g. Greenpeace was allowed to challenge radioactive waste discharges. So watch this space! We could finish up with a system practised on the Isle of Man, and in the Republic of Ireland, where those with property in the vicinity of the proposed development can go to appeal. Significant proportions win their cases, which proves what we already know, namely local planning authorities are not infallible. Meanwhile, Article 6(1) could be used as an additional reason for calling-in an application. Getting a call-in is usually seen as the only option when you don't trust your local authority to make the right decision over an application. When it comes to major projects they usually are called-in by the Secretary of State because the issue is too complex to be handled by one authority, and in any case, the proposal may well affect a large area. For small scale projects Article 6(1) could be used to argue against officers taking decisions under delegated powers.

ECHR has held that right of access is inherent in the "right to a fair trial", and that such a right must be practical and effective, rather than hypothetical. Unfortunately this does not mean the State must provide free legal aid for every dispute. Sometimes the solution would be found in making complainants join together or in simplifying procedures.

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Those familiar with the planning world will be familiar with these arguments, and, indeed the action taken by the Governments in recent years. The other aspect of accessibility is time in which to lodge an objection. The HRA s.7 allows for a year in which to challenge a decision of a public authority: the various time limits specified in the planning acts are all considerably shorter than this.

The State, in one of its many guises, often has a large stake in major projects. The inspector usually reports to the Secretary of State for the Environment, Transport and the Regions. Many large projects emanate from this Department and thus one could object that the Secretary of State would be judge and jury in his own cause. This is contrary to Article 6(1). Even if the project originates in another Department e.g. Energy, the situation is questionable. The matter has already come before the Court of Session in Scotland in Country Properties LTD v The Scottish Ministers. The case was a call-in involving an application for listed building consent to which Historic Scotland objected. The Court of Session upheld an objection under Article 6(1) because Historic Scotland is an executive agency of the Scottish Ministers.

South of the border a lengthy planning inquiry has been adjourned into the future of Alconbury Airfield, Cambridgeshire. Third Parties made two points: the MOD owned the site and therefore the Secretary of State could not been considered impartial; and the sufficiency of a review by the court on a subsequent statutory challenge was inadequate. The verdict of the High court is awaited with bated breath because of its implications for the planning system as a whole.

Some of you will remember the motorway riots of the 1970's: the issue of "judge and jury in their own cause" was at the root of John Tyme's quarrel with the Ministry of Transport. The government's response was to set up the independent inspectorate to preside over road inquiries, staffed by recycled military personnel, under the aegis of the Lord Chancellor. To send the Planning Inspectorate to join them is not the solution. In the McGonnell case, the ECHR shed light on the question of the separation of powers. This could have a bearing on the role of the Lord Chancellor in the UK who is a member of both the executive and the judiciary. Then there is the issue of development plans where, barring an intervention from the Secretary of State, the local authority is manifestly judge and jury in its own cause. Objectors have no right to appear at EIPs and supporters of the LPA have no right to appear at the local plan inquiry. The inspector at the local plan inquiry, or the Panel at the examination in public, just reports to the relevant authority and it is up to them whether they accept the recommendations. The trouble is that local authority responses to objections may be very brief. An inspector's report following a local plan inquiry will provide reasons for his recommendation. If the local authority agrees, albeit with just a short statement, then there will be adequate material to mount a high court challenge. However, if the local authority disagrees with the inspector, their statement may be too sketchy to establish whether all the pros and cons were properly considered. The same applies to objections to modifications. Here again, an objection under Article 6(1) could prove fruitful.

Article 8 states "(1) Everyone has the right to respect for his private life and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protections of rights or freedoms of others."

"The rights of the individual have to be balanced against the legitimate concerns of the State."

The rights of the individual have to be balanced against the legitimate concerns of the State. This is the crux of the matter in every planning dispute, so what contribution is made by Article 8? It shifts the balance in favour of the individual e.g. where someone is suffering from light pollution, which is not amongst the statutory nuisances covered in s.79 of the 1990 Environmental Protection Act. For noise, dust, smell and the less mentionable categories of nuisance, Article 8 could be used to prod the local authorities to provide information about procedures in the event of an emergency in a nearby hazardous plant.

However, the State is allowed a *wide margin of appreciation* i.e. discretion as to what it considers is in its national interest and how it applies its policies. This is shown in two British cases, which went before the Strasbourg Court. The first involved two people living near Heathrow Airport. They complained about the noise, but the Court decided that the economic benefit to Britain outweighed the discomfort of the residents. The second case concerned a gypsy wanting to park three caravans on a plot of land she had bought in green belt. Having been refused planning permission twice, and had an enforcement notice issued against her, she applied to the Court but lost because the planning system had adequate procedural safeguards to protect her interests. In the summer of 2000, in *Berkley v Secretary of State for the Environment*, Lord Hoffman was dealing with the right to have an EIA, and therefore with the rights under EC law. He says: "The directly enforceable right of the citizen which is accorded by the directive is not merely a right to a fully informed decision on the substantive issue. It must been have adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the [EA] directive in which the public, however misguided or wrong-headed it view may be, is given an opportunity to express its opinion in the environmental issues… A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same…"

In other words, democratic procedures are important in the protection of human rights.

Article 8 is focussed on the right to enjoy one's home and family life. Lawyers and other professions who spend long hours at work will be amused to know that the definition of "home" includes the office: in fact it includes anywhere important to one's way of life. Tenants are as important as property owners. When Canary Wharf was being constructed, tenants in nearby flats suffered not only the usual noise and dust, but also interference with the television reception. The House of Lords said that they were not entitled to bring a claim in private nuisance. Under Article 8 the residents would have a case. Together with article 14, which prohibits discrimination between social groups of all kinds, it imposes equity between rich and poor: if the situation wouldn't be tolerated in Belgravia, it shouldn't be allowed in Bermondsey.

Put simply, the approach adopted by ECHR is that interference with individual rights is unjustified unless the benefit to the wider public can be shown to be of sufficient importance. In years to come, local planning authorities will have to bear this in mind when considering planning applications and formulating development plans.

Committee reports may well need to cite convention rights to show that they have taken them into account.

Article 10 states "(1) Everyone has the right to freedom of expression. The right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers…. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, condition, restrictions, or penalties as are prescribed by law and are necessary in democratic society, in the interests of national security, … public safety… for preventing the disclosure of information received in confidence etc.

Those of you fighting environmental battles often run up against commercial secrecy, but it does not appear to be on the list, or is it? Commercial secrets are well protected by UK law and EU law, and then there is the question of confidentiality, but Article 10 does provide the basis for critical questioning. Information, which is not genuinely confidential but just commercially embarrassing, may not qualify!

First Protocol Article 1 states, "Every natural or legal person is entitled to the peaceful enjoyment of his

possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law… The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws, as it deems necessary to control the use of property in the general interest, or secure the payment of taxes…

Possessions include not only physical property, but also acquired rights such as planning permission or licences. However, it does not include the expectations of getting planning permission. CPO proceedings are replete with opportunities for challenges under the First Protocol e.g. delays, blight, and levels of compensation. As with Article 8, it is a question of striking a fair balance between the needs and policies of the State and the rights of the individual. For example, in a Swedish case, the Strasbourg Court considered nature conservation to be a good enough reason to prevent the further excavation of a gravel pit.

What if property owners are deprived of their rights? Compensation is payable. This could be important for those suffering financial loss in certain circumstances. There was the tragic case of the family who realised that their house was radioactive, thanks to Sellafield. Not surprisingly, they decided to move but had to sell the house at a loss. The reference to "damage to property" in the Nuclear Installations Act 1965, meant physical damage, not financial loss. Had action been brought under the First Protocol, it is likely that the family would have been properly compensated.

Procedures

Having examined those aspects of ECHR, which show promise from an environmental point of view, what does the 1998 Human Rights Act mean for British legislation?

1. It incorporates ECHR into the British system. UK legislation must be interpreted so as to be compatible with ECHR: you no longer have to go to Strasbourg before the spirit of the ECHR can be applied;

2. Public authorities must not act in a way which is incompatible with ECHR;

3. Courts and tribunals must take into account the past judgements of the Strasbourg Court.

The Interpretation of Legislation

All legislation must be read and implemented in a way, which is compatible with the rights afforded by ECHR. If necessary, the House of Lords, Court of Appeal or the High Court, may make a 'declaration of incompatibility': the courts do not have the power to strike down incompatible legislation. The effect of a declaration is intended to give a minister the power to make an order to amend the legislation in question. Unless it is urgent, each House of Parliament must approve any such order.

"The 1998 Human Rights Act has the potential to make a difference"

The Duty of Public Authorities

The definition of "public authority" is somewhat elastic. It includes not only courts tribunals and inquiries, but also "*any person certain whose functions are functions of a public nature.*" (s.6) Inevitably it will engender much debate, but despite the privatisation and deregulation of many public bodies, many of them will find themselves considered by the courts to be "public bodies" because of their function e.g. BNFL, Railtrack et al, and professional bodies. For those companies, which still remain firmly in the private sector, it may well be that citizens will take action against the regulating authority, which has failed to act when it should have done. Anyone who claims that a public authority has acted, or proposes to act in a way, which goes against their rights under ECHR, may take action through the courts. As was said before, the person concerned must be the 'victim'. If the court finds their complaint to be justified, it may grant damages or other form of remedial action.

The Duty of the Courts/Tribunals

Under HRA s.2 the courts only have to take into account the judgements and decisions of the Strasbourg Court and the opinions of the Commission: they are not obliged to follow them. On the other hand the British Courts may be more adventurous. The European Court of Human Rights has always been sensitive to the fact that it is a supranational body, and has therefore been wary of interfering in the affairs of nation states. The British courts may be bolder in championing the rights of citizens, and more sensitive to public opinion as to what would be an acceptable balance between the State and the individual. They may also become less hide-bound by precedent, and adopted the evolutionary spirit of the legislation.

When did all this come to pass? It may surprise you to know that it has happened already in Scotland and Wales: the ECHR was embodied in legislation for Scotland and Wales in 1998. England only caught up on 2nd October 2000. When the bill was being debated in the Lords, a Scottish judge cited the experience of following the introduction of a Charter of Rights in Canada, as:*"A field day for crackpots, a pain in the neck for judges and goldmine for lawyers."*

Undoubtedly there will be elements of that here too, but it is up to the British people to use it constructively. As it stands, the 1998 Human Rights Act only has the potential to make a difference. It is a tool, which is available to those who care about the environment, and, as we have seen, those whose top priority is short-term gain will also grab it. As ever, it will be a matter of those with nerve and resources, fighting their cases through the courts. There is nothing to stop environmental NGOs funding local victims prepared to front an action, which, if successful, will benefit us all. Who will carry the banner for third party rights of appeal? The names will go down in history.