

Campaign for Planning Sanity

LOCAL COMMUNITY SUPPORT FOR ADVERSE PLANNING & DEVELOPMENT APPLICATIONS

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A PANNING SANITY BRIEFING

EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL PRINCIPLES IMPLICATIONS FOR PLANNING DECISION MAKING AND TOWN & VILLAGE GREEN APPLICATIONS

THE BASIC PRINCIPLES

1. This briefing investigates how the Human Rights Act (*the Act*) and the European Convention on Human Rights (*the Convention*) will affect planning and development procedure and decision making in England and Wales (*later we hope to add a section on Scotland and Northern Ireland*). Most commentators seem to agree that *the Act* will have some direct implications for planning and environmental protection procedure and decision making. To determine to what degree we must look to see exactly how the courts will interpret the effects, rather than government departments, or indeed local authorities.
2. It is unlikely that the courts will hold English legislation to be in contravention of the convention, except in very clearly defined instances. They are however more likely to rule that the Convention rights have an effect in the field of discretion, leading to more emphasis on the protection of the individual in planning practice, making it more difficult for local planning authorities to avoid taking enforcement action and making it more difficult for the Secretary of State to resist requests for call-in and public local inquiries, however as this report is being compiled we await a transcript of the ruling of the High Court in 4 test cases brought by developers, over the right of the Secretary of State to call-in applications, where it has been found that he cannot, this decision could have a devastating effect on local communities who are pushing for public inquiries, we will though address this issue in more detail in a supplement, once the full consequences of the judgment are known.
3. There will also be specifics, especially where local authorities grant themselves planning permission, and where local authorities fail to give a fair hearing to third parties, when the planning committee, are considering applications, as well as other decision making stages, all of which '*could potentially*' see successful challenges. Where a local authority is acting as both applicant and decision-maker (*judge*), then there is the potential to argue that there is bias, which could be unlawful under the Convention, as the hearing most certainly would not be conceived as a fair tribunal (*see issues relating to bias in section on Article 6.1*).
4. The current arrangements for the hearing and determination of local plan objections may be in breach of the Convention, because of the lack of impartiality on the part of the local planning authority who take the decision on the inspector's recommendations. There is definitely scope for the further development of the principles of common and public law, which could be extended into areas associated with the protection of the environment, that though is not for us in this briefing, except in as far as EIA screening processes, and how subsequent Environmental Statements are dealt with by planning decision makers, and where environmental considerations are a material planning consideration.

THE HUMAN RIGHTS ACT

5. There are four main components to the Act.

- Convention rights are incorporated into domestic law;
 - Legislation is for the future to be read and given effect in a way which is compatible with these Convention rights, taking into account the jurisprudence of the European Court of Human Rights and the Commission;
 - If legislation is found to be incompatible, the courts may make a declaration to that effect. This does not affect the continuing validity of the legislation, but provides an expedited procedure for the Government to introduce rectifying legislation to parliament;
 - It becomes illegal for a public authority to act in a way which is incompatible with convention rights and a victim of such an unlawful act may bring proceedings against such an authority (which includes local authorities and tribunals such as the Planning Inspectorate)
6. There are a number of Articles of *the Convention* which may affect planning legislation and procedures, thereby strengthening the case for local communities and objectors, as well as others involved in planning and development: **Article 2** (*Right to Life*); **Article 6** (*Right to a Fair Trial*); **Article 8** (*Right to a Private and Family Life, Your Home*); **Article 10** (*Freedom of Expression*); **Article 14** (*Freedom from Discrimination*); and **Article 1 of Protocol 1** (*Right to Peaceful Enjoyment of Your Possessions*). Most of this of course also applies to Village and Town Green Applications, as well as the totally discredited permitted development procedures for Telecommunication Masts applications.
 7. The Home Office publish several booklets outlining your rights, the most useful being '**Study Guide - Human Rights Act 1998**'. This includes a full text of the Convention, plus explanations, including a limited glossary of terms, see the listings at the end for details of where to obtain a copy, as well as the WEB address.
 8. The High Court in *Woodhead v Secretary of State for the Environment ((1995) 71 P&CR 419)* held that facts relating to an alleged violation of Article 8 should be raised in front of the planning inspector before the court would consider them on appeal. It follows that Convention rights should also be considered when raised by local planning authorities, since it would arguably constitute maladministration for a local authority to ignore a point which will later be argued on appeal before a planning inspector at considerable public expense. Whilst this decision was pre Human Rights Act, it emphasises the need to raise at all levels of the planning decision making process all arguments, even those that may only be relevant at a later stage, thus opening the door to other areas of challenge and argument, also to ensure that you are afforded every opportunity to put your case.
 9. This briefing sets out to show in every day language the implication of the Human Rights Act that implements the Convention rights, there are a number of references to case precedents, legislation both primary and secondary, all such documents will be available from our WEB site or by post from us, or from their original sources given at the end of the briefing, if there is any aspect of the briefing that you fail to grasp, or need to expand upon, then please either email planning@onlincam.freeserve.co.uk call our help line (0161-959-0999) or contact your legal advisor (solicitor).

THE CONVENTION

ARTICLE 2 - RIGHT TO LIFE

- 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.**
- 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:**
 - (a) in defence of any person from unlawful violence;**

(b)in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c)in action lawfully taken for the purpose of quelling a riot or insurrection.

10. This has a very limited effect on planning, but may prove to have some benefit in issues where there is a health risk, such as Telecommunication Mast or pollution risk applications such as chemical installations. Particularly in-conjunction with Article 8 and Article 1 of the First Protocol. Government advise to local authorities states **‘Public authorities also have a positive obligation to protect life in some situations’**. There are at least two case that lends support to this argument, *Lopez Ostra v Spain (41/1993/436/515)*; *December 9, 1994*; *20 EHRR 277*, and *Powell and Rayner v United Kingdom (1990) 12 EHRR 355* whilst the applicants lost the judgment was nevertheless clear enough to ensure that noise created by aircraft could very conceivably be used to strengthen, if not act as the sole reason for rejection of planning applications where there is a potential life threatening situation such as *‘irradiation’*, *‘chemical leakage’*, *‘high concentration of carbon monoxide!’*, this statement though should not be seen as a reason to run out and start legal proceedings on this argument, as the case would need to be overwhelming if bad law was not to be created.
11. This would though need to be provable, that is not simply an assumption or the application of the **‘precautionary principle’**. Nevertheless, in enforcement proceedings cases, or applications to remove existing buildings or usage’s under Section 102 and 104 of the T&CPA 1990 would be far easier to make out, as the provability of a health threatening situation would be after the event, rather than assumptions, that are counteracted by developers saying they will put in this or that mitigation into effect.
12. It must be clearly spelt out that Article 2 will have only very limited use within planning and development challenges, but could very well see greater use in environmental cases, but that is outside of the scope of this briefing. We would though welcome feed back in order that we can extend our arguments for future updates.

ARTICLE 6.1 - RIGHT TO A FAIR TRIAL

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

13. Article 6.1 gives everyone the right to a fair hearing both criminal and civil. This not only means in the courts but also in tribunals, inquiries and administrative decision making of a semi judicial nature, which as we shall demonstrate includes planning and village green decision making processes.
14. Where Article 6.1 comes into its own is where a local authority are making decisions where they are either the applicant, or in the case of village green applications both the objector and decision maker. This stems from the age-old principle of Common Law that says **‘Justice must not only be done, but must also be seen to be done’**. Another way of simple explanation of the principle we are putting over is the adage **‘that a person cannot be a judge in his own cause’**, these sum up the principles that should be applied.
15. The European Court of Human Rights (*the Court*) has concluded in relation to the importance of a fair trial that it holds **‘pre-eminence’ - ‘the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention’** *De Cubber v Belgium A86 para*

30 [1984]. This is taken a little further in two cases *Moreirs de Azevedo v Portugal* A189 para 66 [1990] and *Cf Delcourt v Belgium* A11 para 25 [1970] with the quote '**there can be no justification for interpreting Article 6(1) of the Convention restrictively**'. With later cases it evolved that these conditions applied not only to domestic courts, but also to administrative tribunals and administrative decisions concerning an individuals rights and obligations.

16. Most people think of Human Rights in the context of atrocities or the protection from an over zealous government in criminal proceedings, however as far as Article 6(1) is concerned they equally apply to civil proceedings. Article 6(1) states: '**the determination of his civil rights and obligations**', this clearly means an individuals rights. Rights must mean exactly that a right, as opposed to something that is granted as a discretion, albeit that any such discretion must be administered fairly. This means private law *Ringeisen v Austria* A13 para 94 [1971] and *Konig v FRG* A27 para 95 [1978], as opposed to public law, do not be put off by the expressions private and public. However it can be crucial to the types of cases that interest us, that is planning and development decision making, and the application to village green applications, and might simply be explained like this, an objector who owned land the subject of a village green application would obviously have a private right, whereas an individual applying to register land as a village green would in essence be exercising a public right. We will set out later instances where the general public, or more precisely individual members of the general public may claim a private right, where they might only have in general a public right. An example might be where a member of the general public would only have a public right to object to a planning application, but a person who might be overshadowed by a building, would have a private right to light, and therefore would come within Article 6(1).
17. A specific area of interest is the likely effect upon identifiable groups, such as Gypsies, or other special groupings, but more on this later. Another area that will be greatly effected will be that of the rights of third parties to appeal against decisions, something they can only do at the moment through judicial review.
18. *The Convention* has already come to play its part in judicial review in this country, not directly as a yardstick for substantive review, but indirectly in judging whether the decision-maker has exceeded the margin of appreciation set by the range of responses open to a reasonable decision-maker (*R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257; *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696).
19. Will it now be ruled that the requirement to obtain leave from the High Court to challenge proceedings on an enforcement appeal is incompatible with Article 6.1. It seems to be accepted by most commentators that third parties (the public) will have greater rights to be heard at inquiries, it is doubtful that the Government will have the power, or indeed political will, to take away any such rights established in the courts. It should then lead to greater participation of the public in planning inquiries, taking that through to the right of challenge in the courts, as opposed to the need to obtain leave first, or if leave is still required, then only in exceptional circumstances would leave be refused, on the grounds of having the right to be heard. However only time will tell if this proves to be the case.
20. The question to be asked in this context is whether the decision making body has acted fairly and impartially, has allowed full representation, and the hearing has been in public. The mere fact that none of these points has been addressed will not invalidate the decision, if and in our view only if, there is an appeal from that tribunal to another tribunal, or the courts, where *the Convention Rights* were complied with. That means an actual right of appeal, not simply a process which then requires permission to be obtained. The short answer being that providing the final arbitrator, be that a panel member or judge has complied with *the Convention* then there has been no breach. Therefore if the planning committee breach *the Convention*, there is an appeal to the Courts, and

the judge does not breach *the Convention*, then there has been no breach (*this is different from appealing by judicial review to the High Court on the grounds that the planning committee breached the Convention*).

21. Article 6.1 may well protect individual rights, but its value in protecting collective interests was limited by a decision of *the Court* in September last year *Balmer-Schafroth v Switzerland* when rejecting a case brought by villagers living in the containment zone surrounding a nuclear power plant, on the grounds that they had failed to demonstrate that any specific right of theirs was at stake when the State granted an extension to operate the station. Finding a '*victim*' may also prove restrictive in this country, because only a victim will have locus under Clause 7 to bring proceedings against a public authority. This is narrowly construed. In *Agrotexim v Greece (1996) 21 EHRR 250* it was claimed that the Mayor of Athens had posted large signs outside a brewery in central Athens, proclaiming the City's intention to acquire the property compulsorily, allegedly in an attempt to discourage redevelopment and to keep the land value down for compensation purposes. The company which owned the brewery went into liquidation, but an action was brought under *the Convention* by certain shareholders. It was rejected on the ground that they were not the '*victims*' of the actions.
22. In *Bryan v United Kingdom [1996] JPL 386; [1996] EG 137; [1996] 1 PLR 47 (ECHR); 21 EHRR 342*, the applicant challenged proceedings that had occurred in England on an enforcement notice requiring him to demolish two brick buildings on his property. Upon the dismissal of that appeal by a planning inspector, he further appealed on points of law to the High Court. The applicant accepted, and *the Court* agreed, that the proceedings before the planning inspector constituted a '*fair hearing*' for the purposes of Article 6.1 of the Convention, but contested whether the inspector was an independent and impartial tribunal. *The Court* was not satisfied that he was. In accordance with established case law of *the Court*, regard must be had to factors such as the manner of appointment of the tribunal and to their terms of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. Whilst it was true that the inspector was required to decide the enforcement appeal in a quasi-judicial manner, and to act independently, impartially and fairly, it was also true that the Secretary of State could at any time issue a direction revoking the inspector's powers to determine the appeal. *The Court* held in *Bryan v UK [1996] 1 PLR at 58* that:

"In the context of planning appeals the very existence of this power available to the executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise was or could have been in issue in the present case."
23. However, the Court had previously accepted, in *Langborger v Sweden A55 (1989)* that such defects in relation to a tribunal could be overcome if it were subject to the supervision of a judicial body that has full jurisdiction and itself satisfies the requirements of Article 6.1. There was a right of appeal to the High Court against a decision on an enforcement appeal. It was limited to a point of law, and therefore did not embrace all the issues raised by the enforcement notice. Nonetheless, the grounds of judicial review were wide enough to provide the necessary safeguards: the decision could be set aside if it had been made by reference to irrelevant factors, or if the evidence relied upon by the inspector was not capable of supporting a finding of fact, or if the decision was based on an inference from the facts that was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference. The court also had regard to the duty incumbent on inspectors to exercise independent judgement, the requirement that inspectors must not be subject to any improper influence and the stated mission of the Planning Inspectorate to uphold the principles of openness, fairness and impartiality.
24. The Court also noted that it was a frequent feature of judicial control of administrative systems

found throughout Party states that an appeal tribunal would have responsibility for findings of fact, and that a higher court would not have power to substitute its own findings of fact. Indeed, the Court concluded, **"the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgement in the regulation of citizens' conduct in the sphere of town and country planning"**. *The Court* concluded unanimously that the remedies available to the applicant under British town and country planning law satisfied the requirements of Article 6.1 of the Convention.

25. A number of issues arise from the Bryan case, in light of the Human Rights Act:

- whether the Government is now prevented from doing that which it has proposed from time to time to help speed up the appeals process, which is to take away altogether the right to be heard in planning and environmental appeals, and to substitute for it a power for the Secretary of State to determine in which cases it should be allowed. To do that would be to deny the right to a fair hearing from an independent and impartial tribunal, and would prima facie constitute an infringement of Article 6.1;

- whether the current arrangements in which appellants may be denied a public local inquiry, but offered instead an informal hearing (*DOE Circular 15/96, Planning Appeals*), contravene the right to a public hearing. *The Convention* is not prescriptive about the type of hearing, and there is no reason to doubt that an informal hearing is taken by any less independent or impartial a tribunal as a public local inquiry. The question of whether the proceedings are "fair" an aggrieved appellant has a right to test by appeal to the High Court (*See eg Dyason v Secretary of State for the Environment*[1998] 2PLR 54.) (it may also be argued that such hearings are unfair in that they are not held in public, one of the requirements of a fair hearing);

- whether the requirement that was introduced in 1992 (*Town and Country Planning Act 1990, s.289(6)*) to obtain leave from the High Court to challenge proceedings on an enforcement appeal is incompatible with Article 6. This barrier was introduced subsequent to Mr Bryan's appeal to the High Court, which had been dismissed. He had been refused leave to the appeal to the Court of Appeal, both from the High Court and the Court of Appeal. It is not an obstruction to meritorious cases proceeding, but a filter mechanism, intended to prevent appellants from buying further time for unlawful activity by keeping proceedings alive. It is unlikely to be seen as a dilution of the supervisory powers of the High Court (*In a second complaint by Mr Bryan to the European Commission (application no 22237/93; decision of March 12, 1996) it was decided that although he had been refused leave to appeal under s.289 on a further appeal, the scope of the review was still sufficient to comply with Article 6*).

26. Article 6.1 may well protect individual rights, but its value in protecting collective interests was limited by a decision of the Court in 1997 in *Balmer-Schafroth v Switzerland August 26, 1997 (67/1996/686/876)* when rejecting a case brought by villagers living in the containment zone surrounding a nuclear power plant, on the grounds that they had failed to demonstrate that any specific right of theirs was at stake when the State granted an extension to operate the station:

". . . the applicants opposed the application for an extension of the operating licence because of the risks which they maintained such an extension entailed for the life and health of the local population, to which they belonged. At no stage in the proceedings had they claimed to have suffered any loss, economic or other, for which they intended to seek compensation . . . They endeavoured to prove the existence of the alleged technical deficiencies and the need to lessen the resulting damage to the population and the environment in general by every available means. However, they did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity [under Swiss law], as they failed to show that the operation of the Muhleberg power station exposed them personally to a danger that was not only

serious but also specific and, above all, imminent."

27. This could be looked at in the context of Telecommunication Mast Applications, where the effect of the mast will be adverse to all the residents of the catchment area of the mast. Therefore to come within the remit it would need to be demonstrated that there was an infringement of a private right, through an application for damages, perhaps by claiming that there is a loss of sunlight to a garden, or other property, the noise from the wind whistling through the structure is causing sleepless nights. However these may be after effects, and may not be proved in the context of the requirement to demonstrate an infringement of Article 6.1, Article 8, or Article 1 of the First Protocol. But in any event the case would need to be such that the dangers to be created by the development could be proved to be life threatening, a very difficult thing to achieve, but perhaps the future will remove that difficulty, if as with the telecommunication cases now going through the USA courts, which seek damages due to the alleged health effects, if the judgement is such that it concludes that there is a link to a life threatening disease such as leukaemia, then the doors might be prised open just a little enabling a test case to give the decision to open the flood gates.
28. Thus, the link between the Government's decision and the right invoked by the applicants was too tenuous and remote. Finding a "victim" may also prove restrictive in this country, because only a victim will have locus under section 7 of the Human Rights Act 1998 to bring proceedings against a public authority. However any local resident deemed to be aggrieved could qualify, of course to be aggrieved means more than simply **'I do not want this in my back yard'**, there would need to be a tangible connection coupled to actual harm, such that could be said to sustain a claim for damages. This might for instance be where the harm from the proposal may affect a vulnerable individual, such as an elderly person or young child, or those already suffering from a disease where any increase in pollution could result in death.
29. Impartiality is a fundamental requirement under national public law for those exercising judicial or (*as with a planning inspector*) quasi-judicial functions. Those who take decisions under statutory powers must avoid any conflict of interest or other possibility of bias. The doctrine applies to Law Lords and to planning inspectors. However, Article 6 has recently been held to go further than current national practice. In *McGonnell v United Kingdom*, the European Court held that the fact that the Deputy Bailiff of Guernsey had presided over the process through which a planning policy document was adopted, was capable of casting doubts on his impartiality when he subsequently determined, as the sole judge of law in the case, the applicant's subsequent planning appeal. That ruling lays the basis for a fundamental challenge to the way in which planning has traditionally been undertaken in this country, as a process in which decisions on planning applications are taken in pursuance of policy, and therefore conveniently taken by the local planning authority, or the Secretary of State, with responsibility for adopting the policy in the first place.
30. This question has been put further into doubt with the 4 cases decided in the High Court in December 2000 and which are presently the subject of an appeal – *Alconbury Developments Limited v Secretary of State for the Environment, Transport and the Regions (SSETR)* – *R v SSETR ex parte Holding and Barnes Plc* – *R v SSETR ex parte Premier Leisure* – *SSETR v Legal & General Assurance Society Limited* – If this judgement stands then the whole planning appeal system will need remodelling, the power of the SSETR to oversee or substitute his own decision for that of an inspector would be lost, open the road to the creation of specialist environment courts, and to ensuring the independence of the Planning Inspectorate from ministerial interference. Procedures most likely to be affected are planning appeals under S78 and s79 of the TCPA 1990, Orders under the Transport and Works Act 1992 (TWA 1992) s1, s6 and s13, call-in under s77 of the TCPA 1990 for consideration by the SSETR, compulsory purchase orders under the Highways Act 1980 (HA 1980), the Acquisition of Land Act 1981 (ALA 1981) relating to the acquiring of land for the construction of a new road....

31. The main aspects on appeal are – The SSETR is not an independent decision maker in the context of Article 6 – similarly the SSETR is not impartial in Article 6 terms because he is effectively a judge in his own terms – judicial review is not sufficient safeguard to save the SSETR's decision making role - however the SSETR had not acted unlawfully due to Section 6.2(b) of the Act, which is to allow even when there is clear contravention of the convention that the action would not be unlawful if domestic law allowed it. The following passages are taken from the judgement of the divisional court (Tuckey LJ and Harrison J):

"The SSETR is part of the executive as are all or any of his ministerial team or the civil servants involved in the decision making process. The contrary is, we think, unarguable which no doubt explains the SSETR's stance in these proceedings. Just how exacting is the requirement for independence from the executive is illustrated by Bryan where the largely theoretical possibility that the inspector's appointment could be revoked by the SSETR meant that he was not an independent tribunal" (paragraph 72).

"The common law approach has inevitably been determined by constraints imposed by legislation. The logic is that if legislation vests a decision a person who is biased or provides for a decision to be taken in a manner which is not compatible with the requirements of independence and impartiality, no breach of the requirements of fairness can be found. Such requirements of fairness as there may be must be accommodated to the relevant statutory scheme. But the question now is not how Article 6 can best be accommodated in the interests of fairness given the existing statutory scheme, but rather whether the scheme itself complies with Article 6. To accept that the possibility of common law bias is inherent in the system and mandated by Parliament is merely to admit that the system involves structural bias and requires determinations to be made by a person who is not impartial.

It must follow from these conclusions that the Secretary of State is not impartial in the manner required by Article 6 because in each case his policy is in issue. This is not of course to say that there is anything wrong with his role as a policy maker. What is objectionable in terms of Article 6 is that he should be judge in his own cause where his policy is in play, In other words he cannot be both policy maker and decision taker.." (paragraphs 85 and 86).

"If the decision was far the Inspector we have no doubt, as in Bryan, that this would justify a restricted review by the High Court. But that is not the case. The Inspector reaches conclusions and makes recommendations at the end of inquiry and the SSETR cannot disagree with his material findings of fact without giving the parties the opportunity to make written representations. But having complied with this requirement of natural justice he is free to make his own decision and does so after taking account of internal legal and policy "elucidation" and the recommendation of the Decision Officer,.. which are not seen by the parties.

We do not think this process contains sufficient safeguards to justify the High Court's restricted power of review. In terms of Article 6 the decision on the merits, which usually involves findings of fact and planning judgment, has not been determined by an independent and impartial tribunal of anyone approaching this, but by someone who is obviously not independent and impartial."

The court concluded - "The processes involved in these four cases are not compatible with Article

6(1) of the Convention, but the SSETR has not and will not act unlawfully under section 6(1) HRA because section 6(2)(b) applies." (paragraph 115)

32. This means independence in two dimensions: independence from the parties and independence from the Executive. In relation to the Executive, the issue is not one of the actual acts or predisposition's of the decision-maker, but of the structures governing the decision-making process. The European Court has held that, in determining whether a body is '**independent**', regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures, and to whether it presents an appearance of independence. Except to the extent that it is a component of impartiality, independence has not been a requirement of national law, and it is therefore an aspect of current practice which will be subject to reappraisal under *the Act*.
33. There have already been some early casualties. In *Smith v Secretary of State for Trade and Industry*, the Employment Appeal Tribunal expressed doubts about the independence of the employment tribunals. They concluded that it was something of an anomaly that the employment tribunals should have such close links with an executive arm of government. They were paid for, largely appointed and administered by the employment appeal service, a DTI agency. There was "*a real and troubling question*" as to whether employment tribunals might properly and lawfully adjudicate on claims made against the Secretary of State, having regard to Article 6 of the Convention. The matter is on its way to the House of Lords. Similarly there are moves to remove Housing Benefit Tribunals from local authorities to the Social Security Commissioners, due to the conflict of interest in the tribunal by the decision making local authority, albeit these decisions seem to have been put on hold.
34. The position of planning inspectors is no doubt closer to that of employment tribunals than Deputy Sheriffs. They do not hold judicial office, but the great majority have security of tenure in their employment as civil servants. Yet they are appointed by the Secretary of State, and they operate within his policy framework. Jurisdiction can be removed from them by the Secretary of State at any time. Can they be said nonetheless to provide an independent and impartial tribunal in the determination of citizen's civil rights? In *Bryan v United Kingdom* the Court was not satisfied that the inspector was an independent and impartial tribunal. Whilst it was true that he was required to decide an enforcement appeal in a quasi-judicial manner, and to act independently, impartially and fairly, it was also true that the Secretary of State could at any time issue a direction revoking the inspector's powers to determine the appeal. The Court held that in the context of planning appeals the very existence of this power available to the Executive, whose own policies might be an issue, was enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise was or could have been in issue in the present case.
35. *The Court* recognised that it was a frequent feature of judicial control of administrative systems found in different countries that an appeal tribunal would have responsibility for findings of fact, and that a higher court would not have power to substitute its own findings of fact. Indeed, *the Court* concluded, "**the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgement in the regulation of citizens' conduct in the sphere of town and country planning**". But this is, in effect, to deny either that "civil rights and obligations" are at stake at all in planning and similar regulatory processes, or that independence from the Executive is necessary in their determination.
36. *The Act* crystallises the issue of inspectors' de facto and de jure independence in determining planning matters. The British planning system has traditionally been based on political decision-making and political accountability. This derives from the time when it was Parliament, through the private Bill process, that held the balance between private landowners and the promoters of major projects. The independence from the Executive that planning inspectors have today is a

relatively recent development, and they are, constitutionally, part still of the Executive. The procedural rules that advance their fairness, impartiality and openness, operate so as to ensure that parties are (if they wish) properly heard before decisions are taken, but that government policy and the provisions of the development plan will prevail unless good reason is shown to depart from them.

37. The right to a fair hearing can also be expressed in the right to equality of arms, the right to access to all relevant information pertaining to an application. In UK domestic law there are rights to access to information held by a local authority, as well as the right to access to information on the environment. We take the right to information a stage further in this argument, to the degree that it would need to be shown that there are competing interests why such information should not be disclosed, and that if the information is not to be disclosed that it can be demonstrated that those not receiving the information do not suffer bias as a result, and that any subsequent hearing is fair in all the contexts meant by Article 6.

ARTICLE 8 - RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private 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 is 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 protection of the rights and freedoms of others.

38. Article 8 establishes a right to respect for private and family life, and which prohibits interference with it by a public authority except where it is (1) lawful; and (2) necessary in the interests of such matters as public safety, national economic well-being and protection of health. But it was held sufficient in *Lopez Ostra v Spain* (41/1993/436/515); December 9, 1994; 20 EHRR 277 to found a claim that the construction of a waste treatment plant next to the applicant's house, which had caused severe local pollution and health problems, was in violation of the applicant's rights. This was the case even though the State did not own the plant: it was sufficient that the municipality had allowed it to be built on their land and that the Government had subsidised it. Similarly it was held to be a material provision in a claim in respect of aircraft noise from London's Heathrow Airport *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355, albeit that the provisions put in place by the state was such as to ensure there was no violation of Article 8.
39. In simple terms, *the Court* requires that the interests of individuals are balanced against the interests of the community. This is something that is supposed to happen with the present planning system, in particular the reports to Planning Committees, but more often than not failing. Reports may now need to be couched more explicitly in the language of *the Convention* - especially where the planning application concerned is particularly controversial.
40. One particular problem area, that has already lead to jurisprudence in Europe, is enforcement action against 'Gypsies'. Not only do they have the right to a home (*even if it has been established unlawfully*), but their rights need to weighed in the balance against the rights of the local community who may seek to have Gypsies moved on. Potentially a 'no win' situation for local authorities. But in any event when we come to the consideration of the provision of sites, not only local authority provided, but also individual Gypsies seeking planning permission, then special care will be needed to ensure that the rights of Gypsies are not infringed. This includes the need for the local authorities to take into account the needs of the Gypsy family the subject of any planning enforcement action, and would require in most cases the provision of alternative sites by the local authority, if they were to avoid claims of violation of Article 8 and possibly Article 14.

41. There is arguably a right of access to information held by a public body if for instance such documentation on a planning issue was such that should the application be approved it would impinge on your family life. The other issue in the same context could be that of the right to ‘**equality of arms**’ in the context of Article 6.1. The information as an example might relate to the health effects of a given subject say contaminated land, this could relate to the actual health effects on you or your family, the effect on the value of your property, the loss of the use of outside areas due to fear of the consequences of the contamination.
42. The effects of Article 8 cannot be underestimated, apart from Article 6.1 the right to a fair hearing it is the one area that has the most potential for affecting planning and development issues, and can potentially be far ranging, from the issues related to environmental damage (right to privacy) of aircraft noise and nuclear fall out from power plants, through to the rights to protection of your home for instance from compulsory purchase *Howard v UK No 10825/84 52 DR 198 (1985)*, and *X v UK No 9261/81 28 DR 177 (1982)*. This aspect then needs to be looked at in great detail to see exactly how on a case by case basis the concepts of a right to a private life and the right to family life will be seen by the UK courts. They may well conclude that a residential development that reduced the prospects of existing residents having access to local facilities infringes the right to a home and family life, they may conclude that any reduction in the number of places in local schools caused by the new development reduced the prospects of existing residents having an education, due to the potential for long journeys to other schools. This issues will need to be seen if the courts ever adjudicate upon them.
43. Article 8 is arguably the most important of the provisions of *the Convention* other than Article 6. As such campaign groups, and local communities should look very closely at the issues that concern them and how the provisions in respect of family and private life may be violated by development proposals.

ARTICLE 10

FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

44. Whilst in its self Article 10 has no direct bearing on planning and development issues, however it most certainly does in the campaigns that accompany adverse planning and development applications. It also has indirect application in relation to other Articles of *the Convention*, for instance Article 6.1 right to a fair trial *Sunday Times v UK A30 (1979)* and Article 8 the right to respect for private life *Lingens v Austria A103 (1986)*. However where the violation comes as part and parcel of another right *the Court* tends to take it forward through the other head, but it is useful for all involved in campaigns to understand and make use of their rights under Article 10.
45. There is also an application of Article 10 in relation to access to information, whilst the Court has ruled against the right to access to government held private information, it has come out in support of the general duty of the state not to obstruct access to information which is available *Z v Austria No 10392/83, 56 DR (1988)*. This point could of course be raised under Article 6.1 with reference to the right of all parties to consult relevant evidence at the disposal of the authorities *Feldbrugge*

v Netherlands A99 (1986) see Article 6.1 for more in-depth debate. Of course much information is technically available to the public, reports put before any committee or sub committee of a local authority, under the Local Government (Access to Information) Act 1985 (which is being updated with a consultation, and draft Bill, or environmental information under the Environmental Information Act 2000. There is also a Home Office published (working draft) Code of Practice on Access to Government Information available from <http://www.homeoffice.gov.uk/foi/dftcp00.htm>

46. There may very well be more situation's where there are direct action campaigns such as Stanworth Valley (M65) and Manchester Airports Second Runway, where during the eviction of protesters (including local residents) the media were excluded from the main eviction area by being confined to '**media compounds**', or other situations such as that found in *Plattform 'Arzte fur das Leben v Austria* where *the Court* found against the state on the disruption of a protest by a hostile mob, on the grounds that the state had a positive obligation to prevent such disruption, albeit that case concerned Article 11, the same argument could be said to apply to Article 10.

ARTICLE 14

PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

47. Discrimination in the context of planning could be argued from a number of view points the most obvious being race (*including Gypsies*), however there may also on occasions be other clear cases of discrimination, as an example where a planning committee grant permission for a new Parish Church, but refuse for a similar site and location an application for a Mormon Church, or Mosque. Not quite so clear cut may be discrimination in the grant of a social club for one section of the community but not another. This discrimination is as a rule taken to mean that another of the Articles of the Convention has been violated. But that does not mean in all situation, there may very well be instances where there is discrimination on its own, but as a general rule that is the position to take.
48. Discrimination should also as a general rule be taken to mean just that, rather than the more forceful term '*equality*', as there may very well be instances where it is needed to insure that one section of society is treated more fairly than another (*positive discrimination*), this might be so for instance in the need to provide for social housing over that of housing built for its market value, in order that those less able to provide housing by their own means can obtain access to good affordable homes.
49. There are likely to be many situation in planning and development where discrimination takes place. If such discrimination can be proved then it would add to any challenge to a planning decision. There may very well be arguments by land owners of village green application sites that they are being discriminated against, and that there is also a violation of Article 1 to the First Protocol the right to possessions (the possessions being the land, and the right to exclusive use of it that would be denied with the registration as a village/town green, which would subsequently give the right to local inhabitants to use the land for lawful sports and pastimes).
50. Another example may be that a developer alleges discrimination of one developer over another. One developer being granted planning permission for say a superstore, whereas another developer is denied permission for a similar site. This could violate Article 1 of the First Protocol and give discrimination under Article 14, many such similar examples could be given.
51. Discrimination is also positive as well as negative, in that the state has an obligation to take such measures to protect those that require protection, this may very well include minority social and

religious groups. The following is a very tenuous argument, how far any one gets with it would have to be seen. But if we look at it in any potentially health threatening situation, such as the potential for contacting leukaemia for those living close to nuclear installations, or those affected by telecommunication mast installations.

52. Article 2 has the obligation to protect life, Article 14 not to discriminate, also positively to discriminate where in the opinion of CfPS not to do so would lead the state to come into violation with another Article of the Convention, in this case Article 2. The Stewart Report recommended that the precautionary principle should be followed. BSE and other such incidents all point to the need for as much research and information as possible to be available to decision-makers. Yet we have the Government saying that local authorities should not take into account the health implications from masts, albeit to some degree some local authorities do in as far as they can, for instance Manchester City Council will not give permission for masts to be sited within 200 metres of any school.
53. From this I conclude that one section of society, in the Manchester case those living within the catchment of the 200 metres zone are treated differently than those living outside the zone. There may very well be other 'types' of schools (places where children gather) not included in this bracket such as nurseries or Sunday Schools. The question then is are they being discriminated against, or more precisely are the children attending nurseries discriminated against, and if they are, is it not fair to extend that argument to say that all children not in the zone are being discriminated against. If this is a correct argument, and at the time of compiling this briefing I can find no precedent either way, then the flood-gates could be opened up. However at this point I urge caution before everyone runs off to the courts. A great many people are working hard to ensure that permitted development legislation, that covers telecommunication masts is corrected to ensure greater protection for local communities, what is not needed is the wrong case to go to court, thereby creating bad law that would prevent a better case from succeeding, thereby creating good law. The right case is out there, we simply need to identify it, and then beef up the argument to give the greatest chance of success, however there is nothing to stop people from progressing this argument to local planning authorities, providing that you do not in the doing create a negative, by the authority simply removing the exclusion zones.
54. Article 14 together with Article 8, was at issue in *Buckley v United Kingdom [1997] 2 PLR 10* where a gypsy maintained that planning legislation was discriminatory against gypsies by prohibiting them from following their traditional way of life by stationing caravans on unoccupied land. *The Court* held for the Government, but it was divided, and it took a different line from the Commission, which had conducted a preliminary review of the case.
55. There is a violation of Article 14 where, in respect of a Convention Right, persons in similar situations are treated differently with no objective or reasonable justification, that is: if the difference in treatment does not pursue a legitimate aim. Or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Belgian Linguistic Case 1 EHRR 252*). An example of the breadth of Article 14 is *Pine Valley Developments Ltd. v. Ireland (The Times December 11, 1991)*, a case concerning the Dublin Green Belt. In that case a difference in treatment between persons whose void planning permission had not been validated retrospectively and others whose permissions had been, led to a finding that there had been a violation of Article 14, taken together with Article 1 of the First Protocol.

ARTICLE 1 OF PROTOCOL 1

PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding

provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

56. Due to resistance to the inclusion of this provision into the Convention from Sweden and the UK the wording is '*possessions*'; rather than the more empowering word '*property*', but the Court has nonetheless managed to construe it as, in substance, '*guaranteeing the right of property*' (*Marckx v Belgium (1979) Series A, No. 31*).
57. There are three linked components to the article:
 - it ensures observance of the principle of peaceful enjoyment of possessions;
 - it denies the State any right to deprive citizens of their possessions except in accordance with law;
 - it allows the State to control the use of property in the national interest.
58. Hence there is a balance to be struck between the objectives, and a test of proportionality between the public objective and the private cost. It clearly has a resonance in compulsory purchase cases, where property is physically taken, and where the Court has managed to insert a requirement that reasonable compensation should be a condition of lawfulness (*Lithgow v United Kingdom (1986)*; *James v United Kingdom (1986)*). The Court has thus regarded this requirement as an inherent feature of the right of property, that is the right to compensation, in the sense that it might form a necessary ingredient in striking a fair balance between public and private rights. To hold that property could be taken without compensation would have undermined the protection intended to be conferred by Article 1 of the First Protocol. For the same reason, the level of compensation should also be reasonably related to the value of the property taken, or else its taking would constitute a disproportionate interference; but the pursuit of legitimate objectives of economic reform might, as in the *James* case, warrant a lower level of compensation. The Court has also refused to tolerate long drawn out planning blight (*Sporrong and Lonnroth v Sweden (1982)*).
59. The provision did not help the Duke of Westminster in his battle against the leasehold reform legislation of the 1960s: he had been deprived of property, but in the public interest (*James v United Kingdom (1986)*). The Court thought it appropriate that the '*margin of appreciation*' available to a legislature in implementing social and economic reforms should be a wide one, and hence was willing to respect the legislature's judgment as to what was '*the public interest*' unless that judgement was manifestly without foundation. This means that the extent of restrictions on the use of land has in practice been left very much to individual states, without effective redress for property owners affected by them, unless they are able to bring a claim under other provisions such as anti-discrimination (Article 14).
60. The power to control land-use is wide, and has been so treated by the Court. For example, in *Pine Valley Developments v Ireland*, where an applicant had purchased property in reliance on the grant of planning permission. This meant, held the Court, that they had a property right with which the State subsequently interfered (even though it was subsequently held to have been void ab initio (*effectively a trespasser, so therefore banned from taking action due to his earlier illegal acts*) by the Supreme Court. However, when it interfered the State had been exercising powers of control rather than expropriation, and its action had been both lawful and proportionate, since it was the only way of achieving the goal of protecting the green belt. *The Court* also placed weight on the fact that the applicants had been engaged in a commercial venture which by its very nature involved an element of risk, and that they had been aware of the zoning plan and of Dublin City Council's opposition to the proposed development.
61. But *the Court* has applied the Article, in line with the jurisprudence of the US Supreme Court under the Fifth Amendment to the US Constitution, to non-tangible property, such as the revocation of a planning permission or discharge consent; though not to the denial of a planning permission in the first place (*Jacobsson v Sweden (1987)*, unless, perhaps, that leaves the land

without any commercial use or value (eg *Baggs v United Kingdom*, Commission Report July 8, 1987 but the case was subsequently settled).

62. Article 1 of the First Protocol provides for the protection of property and in doing so denies the State any right to deprive citizens of their possessions except in accordance with law, but allows the State to control the use of property in the national interest.
63. Hence there is a balance to be struck, and a test of proportionality to be applied when comparing the public objective and the private cost. It clearly has a resonance in compulsory purchase cases, where property is physically taken, and where the Court has managed to insert a requirement that reasonable compensation should be a condition of lawfulness *Lithgow v United Kingdom* 8 EHRR 329 (1986). The Court has also refused to tolerate long drawn out planning blight *Sporrong and Lonnroth v Sweden* (1982) A 52; 5 EHRR 33.
64. The second limb of Article 1 of the First Protocol states that "**no one shall be deprived of his possessions except in the public interest subject to the conditions provided for by law and by the general principles of international law**". It is clear from European case law that a discharge consent or a waste disposal licence will be a 'possession' for the Protocol and that interference (by revocation or otherwise) could constitute a violation. However, the case law also illustrates that such interference will amount to 'control' rather than 'deprivation', the control relating to the underlying business. This is relevant because the third limb of Article 1 of the First Protocol allows the State to control possessions *in accordance with the general interest*. Thus the authority will merely need to justify the decision to revoke or modify a licence on the basis of general interest. Companies whose licenses are revoked, however, will need to be given a fair hearing under Article 6.
65. This Article in substance guarantees the right of property (*Marckx v. Belgium* 2 EHRR 330) and comprises three distinct rules (*Mellacher v. Austria* 12 EHRR 391) The first rule sets out the principle of peaceful enjoyment of possessions. The second covers deprivation of possessions and subjects this to conditions. The third recognises that States may control the use of property in accordance with the general interest and secure the payment of taxes, etc. The three rules are connected, with the second and third rules being construed in the light of the general principle enunciated in the first rule (*James v. U.K.* 8 EHRR).
66. An interference should achieve a fair balance between 'the general interest' and the protection of the person's rights with a reasonable relationship of proportionality between the means employed and the aim pursued (*Air Canada v. U.K.* 20 EHRR 150). If the person concerned has to bear 'an individual and excessive burden', there will not be such proportionality (*Håkansson and Sturesson v. Sweden* 13 EHRR 1).
67. The 'possessions' protected by this Article are not limited to land and chattels. They include economic interests arising from permissions and licences in respect of land and its use (*Pine Valley Developments Ltd. v. Ireland* *The Times* December 11, 1991, *Tre Traktörer Aktiebolag v. Sweden* 13 EHRR 309). However a bare possibility of future interference does not in itself interfere with the right While approval of a development plan may constitute an interference with rights of ownership of land subject to it, such interference will usually be justified as being in the general interest (*Katte Klitsche de la Grange v. Italy* 19 EHRR 368). Indeed many applications under Article 1 of the First Protocol have been rejected because they were held to be justified by matters of general or public interest. These include economic, environmental and social considerations.
68. While a State may justify interference with property rights, it does not have an unrestricted right to do so. Rather, as mentioned above, there is a need to strike a fair balance, and to avoid

individual and excessive burdens. Successful applicants under Article 1 of the First Protocol have included: the owners of property subject to long-term planning blight for which national law provided no compensation (*Sporrong and Lönnroth v. Sweden* 5 EHRR 35); the owners of property expropriated for a road without compensation because of an irrefutable presumption that the road would benefit their retained property (*Katikaridis v. Greece*, [1997] EHRLR 107).

69. It will be clear from the above that the payment of adequate compensation will usually provide the State with a defence to a claim under Article 1 of the First Protocol. However the Article does not guarantee a right to compensation equal to the full market value in every case. In an application by landlords concerning the right of tenants to acquire the freehold under the Leasehold Reform Act 1967, the Court held that **“legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value”**.
70. Article 8 provides for **“the right to respect for his private and family life, his home and his correspondence”** subject to certain exceptions. Relying upon the French text of *the Convention*, the Court has held that this extends to the office of a professional person (*Niemietz v. Germany* 16 EHRR 97). Premises with a mixed use, partly as a residence and partly for commercial purposes are also likely to be covered by the Article (*a point conceded by the Government in Chapel v. U.K.* 12 EHRR 1).
71. In many cases a complaint under Article 8 will not add to one under Article 1 of the First Protocol. However an important difference is that a complainant under Article 8 does not have to have any legal interest in the home (*Mentes v. Turkey* [1998] HRC vol. IX 122). This may result in altering the law of England and Wales by giving a right of action in nuisance to plaintiffs without an interest in their home (*see the dissenting judgment of Lord Cooke of Thorndon in Hunter v. Canary Wharf Ltd.* [1997] AC 655). Restrictions on the use of one’s home may breach Article 8 (*Gillow v. U.K. The Times*, November 29, 1986). This has led to a substantial number of applications by gypsies unable to follow their traditional lifestyle. Although a majority of the European Court of Human Rights rejected on its facts the first gypsy case to reach it (*Buckley v. U.K.*), the European Commission of Human Rights has recently declared six further applications by gypsies to be admissible.
72. Article 6(1) provides that *“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”*. Rights of property are ‘civil rights’ within the meaning of Article 6(1). This is so, not only where the issue is being determined by a normal civil action, but also where it concerns an administrative measure that must be challenged by public law proceedings (*Ringeisen v. Austria* 1 EHRR 455). Hence the right to develop one’s property in accordance with the law is a ‘civil right’ (*Fredin v. Sweden* 13 EHRR 784). Article 6(1) provides a remedy for litigants who have suffered excessive delay.
73. It should however be borne in mind that delays in the legal systems of some signatory States are much greater than those normally experienced in the U.K. and that this appears to have influenced what the Court considers to be reasonable. Article 6(1) also implies the right to silence and the right not to incriminate oneself, and this applies to commercial regulatory offences as well as to mainstream crime (*Saunders v. U.K. The Times* December 18 1996).
74. However, Article 8 and Article 1 of the First Protocol rights are qualified. Interference with a person’s right to peaceful enjoyment of his/her home or possessions is only a violation of that right if the interference is not justified and proportionate to its aims and objectives. The case of *Powell & Rayner -v- United Kingdom* is an illustration of this. In this case the applicants complained of noise pollution from Heathrow Airport and its affect on the quality of their private

life and the scope for enjoying the amenities of their home. The applicants complained that the permitted levels of noise were unacceptable, as were the Government's measures aimed at reducing the noise. The Court held that regard had to be had to the fair balance to be struck between the competing interests of the individual and the community as a whole. The Court considered the benefits derived from Heathrow and the steps undertaken to minimise its impact and concluded that the interference with the applicants Article 8 rights was justified. The operation of Heathrow was a legitimate aim and airports are necessary to the economic well-being of the Country.

75. Another aspect of Article 1 of the First Protocol is the effect on Village/Town Greens, a land owner to a degree is deprived of part of the rights he would enjoy over his land, that is the right to peaceful enjoyment, to use the land as he deems fit. Whereas once the land is registered as a Town or Village Green at a stroke inhabitants of the locality obtain the right to take part in lawful sports and pastimes on the land, thereby denying the land owner his full rights over the land. Albeit that the justification would be that the Convention Right is limited in that those rights can be deprived if they are in the public interest, and very strong arguments that rights over land used for a purpose for 20 years should be continued to be enjoyed by those that have benefited from those rights for such a long period, and therefore the registration of land as a town or village green is in the public interest.

Health Risk Problems - MASTS

76. The appeal decision letter for the telecommunication mast at Sycamore Avenue, Leeds (copy available from the CfPS WEB site). Para 17 refers to the noise from wind whistling through the stabiliser wires, clearly this is a material consideration in tele-mast applications, whether it is under normal planning considerations, or permitted development rights. Para 18 states '**My conclusion on this issue is that the retention of the development would materially harm the living conditions of neighbouring residents.....**'. This is a perceived health effect, where residents would have potentially many sleepless nights. The stress of this is such that it could be argued that it is a material consideration, coming directly from Annex F of the Governments Code of Best Practice on telecommunication masts. This would be applied to the Convention in the context of Article 8 the right to a home.
77. The physical health risk is in its self not a material consideration in planning applications. However that is likely to change in the near future, we argue that if we take into account Article 8 and the obligations under the Act for all local authorities to take into account their obligations under the Convention, it has in reality already become a material consideration, and if the local authority do not comply with the Convention then any decision will be unlawful, and therefore susceptible to legal challenge.
78. In *Rayner v UK* that the intensity and persistence of aircraft noise interfered with the applicants rights to respect for his private life and home (*Albeit they found no violation of either Article 8 or 13*). Had the UK government not taken a large number of stringent precautions then the decision would undoubtedly been different. Therefore if there is a potential health threat, objectors need to look very closely at the measures taken by government (which includes local government) to combat, and off set the problem.
79. In *Lopes Ostra v Spain* the applicant demonstrated to the Court that the failure by the state to act to prevent or to protect her from serious pollution damage (fumes from a waste disposal plant) constituted a failure to respect her home and her private and family life.
80. Having said that other cases have ruled out noise, but these are usually on specific grounds, including the economic well being of the country, and that the noise was insignificant in terms of the numbers of people affected, nevertheless the argument is there, the case is there to support the argument, and therefore they must give consideration to it, especially if you flag it up.

81. The argument is then extended into the various health threatening effects of masts. The same basic argument is there, whether they are visible or covert
82. There is also an argument under Article 1 of the First Protocol, *'The Right to Peaceful Enjoyment of Ones Possessions'*. This not only adds on to the above arguments, but also extends them to the self interest arguments, and the right not to have your possessions put at risk from environmental pollution. It would be argued that you would no longer be able to enjoy the benefits of sitting in your gardens, due to the perceived health risk in doing so (*this is though is an Article 8 argument, that could be used to a lesser extent for Article 1 of the First Protocol*), especially where the household has anyone from a high risk category such as young children.
83. The right to a family life has been interpreted by the Commission in a very wide sense *Z & E v Austria No. 10513/83, 49 DR 67 (1986)* **'In shaping the domestic law, the state must act in a manner calculated to allow those concerned to lead normal family life ... The Commission is of the opinion that this consideration applied not only to legislation regulating family relationships, but also to legislation regulating the use of property insofar as it interferes with the possibility to use this property for family purposes'**.
84. The governments main advise booklet to local government employees *'A New Era of Rights and Responsibilities - Core Guidance to Local Authorities'* states at para 55 **'article 8 covers a vast range of issues and subjects, including to be free from severe environmental pollution.....'**

Article 2 - The Right to Life

85. This we argue is a right to a healthy life. The state should do nothing that threatens life except by rule of law. The erection of a phone mast although not proven to cause the many life threatening illnesses thought to be caused by irradiation and biological radiation, cannot be disproved. Therefore Article 2 applies to such applications. Government advise is that Local authorities are not under an obligation to consider the health implications of telecommunication applications, however this conflicts with other more potent planning policy which states that health issues can be a material consideration, with clear indications that the precautionary approach should be adopted (albeit that is a general reference and not a specific mast reference) however these points still have to be ruled on in a court.
86. The Commission found in *X v UK No. 7154/75, 14DR (1978)* that the first sentence in Article 2 (1) **'enjoins the state not only to refrain from taking life intentionally but, further, to take appropriate steps to safeguard life'**. We argue that this should be read very widely, so as to require a state to take positive steps to ensure a healthy working and living environment. Obviously tele masts are contrary to that obligation, not only from the potential physical, but also from the mental health, stress, worry..... However the threat must be to life, and not simply to health, therefore the argument should be raised specifically to all those potential illnesses where there is a danger that they could lead to premature deaths. This would be very much the case where there was a provable risk, such as a young person who is actually suffering from a life threatening disease, such as leukaemia, the obligation being on the local authority to that that into account.

CONCLUSION

87. Whether the Human Rights Act will have much impact on planning and environmental practice will depend upon how far the courts of this country are willing to embark upon a more substantive review of administrative decision-making. It will no longer be enough to ask whether the decision-maker has taken into account all material considerations and not acted unreasonably in the so-called *Wednesbury* sense of going beyond the powers conferred by the statute concerned. The Human Rights Act provides a new framework for addressing that question. More fundamentally,

it provides judges with the raw material to fashion new rights, both individual and collective, affecting the environment.

88. One issue that might arise is the lack of any third party right of appeal. Whilst those who have had Planning Permission refused have a '*simple*' right of appeal through the planning system, anyone who objects to the grant of Planning Permission has no easy, planning based solution, and must go for judicial review.
89. Another issue to watch out for is the local plan process, in which Local Authorities are both judge & jury (there is a report by an Independent Inspector - but a Council does not have to accept his recommendation). Many village green applications are being dealt with in this way, albeit every local authority appears to be using differing decision making processes, the basic requirement of the local authority to make the decision, flies in the face of the need to have an impartial decision maker where the local authority have a connection to the land.
90. This aspect has already been the subject of deliberation of the UK Courts albeit a transcript is not yet available at the time of writing this briefing. 4 Developers sought judicial review of planning appeal decisions on the grounds that inspectors though they were in themselves independent adjudicators, the reality is that they are liable to have the decision removed by them at any time by the Secretary of State and therefore planning appeals are not impartial tribunals. This ruling has already seen at least one other major developer challenge a decision where an Inspector ruled in their favour, but the Secretary of State intervened and reversed his decision, that case is now pending a judicial review hearing, there are likely to be many more such applications, to the detriment of the local communities concerned, but at the same time local communities should be aware of the potential for legal challenge when the decision is in reverse.. We will update this briefing once these and other decisions are known.
91. Whilst the HRA does not really create 'new law', it does open up and simplify access to the Courts. Claimants can bring actions in their local courts, rather than having to go all the way to Strasbourg. Whilst Planning Committee reports etc may ultimately emerge unscathed if they are written with a eye to the ECHR, local authorities may have to spend time and effort fending off claims which endeavour to pursue Human Rights in a planning context.
92. Articles 6, 8 and 14 of the Convention and Article 1 of the First Protocol of the Convention are likely to be of particular significance to planning enforcement. Exactly to what extent, and how these will be interpreted, remains to be established in case law, although European Court cases have already provided some indications.
93. In particular an LPA will need to be prepared to justify the proportionality of any decision to use planning enforcement powers relative to the aims being pursued. The LPA may also be liable for inaction or insufficient speedy and robust action in relation to enforcement action. Where the local authority acquires information by serving a Planning Contravention Notice it should only use that information for the purpose for which it was obtained. European case law has already established that there can be a violation of Article 6 in respect of the right to silence and privilege against self incrimination if information that is required to be supplied is subsequently used for another purpose.
94. The Human Rights Act will enable third parties, to rely on the Convention to complain to the local planning authority or the Environment Agency that any form of environmental nuisance caused by an existing neighbouring development is an interference with their Article 8 and/or Article 1 of the First Protocol rights. It will then be up to the neighbouring property owner or the local planning authority to justify the infringement.
95. The authority's failure to serve an abatement notice (or an enforcement notice if the use is

unlawful or planning conditions are being breached) on evidence of breach of an individual's Convention rights will be vulnerable to attack under the Act.

96. Impacts on people are an important but small area of environmental protection. Wider objectives of environmental policy include the protection of waters and seas, the reduction of air pollution, the protection of the ozone and alterations in climate, nature conservation and waste management. The Human Rights Act, however only protects individuals who are *directly affected* by environmental nuisances ("*the Victim Test*"). The limitations of the Victim Test mean environmental pressure groups are unlikely to be able to bring claims; people do not meet the standard of being a victim just because they are interested in the environment. However, peaceful demonstrations by environmental groups could be upheld under Article 10 and Article 11 (Right to Freedom of Expression and Freedom of Assembly and Association).
97. It is clear that the rights of landowners under a planning system are '*civil rights and obligations*'. This was accepted by the European Court in *Bryan v United Kingdom*, and it appears to have been conceded in a recent case involving the Deputy Bailiff of Guernsey, *McGonnell v United Kingdom*. It is not clear that the rights of objectors would necessarily be similarly regarded. Much would depend on the context in which the question arose, but it is not inconceivable that they might, for example in a case where the proposed development might cause serious blight on adjoining property.
98. CfPS believes that the European Convention on Human Rights is in its overall context likely to prove more beneficial to local communities than developers. But we do wait with baited breath to see exactly to what degree. We welcome comment on this briefing info on any new court rulings, local authority decisions and public inquiry decisions, to allow us to update not only this report, but generally to enable us to keep the advice that we give to local communities one step ahead of those that would promote adverse developments.
99. The following is taken from the Circular Letter to Permanent Secretaries of 8 December 2000 .
- Rights without responsibilities? On the contrary. The HRA says your rights may need to be balanced against the rights of others – or for the good of everyone. Your rights come first, but so do everyone else's.**
- We have set aside £21 million for additional court sittings if and only if they are required. This represents only 4.7% on top of the budget for running the courts which is £450 million for next year.**
- We have also set aside £39 million for legal aid again if and only if required. This represents just 2.3% of the £1.6 billion legal aid budget.**

PLEASE NOTE THAT THIS REPORT IS BASED ON RESEARCH BY CfPS AS WELL AS INFORMATION GLEANED FROM REPORTS BY OTHERS, AND MAY INCLUDE TEXT TAKEN FROM THOSE REPORTS, WE ARE SORRY IF AUTHORS OF THOSE REPORTS OBJECT TO THE USE OF SUCH INFORMATION AND TEXT BEING USED BY CfPS. WE JUSTIFY THIS BY THE BENEFIT THAT THE INFORMATION WILL BE TO A LARGE NUMBER OF LOCAL COMMUNITIES.

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The decisions of the European Court of Human Rights can be found on their website:

www.echr.coe.int

The Home Office human rights site is: www.homeoffice.gov.uk/hract or www.humanrights.gov.uk

Recent domestic and European Court case-law on human rights may be found on:

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European Commission and Court of Human Rights

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European Court of Human Rights

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ORGANISATIONS

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- Federation of Independent Advice Centres 4 Deans Court St. Paul's Churchyard London EC4V 5AA Tel: 020 7489 1800 www.fiac.org.uk
- National Association of Citizens' Advice Bureaux Myddleton House 115-123 Pentonville Road London N1 9LZ Tel: 020 7833 2181 www.nacab.org.uk
- www.adviceguide.org.uk (an advice and information website)
- Liberty 21 Tabard Street London SE1 4LA General Enquiries: 020 7403-3888 Advice line: 020 7378-8659 (Mondays and Thursdays 6-8 pm, Wednesday lunchtimes) www.liberty-human-rights.org.uk
- The AIRE (Advice on Individual Rights in Europe) Centre 74 Eurolink Business Centre 49 Effra Road Brixton SW2 1BZ Tel: 020 7924 9233 Advice line: 020 7924 0927 (2-5 pm, Monday to Thursday)
- Legal Action Group - 242 Pentonville Road, London, NW1 9UN Tel: 020 7833 2931 www.lag.org.uk
- Charter 88, 16-24 Underwood Street, London N1 7JQ Tel: 020 7684 3888 www.charter88.org.uk E-mail: info@charter88.org.uk
- Scottish Human Rights Centre, 146 Holland Street, Glasgow G2G, Tel: 0141 332 5960 E-mail: shrc@dial.pipex.com
- OFTEL, 50 Ludgate Hill, London, EC4M 7JJ Tel: 0171 634 8700 Consumer helpline: 845 714 5000 www.oftel.org.uk E-mail: www.advice@oftel.gov.uk
- The Advisory Council for the Education of Romany and Other Travellers (ACERT), Moot House, The Stow, Harlow, Essex, CM20 3AG Tel: 01279 418666
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Romford, Essx, RH15 4HD Tel: 01708 868 986 E-mail: thegypsyCouncil@btinternet.com