

NIGEL MAYHEW MEMORIAL LECTURE 2009

PLANNING AND HUMAN RIGHTS

Robert Lewis

Radcliffe Chambers

11 New Square Lincoln's Inn London WC2A 3QB

DX: LDE 319 Tel: 020 7831 0081 Fax: 020 7405 2560

rlewis@radcliffechambers.com www.radcliffechambers.com

Introduction

It is commonly believed that the Human Rights Act 1998, since it came into force on 2 October 2000, has had a major influence on how public authorities discharge their functions, including planning decisions. In this paper I will address whether this belief is correct as far as planning is concerned. After all, the most important purpose of the Act was not to change the substantive law, but to ‘repatriate’ the protected rights, making the provisions of the European Convention on Human Rights enforceable in our domestic courts, thereby relieving parties of the need to take their cases to the European Court of Human Rights (ECtHR) in Strasbourg.

Section 6 of the Act provides: *‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’* and in my view this has undoubtedly focussed minds, and forced public authorities, including, of course, local planning authorities, to confront human rights considerations expressly, usually for the first time. All those involved with public decision-making, including planning decisions, are now (or should be) aware of what human rights are enshrined in the Convention and how they must be observed. Whether this means that planning decisions that are now made are different to what they would otherwise have been is, however, a very different thing.

First, however, some background...

What is the Convention?

The European Convention for the Protection of Human Rights and Fundamental Freedoms (to give it its full title, usually abbreviated to ‘the European Convention on Human Rights’) was drafted by the Council of Europe after World War II. It was a reaction to the excesses of fascism and reflected a traditional civil liberties approach to protecting citizens’ rights. The UK had a major role in its drafting (the Chairman of the Council’s legal and administrative division which was responsible for its wording was a former Lord Chancellor and Home Secretary, Sir David Maxwell-Fyfe) and the UK was its first signatory. However, although the Convention came into force in September 1953, it was not until 2000 and the coming into force of the Human Rights Act 1998, that it became directly enforceable in our national courts.

The Convention is ultimately interpreted and enforced by the ECtHR. If someone believes his Convention rights have been infringed, he must first challenge the legality in his national courts, including appealing to higher courts if possible, before he can take the case to Strasbourg. UK courts will give effect to the Convention rights unless an Act of Parliament clearly prevents them from doing so, in which case they can make a ‘declaration of incompatibility’, thereby alerting Parliament to the need to consider whether amending legislation is required.

A recent example (not involving planning law) of an application to secure a declaration of incompatibility was the unsuccessful attempt by shareholders of Northern Rock to have the compensation scheme made under the Banking (Special Provisions) Act 2008 following the bank's nationalisation declared incompatible with the Convention (*SRM Global Master Fund and Others v The Commissioners of Her Majesty's Treasury*¹).

The Convention rights are drafted in broad terms, in a very different fashion to the traditional way in which UK statutes are phrased. This is both a strength and a weakness – a strength because it allows the courts to be flexible to meet each unique situation and to keep interpretation up-to-date, and a weakness in that the rights are less certain. As Lord Denning said in *Ahmad v Inner London Education Authority*²:

'We will do our best to see that our decisions are in conformity with it. But it is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be brought down to earth. They have to be applied in a work-a-day world.'

A good example of the way in which this uncertainty of the Convention rights can allow them to develop is the extent to which they protect privacy. It is only very recently that this right has been recognised as being protected, following a judgement of the ECtHR in a case in 2004 in which Princess Caroline of Monaco sued paparazzi for taking photographs of her going about her daily business – skiing, shopping, leaving restaurants etc. That ruling has subsequently been relied on in the UK in two high profile cases: that brought by Michael Douglas and Catherine Zeta Jones against Hello! magazine (in which Zeta Jones told how she felt "devastated, shocked and appalled" when she realised that unauthorised photographers had gatecrashed her wedding at the Plaza Hotel, New York – the couple having been paid £1m by 'OK!' magazine for the wedding photographs); and that brought by Max Mosley against The News of the World for publishing a story that he took part in Nazi-inspired sado-masochistic activities.

What rights do the Convention protect?

The Convention, together with the additions that have been made to it over the years via 'protocols', recognises a wide number of rights, the most significant being:

Art. 2 – right to life

Art. 3 – prohibition of torture

Art. 4 – prohibition of slavery and forced labour

¹ [2009] EWCA Civ 788 (28 July 2009)

² [1978] QB 38

- Art. 5 – right to liberty and security
- Art. 6 – right to a fair trial
- Art. 7 – no punishment without law
- Art. 8 – right to respect for private and family life
- Art. 9 – freedom of thought, conscience and religion
- Art. 10 – freedom of expression
- Art. 11 – freedom of assembly and association
- Art. 12 – right to marry
- Art. 13 – right to an effective remedy
- Art. 14 – prohibition of discrimination
- Art. 1 of the First Protocol – protection of property
- Art. 2 of the First Protocol – right to education
- Art. 3 of the First Protocol – right to free elections
- Art. 1 of the Thirteenth Protocol – abolition of the death penalty.

In addition to the problem of the broad language used in the Convention, the applicability of these rights to particular circumstances is made more difficult to predict owing to the fact that while a few are expressed as ‘absolute’ rights (e.g. the article 3 right not to be tortured), the majority are ‘qualified’. For example, article 8 (relied on in the privacy cases and of principal relevance to planning) reads as follows:

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.*

Such qualifications, or ‘derogations’, make the extent of the right even more uncertain. For example, if enforcement action is taken against someone who has built a home without planning permission, there is no doubt (except where the home is too recent to be established as a ‘home’³) that such action on the part

³ See *Buckley v UK* (1997) 23 EHRR 101 (where the court held that a ‘home’ can be one established unlawfully, without planning permission) and *Leeds City Council v Price* [2006] 2 AC 465 (where caravans had been placed on the site for just

of the local authority interferes with his right to respect for his private and family life and home. But is that interference ‘necessary in a democratic society’, and is it justified by any of the factors listed – ‘public safety’, ‘the economic well-being of the country’, ‘the protection of the rights and freedoms of others’ etc?

The extension of human rights into the field of planning and environmental protection

When the Convention was drafted the concern for the environment that we take for granted today was far less developed. The concern was to prevent a return to the excesses of fascism in a Europe that was devastated by five years of war. The protection of the environment, either in its wider, global, sense or in the sense of local amenity – both matters that lie at the core of planning control – is therefore not one of the listed rights, nor is it one of the listed derogations. ‘The environment’ is nowhere mentioned in the Convention. Further, protection of the environment – whether narrow such as an ecosystem or wide such as the atmosphere – is generally a collective interest, in contrast to the individual focus that is characteristic of human rights.

It is, perhaps, not surprising that early attempts to argue that the Convention protected the environment failed. For example in the 1976 case 7407/76⁴ the Commission stated: ‘*no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention*’, and it rejected a claim by an organisation that was seeking to prevent the military use of an area of marshland.

However, one aspect of the Convention that distinguishes it from, say, UK legislation, is its flexibility. It is regarded as a ‘living instrument’ (*Tyrer v UK*⁵), capable of being interpreted to meet ‘present day conditions’. Following this approach, protection of the environment eventually came to be regarded as Convention territory. It did so through two avenues:

- First, where harm to the environment also causes direct harm to an individual’s protected rights, it has been held that a failure of the relevant governmental body to take effective regulatory action to prevent it can amount to a breach of those rights. So, for example, in cases such as *Lopez Ostra v Spain*⁶, *Guerra v Italy*⁷, and *Moreno Gomez v Spain*⁸, where the interference comprised smells and fumes from a waste plant, pollution from a chemical factory, and noise from bars, clubs and discothèques respectively, the ECtHR held that the Convention does not simply apply where there

two days before the eviction took place.) In *Rafferty and Jones v SSCLG and North Somerset Council* [2009] EWCA Civ 809 (29 July 2009) the Court of Appeal held that Article 8 of the Convention may be engaged even where a gypsy has yet to move onto the site, on the basis that his ‘home’ is his caravan.

⁴ 1976 DR 161

⁵ (1978) 2 EHRR 1

⁶ (1994) 20 EHRR 277

⁷ (1998) 26 EHRR 357

⁸ 16 Nov. 2004)

is a direct interference with a protected right by the public body, but also where public authorities adopt measures designed to regulate relations between private persons. In those cases the court held that inaction could amount to an infringement of article 8's right to respect for private and family life.

- Second, in cases such as *Hatton v UK*⁹ (concerned with aircraft noise at Heathrow) and *Chapman v UK*¹⁰ (concerned with planning enforcement action taken against a gypsy) it was held that the derogation in article 8 whereby an interference can be justified if necessary to protect 'the rights and freedoms of others' does extend to the public being able to enjoy a well-regulated environment.

Environmental protection remains unrecognised as a human right (although in *Taskin v Turkey*¹¹ it was held that where pollution seriously damaged the value of land there might be a *de facto* expropriation capable of amounting to a breach of article 1 of the First Protocol). The Convention has been described as being 'anthropocentric' as opposed to 'ecocentric' or 'biocentric'¹². The court cannot interfere unless there is an individual whose protected rights are infringed. It is not possible, for example, for a claimant merely to assert that the state is proposing to harm the environment in an unjustified way. He must frame his case as an infringement of his own personal right to respect for his home, family life etc. For example, In *Hatton*¹³, the ECHR said:

'Article 8 protects the individual's right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under article 8'

Nevertheless, it is now clear that human rights are firmly embedded into planning and other environmental controls and must be understood and taken into account in the planning process, not least because the planning system can interfere with rights that are clearly protected, notably the right to respect for one's home and family life under article 8 and the right to the peaceful enjoyment of possessions under article 1 of the First Protocol.

As explained above, it is not merely where there is a direct interference by the state that a claim may arise, for example through taking enforcement action. Where the state involves itself in environmental

⁹ (2003) 37 EHRR 611

¹⁰ (2001) 33 EHRR 399

¹¹ Case no. 46117/99 (29 Jan. 2004)

¹² Alder and Wilkinson *Environmental Law and Ethics*, cited by Morrow in JPL 2005 1010

¹³ *supra*

protection, a regulatory failure to act may also give rise to a claim (as in the *Lopez Ostra*, *Guerra* and *Mareno Gomez* cases referred to above). Thus if a local authority fails to exercise its statutory powers, it is arguable that it may have to pay damages under the Human Rights Act, even in situations where no common law right to damages arises. It has been held by the Court of Appeal, for example, that there is no common law right to damages if an authority fails to serve a planning enforcement notice against a ‘bad neighbour’ use – *R. (Lam) v Brennan and Borough of Torbay*¹⁴, but this would, in principle, not prevent an action for damages under the Human Rights Act if a breach of a protected right was established.

What is special about planning?

Planning and other environmental controls have a particular characteristic that marks them out as being different from a number of other areas which can engage the Convention. Interfering with a landowner’s ability to use his land in the way he wishes in the interests of the community at large may amount to an infringement of his rights, either under article 8 or article 1 of the First Protocol, but at the same time, the development he proposes may well interfere with the rights of others. There is therefore a need to balance these rights. Moreover, the protected rights of others that need to be balanced may not be limited to ‘public’ rights to enjoy a well regulated environment, but may be personal, such as the right to respect for their own family life or to enjoy their own possessions. For example, the proposed development may cast a shadow over nearby dwellings or interfere with their television signals, in which case an argument might be made that the occupants of those dwellings will have the respect due to their homes and family life interfered with.¹⁵

This need to balance individuals’ rights when considering planning controls is shown in the different approach that the courts take to assessing whether an interference is justified. The classic approach when gauging whether human rights have been unlawfully breached was set out by the Court of Appeal in the case of *R (Samaroo) v Secretary of State for the Home Department*¹⁶. It advocated a two-stage test for determining whether an interference was proportionate:

- first, one has to ask whether the objective in question can be achieved by means that are less interfering of the individual’s rights;
- second, assuming that the means are the least intrusive (and therefore ‘necessary’), one asks whether the measure has an excessive or ‘disproportionate’ effect on the protected interests.

¹⁴ [1997] PIQR 488

¹⁵ In *Hunter v Canary Wharf Ltd* [1997] AC 655 the House of Lords held that there was no nuisance where a building interfered with the neighbours’ television reception.

¹⁶ [2001] UKHRR 1150

In succeeding planning cases (e.g. *R (Egan) v Sec. of State for Transport, Local Government and the Regions*¹⁷, concerned with a 12 pitch caravan site in the Green Belt, and *R (Gosbee) v First Secretary of State*¹⁸, concerned with enforcement action in respect of a bungalow), that same test was applied in a planning context. However, in *Lough v First Secretary of State*¹⁹ the Court of Appeal held that that approach was not appropriate in planning cases, Pill LJ stating:

‘The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in Samaroo, as stated, is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require, that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must however be considered in the context of Article 8, and a balancing of interests is necessary. The question whether the permission has "an excessive or disproportionate effect on the interests of affected persons" (Dyson LJ at paragraph 20) is, in the present context, no different from the question posed by the Inspector, a question which has routinely been posed by decision makers both before and after the enactment of the 1998 Act. Dyson LJ stated, at paragraph 18, that "it is important to emphasise that the striking of a fair balance lies at the heart of proportionality"’. (para. 49)

The court’s acceptance that the need to balance competing interests has always been inherent in planning decisions means that in this respect the Human Rights Act has made little difference to the way in which most planning decisions are taken or the factors that are taken into account.

A further aspect in which planning is regarded as being distinct in the context of human rights is its specialised nature, involving matters of subjective judgment. As a result, the ECtHR has consistently held that it should give member states a wide ‘margin of appreciation’ and only exceptionally interfere with locally-made decisions. In *Buckley v UK*²⁰ the court said:

¹⁷ [2002] EWHC 389 (Admin)

¹⁸ [2003] EWHC 770

¹⁹ [2004] 1 WLR 2557

²⁰ (1996) EHRR 101

'It is not for the court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases... national authorities are in principle better placed than an international court to evaluate local needs and conditions...the national authorities in principle enjoy a wide margin of appreciation.'

In *Chapman v UK*²¹ the ECtHR considered that while the level of provision of sites for gypsies in the UK was 'deplorable', nevertheless the judgement by a national authority in any particular case that there were legitimate planning objections overriding an individual's needs was one that the court was ill-equipped to challenge. The court said:

'Because planning inspectors visit the site, hear arguments on all sides and allow examination of witnesses, they are better situated than the Court to weigh the arguments.'

The same approach is taken by our domestic courts when considering human rights claims. For example, in *Belfast City Council v Miss Behavin' Limited*²² (concerned with sex shop licensing, not planning, but worth citing if only for the name of the Claimant), Lord Hoffman said:

'This is an area of social control in which the Strasbourg Court has always afforded a wide margin of appreciation to Member States which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. If the local authority exercises their power rationally and in accordance with the statute, it will require very unusual facts for it to amount to a disproportionate restriction on Convention rights.'

These statements strike a note of great familiarity to those used to dealing with planning, and administrative, law generally. The national courts have long stressed that their role is not to substitute their own view of the planning merits of a decision when examining its legality²³. Again, one is forced to conclude that the Human Rights Act has not made any real difference in substance.

Due process

Because matters of planning judgment are normally outside the scope of challenge on human rights grounds, one finds that cases are generally argued in terms of the procedure that was followed rather than the substance of the decision. For example, the first case to reach the House of Lords under the 1998 Act was a planning case – *R (Alconbury Developments Ltd) v Secretary of State*²⁴ in which it was argued that

²¹ (2001) 33 EHRR 399

²² [2007] 1 WLR 1420

²³ See, for example, *R (Newsmith Stainless Ltd) v SoSETR* [2001] EWHC Admin 74

²⁴ [2003] 2 AC 295

a decision to grant planning permission for the development of a former airfield owned by the government, given by the Secretary of State following a ‘recovered’ appeal, was unlawful because it had not been made by an independent and impartial tribunal as required by article 6 of the Convention. The House of Lords held that although the Secretary of State was not himself an independent and impartial tribunal, the power of the High Court to review the legality of the decision meant that the process as a whole satisfied article 6. The court rejected in trenchant terms the suggestion that the Secretary of State could not take planning decisions, Lord Nolan saying:

‘(to) substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos, it would be profoundly undemocratic.’

(N.B this pre-dated the creation of the Infrastructure Planning Commission!)

A recent example where the procedure adopted, as opposed to the substance of the decision, was alleged to have been in breach of the 1998 Act was *Basildon DC v McCarthy and Others*²⁵. Collins J at first instance had quashed a decision by the local planning authority to evict 40 gypsy families from an unauthorised site on the ground that:

‘...the approach has been that the sites should be cleared rather than a consideration of whether there are any individual families whose circumstances are such, whether because of serious ill-health or the needs of their children, that in their individual cases eviction would be disproportionate.’

The Court of Appeal reversed the decision, finding that sufficient consideration had in fact been given to each occupant.

Article 6 – the right to a fair hearing

As we have seen from the *Alconbury*²⁶ case, one aspect of procedure that has sometimes been invoked in planning cases is the right to a fair hearing conferred by article 6 of the Convention. For example, in *Brugger v Austria*²⁷ (a planning case concerned with the applicant’s wish to erect a building on his land for forestry purposes) the ECtHR held that, apart from in cases involving highly technical issues such as the right to social security benefits, an oral hearing was an entitlement. However, no judicial review was available under domestic law in that case and this does seem to have been a crucial aspect.

²⁵ [2009] EWCA Civ. 13 (2 January 2009)

²⁶ *supra*

²⁷ (app. no. 76293/01) (2006)

However, in this area (the right to a fair hearing) too, one is driven to the conclusion that the Human Rights Act has had little impact on planning law or practice. The recent change effected by the Planning Act 2008 with effect from 6 April 2009 whereby it is the Planning Inspectorate rather than the parties themselves who decide whether an appeal should be conducted orally (either at a hearing or public local inquiry) or in writing, sparked some debate as to whether it is compliant with article 6 to deny a hearing to a party who wants one. The Government was advised that the measure would be compliant with the article.

Similarly, as far as third parties are concerned, it has been consistently held that they have no right under article 6 to be heard, either at application or appeal stage. In *R (Adlard) v SoSETR*²⁸ the Court of Appeal held that there was no right under article 6 for objectors to an application for planning permission (in that case for the redevelopment of Fulham Football Club's ground at Craven Cottage) to be afforded a hearing by the local planning authority, citing the availability of judicial review. And article 6 has been held not to confer on third parties any right to appeal against planning decisions (*Re Ronald Foster's application for judicial review*²⁹).

Plan designations

In addition to development control decisions relating to specific projects, another way in which planning may potentially have an impact on protected rights is where land is designated for particular purposes or for particular protection. Here again there have been attempts to argue that such decisions are amenable to challenge on human rights grounds. For example, in *Papastavrou v Greece*³⁰ a public decision to re-forest an area, thereby restricting the use to which the land could be put, was found to be in contravention of the Convention because the owner's rights had not been assessed and no compensation was offered.

Again, however, the jurisprudence establishes that provided adequate procedural safeguards are in place (judicial review) and, if loss ensues, compensation is payable, such challenges will not succeed. For example, in *Bovis Homes Ltd v New Forest DC*³¹ the court held that the designation of land in a development plan did not determine any human right, even where the designation had pecuniary consequences, unless, perhaps, blight ensued. In a series of cases (*R (Aggregate Industries) v English Nature*³², *R (Fisher) v English Nature*³³ and *R (Trailer and Marina Leven) Ltd v Secretary of State for*

²⁸ [2002] 1 WLR 2515

²⁹ [2004] NIQB 1

³⁰ 10 April 2003

³¹ [2002] EWHC 483 (Admin.)

³² [2003] Env. LR 3

³³ [2004] EWCA Civ 663

*the Environment, Food and Rural Affairs*³⁴) the courts have held that the designation of land as a SSSI did not involve a breach of article 6 even though there was no right of appeal, given the possibility of judicial review, and no breach of article 1 of the First Protocol even though no compensation was payable.

Planning Enforcement – Direct Action and Injunctions

The enforcement of planning control through the LPA taking direct action under s.178 of the Town and Country Planning Act 1990, or through the courts granting an injunction under s.187B, does, of course, have an obvious and immediate impact on the individual affected and potentially on his protected human rights. Unsurprisingly, this has been the source of a number of cases that have come before the courts. I have already mentioned the recent *Basildon*³⁵ case in which the Court of Appeal upheld the taking by the local planning authority of direct action and, of course, even in such cases there is a degree of procedural safeguard in that such action can only be taken in order to carry out steps required by an earlier enforcement notice, against which there exists a right of appeal.

Planning injunctions under s.187B are an aspect of the law which has, perhaps, been changed as a result, at least partly, of the Human Rights Act. Historically, in cases such as *Mole Valley DC v Smith*³⁶ and *Hambleton DC v Bird*³⁷ the courts deferred to the local planning authority and were willing to grant injunctions where the authority had established the factual basis for them. However, in *South Bucks v Porter*³⁸ the court stated that since the courts were themselves under an obligation to act compatibly with the Human Rights Act, it was incumbent on them to reach an independent assessment of the proportionality of granting this remedy, bearing in mind the potential criminal liabilities attaching to any breach. (At the same time, the court confirmed that it was not for it to reach any decision on the planning merits of the case.)

One might conclude that this is one instance where the Human Rights Act has made a significant difference to planning law. However, while in *Porter* the court did refer to the 1998 Act, it also stressed the discretionary nature of injunctive relief and, in my view at least, it is likely that the shift in judicial approach would have occurred even without the passing of the Human Rights Act.

Compulsory Purchase

Compulsory purchase is, of course, a subject on its own but deserves mention in this paper given that many compulsory purchase orders are made for planning purposes and under the planning legislation.

³⁴ [2005] 1 WLR 1267

³⁵ *supra*

³⁶ [1992] 3 PLR 22

³⁷ [1995] 3 PLR 8

³⁸ [2003] AC 558, upholding CA at [2002] 1 WLR 1359

Article 1 of the First Protocol does not provide for an absolute right to the ‘peaceful enjoyment of possessions’ but only such right as is compatible with the public interest. It has been consistently held that, in determining whether an infraction of this right has occurred, the availability of compensation is a key consideration.

In order to ensure that a deprivation of property does not infringe this Article, it is necessary that a ‘fair balance’ is struck between the interests of the public on the one hand and the property owner on the other. The taking of property without payment of an amount reasonably related to its value does not represent a fair balance and therefore normally constitutes a disproportionate and unlawful interference with the protected right: *James v UK*³⁹; *Lithgow v UK*⁴⁰. Of course, in the law before the Human Rights Act came into force landowners were entitled, under the ‘principle of equivalence’ to receive as compensation the full market value of their land plus compensation for other losses such as disturbance payments⁴¹.

The principal policy guidance for compulsory purchase orders, ODPM Circular 6/2004, following similar wording to its predecessor, Circular 14/1994, states at paragraph 17 that a CPO should only be made:

‘where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected.’

However, here again it appears that the 1998 Act has not in fact made any real difference to preceding practice. In *Tesco Stores Limited v. Secretary of State for the Environment Transport and the Regions*⁴² Sullivan J stated:

‘In very broad terms the Convention requires that a fair balance must be struck between the public interest, in the present case in securing much needed redevelopment of the western sector...., and an individual's right to the peaceful enjoyment of his possessions. Any interference with that right must be necessary and proportionate.’

Although the Human Rights Act 1998 does not come into force until October 2, I am satisfied that for present purposes the Secretary of State's policy, as set out in Circular 14 of 94 that a Compulsory Purchase Order should not be made unless there is 'a compelling case in the public interest', fairly reflects that necessary element of balance.’

³⁹ (1986) 8 EHRR 123

⁴⁰ (1986) 8 EHRR 329

⁴¹ *Horn v Sunderland Corporation* [1941] 2 KB 26 and s.5 Land Compensation Act 1961

⁴² (2000) 80 P&CR 427

Conclusions

It is now time to take stock. In assessing what impact the Human Rights Act has made to our planning system it is important to remember that even before its enactment, the Convention was not a stranger to the domestic courts, which sought to make their decisions compatible with Strasbourg jurisprudence. Between 1964 and July 1999 the Convention was referred to in over 650 English cases.⁴³ It was recently stated by the Court of Appeal in *Doran v Liverpool City Council*⁴⁴:

‘Having said that the question whether the council’s decision was unreasonable has to be decided by applying public law principles as they have been developed at common law, it is to be remembered that those principles are not frozen. Even before the enactment of the HRA, our public law principles were being influenced by Convention ways of thinking. Since its enactment, the process has gathered momentum. It is now a well recognised fact that the Convention is influencing the shape and development of our domestic public law principles, whether one uses the metaphors of embedding, weaving into the fabric, osmosis or alignment.’

Nevertheless, it is customary nowadays to see human rights expressly addressed in local authority committee reports and inspectors’ decisions, with the questions being raised as to whether the action being considered does interfere with a protected right and, if so, whether the interference is justified by one of the recognised derogations and is proportionate.

So to what extent has the consideration of human rights made a difference in practice to the way in which planning controls are implemented? On balance, I believe that the answer is ‘not much’. As have described above, in implementing human rights, the courts have been astute to continue their traditional refusal to engage in any independent assessment of planning judgments, although it is fair to say that we have seen them more ready to interpose their own views when asked to grant a planning injunction, and this is partly attributable to human rights considerations.

The traditional deference that the courts have shown to procedural matters has also been continued. As was established in the first Human Rights Act case to reach the House of Lords, *Alconbury*⁴⁵, provided procedures are in place whereby the person affected has access to an independent tribunal, even one with a restricted jurisdiction such as the High Court on a judicial review, the scope for a public authority to interfere with protected rights remains considerable.

⁴³ Hunt, *Using Human Rights Law in English Courts*

⁴⁴ [2009] EWCA Civ 146

⁴⁵ *supra*

Even where human rights considerations are not expressly addressed in the decision-making, the courts have been reluctant to interfere on human rights grounds unless there has in fact been a breach. In *Belfast City Council v Miss Behavin' Limited*⁴⁶ where the court had to consider an alleged infringement of article 10 (right to freedom of expression) by Belfast City Council in refusing a sex shop licence, Lord Hoffman made it clear that the relevant question was not whether the local authority had properly considered whether the applicant's rights under the Convention had been violated, but whether there had actually been a violation of those rights. He stated that where the Council had exercised its powers of judgment rationally and in accordance with the purposes of the relevant statutory provisions, and its decision was not a disproportionate inference with the applicant's Convention rights, a failure to refer specifically to those rights did not vitiate the decision. Either the refusal infringed the applicant's Convention rights or it did not. If it did, no display of human rights learning by Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.

If one looks at areas such as the circumstances in which the courts will be prepared to overturn planning decisions, the rights given to third parties, the test to be applied to compulsory purchase orders etc., one consistently arrives at the conclusion that the Human Rights Act has made little actual difference to our planning regime, although decisions now are clothed in human rights language and concepts. Our administrative law has long been based on considerations such as reasonableness, according complainants a right to a fair and impartial hearing, and the subordinate position of the courts in making value judgments. In the post-Human Right Act world, the language used to judge whether those precepts have been respected may have changed, but in my view little else has.

This is far from being a criticism. To the contrary, it demonstrates how our legal and administrative systems had already reflected the fundamental principles enshrined in the Convention, and how little therefore needed to change on 2 October 2000 when the Act came into force.

⁴⁶ supra