Article 6(1) of the European Convention and the curative powers of judicial review

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THE European Convention on Human Rights and Fundamental Freedoms makes no mention of any right to procedural justice in the making of administrative decisions. Any protection for such rights must be found in Article 6(1) which provides that in the determination of their “civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. But Article 6(1) was originally intended to apply to the determination of private law rights only and not to public law matters (see Le Compte, Van Leuven and De Meyere v. Belgium (1981) 4 E.H.R.R. 1, 36 (Sir Vincent Evans, dissenting); König v. Germany (1978) 2 E.H.R.R. 170 (Matscher J., dissenting)). The article plainly envisages judicial proceedings, and there are obvious difficulties in applying it straightforwardly to administrative proceedings.

Given the modern far-reaching duty of procedural fairness applicable to administrative decision-makers, it would not matter much if there were no protection of administrative justice under the Human Rights Act 1998. And the easy way to decide R. (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions [2001] 2 W.L.R. 1389 (where it was argued that the Secretary of State would be in breach of Article 6(1) if he, rather than an independent inspector, decided a planning appeal) would have been to hold that Article 6(1) was not applicable. However, the House of Lords followed the European jurisprudence (Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455; Fredin v. Sweden (1991) 13 E.H.R.R. 784 and other cases) and accepted that Article 6(1) applied in planning matters.

Stripped of unnecessary detail, what had happened was that Alconbury Developments Ltd. had agreed with the Ministry of Defence that, if planning permission were granted, it would develop a disused airfield owned by the Ministry into a national distribution centre. The company made an application for planning permission to the Huntingdonshire District Council but this was refused; and an appeal was launched.

Although such appeals are in form made to the Secretary of State, most are decided, after an inquiry, by independent inspectors acting under delegated powers. However, the Secretary of State has power “if he thinks fit, [to] direct that an appeal which would otherwise fall to be determined by an appointed person [the inspector] shall instead be determined by the Secretary of State” (Town and Country Planning Act 1990, Schedule 6, para. 3(1)). And the Secretary of State “recovered” the company’s appeal for his own determination. When this happens, an inquiry by an inspector is still held but the inspector makes recommendations rather than a decision. Over 100 such appeals, dealing with cases of national importance or sensitivity, are recovered each year.

In deciding the appeal the Secretary of State will take into account his own planning policy. This, with the fact that the land in question was owned by another government department, meant, argued the objectors, that the Secretary of State could not be an “independent and impartial tribunal” as required by Article 6(1). The Divisional Court agreed and made a declaration of incompatibility under section 4 of the 1998 Act; but the matter went on appeal to the House of Lords.

The Secretary of State is plainly not an “independent and impartial tribunal”. The Secretary of State's
relationship with his own policy is intimate, and he is entitled to take broader matters of government policy into account. This does not mean that he can act unfairly. He must not make up his mind in advance, he must not act for an improper purpose and he must not take irrelevant considerations into account. But he is an administrative not a judicial decision-maker and so it is inevitable and proper that matters of policy will loom large in his decision. As Lord Greene M.R. stressed in *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* [1947] 2 All E.R. 395, it is not just the objectors and the developers who must be considered: “[T]here is [also] a third party who is not present, viz., the public, and it is the function of the minister to consider the rights and interests of the public”. And as Sir William Wade explained, in such cases “... the place where policy should be explained is in Parliament, where the responsibility lies. Nothing therefore can prevent the ultimate responsibility lying outside the forum of an inquiry, whereas [in a judicial proceeding] it must lie inside the forum of a court of law” (*Wade and Forsyth, Administrative Law*, 8th ed. (2000), p. 945). Critics may say, with some justice, that ministerial responsibility is a broken reed and that the current system means that such decisions are in reality taken in secret by civil servants: rather, final decisions should be taken by independent inspectors. But in *Alconbury* the House of Lords clearly felt that such a change should be initiated in Parliament.

In any event the engagement of Article 6(1) in planning matters might be thought to throw this aspect of planning law into disarray. But the jurisprudence of the Human Rights Court itself provided a solution. It has accepted that the failure of an initial decision to comply with Article 6(1) may be cured if the person aggrieved can bring the case on review before an independent and impartial tribunal of “full jurisdiction” (*Le Compte*, para. 29: *Bryan v. United Kingdom* (1995) 21 E.H.R.R. 342). And, of course, the decision of the Secretary of State may be questioned before the High Court by a special form of judicial review— an application made under section 288 of the 1990 Act. Although the merits of the decision may not be questioned in such proceedings, the House of Lords held that this was not necessary to enable review before the High Court to cure the lack of impartiality and independence of the Secretary of State (see *Zumtobel v. Austria* (1994) 17 E.H.R.R. 116). The declarations of incompatibility made by the Divisional Court were set aside.

This pragmatically satisfactory conclusion reached through the “curative powers” of judicial review is, perhaps, incoherent. The supposed flaw in the Secretary of State’s decision was his reliance upon his own policy and understanding of the public interest. That “flaw” cannot be cured by judicial review proceedings that do not reconsider his reliance upon that policy, *i.e.* do not touch the merits. None the less, the curative principle will be an important, and helpful, way whereby the law of procedural justice can accommodate the European Convention without too much disruption. Thus, for example, it has been held that the disciplinary arrangements of the General Dental Council would not comply with Article 6(1) (insufficient independence) were it not for the right of appeal to the Privy Council: *Preiss v. General Dental Council* [2001] *The Times*, 14 August, where it was held “that any tendency to read down rights of appeal in disciplinary cases was to be resisted”.

This last remark shows that there will be pressure to extend the grounds of judicial review to ensure that the jurisdiction of the reviewing court is sufficiently full. Thus in *Alconbury* Lord Slynn (confirming his view in *R. v. Criminal Injuries Compensation Board, ex p. A* [1999] 2 A.C. 330 at 344) held that “the court has jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact” (at 1407), thus firming the footing of judicial review for error of fact.

*CLJUK 452* Moreover, were the grounds of judicial review to come from the common law without any legislative imprimatur, then the court hearing a review under section 288 of the 1990 Act (being limited to review on the ground that the decision is “not within the powers of this Act”) would not have “full jurisdiction”. So the curative principle requires— in planning matters at least— the adoption of the modified ultra vires doctrine (see Forsyth (ed.), *Judicial Review and the Constitution* (2000), pp. 406-407).

The curative principle, however, has limits as shown by *Kingsley v. The United Kingdom (Application No. 35605/97)* [2001] *The Times*, 9 January. Here the Gaming Board had found that the applicant was not a fit and proper person to hold a gaming licence. The applicant contended that, in the particular circumstances, there was a real danger of bias. But the judicial review court said that even if there was such a danger only the Gaming Board could make the decision and so the rule against bias gave way to necessity; and the Court of Appeal refused leave on similar grounds. (See Wade and Forsyth, *op. cit.*, pp. 452-453 on necessity.) The Human Rights Court held that the judicial review court lacked “full jurisdiction” and the curative principle did not operate. Time has thus been called on the principle of necessity and the impact on the law of bias will be considerable.