

LICENSING, LOCAL AUTHORITY OBJECTIONS AND COMPATIBILITY WITH THE ECHR

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INTRODUCTION

Is it unfair when a Licensing Board acting under the Licensing (Scotland) Act 1976 ("the Act") determines an objection made by a local authority in relation to an application which is before it or a suspension complaint, where the objection or complaint is lodged by the same local authority from whom the members of the Board are drawn ? Equally what if a local authority makes an application to the Board to hold a licence and the application is granted? Does the Board act as a judge in its own cause? The same issues might also arise under the recently passed Licensing (Scotland) Act 2005.

Before the Human Rights Act there can have been little doubt about the outcome. At common law such an objection based on the structure of the process itself and irrespective of proof of actual bias would not succeed simply on the basis that Parliament had created a statutory scheme which either expressly or impliedly allowed such a situation to arise. If there was a deviation from the rules of natural justice then the Court would assume that Parliament had intended this to be the case (see e.g. *Jefferies v. New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 ; *Franklin v. Minister of Town and Country Planning* [1948] AC 87 ; *Lockhart v. Irving*, 1936 SLT 567-police regulations removed scope for operation of common law rule against bias).

THE COMMON LAW CHALLENGE-NEMO JUDEX IN SUA CAUSA

As a general proposition in administrative law it would have been necessary to show more than just the connection between the Board and the local authority. It would probably be necessary to show that there was something in the particular circumstances of a case which supported a finding of actual or apparent bias-a breach of the maxim *nemo judex in sua causa*.

So for example in *London and Clydeside Estates Ltd v. Secretary of State for Scotland*, 1987 SCLR 195, judicial review was refused when an application for planning permission had been refused on appeal to the Secretary of State for Scotland. At the time of the application the Secretary of State was George Younger. The constituency MP for an objector to the application was Malcolm

Rifkind. He wrote in support of the objection. By the time the appeal against refusal of the application was determined Mr Rifkind was now the Secretary of State for Scotland. The applicants argued that the refusal of the appeal had been breached natural justice as Mr Rifkind had acted with either actual bias, or at least with the appearance of bias.

Lord Davidson rejected this submission. He held that it was insufficient to allege that because Mr Rifkind had expressed one view in his role as constituency MP that this disbarred him from determining the appeal when acting in another role. He did not rule out the possibility that an argument might succeed as where the Minister in:-

“...expressing support for a particular policy with such a degree of intransigence and intemperance as to betray a mind not only closed against reasoned argument but unable to weigh up proved facts in a fair way.”

However as was explained by Webster J in *Steeple v. Derbyshire County Council* [1985] 1 WLR 256 (at 288H-289C) because of the possibility, or even inevitability of predisposition such decision-makers must be *“particularly scrupulous to ensure that [the] decision is seen to be fair.*

There are other examples where involvement in the decision under question other than as decision-maker has not led to a finding of bias as where a local authority was charged with the promotion of a road and also sat as planning authority to determine if planning permission should be granted for it: *R v. Amber Valley District Council, ex parte Jackson* [1985] 1 WLR 298. Similar results were arrived at in *R v. Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 ; *Lothian, Borders and Angus Co-operative Society Ltd v. Scottish Borders Council*, The Times, 10 March 1999.

These cases do not depend on the basis that in the context of administrative decision-making the rule that no man should be a judge in his own cause falls to be applied in a different way than where the decision under question then where a decision is more “judicial” in character. Context is relevant though. As Woolf LJ (as he then was) put it in the *Amber Valley* case (at 307):-

“The rules of fairness or natural justice cannot be regarded as being rigid. They must alter in accordance with the context.”

And in the *Kirkstall* case (at 320j-321a):-

“Today...the right [result]...will be reached, not by drawing a line between judicial and other functions, but by deciding whether there was a real danger of bias by reference to circumstances which prominently include the particular nature and function of the body whose decision is impugned. In this way the necessary

involvement of local elected councillors in matters of public controversy and the probability that they will have taken a public stand on many of them, limit the range of attacks which can be properly made upon any decision in which even a highly opinionated councillor has taken part.”

However the introduction of Article 6 of the ECHR which can “trump” incompatible national legislation means that on one view the old common law position can no longer be treated as necessarily reflecting the approach under the ECHR. That appears to have been the approach of the Nicholson Committee.

THE NICHOLSON REPORT

Article 6 provides so far as is relevant:-

“

Right to a Fair Trial

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...”

In a recent issue of *Scottish Licensing Law and Practice* (“*Human Rights Breach could spell “Disaster” for reform*”), Gordon Nicholson was reported as having criticised the Scottish Executive for apparently failing to adopt his proposal that a local authority should no longer be a competent objector because of the possibility of a violation of Article 6, and in addition, should no longer be able to apply for and hold a licence.

In Appendix C to the Nicholson Report the Committee considered that the practice of a local authority being able to lodge objections and to apply for and hold a licence were in effect inconsistent with the view that a tribunal under Article 6 should be independent and impartial. To be fair, it seems that the Report itself did not conclude in terms that there would be a breach of Article 6. It accepted that the concept of full jurisdiction (which is discussed later in this Article) would, on an appeal to the Sheriff, probably be enough to secure compliance with Article 6 in the process when viewed overall. It founded the recommendation on the view expressed in the Inner House in *County Properties Ltd v. Scottish Ministers*, 2001 SLT 1125, that where a body did not meet Article 6 then it should strive, so far as possible to act in accordance with the requirements of Article 6 notwithstanding that an appeal might cure any defect so as to ensure overall compliance with Article 6. Notwithstanding this, Gordon Nicholson, given his recent reported remarks seems to be more concerned about the possibility of a breach occurring than ever before.

The Scottish Executive White Paper which had been published in May of last year had indeed rejected this recommendation. In this article it is reported that Gordon Nicholson pointed out that under section 29(1), (2) (d) of the Scotland Act an Act of the Scottish Parliament was not law if it is “incompatible with any of the Convention rights”. He was critical that no authority had been offered to gainsay the conclusion of the Committee.

The issue is not an academic one. In the last couple of years there have been at least two cases in the Sheriff Court where the Court has considered whether the involvement of a local authority in the decision-making of a Licensing Board breached the rule against bias and Article 6.

THE SHERIFF COURT CASES

In *Blusins Ltd v. City of Dundee Licensing Board*, 2001 SLT (Sh Ct) 176, Sheriff RA Davidson held that there had been a breach of natural justice where members of the Licensing Board who were also members of the finance committee of Dundee City Council held that the licence holder was not a fit and proper person when an application for renewal of a licence fell to be considered.

The finding was based on an objection from the finance department of the Council based on non-payment of non-domestic rates by the applicant company and other companies related to the applicant company. On that basis it might be thought that Sheriff Davidson treated this as a case of a Board having its mind made up on the facts and circumstances of a particular case, or at least giving rise to the reasonable suspicion or real risk that this was so.

That finding was however strictly *obiter* as he also determined that the objection had not been properly authorised by the Council and so had not been a competent objection in any event.

Although on one view it might be thought that the judgment of the Sheriff was limited to circumstances where the members of a Board were also members of a local authority committee which was ultimately responsible for an objection, the Sheriff went on to observe that although Article 6 was not relied on in that case, that he had some difficulty in seeing how a licensing board could ever be a fair and impartial tribunal when (at 185K-L) the members of the Board were also members of the local authority. Here Sheriff Davidson seemed to be hinting at the possibility that the problem of apparent bias was a structural one which arose in all cases rather than one which was dependent on the facts and circumstances of a particular case.

More recently in *Alcock v. Aberdeenshire Licensing Board* (Banff Sheriff Court, 10 November 2004, Sheriff E Savage), the Article 6 issue arose for specific decision.

Here the environmental health department of a local authority made a complaint about food hygiene issues at a hotel operated by the appellant. The Board determined to consider the complaint in terms of possible suspension of the hotel licence in terms of section 31 of the Act. After hearing the parties the licence was suspended. It had been a matter of concession that there had been food hygiene problems at the premises. There did not appear to be any significant dispute on the facts in this case.

The Nicholson Report was considered in *Alcock* but the Sheriff did not consider that the concerns expressed in that report should lead him to the conclusion that there had been a breach of Article 6.

Parties agreed that the Board was not an independent and impartial tribunal for the purpose of Article 6. This agreement stemmed from the view that as councillors were appointed to the Board from the local authority they could not amount to an independent and impartial tribunal.

The question which Sheriff Savage had to determine was whether the appeal to him under section 39 of the Act was sufficient to secure compliance with Article 6 viewing the process of hearing before the Board and appeal to the Sheriff overall. In other words did he afford the appellant what is known in Strasbourg terminology, “full jurisdiction”, so that overall the guarantees of Article 6 were met..

Sheriff Savage held that the grounds of appeal and powers available to him under section 39 of the Act did afford full jurisdiction and accordingly dismissed the arguments which had been advanced to the contrary. In the main the Sheriff found that the approach set out in the decision of the House of Lords in *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Limited* [2001] W.L.R. 1389 (“*Alconbury*”) and which followed the approach of the European Court of Human Rights in *Bryan v. United Kingdom* (1995) 21 EHRR 342, provided the answer.

THE ALCONBURY APPROACH -“THE RULE OF LAW, NOT OF LAWYERS”

In the *Alconbury* case the Department of Environment, Transport and the Regions (“DETR”) was asked to determine appeals arising from called-in planning applications, the refusal of a planning application and one case of compulsory purchase. In the latter case the DETR was both decision-maker and the promoter of the CPO in question (which related to road building) under the Highways Act 1981. In one of the planning cases the Crown had an interest in the land in question. The DETR was of course a policy -maker in relation to planning and roads. In each case the DETR would be taking the decisions on the merits and statutory forms of judicial review were available to challenge the

decisions. The structure is therefore very similar to the present case in that the decision-maker was being asked to determine matters in relation to which, and in another guise the same decision-maker, when viewed reasonably might be thought to have a predisposition towards a particular outcome.

The Divisional Court held ([2001] J.P.L. 291), that unlike the position of an inspector (the English equivalent of the Scottish Planning Reporter) in a case delegated to that official for decision, the limited powers of judicial review were not sufficient as the DETR did not even approach the status of an independent and impartial tribunal. The court was not prepared to extend the powers of review as this was precluded by the statutory provisions and so made a declaration of incompatibility under section 4 of the Human Rights Act. The case was fast-tracked to the House of Lords. In reaching this decision the Court followed the earlier decision in *County Properties v. Scottish Ministers*, 2000 S.L.T. 973 where Lord Mcfadyen also held that there would be a breach of Article 6 in similar circumstances.

To a great extent the debate turned on whether the powers of the court to review the decisions made by the DETR were sufficient to afford full jurisdiction. If full jurisdiction existed then there would be no breach of Article 6 as the powers of the courts would be sufficient to offset the accepted lack of independence and possibly impartiality on the part of the DETR following the approach in *Bryan v. United Kingdom* (1995) 21 EHRR 342; *Albert and Le Compte v. Belgium* (1983) 5 EHRR 533.

In the *Bryan* case the Strasbourg Court had held that limited judicial review after the hearing of a planning inquiry at which the Inspector determined the case was sufficient to secure full jurisdiction. Both Lord Macfadyen and the Divisional Court had held that where it was the Minister who determined the appeal then the approach in *Bryan* did not assist.

The House of Lords reversed the Divisional Court. They held that:-

(1) The case involved the determination of a civil rights as planning and CPO disputes could affect civil rights in land;

(2) Whilst the Secretary of State was not independent and impartial his decisions were subject to review by a court which did meet these criteria and which had full jurisdiction for the purposes of Article 6;

(3) the adoption and application of planning policy were not matters which could be understood in judicial terms and which were matters which had been delegated to ministers and elected local planning authorities to determine ;

(4) there was no inherent conflict between human rights and this form of democratic accountability as the principle of the rule of law which embodied the

principles and grounds of judicial review ensured that decisions which interfered with those rights were taken in accordance with due respect for those rights ;

(5) What was full jurisdiction varied from case to case and required to be understood in light of the principles of democratic accountability. In this case there was no requirement for a full rehearing as the minister was not answerable to the court for the policy lying behind the exercise of his statutory function but was answerable with regard to matters of law ;

(6) In considering whether the court had full jurisdiction in the matters which were for the court it was material that in this case there were adequate procedural safeguards in place in the form of an inquiry before a planning Inspector the conduct of which inquiry was subject to the rules of natural justice and express procedural safeguards. The Secretary of State was also subject to judicial review on grounds of illegality, procedural impropriety, reasonableness, proportionality and review of the facts was possible where there had been error as to a material fact or ignorance of an established and relevant fact. In particular any departure from the findings of fact made at the inquiry by the Secretary of State was amenable to review and could not be taken on an arbitrary basis.

The decision was followed by the Inner House in the reclaiming motion from the decision of Lord Macfadyen in *County Properties* and which was referred to in the Nicholson Report. The subsequent application made by *Alconbury* to the European Court of Human Rights was declared inadmissible: *Holding and Barnes plc v. United Kingdom*, 12 March 2002.

In *Alconbury* one of the sites was owned by the Ministry of Defence. It has been suggested by David Elvin QC and James Maurici (both of whom appeared as Counsel for the Government in *Alconbury*) in their article *The Alconbury Litigation: Principle and Pragmatism* [2001] JPEL 883 at 894 and 898-901, that *Alconbury* leaves unresolved the issue of whether where the decision-maker has a financial interest in the decision he is asked to make whether Article 6 is thereby breached.

In *Alconbury* the House of Lords held that the fact that the Crown had a financial interest in some of the land did not *per se* disqualify the DETR from determining the appeal but that each case involving financial interest had to be given individual scrutiny. In particular Lord Slynn said:-

"I do not consider that the financial interests of the Ministry of Defence automatically precludes a decision on planning grounds ...if of course specific breaches of the administrative law rules are established, as for example if the financial interests of the Government were wrongly taken into account by the Secretary of State, then, specific challenges on those grounds may be possible on judicial review."

(See also Lord Nolan at para. 64; Lord Hoffman at para. 130; Lord Hutton at para. 197). This is rather similar to the approach in the existing common law jurisprudence on taking interests into account which should not have been taken into account, or rigidly adhering to a pre-determined view that those interests will prevail.

DOES THE ALCONBURY APPROACH DEAL WITH CASES OF DISPUTES OF FACT?

For a while there was a view that where what was in issue was a factual dispute the approach in *Alconbury* may not have been sufficient to ensure that Article 6 was not breached. The view was based on a reading of *Alconbury* which suggested that the full jurisdiction analysis held good where what was in issue was the application of pre-existing policy by a decision-maker to the circumstances of a particular case.

This view rested in the main on a dictum of Lord Hoffmann in *Alconbury* (para. 21) to the effect that the type of safeguards found in *Bryan* were needed where matters of fact fell to be assessed

This suggested that where there was a conflict on questions of primary fact and the decision maker was not independent of the parties judicial review might not be enough. So for example it was suggested that where a local planning authority determined a planning application made by that authority there may be a breach of Article 6 where there were disputed issues of fact raised by objectors which were not put before an independent planning inspector or reporter for resolution: *R (Kathro) v. Rhondda Cynon Taff County Borough Council* [2001] EWHC Admin 527. This might be thought comparable to a local authority making an application to a licensing board for a licence in the face of objections. Similarly where a panel of local authority councillors decided an issue of credibility in relation to the intention behind the disposal of a home belonging to someone going into local authority care where it was suggested that the disposal had been done to avoid meeting care fees, judicial review was held not to be an absolute safeguard as the court could not determine if the findings of the councillors on credibility were motivated by a desire on their part to avoid liability on the local authority to meet the care costs : *R(Beeson) v. Dorset County Council* [2001] EWHC Admin 986. That decision was overturned on appeal: [2002] EWCA Civ 1812.

This debate which had been conducted in the English High Court eventually came before the House of Lords in *R(Begum) v. Tower Hamlets London Borough Council* [2003] 2 WLR 388 . This case was not considered in *Alcock*. There the appellant was offered local authority housing but refused the offer

because the area where the house was situated suffered from drug and race problems. Her decision to decline the offer was reviewed by an officer of the local authority who decided her refusal was unreasonable.

She appealed to the County Court which held that the failure of the local authority to refer the matter to an independent tribunal breached Article 6. Neither the Court of Appeal ([2002] 1 WLR 2491) nor the House of Lords agreed. The House was content to proceed, for the sake of argument, that Article 6 may have been engaged. They proceeded on the basis that although the local authority had some discretion under the statutory scheme but that this did not preclude the existence of a civil right.

Lord Hoffmann gave the main speech. He accepted that the officer was not an independent tribunal. The live issue was whether this was cured by the right of appeal to the County Court. The jurisdiction of the County Court was comparable with the judicial review jurisdiction and so it was not open to it to make fresh findings of fact. The essential position of the appellant was that if a case turned on contested facts then it was necessary for either the appellate body to have the ability to make such findings or alternatively that the initial decision-maker should have such safeguards as to make it virtually judicial in character. If neither was possible then Article 6 would be breached.

The appellant relied on the dictum of Lord Hoffmann in *Alconbury* that the safeguards described in *Bryan* would be needed where facts required to be assessed. In the instant case however Lord Hoffmann described that remark as "incautious" (at para. 40). He then went on to formulate different approach to the fact / policy distinction that he had described in *Alconbury* as follows (at paras. 42-43):-

"The rule of law rightly requires that certain decisions, of which the paradigm are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision-maker...But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament"

In the instant case no question of democratic accountability arose but that questions of efficiency and the will of Parliament were relevant. It was legitimate for Parliament not to judicialise welfare disputes to conserve the funds available to deliver the substance of the scheme. It followed that it was not appropriate to require that findings in fact be made by an independent body nor was there a

need for such findings to be made on appeal from the local authority. In relation to the latter point what mattered was whether overall the procedures were “lawful and fair”. This could be determined by examining the procedures which were attendant on the initial decision and the scope for review in the court. Lord Hoffmann said that it was open to the court to adopt a more intensive scrutiny of the decision of the reviewing officer, including whether there had been a misunderstanding of an established and relevant fact or when rights were engaged to examine considerations of proportionality. He did not however go as far as to say this was necessary although he did say that where no other human rights other than Article 6 were engaged then judicial review on traditional grounds would be enough. The other judges concurred in this approach.

Taken as a whole *Begum* suggests that even in cases where matters of fact are in dispute, the fact that one of the parties may not be independent in the Article 6 sense is not enough to mean that Article 6 is breached. Provided that the matter can go before a court which can afford full jurisdiction then Article 6 will not be breached. This may mean that sometimes the court will have to perhaps engage in a more intensive scrutiny than normal but that was a function of the role it had to play where the importance of the appearance of fairness may be at a premium.

AN EXCEPTION TO THE RULE?

Kingsley v. United Kingdom (2001) 33 EHRR 13 may represent an exception to the general approach found in *Alconbury* and *Begum*. From the terms of the judgment, Kingsley does not appear to have been considered in *Alcock*.

Mr Kingsley was the managing director of a company which owned casinos. After an official raid on company premises in 1991 and after a meeting with the Gaming Board, Kingsley and other directors resigned in 1992. In 1993 the Board informed him that it was minded to withdraw his certification that he was a fit and proper person to hold a management position. The Board had already expressed the view to licensing magistrates that Kingsley was not a fit and proper person. Kingsley argued that the Board was biased and that an independent tribunal should be set up. This was rejected and after a hearing the Board revoked the certificates. His application for judicial review was dismissed. The domestic courts held that in alleging bias he was in substance seeking an appeal on findings of fact which went beyond the scope of judicial review.

The failure to give reasons for a revocation of a licence was specifically identified as a factor compounding the lack of a fair hearing in the context of the revocation of a licence by the Gaming Board (para. 37).

There was also an issue of perceived bias before the Board which gave rise to an additional important factor as to whether judicial review would be adequate. In

Kingsley, judicial review in the High Court had not allowed the Court to do other than to remit the decision on question back to a body which had been found to be tainted by bias. There was no other option. The European Court of Human Rights held that the proceedings had breached Article 6 and had denied Mr Kingsley an effective remedy in national law for the breach of Article 6 which was in turn a breach of Article 13 (“the right to an effective remedy”). Article 6 was engaged because the case determined the civil rights of Mr Kingsley in that his ability to hold an existing certificate was in issue. Not every licensing case will involve such a determination. Applications for licences may, depending on the relevant framework, raise matters of pure discretion rather than civil right: *Mecca Bingo Limited v. City of Glasgow Licensing Board*, 8 June 2004, Lord Clarke.

Kingsley suggests that if there is only one relevant licensing body, which itself is tainted by a specific defect, the possibility of judicial review and then remitting the matter back to the same defective tribunal cannot comply with Article 6. *Kingsley* might be thought to be consistent with domestic case law which could support a submission that a remit back to a biased panel may not be a proper disposal of a licensing appeal under the Act : *Botterills of Blantyre v. Hamilton District Licensing Board*, 1986 SLT 14.

ARTICLE 6, FULL JURISDICTION AND SECTION 39

Was the Sheriff correct to suggest in *Blusins* that a panel of councillors sitting on a Licensing Board would breach Article 6 if it considered an objection from their local authority ? It is respectfully suggested that the Sheriff may have over-stated the position. Developments since in *Alconbury* show that there is nothing *per se* wrong in law with such a structure.

One can see how in a rates case an allegation of the systematic non-payment of rates could be seen as a matter going to fitness to hold a licence as could the failure to deal with food hygiene in the *Alcock* case. In the former case provided that suspension proceedings were not being used as a rates enforcement mechanism for the local authority and provided the Board deal with the matter on the merits and listens to both sides-and perhaps giving due allowance for the extra perception of fairness suggested by Webster J in the *Steeple* case-then there would be no breach of Article 6. In the food case it is perhaps not wholly accurate to think of the matter of food hygiene as a matter in which the local authority *qua* local authority has an interest. A better analysis might be that the local authority acts in the wider public interest in such matters. Either way given the administrative context and provided the Board approaches the matter fairly and rationally, then no difficulty should arise.

Was the Sheriff correct to hold in *Alcock* that section 39 afforded him full jurisdiction? It is suggested that he was.

Section 39 affords the Sheriff wide powers on appeal. Appeals can be brought in terms of section 39(4) on grounds of error of law, the basing of a decision on an incorrect material fact, breach of natural justice, and unreasonable exercise of discretion. These are wide grounds and reflect to a great extent the grounds of judicial review found to afford full jurisdiction in *Alconbury*.

In some ways they are wider. For example an appeal on unreasonableness under the Act is not based on the narrow *Wednesbury* grounds of judicial review but has a wider scope: *Latif v. Motherwell District Licensing Board*, 1994 SLT 414.

In terms of section 39(6) (a), (b) the Sheriff can remit the matter back to the Board or reverse or modify their decision. Provided that there are no considerations of the *Kingsley* kind the Sheriff can remit matters back to the same board without any breach of Article 6.

In terms of section 39(5) he can entertain evidence on appeal and so resolve disputed matters of primary fact perhaps under the incorrect material fact jurisdiction, or to determine disputes as to what happened before the Board, although of course parties should not be allowed to use this to improve on a submission they might have made before the Board: *Pancham Ltd v. City of Glasgow District Licensing Board*, 1997 SLT 32. The jurisdiction of the Sheriff is consistent with the analysis in *Begum*.

CONCLUSION

Overall it is suggested that it is hard to escape the conclusion that the concern that the continuing role of local authorities in acting as objectors will be found to breach Article 6 is misplaced. There does not appear to be any systemic problem in that role remaining in place. Problems may arise in the circumstances of particular cases. However control of any possible abuse of that system of objection can be had through the application of existing principles of administrative law.