

# Positive Obligations and Administrative Law

**Professor Alastair Mowbray, LLB, PhD: *University of Nottingham***

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The aim of my paper this afternoon is to examine some of the major facets of the Strasbourg Court's jurisprudence that impact upon the domain of administrative law. I do not intend to deal, because of the obvious constraints of time, with the (numerous and important) influences of the Strasbourg case-law on the development of our own domestic judicial review principles (such as the test for non-pecuniary bias in English law).

## **(1) Institutional and procedural requirements of bodies created to resolve disputes between persons and public authorities**

There is a very rich seam of jurisprudence on this topic, with *Bentham v Netherlands* A.97 (1985) being a major early judgment. He claimed that the determination of his application for a licence to build/operate an LPG facility had not been made by an "independent and impartial tribunal" as required under Article 6(1) ECHR. The Administrative Litigation Division of the Council of State had delivered an *opinion* in favour of the Health Inspector's appeal. The Minister of Health/Crown then issued a Decree quashing B's licence. Court held that:

"40. ...a power of decision is inherent in the very notion of "tribunal" within the meaning of the Convention... Yet the Division tenders only an advice."

Consequently, the ALD did not satisfy the requirements of Article 6(1). Nor did the final Ministerial decision/Royal Decree as it had been made by a member of the executive (indeed the hierarchical superior of the Health Inspector) and it was not susceptible to judicial review. Hence from the Court's perspective the Dutch appeals system was not sufficiently independent from the executive.

A similar challenge to the English planning appeals system was brought a decade later in *Bryan v UK* A.335-A (1995). Landowner appealed against an enforcement notice served on him by his local planning authority. Determined by a planning inspector (full-time employee of an executive agency- bound to follow the published planning policies of the Environment Minister- could have individual appeals withdrawn from them by the Minister at any time prior to an inspector issuing his/her decision) rejected B.'s appeal. B. subsequently, unsuccessfully, appealed (on a point of law) to the High Court against inspector's decision. Before the Strasbourg Court B. contended that the inspector did not constitute an "independent tribunal". Court noted that:

"37. In order to establish whether a body can be considered "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 the question whether the body presents an appearance of independence...

Whilst the Court found that inspectors were bound to reach their decisions via a quasi-judicial procedure, the (rarely used) power of the Minister to withdraw appeals from them deprived inspectors of the required appearance of independence. As to the applicant's High Court appeal:

"44. The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan. In particular, as is not infrequently the case in relation to administrative-law appeals in the Council of Europe member States, there was no rehearing as such of the original complaints submitted to the inspector, the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited."

But, the Court concluded that the High Court had jurisdiction to overturn the inspector's decision if it was based on irrational findings of fact. Consequently, the combination of appeal processes before the inspector and the High Court met the requirements of Article 6(1).

So a crucial difference between the procedures in *Bentham* and *Bryan* was that the English planning appeals system was subject to a final determination by the domestic courts.

More recently the full-time Court has re-stated the unacceptability, under Article 6(1), of appellate bodies being closely linked with the administrative authority whose decision is being challenged. In *Tsfayo v UK* (Judgment of 14 November 2006) the applicant's retrospective claim for housing benefit was dismissed by a council official. With legal representation Tsfayo appealed to the council's Housing Review Board (composed of 5 councillors). After a hearing the Board rejected her appeal (they did not accept the applicant's account of events). She brought judicial review proceedings against the Board, but leave was refused as the ECHR was not (then) enforceable in domestic law and the Board's decision was not irrational. The Strasbourg Court considered that:

"40. ...disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6(1)..."

This case could be distinguished from *Bryan* because the Board:

"47. ..was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded."

Furthermore, the High Court did not have jurisdiction to review the central issue of the Board's decision regarding the credibility of the applicant's testimony. Therefore, a breach of Article 6(1) had occurred.

We may speculate that the Court was encouraged in its robust application of Article 6(1) in *Tsfayo* as it was supported by the public views of the Council on Tribunals which since 1988 had been calling for the abolition of the Housing Review Boards due to their lack of independence. Parliament had legislated in 2000 to replace them with appeals to independent statutory tribunals.

From the previous case-law we can see that the Court has:

- expanded the range of governmental decision-making subject to the express positive obligation of determination by an independent and impartial tribunal;

- whilst recognising the needs of States to have specialist administrative appeals processes the Court requires that those bodies are sufficiently independent of the executive, have decision-making powers and are ultimately subject to review by the ordinary/administrative courts.

## **(2) The scope of the right of civil/public servants to have access to a court to determine their employment disputes**

Over the last decade there have been astonishing convolutions in the Court's approach to civil/public servants claims.

In *Pellegrin v France* (Judgment of 8 December 1999) the Grand Chamber considered that the existing case-law on this matter:

"60. ...contains a margin of uncertainty for Contracting States as to the scope of their obligations under Article 6(1) in disputes raised by employees in the public sector over their conditions of service. ...

61. The Court therefore wishes to put an end to the uncertainty which surrounds application of the guarantees of Article 6(1) to disputes between States and their servants."

To that end the Grand Chamber, influence by EU law/practice, elaborated a new functional test that civil/public servants who exercised the sovereign power of the State were excluded from the guarantee of access to a court to resolve their employment disputes. A majority then applied the new approach to determine that the applicant, a management consultant employed by the French Ministry of Development to assist the government of Equatorial Guinea on its budget, fell within the excluded category of public servants. However, 4 dissenters (Judges Tulkens, Fischbach, Casadevall and Thomassen) argued that the majority's new approach risked creating arbitrariness and uncertainty.

Eight years later another Grand Chamber, with Judge Tulkens having the majority on her side on this occasion, overruled *Pellegrin*. The applicants in *Vilho Eskelinen and Others v Finland* (judgment of 19 April 2007), were several police officers and an administrator working for the police who had their local wage supplements removed when their police district was re-organised. The applicants unsuccessfully challenged the loss of their supplements before the domestic courts. Eventually, the applicants complained to Strasbourg alleging breaches of Article 6(1) by the Finnish courts, including excessive delays. A majority of twelve Judges concluded that the *Pellegrin* functional criterion approach could produce "anomalous results", as in this case where

the police officer applicants would not be protected by Article 6(1) but the administrator would be. Nor had it been easy to determine its application in subsequent cases.

"55. The Court can only conclude that the functional criterion, as applied in practice, has not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant is a party or brought about a greater degree of certainty in this area as intended (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, § 55, ECHR 2004-I.).

56. It is against this background and for these reasons that the Court finds that the functional criterion adopted in the case of *Pellegrin* must be further developed."

The majority then set out a two-fold test to determine if particular civil servants had been excluded from the judicial protection of Article 6(1):

-Did the national law excluded the applicant from access to a court;

-If so, was that exclusion justifiable on objective grounds of state interest?

Applying these new criteria the majority ruled that, as all the applicants had a right of access to the courts under Finnish law, Article 6(1) was applicable to them and it had been breached by the excessive delays in resolving the litigation. The current and former Presidents of the Court, together with three other judges, issued a joint dissent in which they deplored the majority's abandoning of the *Pellegrin* approach.

The outcome of *Vilho* is likely to increase the numbers of civil/public servants who will be able to assert a right of access to a court to settle their employment disputes.

### **(3) Implied procedural obligations placed upon public authorities**

Another category of positive obligations created by the Court apply to public authorities responsible for a diverse range of functions from child welfare to environmental protection. These obligations have their basis in Article 8's requirement that States "respect" the rights elaborated in Article 8(1). For example, in *W. v UK* A.121-A (1987) the applicant/father complained about a local authority assuming parental rights over his child. The Court held that:

"62. ...It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8..."

The Court found that the applicant had not been given an opportunity to participate in the council's decision-making process and a breach of his right to respect for his family life had thereby occurred.

Later in *T.P. and K.M. v UK* (Judgment of 10 May 2001) the full-time developed *W.* to require public authorities to disclose relevant information to a parent whose child has been taken into care. The first applicant (a single mother) had her daughter (the

second applicant) taken into care at the instigation of a local authority (which feared the child was being subject to sexual abuse). The local authority had a video recording of the child identifying her abuser, but the authority would not disclose it to the first applicant. The Strasbourg Court ruled that:

"82. ...The positive obligation on the Contracting State to protect the interests of the family requires that this material be made available to the parent concerned, even in the absence of any request by the parent. If there were any doubts as to whether this posed a risk to the welfare of the child, the matter should have been submitted to the court by the local authority at the earliest stage in the proceedings possible for it to resolve the issue involved.

As the local authority had failed to do this Article 8 had been violated.

Of course, the Court has recognised that public authorities are entitled to take unilateral action to safeguard children, without involving their parents, where emergency circumstances exist. But, this exception has been applied restrictively, *e.g.* in *K. and T. v Finland* (Judgment of 12 July 2001) a pregnant woman suffering from serious mental illness went into hospital to give birth. The local Social Director issued an emergency care order taking the baby into public care, which was served on the hospital and the baby was removed from her mother soon after being born. The Grand Chamber held that:

"168. ...the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from the care of its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved."

Here it had not been necessary for such an order to be made.

Another Grand Chamber has required public authorities to utilise "appropriate investigations and studies" when balancing the conflicting interests (including national economic well-being and the minimising of pollution affecting local residents) involved in regulating plane usage of airports. In the leading case of *Hatton and others v UK* (judgment of 8 July 2003) the majority of the Court concluded that the night-flights quota system applied by the government to Heathrow airport satisfied the implied procedural obligations under Article 8 as it had been preceded by public consultations and supported by research into sleep disturbance.

#### **(4) Challenges to the social and economic policies of public authorities**

We will (briefly) examine some of the Strasbourg litigation that has sought to extend the scope of Convention rights into fields occupied by later generational rights.

##### Recognition of the "new" personality of transsexuals

From *Rees v UK* A.106 (1986) to *Christine Goodwin v UK* (judgment of 11 July 2002) the Court, following the evolving European consensus, increased the pressure on the British authorities to provide full recognition of the new personalities/identities of post-operative transsexuals. Such that by the time of *Christine Goodwin* the Grand Chamber was no longer willing to accept that administrative concessions to such persons (*e.g.* such as the

provision of new driving licences and passports) satisfied their right to respect for their private lives. Only full legal recognition would be compatible with Article 8.

### Protection from severe environmental pollution

We have already seen how the Court has scrutinised the procedures followed by public authorities responsible for controlling pollution in *Hatton*. There is also an extensive body of Strasbourg jurisprudence that requires domestic authorities to establish regulatory systems and harm reduction programmes over serious pollution (created by both private enterprise and public agencies) that adversely affects persons' homes and family/private lives from *Powell and Rayner v UK* A.172 (1990) onwards. Where administrative authorities fail to enforce/observe domestic environmental regulations the Court is likely to find a breach of Article 8, as in *Lopez Ostra v Spain* A.303C (1994), *Guerra v Italy* 1998-I and *Fadeyeva v Russia* (Judgment of 9 June 2005). Indeed, where such failures result in deaths breaches of Article 2 (right to life) may be found. A tragic illustration is *Oneryildiz v Turkey* (Judgment of 30 November 2004) where several members of the applicant's family had been killed in their home as a result of an explosion in a neighbouring municipal refuse tip. Two years prior to the explosion (caused by methane gas produced by the decaying refuse) an official report on the site had found that the site did not comply with national environmental regulations and there was a serious risk of an explosion occurring. The Grand Chamber held that:

"89. The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life...

90. This obligation indisputably applies in the particular context of dangerous activities, where in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."

The Grand Chamber concluded that there had been a breach of Article 2 due to failures in the Turkish town planning/environmental policies and the enforcement of domestic regulations in the context of a known hazard.

So positive obligations under both Article 8 and 2 can be invoked to challenge the content and (non) enforcement of pollution policies.

### Provision of a home

In *Mazari v Italy* (Decision of 4 May 1999) the Court expressed the view that:

"...although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8..."

The applicant was classified as disabled due to a serious metabolic disease and the authorities had provided him with a flat (and were willing to make modifications to the accommodation in accordance with the recommendations of an expert body).

Consequently, the Court considered that the authorities had fulfilled their positive obligation to the applicant and his application was declared inadmissible.

Subsequently, a Grand Chamber was deeply divided over the extent of States' housing obligations in *Chapman v UK* (Judgment of 18 January 2001), where the applicant gypsy complained about planning enforcement action taken against her for residing in her caravan on agricultural land. The majority believed that:

"99. It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."

Whereas, 7 dissentients considered that, following *Marzani*:

"...it is not the Court's case-law that a right to be provided with a home is totally outside the ambit of Article 8."

The cautious approach of the majority in *Chapman* was followed in *O'Rourke v UK* (Decision of 26 June 2001), where a released prisoner (with chest problems) was provided with temporary accommodation by a council. However, he was evicted due to assaults on fellow residents. The council advised him to go to a night shelter whilst it sought to find other accommodation for him. In the light of *Chapman* the Court expressed the view, "that the scope of any positive obligation to house the homeless must be limited." The council's advice and searches had discharged the obligation upon the State.

The Court has trodden a circumspect path between a complete refusal to imply any kind of housing obligation into Article 8 and the recognition that some positive obligations arise in respect of assisting sick homeless persons.

#### Provision of help for the disabled

Natural link with the above housing cases. There has also been litigation by disabled persons seeking other forms of assistance from public authorities. For example, in *Molka v Poland* (Decision of 11 April 2006) the wheel-chair bound applicant complained that he had been unable to gain physical access to a polling station in order to vote in municipal elections. The Court, of its own motion, raised the issue whether a breach of Article 8 had occurred.

"More generally, the Court observes that the effective enjoyment of many of the Convention rights by disabled persons may require the adoption of various positive measures by the competent State authorities."

However, in determining the extent of these positive obligations the domestic authorities were to be accorded a wide margin of appreciation as these measures involved the allocation of limited public resources.

"In view of their awareness of the funds available to provide such access for disabled persons, the national authorities are in a better position to carry out this assessment than an international court."

Having regard to the fact that the applicant had only been unable to vote on one occasion and that since 2001 legislation had required all polling stations used for

parliamentary elections (the same locations were also generally used for local elections) to be accessible for disabled voters, the Court determined that the application was inadmissible.

Again we see the Court being very cautious in imposing potentially extensive and costly social positive obligations on States. Indeed, Warbrick has argued that:

“the ECHR does not protect economic and social rights, explicitly (with the exception of the right to education) or impliedly.” C. Warbrick, “Economic and Social Interests and the ECHR” in *Economic, Social & Cultural Rights in Action* ed. By M.A. Baderin & R. McCorquodale (OUP, 2007) at p.241.

## **Conclusions**

We have now analysed how the Strasbourg jurisprudence on States’ positive obligations under the Convention has had a number of important interactions with the concerns of administrative law. These include:

- requiring fair decision-making procedures to be followed by public authorities when performing a variety tasks;
- ensuring the independence of specialist administrative appeals systems;
- facilitating public servants having access to a court for the determination of their employment disputes.

Alongside these traditional procedural interests of administrative lawyers the Court has also been willing to contemplate the expansion of States’ positive obligations under the Convention into areas of social/economic policymaking. Applicants have been most successful in litigation directed at States’ responsibility for environmental pollution and (eventually) regarding the recognition of transsexuals.

The above case-law vividly demonstrates the creativity of the Court in developing both express and implied positive obligations from the text of the ECHR.