RIGHTS OF WAY

The matter of unlawful Local Public Inquiries post 2002

Aim

1. The Aim of this paper is to show that Local Public Inquiries conducted by Government Inspectors into Rights of Way matters since 2002 have been illegal.

Background

2. In 1947 a Special Committee published a Report, "Footpaths and Access to the Countryside"[1] known as the Hobhouse Report after the Committee Chairman. A comprehensive record was to be made of existing Rights of Way in England and Wales. Lord Justice Scott was the senior legal adviser.

3. Lord Justice Scott recommended the establishment of a panel of arbitrators at the lower level whose function would be the investigation of disputes referred to them. A single arbitrator would make a binding decision on disputed cases. "The question being essentially legal, the membership of the panel should be limited to barristers of not less than seven years standing or other persons specially familiar with the law of highways; and in order to ensure confidence in their impartiality and so avoid frequent appeals, it might be desirable that they should be appointed, not by the Commission (a predecessor of DEFRA) but by some independent authority such as the Lord Chancellor."[2]

4. A Lord Chancellor's Panel was established. Inspectors were found from among barristers and retired professional people. The members of the Lord Chancellor's Panel were seen to be independent and impartial, demonstrating a clear separation of Decision Takers from Policy Makers.

The Relevant Law

5. The Human Rights Act 1998 passed into English Law in 2000. The relevant part is Article 6(1) of the Act. I have italicised the key words:

> "…..everyone is entitled to a *fair* and public hearing within a reasonable time by an *independent* and *impartial tribunal* established by law".

6. The year 2000 saw the beginning of a process to remove the Lord Chancellor's Independent Inspectors, to be replaced by former Rights of Way Officers. Of the

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[1] Report of the Special Committee. Footpaths and Access to the Countryside. Ministry of Town and Country Planning. HMSO Cmd 7207 (London, September 1947).

[2] National Archives. MAF 48/666111930 dated 16 May 1945.

present 11 Inspectors who undertake Rights of Way Casework, 9 have previously held junior Rights of Way posts. This development compromised the provisions of Article 6(1) insofar as Secretary of State DEFRA became both policy maker and decision taker, an untenable position since it is the Secretary of State's policy that is the issue.

Tracing the Path of Change

7. The effective date of 2002 from which Local Public Inquiries are deemed illegal is found from the progress of the cadre of Rights of Way Officers recruited from the Counties. Their successful recruitment was confirmed before completion of their two weeks 'intensive training' from 15 July to 1 August 2002.

8. There was a reasonable expectation that the authority to effect a change in English Law would be found as an amendment to the original statute or as an appropriate Resolution in one or both Houses. There was no trace. It was discovered that Departmental Heads agreed to disband the Lord Chancellor's Independent Panel administratively, without reference to Parliament. The matter was referred to the lead party, the Planning Inspectorate, who said: "The disbandment of the Panel was a direct consequence of the House of Lords judgement in respect of R-v-SSETR ex parte Alconbury Development Ltd (a Planning Case) and others (9 May 2001) which found that salaried Inspectors taking decisions – even on proposals made by Government was lawful". That is not what the Law Lords said (24).

Fairness

9. Rights of Way applications are first submitted to County Councils who have a duty to consult with other Local Authorities. There is also a best practice guideline that they also consult with prescribed Organisations. It is a long process. Ultimately, locally elected Councillors, members of Specialist Committees supported by in-house lawyers, make their Decision. Some will insist that 'specialist' is too strong a term. One dissatisfied individual, who need not live in the County, can even object to an unanimous, democratically taken decision, thereby obliging Secretary of State DEFRA to nominate an Inspector to chair a Local Public Inquiry.

10. The grievance of many of those attempting to protect homes and property within the law lies in the obligation of being beholden to the Decision of a singular public servant who appears doctrinally opposed to what they are trying to achieve. The

majority of Inspectors come from one side of the fence. The inference and reality seems that they still behave and act as they did prior to being appointed Inspector. The same prejudices and mindsets appear to prevail. What has been described is the statutory procedure, bad procedure, yet we need to be cautious in arguing that the Committee Decision should be final when the Committee is frequently not provided with an unbiased recommendation from their Rights of Way Officers and the legal advice received by Committee Members is not always either correct or impartial. The O'Keefe judgement insisted Members should not be 'misled or misguided' but in some Authorities the Officers have brought this to an art form. O'Keefe also said that Counsel's opinion should be obtained in contentious cases. Members rarely ask for sight of this opinion and its absence appears to pass through the Planning Inspectorate without comment. While caution is advised, in my case the decision makers – the Members – emphatically put their Officials, their advisors, in their place, only to be defeated by indefensible statutory procedure that had been hijacked. There is to be a formal Report in which there will be Recommendations how best to bring fairness, discipline and order to this shabby business.

11. The Tribunal Test to determine which course comes closest to the understanding of what a tribunal best represents examines the cases of the Government Inspector and Council Committees. An Inspector is unelected, unqualified in law, has been removed from the oversight of the Lord Chancellor, has been associated with one side of the Rights of Way argument and is not independent as required by law. A board of elected, independent representatives of the people, acting as arbitrators on a District or County Council specialist committee, their procedure overseen by lawyers, best fits the description of a tribunal.[3] DEFRA should explain the nature of the authority which permits the former to overturn the legitimate decisions of the latter.

12. There is no appeal to the Planning Inspectorate with regard to Inspectors' decisions, which can reveal misrepresentations, poor judgement or evidence having been cherry-picked. The only route for redress of grievance is disproportionately and inappropriately by reference to Judicial Review at the High Court. There is no equality of arms. The Judiciary takes the view that their Tribune of Fact is entitled by law to come to the conclusions they do. Inspectors

[3] The anomaly here is that whereas Officers have unlimited time to make their case, the Plaintiff is restricted to 3 minutes. A recommendation for change appears in the Report.

do not give reasons for their decisions. Thus the claimant faces a duopoly; one providing their own view of the facts and the other entirely focused upon observation of the law. There is no place for the appellant to express an opinion to suggest the Inspector's facts are wrong but also perhaps, that they are dishonourably wrong.

Impartiality

13. There is a wealth of evidence to indicate bias among Inspectors and elements of that same bias is evident within the Planning Inspectorate. It is unrealistic to believe that public servants whose *raison d'être* is Access would act otherwise.

Independence

14. Inspectors must be independent of other groups – e.g. the Rights of Way interests and the Executive as represented by the Secretary of State. An Independent individual is not dependent upon, or subject to the control, power or authority of another: they are not subordinate. There must never be room for suspicion that the manner of an Inspector's handling of a case had been plotted within the Planning Inspectorate. The Inspectorate cannot be Independent for it has no standing jurisdiction of its own.

15. There is merit in examining the *locus classicus,* Bryan v UK [1996] 21EHRR342. There are two points:

    a. It is given in Planning Inspectorate's Advice Note 19, referring to the Bryan case, that an Inspector is independent and impartial for the purposes of Article 6(1). "There is nothing to suggest that, in finding the primary facts and drawing conclusions and inferences from those facts, an Inspector acts anything other than independently." The Bryan Case, 1996, occurred when the Independent Inspectors within the Lord Chancellor's Panel were still in place, prior to the politicisation of the Inspectorate brought about as a consequence of the introduction of former Rights of Way Officers as Inspectors. The European Court was not satisfied that the Inspector was an independent and impartial tribunal, on the grounds that he could be overruled by the Executive. They believed however that these defects could be overcome if the Inspector were subject to the supervision of a judicial body that had full jurisdiction and itself satisfied the requirements of Article 6. The Court believed that the right to appeal to the High Court and the grounds of

review being wide enough to provide the necessary safeguards, an Inspector could be deemed to be an independent and impartial tribunal.

b. Professor Malcolm Grant contested the point which suggests if the lack of independence were a problem, there was an appeal process to fall back upon. He disagreed. "If the initial hearing was, by definition, conducted by a tribunal which lacked the requisite independence from the Executive, it is impossible to understand how that defect can be corrected by a right to appeal to a body which does not have the power to re-hear the matter afresh… If the threat to the Inspector's independence stems, as the Court found, from his or her proximity to the Secretary of State, then appeal to the High Court on a point of law offers no escape from the violation."[4]

16. There is a more fundamental reason for believing the European Court's ultimate conclusion to be unacceptably infected by unreality. The Study is replete with examples of citizens being prevented from proceeding to the High Court to protect their property due to the enormous cost involved. There is a difference between the right to appeal and an ability to appeal. No such affordability restriction applies to their opponent, DEFRA, given their access to unlimited public funds.

17. The European Court of Human Rights established 5 parameters for the acceptable function of holders of the post of Inspector[5] paraphrased as follows:

- The Inspector must not be connected with parties to the dispute or be subject to their influence or control.
- The Inspector's findings are based exclusively upon the evidence and submissions before him.
- The Inspector has a duty to exercise independent judgement.
- The Inspector is required not to be subject to any improper influences.
- It is the stated mission of the Planning Inspectorate to uphold the principles of openness, fairness and impartiality.

18. None of the Inspectors is capable of exercising independent judgement. Understandably, Independence forms no part of the Planning Inspectorate's mission. The Planning Inspectorate was asked which of the five principles had

[4] Professor Malcolm Grant to the Select Committee on Environment, Transport and Regional Affairs. 21 May 2006.

[5] Planning Inspectorate. Rights of Way Section. Advice Note 19, para 10.

been observed by their representative as applicable to the Wallhayes case. There was no reply. It is possible to make a case that the answer is 'none'.

Context

19. The politicisation of the post of Rights of Way Inspector as evidenced by the replacement of Independent Inspectors by former Access officials should be seen as part of a strategic development with the potential to provide a seamless connection between the Access Organisations and Access Officials in County Councils. They are bound by the same virus which also infects our Courts. We observe Definitive Maps still open which should have been closed over half a century ago. They survive through the manipulation of bad law. Individuals who own assets cherished by the Access parties cannot compete against such a well organised, well structured and well resourced co-operative. Bullying and intimidation are rife. This evil will persist for as long a good men and women are content to do nothing.

20. The law is unambiguous – "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". That is not happening due to a change in circumstances in 2002 when the Government surreptitiously overturned a recently enacted part of Human Rights Law. It is from this point that it can be shown that Local Public Inquiries conducted by Government Inspectors on Rights of Way matters have been illegal. That premise was put to a QC for a legal opinion. He said the case was persuasive. "There appear to be many examples in which decisions and Inquiries have been flawed and unsatisfactory."

Conclusion

21. Local Public Inquiries conducted by Government Inspectors into Rights of Way Matters since 2002 have been illegal. There are ten years of implications here. Lord Carlile recently said, the British have a habit of righting wrong. This is a good place to start.

Richard Connaughton
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