House of Lords

Regina (Alconbury Developments Ltd and others) *v* Secretary of State for the Environment, Transport and the Regions

Regina (Holding & Barnes plc) *v* Secretary of State for the Environment, Transport and the Regions

Secretary of State for the Environment, Transport and the Regions *v* Legal and General Assurance Society Ltd

[2001] UKHL 23

2001 Feb 26, 27, 28; March 1, 5; May 9

Lord Slynn of Hadley, Lord Nolan, Lord Hoffmann, Lord Clyde and Lord Hutton

Human rights — Right to fair trial — Determination of civil rights and obligations — Use of land — Powers of Secretary of State to decide planning applications etc — Decision challengeable only by way of judicial review — Whether determination by independent and impartial tribunal — Human Rights Act 1998 (c 42), s 4, Sch 1, Pt I, art 6(1)

In the first case a company agreed that, if planning permission were granted, it would develop a disused airfield owned by the Ministry of Defence into a national distribution centre. Applications were made to the district and county councils for relevant planning permissions and to the Secretary of State for the Environment, Transport and the Regions, under the Transport and Works Act 1992, for permission to build a rail connection. When the district council refused and the county council failed to determine the applications made to them the Secretary of State recovered the applications for determination by him under paragraph 3 of Schedule 6 to the Town and Country Planning Act 1990. Groups of local objectors claimed that determination by the Secretary of State of the applications under both the 1990 and 1992 Acts was contrary to the right to have civil rights and obligations determined by an independent and impartial tribunal guaranteed by article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1]. The company applied for judicial review of the Secretary of State's decision to entertain the applications.

In the second case a company applied for planning permission to use land as a depot for wrecked cars. The Health and Safety Executive objected because the development was near to gas storage facilities. The local planning authority resolved to grant planning permission but the Secretary of State called in the application for determination by him pursuant to section 77 of the 1990 Act. The company applied for judicial review of that decision on the grounds of incompatibility with article 6(1).

In the third case the Highways Agency, a branch of the Secretary of State's department, proposed an improvement scheme to a major road junction, the construction of which would involve the compulsory purchase of land belonging to a

[1] Human Rights Act 1998, s 4: "(2) If the court is satisfied that [a provision of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility."

S 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if . . . (b) in the case of . . . provisions . . . which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Sch 1, Pt I, art 6(1): see post, para 21.

company. The Highways Act 1980 and the Acquisition of Land Act 1981 provided that the Secretary of State was the decision maker who would approve the scheme and the draft compulsory purchase order. At the invitation of the company the Secretary of State sought a ruling as to the compatibility of the procedure with article 6(1).

The Divisional Court declared, pursuant to section 4 of the Human Rights Act 1998, that all the impugned powers of the Secretary of State were incompatible with the provisions of article 6(1) but that the Secretary of State would not be acting unlawfully in exercising those powers under section 6(1) of that Act because section 6(2) applied.

On appeal by the Secretary of State to the House of Lords—

Held, allowing the appeals, that, having regard to the jurisprudence of the European Court of Human Rights, the disputes concerned involved the determination of "civil rights" within the meaning of article 6(1) of the Convention; that, although the Secretary of State was not himself an independent and impartial tribunal, decisions taken by him were not incompatible with article 6(1) provided they were subject to review by an independent and impartial tribunal which had full jurisdiction to deal with the case as the nature of the decision required; that when the decision at issue was one of administrative policy the reviewing body was not required to have full power to redetermine the merits of the decision and any review by a court of the merits of such a policy decision taken by a minister answerable to Parliament and ultimately to the electorate would be profoundly undemocratic; that the power of the High Court in judicial review proceedings to review the legality of the decision and the procedures followed was sufficient to ensure compatibility with article 6(1); and that, accordingly, the impugned powers of the Secretary of State were not incompatible with article 6(1) (post, paras 28–29, 43–45, 47–50, 54–57, 59–64, 87, 100, 116–117, 122, 127–130, 134–136, 144, 150, 154, 159, 170, 172, 183–184, 189, 196–198).

B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA, *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 and *Bryan v United Kingdom* (1995) 21 EHRR 342 considered.

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in the opinions of their Lordships:

Albert and Le Compte v Belgium (1983) 5 EHRR 533
Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320; [1965] 3 All ER 371, CA
Ashingdane v United Kingdom (1985) 7 EHRR 528
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Balmer-Schafroth v Switzerland (1997) 25 EHRR 598
Benthem v The Netherlands (1985) 8 EHRR 1
Bodén v Sweden (1987) 10 EHRR 367
Bryan v United Kingdom (1995) 21 EHRR 342
Bushell v Secretary of State for the Environment [1981] AC 75; [1980] 3 WLR 22; [1980] 2 All ER 608, HL(E)
Chapman v United Kingdom (2001) 33 EHRR 399
County Properties Ltd v The Scottish Ministers 2000 SLT 965
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Ettl v Austria (1987) 10 EHRR 255
Francis v Yiewsley and West Drayton Urban District Council [1958] 1 QB 478; [1957] 3 WLR 919; [1957] 3 All ER 529, CA
Fredin v Sweden (1991) 13 EHRR 784
Golder v United Kingdom (1975) 1 EHRR 524
H v France (1989) 12 EHRR 74
Howard v United Kingdom (1984) 9 EHRR 116
ISKCON v United Kingdom (1994) 18 EHRR CD 133

Jacobsson (Allan) v Sweden (1989) 12 EHRR 56
James v United Kingdom (1986) 8 EHRR 123
Johnson (B) & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395, CA
Kaplan v United Kingdom (1980) 4 EHRR 64
König v Federal Republic of Germany (1978) 2 EHRR 170
Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1
Moreira de Azevedo v Portugal (1990) 13 EHRR 721
Obermeier v Austria (1990) 13 EHRR 290
Pudas v Sweden (1987) 10 EHRR 380
R v Criminal Injuries Compensation Board, Ex p A [1999] 2 AC 330; [1999] 2 WLR 974, HL(E)
R v Secretary of State for the Home Department, Ex p Turgut [2001] 1 All ER 719, CA
R v Wicks [1998] AC 92; [1997] 2 WLR 876; [1997] 2 All ER 801, HL(E)
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
Ringeisen v Austria (No 1) (1971) 1 EHRR 455
Skärby v Sweden (1990) 13 EHRR 90
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; [1971] 1 All ER 65
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
Tre Traktörer AB v Sweden (1989) 13 EHRR 309
Varey v United Kingdom The Times, 30 January 2001
W v United Kingdom (1987) 10 EHRR 29
X v United Kingdom (1982) 28 DR 177
X v United Kingdom (1998) 25 EHRR CD 88
Zander v Sweden (1993) 18 EHRR 175
Zumtobel v Austria (1993) 17 EHRR 116

The following additional cases were cited in argument:

Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117
De Cubber v Belgium (1984) 7 EHRR 236
Fayed v United Kingdom (1994) 18 EHRR 393
Findlay v United Kingdom (1997) 24 EHRR 221
Franklin v Minister of Town and Country Planning [1948] AC 87; [1947] 2 All ER 289, HL(E)
Jacobsson (Mats) v Sweden (1990) 13 EHRR 79
Kingsley v United Kingdom (2000) 33 EHRR 288
Lafarge Redland Aggregates Ltd v The Scottish Ministers 2000 SLT 1361
Langborger v Sweden (1989) 12 EHRR 416
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA
Lloyd v McMahon [1987] AC 625; [1987] 2 WLR 821; [1987] 1 All ER 1118, HL(E)
McGonnell v United Kingdom (2000) 30 EHRR 289
Oerlemans v The Netherlands (1991) 15 EHRR 561
Piersack v Belgium (1982) 5 EHRR 169
Procola v Luxembourg (1995) 22 EHRR 193
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)
R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Hereford and Worcester County Council, Ex p Wellington Parish Council [1996] JPL 573

R v Torquay Licensing Justices, Ex p Brockman [1951] 2 KB 784; [1951] 2 All ER 656, DC
Reid v Secretary of State for Scotland [1999] 2 AC 512; [1999] 2 WLR 28; [1999] 1 All ER 481, HL(Sc)
Sramek v Austria (1984) 7 EHRR 351
Uppal v United Kingdom (No 1) (1979) 3 EHRR 391
V v United Kingdom (1999) 30 EHRR 121
Wycombe District Council v Secretary of State for the Environment [1988] JPL 111
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

APPEALS from the Divisional Court of the Queen's Bench Division

These were appeals pursuant to section 12 of the Administration of Justice Act 1969 by the Secretary of State for the Environment, Transport and the Regions from decisions of the Divisional Court (Tuckey LJ and Harrison J) given on 13 December 2000 to declare, pursuant to section 4 of the Human Rights Act 1998, that sections 77, 78 and 79 (excluding the words inserted into section 79(4) by paragraph 19 of Schedule 7 to the Planning and Compensation Act 1991) and paragraphs 3 and 4 of Schedule 6 (in so far as applied to section 79) to the Town and Country Planning Act 1990, sections 1, 3 and 23(4) of the Transport and Works Act 1992 and sections 14(3)(a), 16(5)(a), 18(3)(a) and 125 of and paragraphs 1, 7 and 8 of Part I of Schedule 1 to the Highways Act 1980 and section 2(3) and paragraph 4 of Schedule 1 to the Acquisition of Land Act 1981 were incompatible with the provisions of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In so declaring the Divisional Court was determining (i) an application by Alconbury Developments Ltd supported by Cambridgeshire County Council but opposed by Huntingdonshire District Council and two groups of local residents, Huntingdonshire Says No to Alconbury Proposals ("Huntsnap") and the Nene Valley Association ("NVA"), for a declaration that the powers of the Secretary of State to recover planning applications pursuant to paragraph 3 of Schedule 6 to the 1990 Act and determine applications under the Transport and Works Act 1992 were compatible with article 6; (ii) an application by Holding & Barnes plc for a declaration that the powers of the Secretary of State to call in an application for planning permission pursuant to section 77 of the Town and Country Planning Act 1990 were incompatible with article 6 of the Convention; (iii) an application by the Secretary of State, at the instigation of Legal and General Assurance Society Ltd, for a declaration that his powers to make decisions under the Highways Act 1980 and the Acquisition of Land Act 1981 were compatible with article 6.

Holding & Barnes plc, Huntingdonshire District Council, Huntsnap and NVA cross-appealed from the Divisional Court's decision that although the powers were incompatible with article 6 the Secretary of State would not be acting unlawfully in exercising those powers under section 6(1) of the Human Rights Act 1998 because section 6(2) applied.

The Lord Advocate intervened.

The facts are stated in the judgment of Lord Slynn of Hadley.

Jonathan Sumption QC, David Elvin QC, Philip Sales and *James Maurici* for the Secretary of State. Many of the errors in the Divisional Court's decision arise because it tested the roles of the Secretary of State and the

A planning inspector against a judicial authority. The Secretary of State is not a judicial authority. To the extent that he has a duty to act fairly and apply an independent mind having heard the parties, he acts judicially, but he is an administrator responsible to Parliament, and thus the electorate, in a way no judge is. Consequently, his decision making process does not conform to article 6. The essential question is, therefore, whether the English system gives an aggrieved party to a planning decision an adequate right of access to a court.

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The English system follows the European model in providing a right to limited judicial review of a decision made by an elected authority. It differs only in giving the parties more opportunities to make representations. Although the court cannot reconsider the facts, article 6 does not require full judicial control of the determination of planning matters. Nor does the Convention require a separation between the formulation and application of policy. That is a misconception arising from regarding the Secretary of State as a court. A state is not required to divide different executive functions between different administrative bodies.

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The jurisprudence of the European Court of Human Rights distinguishes between purely administrative or legislative acts which represent no more than the exercise of legal powers, and acts which involve the determination of a "dispute" or "contestation" and are therefore at least in part adjudicatory: see *Kaplan v United Kingdom* (1980) 4 EHRR 64. In many cases, including the instant cases, the determination of a planning application will involve a "dispute" and a "determination of civil rights and obligations". The question of what is a "right" is a matter for national law: see *James v United Kingdom* (1986) 8 EHRR 123. The distinction between civil and other rights broadly corresponds to the difference between public and private law: see *Uppal v United Kingdom (No 1)* (1979) 3 EHRR 391. However, article 6 can apply to public law matters which affect or give rise to civil matters and rights: see *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455; *Benthem v The Netherlands* (1985) 8 EHRR 1. The rather awkward distinction between pure public law and public law with civil right implications has led the court to define the relevant civil right as the private law right which is adversely affected by the public law decision. In planning cases, the relevant civil right is the qualified right to the peaceful enjoyment of property. The court has consistently held that the right to property is engaged by any state action which substantially restricts the practical use that may be made of it, even if the legal rights of ownership and occupation are undisturbed: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; *Fredin v Sweden* (1991) 13 EHRR 784; *Oerlemans v The Netherlands* (1991) 15 EHRR 561. This is so not only where the state intervenes to deprive the owner of the right to use the land in a way which was previously open to him, but also in cases where there never was a right to use the land in that way without a licence and such licence had been refused: see *Jacobsson (Allan) v Sweden* (1989) 12 EHRR 56; *Mats Jacobsson v Sweden* (1990) 13 EHRR 79; *Skärby v Sweden* (1990) 13 EHRR 90. However, planning applicants, or indeed objectors to a planning application, cannot claim to have a civil right to any particular outcome. In this respect their position is quite different from that of parties to private litigation who are generally asserting that a particular outcome represents their legal entitlement. The right to enjoy property is not absolute. Consequently, any civil right to the

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enjoyment of property asserted by applicants or objectors is sufficiently vindicated by a procedure which ensures that the application is decided in a manner which accords with the law and there is recourse to a court if it is not.

The Commission and court have always recognised that some functions are properly made by executive authorities which are not courts provided they are subject to a measure of judicial control. Planning is one such area, it is specialised and requires knowledge on the part of the decision maker beyond the facts of the particular case. Consequently, although the Secretary of State is not an independent tribunal, the real issue is whether the planning system as a whole allows to persons whose civil rights are engaged such access to an independent tribunal as may be required to enable them to vindicate those rights. Recourse to the High Court by way of judicial review sufficiently protects the civil rights of those affected by disputed planning applications as it provides a procedure under which the method by which the decision maker reached his decision is subject to judicial intervention if it is unfair: see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; *Kaplan v United Kingdom* 4 EHRR 64; *Oerlemans v The Netherlands* 15 EHRR 561; *Zumtobel v Austria* (1993) 17 EHRR 116; *ISKCON v United Kingdom* (1994) 18 EHRR CD 133; *Bryan v United Kingdom* (1995) 21 EHRR 342; *Varey v United Kingdom* The Times, 30 January 2001; *Chapman v United Kingdom* (2001) 33 EHRR 399. Although not involving planning, see also: *X v United Kingdom* (1998) 25 EHRR CD 88; *Kingsley v United Kingdom* (2000) 33 EHRR 288. The English cases were all heard by the court prior to the Human Rights Act 1998 coming into force. That makes a difference because now the High Court can take into account the proportionality of a decision: see *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719.

The whole justification for a national planning policy is based on the idea that there are wider interests than those of the applicant himself and his neighbours e g environment policy. The limitations on the scope of judicial review reflect a distribution of powers between the executive and legislative branches and the courts. Planning adjudications are not between competing private interests but made in the public interest: see *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395. In the language of the European Court of Human Rights this is a discretionary decision i e one taken on behalf of a wider public interest which outweighs private rights. The role of the Secretary of State makes the planning system coherent and consistent across the country. Local authorities prepare development plans which reflect national policy and must be adhered to. The right of appeal to an inspector and the Secretary of State's right to call in a case are essential features of the scheme. If it is legitimate to have a national planning policy it is also legitimate to have it decided and applied by accountable elected ministers which the courts only oversee to the extent of ensuring decisions are taken lawfully: see *Ashingdane v United Kingdom* (1985) 7 EHRR 528; *Brown v Stott* [2003] 1 AC 681.

The Divisional Court thought *Brown v Stott* was distinguishable as the Secretary of State failed the test of independence and impartiality as he was both policy maker and decision maker. The Convention only requires judges to be insulated from the executive not administrators. There are good

A reasons why policy making and decision making should go together. It allows for occasional departures from policy in exceptional circumstances. The Secretary of State is not a judge in his own cause as the matter in issue is the particular planning application rather than the planning policy itself. There is no objection to the Secretary of State taking advice from his departmental staff as they are seen as part of his thinking process: see *Bushell*
B *v Secretary of State for the Environment* [1981] AC 75. It is consistent with regarding the Secretary of State as the holder of an office rather than an individual. An inspector is no more independent than the Secretary of State: see *Bryan v United Kingdom* 21 EHRR 342. Both are required to act fairly which should be an adequate guarantee of fair findings of fact, and both are subject to judicial review if they art unfairly. There is nothing in the current statutory structure which is unfair. The role of the Secretary of State and the
C question of principle are the same as in *Howard v United Kingdom* (1984) 9 EHRR 116.

[Submissions were made on the appropriate remedy if there is an incompatibility with article 6. Reference was made to *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 and *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330.]

D *Roderick F Macdonald QC* and *Andrew G Webster* (both of the Scottish Bar) for the Lord Advocate. A similar question has arisen in Scotland. In *County Properties Ltd v The Scottish Ministers* 2000 SLT 965 it was decided that the process by which the Scottish Ministers take decisions under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 was incompatible with article 6. The case was wrongly decided and is the
E subject of a reclaiming motion. The arguments of the Secretary of State on conformity with article 6 are adopted. However, article 6 is not applicable because a planning appeal does not raise a dispute. The appeal is merely a re-run of the original application. No civil rights are determined at that stage. A dispute only arises when the decision is challenged in court. The proper approach is to be found in *Kaplan v United Kingdom* 4 EHRR 64 and
F *Zander v Sweden* (1993) 18 EHRR 175. Those principles have never been criticised and *Kaplan* and *Zander* should be approved and followed rather than *X v United Kingdom* 25 EHRR CD 88 and *Bryan v United Kingdom* 21 EHRR 342.

Keith Lindblom QC, Craig Howell Williams and *Hereward Phillpot* for Alconbury. The arguments of the Secretary of State are supported. The decision making process in issue reflect an appropriate and mature balance
G between the general interests of the community and the individual's personal rights. The process considered as a whole is compatible with article 6. The pecuniary benefit to the Ministry of Defence does not render the Secretary of State's decision incompatible in the *Alconbury* case. The approach of the Secretary of State rather than that of the Lord Advocate to *Kaplan v United Kingdom* 4 EHRR 64 is adopted.

H *Gregory Jones* and *Paul Hardy* for Cambridgeshire County Council. The position of the Secretary of State and Alconbury is adopted: see *Chapman v United Kingdom* 33 EHRR 399; *R v Torquay Licensing Justices, Ex p Brockman* [1951] 2 KB 784; *Sporrong and Lönnroth v Sweden* 5 EHRR 35. It is questionable whether the court appreciated that planning policy

itself is not in issue in a planning appeal when it decided *Bryan v United Kingdom* 21 EHRR 342. A

Stephen Hockman QC, Kevin Leigh and *Gordon Nardell* for Holding & Barnes. The process of reaching a decision on the Holding & Barnes planning application is plainly a determination of its civil rights and obligations. The outcome of the application concerns an important incident of its ownership of the land, namely its freedom to carry on a lawful trade B there. It acquired the land solely for the purpose of its business and the grant or refusal of permission will determine whether it can make any beneficial use of the land. Moreover, the proceedings before the Secretary of State on the application are decisive as to the grant or refusal of permission so they amount to a determination for article 6 purposes. The proceedings are not prevented from relating to a "right" merely by reason that the grant or C refusal of planning permission is a matter of discretionary judgment. What is important is not whether the applicant has a right to planning permission but the impact of the grant or refusal of planning permission on the rights of the applicant in relation to the use of a valuable asset. Even if the focus is placed on the question whether the applicant has a "right" to planning permission for article 6 purposes it need not be established that the right exists at the outset of the decision making process but merely that it arguably D exists and that the process will determine that argument. It is not argued that the separate decision of the Secretary of State whether to call in the planning application was itself determinative of a civil right.

The Divisional Court was right in finding that the Secretary of State lacks the necessary independence and objective impartiality in determining planning applications. In particular it was right to emphasise: (1) the E importance of assessing not merely the Secretary of State's personal independence but the structural independence of his department; (2) his incompatible functions as policy maker and decision taker; and (3) the inadequacy of existing domestic standards of impartiality, which presuppose that departmental bias is built into the legislative scheme, as a basis for evaluating whether the decision making process meets the requirements of article 6(1). The inspectorate is acceptable because, although it is not F formally independent, it is effectively independent. The Secretary of State, unlike the inspector, is in reality the executive. Also, there are at least some procedural safeguards in inquiry proceedings before the inspector compared to the secretive and one sided process of determination by the Secretary of State following an inquiry.

The Divisional Court was right to find: that the requirements of "full G jurisdiction" are to be assessed in the light of the extent of the Secretary of State's lack of independence and impartiality, the absence of procedural safeguards in hearings before him and, in the context, the scope of review under section 288 of the Town and Country Planning Act 1990; that, the limited remedy available, namely remission of the case for redetermination by the ex hypothesi non article 6 compliant Secretary of State, renders H review by the High Court ineffective to cure the Secretary of State's lack of independence and impartiality; that, in the circumstances, it is impossible to say that an applicant can at any stage submit the merits of its case to a tribunal complying with the essence of article 6; and that it is neither legally nor pragmatically possible to attain the necessary review jurisdiction by

A extending, within the existing legislative framework, the scope of the High Court's powers.

Those submissions are borne out by the case law. A review of the cases in chronological order shows that the Secretary of State's case is a simplification: see *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395; *Golder v United Kingdom* (1975) 1 EHRR 524; *Kaplan v United Kingdom* 4 EHRR 64; *Bodén v Sweden* (1987) 10 EHRR 367; *Jacobsson (Allan) v Sweden* 12 EHRR 56; *Zumtobel v Austria* 17 EHRR 116; *Lafarge Redland Aggregates Ltd v The Scottish Ministers* 2000 SLT 1361; *ISKCON v United Kingdom* 18 EHRR CD 133; *Bryan v United Kingdom* 21 EHRR 342; *Chapman v United Kingdom* 33 EHRR 399; *Varey v United Kingdom* The Times, 30 January 2001; *Kingsley v United Kingdom* 33 EHRR 288.

C [Submissions were made as to whether section 6(2)(b) of the Human Rights Act 1998 is applicable and whether section 77 of the Town and Country Planning Act 1990 can be read compatibly with article 6. Reference was made to *Lloyd v McMahon* [1987] AC 625.]

Martin Kingston QC and *Peter Goatley* for Huntingdonshire District Council. The clear object of article 6 is to secure for the citizen a procedure D which in respect of all issues (i e fact, policy application and law) provides for an independent and impartial determination: see *Benthem v The Netherlands* 8 EHRR 1. There is no basis for the view that because the case is one which involves some specialism, such as planning, the right to an independent and impartial tribunal to find facts should be abridged: see *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; *Albert* E *and Le Compte v Belgium* 5 EHRR 533.

It is clear that it is permissible for the decision making process to be in two stages and that article 6 does not have to be satisfied at both stages. However, the more serious is the want of independence at the first stage, the greater is the need for judicial intervention at the second stage. In *Bryan v United Kingdom* 21 EHRR 342 the court relied on the safeguards built into the inspector's role, hence it found that judicial review was a good enough F safeguard at the second stage. It is clear that if it had not been for the existence of the Secretary of State's power to remove proceedings from the inspector the court would have said that the proceedings before the inspector met the requirements of article 6. Consequently, it cannot be said that *Bryan* can be taken to apply to the Secretary of State's decision. The Secretary of State's role cannot be regarded as judicial or quasi-judicial: see *Franklin v* G *Minister of Town and Country Planning* [1948] AC 87. The extent to which he lacks impartiality, or appears to lack impartiality, becomes critical when consideration is given to the extent to which judicial review provides good enough protection for the applicant. When findings of fact are made by the Secretary of State he has not heard the evidence or seen the witnesses.

[Submissions were made on the facts and the decision making process in the *Alconbury* case.]

H There are two aspects to the question of independence: (a) independence from the parties, which merges into the requirement of impartiality: see *McGonnell v United Kingdom* (2000) 30 EHRR 289; and (b) independence from the executive. No adjudicatory decision taker should be able to act as the judge in his own cause: see *Locabail (UK) Ltd v Bayfield Properties Ltd*

[2000] QB 451; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. In seeking to be the decision taker in the *Alconbury* case the Secretary of State has the inexorable difficulty of being connected through Government to the Ministry of Defence which has a material financial interest in the outcome. In relation to the executive the issue is not one of the actual acts and predispositions of the decision maker but of the structures governing the decision making process. In determining whether a body is 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 whether it presents an appearance of independence: see *V v United Kingdom* (1999) 30 EHRR 121; *Langborger v Sweden* (1989) 12 EHRR 416; *De Cubber v Belgium* (1984) 7 EHRR 236; *Piersack v Belgium* (1982) 5 EHRR 169; *Sramek v Austria* (1984) 7 EHRR 351; *Findlay v United Kingdom* (1997) 24 EHRR 221; *Procola v Luxembourg* (1995) 22 EHRR 193. In the instant case the Secretary of State is the policy maker, has an interest in the outcome of the decision and is the decision maker. It is appropriate that he should be involved with policy but when it comes to the application of the policy where civil rights are in issue the Convention requires that there should be a process that produces an independent and impartial adjudication on the matter. In domestic law the decision makers position is clear from *Wycombe District Council v Secretary of State for the Environment* [1988] JPL 111. That approach is not consistent with formulating the policy in the process of making the decision. The Secretary of State has a choice of courses to follow in planning proceedings and has chosen to take the one which brings him into conflict with article 6, consequently it will not take much to correct matter and will not affect too many cases.

The availability of judicial review is insufficient as no article 6 compliant tribunal ever deals with the factual issues. The arguments of the amici curiae are adopted on the question whether a contestation arises.

Paul Stanley and *Tim Eicke* for Huntsnap and NVA. The case for Huntingdon is adopted. Civil rights first come into issue at the start of the planning process when a decision is first taken and not just at the stage when that decision is challenged, consequently there is a contestation for article 6 purposes throughout the proceedings: see *Benthem v The Netherlands* (1985) 8 EHRR 1. On the problem of policy being in issue in planning decisions: see *R v Hereford and Worcester County Council, Ex p Wellington Parish Council* [1996] JPL 573. Article 6 is flexible; although there has to be a determination of civil rights and obligations before an independent and impartial tribunal, the right is qualified in areas such as planning because not every stage has to be handled by such a tribunal. However, care has to be taken when allowing such qualifications: see *Obermeier v Austria* (1990) 13 EHRR 290. Article 6 does not allow contracting parties to limit the rights it guarantees or trade them off against concepts such as democratic accountability: see *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38. The democratic accountability of the Secretary of State is not an answer to the article 6 complaint but part of the problem. Judicial review in not an adequate safeguard of the article 6 rights as its effectiveness is dependent on the decision maker being honest about the facts which he took into account. A limited review is an adequate safeguard

A only when there is fundamental confidence in the decision making process: see *Kingsley v United Kingdom* 33 EHRR 288.

John Howell QC and *Rabinder Singh* as amici curiae. Article 6(1) applies to all disputes the result of which is directly decisive for private rights and obligations. The dispute may relate to the existence, scope or value of such right or to the manner in which it may be exercised: see *Le Compte, Van* B *Leuven and De Meyere v Belgium* 4 EHRR 1. In relation to compulsory purchase orders: rights of ownership are private, and thus civil rights, which are recognised under domestic law. Once there is an objection to the making of any compulsory purchase order there is a dispute about such rights, the resolution of which will be directly decisive of them.

It is irrelevant whether the dispute turns on a question of law, fact judgment or discretion. As a matter of principle there is no reason in terms C of the language used in article 6(1) why the exercise of a discretion may not arise in the determination of a person's rights or in deciding a dispute over such rights: see *W v United Kingdom* (1987) 10 EHRR 29; *Obermeier v Austria* 13 EHRR 290. There is nothing in the text of article 6(1) to support *Kaplan v United Kingdom* 4 EHRR 64. The decision was wrong as it places a technical meaning on "contestation" which the word will not bear. It rests D on a distinction which is a matter of form not substance and which in practice is illusive. The consequences of applying that meaning are paradoxical and repugnant and would produce absurd results. The decision was not followed in *X v United Kingdom* 25 EHRR CD 88. Subsequent cases such as *Kingsley v United Kingdom* 33 EHRR 288 have followed the *X* case 25 EHRR CD 88 rather than *Kaplan* 4 EHRR 64.

E Likewise there is no reason in principle why a dispute about civil rights should be limited to the legality, as distinct from the merits, of the measure which decisively determines the right. Although some cases before the European Court of Human Rights might appear to support the conclusion that the ambit of any dispute should be so limited, they are cases which concerned a lack of review as to lawfulness: see, for example, *Oerlemans v The Netherlands* 15 EHRR 561. Thus the court was not asked to consider F whether only a review as to lawfulness was sufficient. By contrast, in later cases, the court's decision turned on the fact that the reviewing tribunal had full power to reconsider the merits of the decision: see *Zumtobel v Austria* 17 EHRR 116. Overall, when considering whether the review is adequate, the court is concerned with the procedure by which the decision was reached and not just the matter of dispute.

G The essence of the right under article 6 applies to the determination of rights and not a later review of that determination. There is no exemption for administrative decisions. Civil rights must be determined by a body independent of the executive. The views of the executive are entitled to deference but no more.

A limitation on the rights guaranteed by article 6 is permissible where it pursues a legitimate aim, involves a reasonable proportionality between aim H and means and does not extinguish the essence of the right: see *Fayed v United Kingdom* (1994) 18 EHRR 393. However, the minimum requirements of article 6(1) are: (1) a fair hearing on the merits before a tribunal which is in fact substantially impartial and independent as to merits; and (2) an effective review by an article 6(1) compliant body. The

Secretary of State in the *Legal and General* case does not satisfy requirement (1). He is literally judge in his own cause as he is deciding whether or not to grant himself the relevant powers. He is also the promoter of the scheme on which he makes the relevant determination. Claims that the requirements of article 6(1) can be adapted to allow for a democratic model of decision making where private interests are balanced against a wider public interest cannot justify entrusting effective power of decision making to the executive when its interests are so directly involved that it cannot be regarded as independent of the parties or as an impartial tribunal in relation to the merits of the dispute.

In *ISKCON v United Kingdom* 18 EHRR CD 133 and *Varey v United Kingdom* The Times, 30 January 2001 there was no issue concerning the Secretary of State's impartiality on the merits. Judicial review is limited to a strict legal test of the correctness of a decision: see *Reid v Secretary of State for Scotland* [1999] 2 AC 512; *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117. No review on the merits is possible. Both *Bryan v United Kingdom* 21 EHRR 342 and *Kingsley v United Kingdom* 33 EHRR 288 show that a power of limited review will be insufficient if the initial decision is not taken by an independent person in the first place.

Legal and General Assurance Society did not appear and were not represented.

Sumption QC in reply. Article 6 cannot be applied to issues which are discretionary and in the public interest in the same way as it is applied to areas involving purely private issues. Matters which have a broad public reach should not be left for determination to a non-democratic body. The jurisprudence of the European Court of Human Rights shows that the character of the dispute with which article 6 is concerned with is an important issue when considering what will satisfy the requirements of the article. The proceedings as a whole engage article 6 but the court has always recognised that the two stages of the decision making process do not require the same content. The range of the reviewing judicial stage can be less than the range of the original administrative stage: see *ISKCON v United Kingdom* 18 EHRR CD 133; *Bryan v United Kingdom* 21 EHRR 342; *Chapman v United Kingdom* 33 EHRR 399; *Varey v United Kingdom* The Times, 30 January 2001; *X v United Kingdom* 25 EHRR CD 88; *Kingsley v United Kingdom* 33 EHRR 288. There is no single test for "full jurisdiction" at the reviewing stage. It depends on the circumstances, subject matter of the dispute, etc.

The distinction drawn between an inspector and the Secretary of State is unreal. In both cases the facts are found by the inspector. The Secretary of State can disagree with those findings but he must give an opportunity for representations and act rationally. In making a decision their functions are the same.

The discretionary nature of the decision is crucial to the decision in *Bryan v United Kingdom* 21 EHRR 342. The reason why the limited nature of judicial review is acceptable on discretionary decisions is that the major issue at stake is the public interest and not individual rights. The right the individual has under article 6 is the right to have the decision making process, but not the outcome, judicially controlled. The standard which

A article 6 imposes on the administrative stage is that the decision maker should be fair or subject to judicial review to the extent that he is unfair. The obligation of fairness does not require that the decision maker should have no prior view on the issue provided that he keeps an open mind until he has heard the parties. Judicial standards are not applied to administrative decision makers. Apparent bias is only relevant when considering a judicial
B decision maker. It is not relevant to an administrative decision maker who has the broader public interest to consider. The guiding principles regarding administrative decision making are relevance and fairness.

The balance between democratic accountability and the rule of law is in the right place. Private rights are wholly vindicated by access to the courts to test the lawfulness of the decision. The same balance has been made by other Convention countries.

C

Their Lordships took time for consideration.

9 May. **LORD SLYNN OF HADLEY**

1 My Lords, these three appeals come direct to the House pursuant to section 12 of the Administration of Justice Act 1969 from decisions of the Divisional Court (Tuckey LJ and Harrison J) in a judgment given on
D 13 December 2000. Although there are differences between the three cases they raise broadly the same question as to whether certain decision making processes of the Secretary of State for the Environment, Transport and the Regions are compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as incorporated in the Human Rights Act 1998. There was a consequential question as to
E whether if these processes are not compatible there should be a declaration under section 4 of the 1998 Act.

2 The Divisional Court held that the following statutory provisions were incompatible with article 6 and accordingly made a declaration of incompatibility under section 4 of the 1998 Act: (a) the Town and Country Planning Act 1990 (i) section 77; (ii) section 78 and 79 (excluding the words inserted into section 79(4) by paragraph 19 of Schedule 7 to the Planning and
F Compensation Act 1991); (iii) paragraphs 3 and 4 of Schedule 6 (in so far as it applied to section 79); (b) the Transport and Works Act 1992, sections 1, 3 and 23(4); (c) the Highways Act 1980, sections 14(3)(a), 16(5)(a), 18(3)(a) and 125 and paragraphs 1, 7 and 8 of Part I of Schedule 1; (d) the Acquisition of Land Act 1981, section 2(3) and paragraph 4 of Schedule 1.

3 The Secretary of State appeals against all these decisions and
G declarations. Since a related question had arisen in Scotland in *County Properties Ltd v The Scottish Ministers* 2000 SLT 965, the Lord Advocate has intervened in support of the application that the decision of the Divisional Court be reversed on the basis that article 6(1) does not apply to the decision-making processes under review and on the basis that they are not in any event incompatible with a Convention right. The role of other parties to the proceedings will appear in a brief summary of facts to which
H I turn. I summarise briefly because the facts are more fully set out in the judgment of the Divisional Court to which reference can be made and which it is not helpful to repeat.

4 *Alconbury Developments Ltd* ("AD") has agreed with the Ministry of Defence, the owner of a disused airfield at Alconbury, that if planning

permission is given AD will redevelop the site into a national distribution centre in return for financial payments to the Ministry. AD applied to Huntingdonshire District Council ("HDC") for planning permission for the overall scheme with adjunct facilities and approach road and rail sidings. It also applied under various individual applications for planning permission for parts of the scheme. There were related applications (1) to Cambridgeshire County Council ("CCC") as the waste disposal authority for planning permission to construct a temporary recycling depot on part of the site; (2) to HDC for permission to set up a commercial air freight operation though this was opposed by a group of local residents ("Huntsnap") and the application was withdrawn in March 1998; (3) to the Secretary of State under section 1 of the Transport and Works Act 1992 for permission to build a rail connection between the airfield and the east coast rail line together with railway sidings within the airfield.

5 On 4 August 1998 the Secretary of State refused a request to call in the planning application to be determined by him but, after the HDC dismissed the overall application for planning permission and the CCC failed to determine the application for the waste recycling depot within the prescribed period, AD's appeals were "recovered" by the Secretary of State for determination by him under paragraph 3 of Schedule 6 to the Town and Country Planning Act 1990 rather than by an inspector appointed by the Secretary of State. This was done on the basis that "the appeals relate to proposals for development of major importance, having more than local significance".

6 An inspector was appointed to hold an inquiry at which for various reasons Huntsnap and an association of Nene Valley residents ("NVA") together with English Nature, a statutory body, appeared. Huntsnap and NVA contended that the proceedings were contrary to article 6. AD accordingly applied for judicial review of the Secretary of State's decision in order to clarify the position, contending that the Secretary of State's decisions to take jurisdiction over the planning appeals and the Transport and Works Act 1992 applications were lawful. CCC supported AD; HDC, Huntsnap and NVA opposed it. On the present appeal AD and CCC support the Secretary of State. HDC and NVA contend that the Divisional Court were right in holding that there was a breach of section 6(1) but wrong in their decision on section 6(2). The Secretary of State was bound to act so as to avoid incompatibility with the Convention and therefore to permit the appeal to be determined by an independent inspector.

7 *Holding & Barnes plc* ("HB") applied for planning permission to use land at Canvey Island for the storage and sale of damaged cars. The Health and Safety Executive objected because the development was near to gas storage on some neighbouring sites but the Executive was willing to reconsider the position if modifications to the proposal could be made. The local planning authority on 2 May 2000 resolved that it was minded to grant permission. On 25 July 2000 the Secretary of State directed, pursuant to section 77 of the Town and Country Planning Act 1990 that the application should be referred to him because of (a) the nature of the proposed use, (b) the impact it could have on the future economic prosperity of Canvey Island and (c) the site's location close to hazardous installations. It is that direction which HB challenged on an application for judicial review.

A 8 *Legal and General Assurance Society Ltd.* These proceedings are brought by the Secretary of State at the invitation of Legal and General Assurance Society Ltd ("L & G"). The issue relates to an improvement scheme at junction 13 of the A34/M4 proposed by the Secretary of State through the Highways Agency. There are complex details of a dual two-lane carriageway all-purpose road, 100 metres to the west of the existing junction
B 13, together with connected slip and side roads. In August 1993 following an inquiry, orders were confirmed for the work to go ahead. The court quashed part of one of the side road orders and new draft orders were published on 17 February 2000 followed by a draft compulsory purchase order on 24 February 2000. Following objections the Secretary of State appointed an inspector to hold a public inquiry into the draft order. L & G which own some land the subject of the draft compulsory purchase order
C invited the Secretary of State to seek a ruling of the court as to the compatibility of the proceedings with the Convention. L & G decided not to be represented in the proceedings and the Attorney General appointed counsel as amici curiae in that case both before the Divisional Court and before the House.

9 The Divisional Court set out with clarity the details of the legislation
D relevant to these cases. I gratefully adopt their account in paras 30 to 52 of the judgment and accordingly I only summarise the essential characteristics with which these appeals are concerned.

10 It is important to make clear that these appeals are not concerned directly with issues which affect the vast majority of applications for planning permission. Those applications are dealt with by elected local authorities and not by the Secretary of State even though local authorities
E have to take into account the development plan for their area which does reflect national policies, guidance and instructions given by the Secretary of State. Nor are the present appeals concerned with the majority of appeals from such local authority decisions which are decided by inspectors on the Secretary of State's behalf even though those inspectors may be full-time officials of the Planning Inspectorate and even though they must have regard
F to the Secretary of States's policies and the framework document setting out their functions. The present appeals under the Town and Country Planning Act 1990 are concerned only with applications which are "called in" by the Secretary of State under section 77 of the Act and those appeals which are "recovered" by the Secretary of State under paragraph 3 of Schedule 6 to the Act. The Divisional Court found that of some 500,000 planning applications each year about 130 were "called in" by the Secretary of State and of some
G 13,000 appeals to the Secretary of State each year about 100 were "recovered" by the Secretary of State. In both types of case the Secretary of State followed to a large extent the recommendations of the inspectors. These figures of 130 and 100 are not insignificant and they concern important questions, important both to the individual and to the nation, but the figures do show the limits of the question raised on the appeals.

H 11 It is therefore important to see what are the statutory powers under these various sections.

12 Under section 77 of the Town and County Planning Act 1990 the Secretary of State may (1) give directions requiring applications for planning permission to be referred to him instead of being dealt with by local planning authorities:

"(5) Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose."

13 By the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) the applicant and the local planning authority are entitled to appear before the inspector ("the person appointed") to call and cross-examine witnesses and to make representations.

14 Section 78 of the Town and Country Planning Act 1990 provides for an applicant who has been refused planning permission or granted planning permission subject to conditions to appeal to the Secretary of State. Before determining an appeal, the Secretary of State is required by section 79(2), if the appellant or the local planning authority wish, to give them an opportunity to be heard by a person appointed by the Secretary of State. By paragraph 1 of Schedule 6 to the Act, the Secretary of State may prescribe classes of appeals to be determined by appointed persons rather than by the Secretary of State. By paragraph 3(1) of Schedule 6 the Secretary of State "may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State". Such direction shall state the reasons for which it is given and it is to be served on the appellant, the local planning authority and any person who has made representations.

15 The Town and Country Planning (Inquiries Procedure) (England) Rules 2000, which replaced the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992 (SI 1992/2039) with effect from 1 August 2000, apply to any local inquiry ordered by the Secretary of State before he determines an application for planning permission referred to him under section 77 or an appeal to him under section 78 of the Act.

16 When an inspector is holding an inquiry leading to an appeal which he will determine himself or when he is holding an inquiry before the Secretary of State decides an application for planning permission called in by him under section 77, or before the Secretary of State determines an appeal under section 78 "recovered" by him, the procedures are broadly the same until the inspector's final report. When an inspector takes a decision he must set out that decision with reasons and notify the parties. When, however, he is holding an inquiry before the Secretary of State takes a decision he must state his conclusions and make his recommendations. There is an important provision in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000:

"(5) If, after the close of an inquiry, the Secretary of State—(a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy), and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an

A opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the re-opening of the inquiry . . .

"(7) The Secretary of State may, as he thinks fit, cause an inquiry to be reopened, and he shall do so if asked by the applicant or the local planning authority in the circumstances mentioned in paragraph (5) and within the B period mentioned in paragraph (6); and where an inquiry is reopened (whether by the same or a different inspector)—(a) the Secretary of State shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited; and (b) paragraphs (3) to (8) of rule 10 shall apply as if the references to an inquiry were references to a reopened inquiry."

C

17 In relation to applications made under the Transport and Works Act 1992 in relation to the construction and operation of a railway and to authorise the compulsory acquisition of land and to grant any necessary planning permission, under the Transport and Works Act, the decision is taken by the Secretary of State. Where an objection is received, a public inquiry must be held if the objector wishes. The provisions of the Transport D and Works (Inquiries Procedure) Rules 1992 (SI 1992/2817) are broadly similar to those found in the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

18 The Highways Act 1980 gives to the Secretary of State power to make orders in relation to existing and proposed highways and to empower the highway authorities for trunk roads to stop up or improve highways in prescribed circumstances. If a local inquiry is held, the inspector appointed E reports his conclusions and recommendations to the Secretary of State. The Highways (Inquiries Procedure) Rules 1994 (SI 1994/3263) contain similar provision to those in the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The Secretary of State may make an order with or without modification but if he disagrees with his inspector's conclusions or recommendations the Secretary of State must follow a procedure similar to F that in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000: see rule 26(4) of the Highways (Inquiries Procedure) Rules 1994. When exercising his powers under the Highways Act, the Secretary of State is given power to acquire land compulsorily. The Acquisition of Land Act 1981 and the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1994 (SI 1994/3264) provide for a public local inquiry to be held if an objection is received. The inspector makes his G conclusions and recommendations to the Secretary of State. If the latter disagrees he is required once again to follow a procedure similar to that in rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

19 The various statutes provide for judicial review rather than for an appeal on the facts or the merits of the decision. Thus in section 288 of the H Town and Country Planning Act 1990:

"*Proceedings for questioning the validity of other orders, decisions and directions* 288(1) If any person—(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—(i) that the order is not within the powers of this Act, or (ii) that

any of the relevant requirements have not been complied with in relation to that order; or (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—(i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section."

20 Section 22 of the Transport and Works Act 1992, the provisions for challenge set out in paragraph 2 of Schedule 2 to the Highways Act 1980 and section 23 of the Acquisition of Land Act 1981 are similar.

21 The essence of the complaints in all these cases is that there is a violation of article 6 of the European Convention for the Protection of Human Rights incorporated in Part I of Schedule 1 to the Human Rights Act 1998. Article 6 provides:

"*Right to a fair trial*

"1. 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."

22 The second and third paragraphs of the article are concerned with criminal offences and are not relevant to the present appeal.

23 The contention in these proceedings is that the processes which I have set out violate article 6. These are civil rights which are determined without a fair and public hearing by an independent and impartial tribunal established by law.

24 There is really no complaint about the inquiry conducted by an inspector or about the safeguards laid down for evidence to be called and challenged and for representations and objections to be heard. It is not suggested that the inspector himself is not independent and impartial even though he is a member of, e g, the Planning Inspectorate in the case of planning appeals. The essential complaint is that when a decision is taken, not by such an inspector but by the Secretary of State or one of the Ministers of State or an Under-Secretary on behalf of the Secretary of State there is such an interest in the decision that the person concerned cannot be regarded as an independent and impartial tribunal. The Secretary of State or his department, it is said, lays down policy and directs what he or the department considers to be the most efficient and effective use of land in what he sees to be the public interest. They issue guidance and framework directions which local authorities, inspectors and officials operating the planning system must follow. All of these are bound to affect the mind of the Secretary of State when he takes decisions on called in applications or on appeals which he recovers, it is alleged. Moreover it is said that in the case of Alconbury there is a particular factor in that the land in question is owned by another government department, the Ministry of Defence.

25 Mr Kingston on behalf of HDC also criticised the correspondence and minutes relevant to the Alconbury project. He contends that the role of the officials involved at the Planning and Transport Division in the Government Office for the Region ("GO") was such that there was a real connection not only with planning matters and planning ministers but also

A with transport ministers and officials and their policies. A site visit by the Parliamentary Under-Secretary for Transport may not have been prejudicial to the determination of the application before the matter was taken over by the Secretary of State. It was quite different once he took over the case for his own decision. As it was put in the case, even leaving aside the fact that the Secretary of State was carrying out his own policy "it is quite clear that the structures in place in relation to cases where the Secretary of State has B recovered jurisdiction do not preserve any appearance of independence".

26 Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that C the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.

27 It is not necessary to refer to all these cases but some statements of principle by the European Court of Human Rights are important in guiding the House in the present decisions. A preliminary question has arisen as to D whether a dispute over administrative law matters of the present kind involved the determination of "civil rights". At first sight to a common lawyer there appears a difference and that difference might seem stronger to a lawyer in a civil law country. In *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, para 94, however, the court said:

> E "For article 6(1) to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of article 6(1) is far wider; the French expression 'contestations sur [des] droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of . . . civil rights and F obligations', confirms this interpretation. The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence."

See also *Kaplan v United Kingdom* (1980) 4 EHRR 64, 85, *Allan Jacobsson v* G *Sweden* (1989) 12 EHRR 56.

28 In *Fredin v Sweden* (1991) 13 EHRR 784 the court accepted that disputes under planning rules could affect civil rights to build on the applicant's land. Despite the submissions of the Lord Advocate that a decision on a called in application is not a "contestation" on the basis of these and a number of other cases it seems to me plain that this dispute is one H which involves the determination of "civil rights" within the meaning of the Convention.

29 The European Court of Human Rights has, however, recognised from the beginning that some administrative law decisions which affect civil rights are taken by ministers answerable to elected bodies. Where there is a two-stage process, i e there is such an administrative decision which is

subject to review by a court, there is a constant line of authority of the European court that regard has to be paid to both stages of the process. Thus even where "jurisdictional organs of professional associations" are set up:

> "None the less, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

See *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 29. See also *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, *Golder v United Kingdom* (1975) 1 EHRR 524.

30 In *Kaplan v United Kingdom* 4 EHRR 64 the Commission noted, at para 150, that

> "it is a feature of the administrative law of all the contracting states that in numerous different fields public authorities are empowered by law to take various forms of action impinging on the private rights of citizens."

The Commission referred to its earlier opinion in *Ringeisen v Austria (No 1)* 1 EHRR 455, para 666, where having referred to a number of examples of state regulation the Commission had stated:

> "These examples, to which numerous others could be added, seem to indicate that it is a normal feature of contemporary administrative law that the rights and obligations of the citizen, even in matters which relate very closely to his private property or his private activities, are determined by some public authority which does not fulfil the conditions laid down in article 6(1) with respect to independent and impartial tribunals."

31 The Commission continued, at para 159, in relation to judicial review: "It is also a common feature of their administrative law, and indeed almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited." And, at para 161:

> "An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

32 In *ISKCON v United Kingdom* (1994) 18 EHRR CD 133 (a decision of the Commission) a local authority served an enforcement notice on ISKCON alleging a material change of use of the land. ISKCON appealed against the notice under section 174(2) of the Town and Country Planning Act 1990 and after a report by an inspector the Secretary of State largely confirmed the enforcement notice. The High Court and the Court of Appeal rejected ISKCON'S appeal. On a complaint under the Convention the Commission recalled that an appeal under section 289 of the Town and Country Planning Act 1990 lay only on a point of law but it took into account that the local authority could only take proceedings within the limits of section 174 of that Act and that in accordance with its own structure plans and the policy guidance laid down by the Secretary of State

ISKCON could then seek a determination as to whether the legal requirements had been met. The Commission concluded, at p 145:

> "The Commission recalls that the High Court dealt with each of ISKCON'S grounds of appeal on its merits, point by point, without ever having to decline jurisdiction. Moreover, it was open to ISKCON to contend in the High Court that findings of fact by the inspector and/or the Secretary of State were unsupported by evidence, as they could have argued that the administrative authorities failed to take into account an actual fact or did take into account an immaterial fact. Finally, the High Court could have interfered with the administrative authorities' decisions if those decisions had been irrational having regard to the facts established by the authorities. It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised: article 6 gives a right to a court that has 'full jurisdiction' (cf *Zumtobel v Austria* (1993) 17 EHRR 116, para 32)."

33 In *Bryan v United Kingdom* (1995) 21 EHRR 342, a case which it is necessary to refer to in some detail since it has been followed in later cases, an applicant was served with an enforcement notice requiring him to demolish buildings erected without planning permission. He complained that the inspector's decision did not satisfy article 6(1). The court and the Commission described the role of the inspector and the procedures to be followed under the Town and Country Planning Act including both his duty under the Planning Inspectorate Executive Agency Framework Document (1992) of the Secretary of State to exercise independent judgment and not to be or to be seen to be subject to any improper influence and to act fairly but at the same time to have regard to the policies promulgated by the Secretary of State on matters of planning. Both the Commission and the court accepted that there had been a fair hearing before the inspector. Because however the inspector's appointment to hear the appeal could be revoked in a situation where the executive's own policies may be in issue, the inspector did not satisfy the requirements of article 6 that there must be an independent and impartial tribunal.

34 However having set out the national court's powers of review the court like the majority of the Commission concluded that in that case the High Court's powers of review were sufficient to comply with article 6. The court noted, at para 44, that an appeal to the High Court was only on points of law and therefore

> "not capable of embracing all aspects of the inspector's decision . . . 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."

35 The court continued, in paras 45–47, that in assessing the sufficiency of the review available before the High Court

"45 . . . it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

"46 In this connection the court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality. Further, any alleged shortcomings in relation to these safeguards could have been subject to review by the High Court.

"47 . . . The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal"—i e other than his contention that as a matter of fact and degree the buildings could from their appearance and layout be considered to have been designed for the purposes of agriculture—"and his submissions were adequately dealt with point by point. These submissions, as the Commission noted, went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a conservation area'.

"Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational.

"Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning.

"The scope of review of the High Court was therefore sufficient to comply with article 6(1)."

36 The respondents contend that this judgment does not assist the Secretary of State since his decision-making process was not of a quasi-judicial nature; he did not have to exercise an independent judgment, there was no obligation to uphold the principles of openness, fairness and impartiality.

37 In *Chapman v United Kingdom* (2001) 33 EHRR 399 the question arose as to the refusal of planning permission and the service of an enforcement notice against Mrs Chapman, who wished to place her caravan on a plot of land in the Green Belt. The refusal of planning permission and the enforcement notice were upheld by the inspector. The court like the majority of the Commission held that there had been no violation of article 6:

A "124. The court recalls that in the case of *Bryan v United Kingdom* 21 EHRR 342 it held that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with article 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis B on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."

38 It is also to be noted that in *Howard v United Kingdom* (1984) 9 EHRR 116 a submission that the power of appeal under section 23 of the C Acquisition of Land Act 1981 did not provide an adequate remedy to challenge a compulsory purchase order so was not an effective remedy within the meaning of article 13 of the Convention was rejected as inadmissible.

39 In *Varey v United Kingdom* The Times, 30 January 2001 the Commission concluded on the challenge to a planning decision that the fact that an inspector's recommendation had been rejected by the Secretary of D State did not mean that there had been a violation of article 6. The Secretary of State had given reasoned decisions on the basis of facts found by the inspector

> "and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court. Consequently in these circumstances the Commission is satisfied that the E power of review of the process by the High Court ensures adequate judicial control of the administrative decisions in issue": para 86.

40 The House has been referred to many other cases some involving other member states where the administrative provisions and the judicial control were in different terms. I do not refer to these only because it seems to me that in the recent cases to which I have referred the court has given an F indication of the principle to be followed sufficiently for the disposal of the present case.

41 On the basis which I have accepted that the planning, compulsory purchase and other related decisions do affect civil rights even if the procedures and decisions are of an administrative law nature rather than strictly civil law in nature, the first question is, therefore, whether the G decision of the Secretary of State which effectively determined these rights in itself constitutes "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

42 "Independent" and "impartial" may import different concepts but there is clearly a link between them and both must be satisfied. It is not suggested that there is actual bias against particular individuals on the part of the Secretary of State or the officials who report to him or who advise him. H But it is contended that the Secretary of State is involved in laying down policy and in taking decisions on planning applications in accordance with that policy. He cannot therefore be seen objectively to be independent or impartial. The position is said to be even more critical when roadworks and compulsory purchases are initiated by the Highways Agency or when as in

the Alconbury case the land involved belongs to another ministry of the Crown.

43 Before the House the Secretary of State did not contend that in dealing with called in or recovered matters he is acting as an independent tribunal. He accepts that the fact that he makes policy and applies that policy in particular cases is sufficient to prevent him from being an independent tribunal and for the same reasons he is not to be seen as an impartial tribunal for the purposes of article 6 in Part I of Schedule 1 to the 1998 Act.

44 But the many decisions of the European Court of Human Rights make it plain that one does not stop there. A choice was recognised as early as *Albert and Le Compte v Belgium* 5 EHRR 533, para 29 that:

> "either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

45 These judgments also show that the test whether there is a sufficient jurisdictional control is not a mechanical one. It depends on all the circumstances.

46 On the basis of these decisions it is in my view relevant as a starting point to have regard to such procedural safeguards as do exist in the decision-making process of the Secretary of State even if in the end, because he is applying his policy to which these controls do not apply, he cannot be seen as an impartial and independent tribunal. The fact that an inquiry by an inspector is ordered is important. This gives the applicant and objectors the chance to put forward their views, to call and cross-examine witnesses. The inspector as an experienced professional makes a report, in which he finds the facts and in which he makes his recommendations. He has of course to take account of the policy which has been adopted in, e g, the development plan but he provides an important filter before the Secretary of State takes his decision and it is significant that in some 95% of the type of cases with which the House is concerned the Secretary of State accepts his recommendation. The Divisional Court had evidence that other steps are taken to ensure that the contentions of the applicant and the objectors are adequately considered. Thus the Divisional Court quoted evidence, in para 62 of their judgment, as to the way in which it is sought to ensure that all material considerations needed to reach an informed, fair, unbiased and reasonable decision could be arrived at as quickly as practicable. Decisions were taken by ministers who so far as possible had no connection with the area from which the case came, and in respect of the decision officer who dealt with the case it was said, in para 63, that he

> "works separately from the casework team of which he is nominally a part, does not discuss the merits of the planning decisions before him with an individual either within or without GO East, is not copied into or involved in the preparation of the Regional Planning Guidance ('RPG') or the exercise of any of the Secretary of State's powers of intervention under the Town and Country Planning Act, and only has before him the information which the inspector would have had at the inquiry into the particular appeal or called in application, together with any

representation made after the close of the inquiries (all relevant parties are given the opportunity to comment on any such representations where they are material or raise new matters)."

47 On the decision-making process I do not suggest that one can make artificial distinctions between different branches of a government department. I refer to what was said by Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75, 95. But there is nothing unusual or sinister in the methods provided for planning decisions to be taken by the executive in the United Kingdom. The European Court of Human Rights has recognised that in many European countries planning decisions are made by elected or appointed officers with a limited judicial review even though the extent of this may vary from state to state. In *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, 399 Lord Greene MR recognised the importance of the administrative stage of the decision:

"the raising of the objections to the order, the consideration of the matters so raised and the representations of the local authority and the objectors—is merely a stage in the process of arriving at an administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. A moment's thought will show that any such conception of the relationship must be fallacious, because on the substantive matter, viz, whether the order should be confirmed or not, there is a third party who is not present, viz, the public, and it is the function of the minister to consider the rights and the interests of the public . . . It may well be that, on considering the objections, the minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will overrule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands."

48 The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking particular planning decisions and it is easy to overstate the difference between the application of a policy in decisions taken by the Secretary of State and his inspector. As to the making of policy, *Wade & Forsyth, Administrative Law,* 8th ed (2000), p 464 says:

"It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be

A impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy."

As Mr Gregory Jones put it pithily in argument it is not right to say that a policy maker cannot be a decision maker or that the final decision maker cannot be a democratically elected person or body. B

49 Accepting this method of proceeding, the question, as the European court has shown, is whether there is a sufficient judicial control to ensure a determination by an independent and impartial tribunal subsequently. The judgments to which I have referred do not require that this should constitute a rehearing on an application by an appeal on the merits. It would be surprising if it had required this in view of the difference of function between C the minister exercising his statutory powers, for the policy of which he is answerable to the legislature and ultimately to the electorate, and the court. What is required on the part of the latter is that there should be a sufficient review of the legality of the decisions and of the procedures followed. The common law has developed specific grounds of review of administrative acts and these have been reflected in the statutory provisions for judicial review such as are provided for in the present cases. See as relatively D straightforward examples *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 and *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281.

50 It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take E account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps—failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness and natural justice requires—the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control. But none F of the judgments before the European Court of Human Rights requires that the court should have "full jurisdiction" to review policy or the overall merits of a planning decision. This approach is reflected in the powers of the European Court of Justice to review executive acts under article 230 of the EC Treaty:

G "It shall for this purpose have jurisdiction in actions brought by a member state, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."

51 The European Court of Justice does of course apply the principle of H proportionality when examining such acts and national judges must apply the same principle when dealing with Community law issues. There is a difference between that principle and the approach of the English courts in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. But the difference in practice is not as great as is sometimes supposed.

The cautious approach of the European Court of Justice in applying the principle is shown inter alia by the margin of appreciation it accords to the institutions of the Community in making economic assessments. I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the Human Rights Act 1998 however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied: see *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719; *R (Mahmood) v Secretary of State for the Home Department* [2000] 1 WLR 840.

52 This principle does not go as far as to provide for a complete rehearing on the merits of the decision. Judicial control does not need to go so far. It should not do so unless Parliament specifically authorises it in particular areas.

53 In *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, 344–345 I accepted that the court had jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact. I remain of that view, which finds support in *Wade & Forsyth, Administrative Law,* 7th ed (1994), pp 316–318. I said:

> "Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to *Wade & Forsyth, Administrative Law,* 7th ed (1994), pp 316–318 in which it is said: 'Mere factual mistake has become a ground of judicial review, described as "misunderstanding or ignorance of an established and relevant fact" [*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030] or acting "upon an incorrect basis of fact" . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a "wrong factual basis" doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law.' *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed (1995), p 288: 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.' "

54 I accordingly hold that, in relation to the judicial review of the Secretary of State's decision in a called in application or a recovered appeal under the planning legislation and to a review of the decisions and orders under the other statutes concerned in the present appeals, there is in

principle no violation of article 6 of the European Convention on Human Rights as set out in Part I of Schedule 1 to the Human Rights Act 1998. The scope of review is sufficient to comply with the standards set by the European Court of Human Rights. That is my view even if proportionality and the review of material errors of fact are left out of that account: they do, however, make the case even stronger. It is open to the House to rule on that question of principle at this stage of the procedure in the various cases.

55 I do not consider that the financial interests of the Ministry of Defence automatically precludes a decision on planning grounds by the Secretary of State, or that the communication between government departments and site visits by ministers to which reference has been made in argument in principle vitiate the whole process. 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.

56 I would accordingly allow the appeals, dismiss the cross-appeals and set aside the declarations of the Divisional Court.

LORD NOLAN

57 My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Slynn of Hadley. I gratefully adopt his account of the facts and of the issues raised in these appeals.

58 I too would allow the appeals, and would declare that the impugned decision-making procedures are not in breach of or incompatible with the Human Rights Act 1998. The case is one of great practical and constitutional importance for this country, and of importance also for the development of human rights law both in this country and abroad, and argument has ranged over a wide field. The central question, however, is the first of those raised in the agreed statement of facts and issues, namely whether the impugned procedures "are compatible with article 6(1) of the Convention as applied by the Human Rights Act . . . having regard to the existence of statutory rights of appeal to the High Court and of supervision of the procedures by way of judicial review". The alternative to these procedures would effectively involve the removal from the appellant Secretary of State of his discretion over the grant of planning permission and other matters related to the ownership and enjoyment of land in the rare and often controversial cases in which he exercises it at present, and its vesting in some other person or body which constitutes "an independent and impartial tribunal" for the purposes of article 6(1). The precise nature of this alternative entity was not formulated by the respondents, but it would presumably be modelled on the Planning Inspectorate either in its present or in some modified form. Understandable, but, I think, also significant, was the absence of any suggestion that the discretion should be vested in the courts.

59 My Lords, this brings me at once to my reasons for concluding that the decision of the Divisional Court cannot be allowed to stand. They can be shortly stated.

60 The first, which reflects the obvious unsuitability of the courts as the arbiters in planning and related matters, is that the decision to be made, as explained by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister*

of Health [1947] 2 All ER 395, 399, is an administrative and not a judicial decision. In the relatively small and populous island which we occupy, the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. 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.

61 Electoral accountability alone is, of course, plainly insufficient to satisfy the rule of law. Are then the rights of the subject in planning and related matters adequately protected by the statutory provisions for appeal to the courts and by the process of judicial review? It is said that these remedies fail to meet the article 6(1) criterion because they do not permit a review of the decision of the Secretary of State on its merits. If this criticism is limited to the absence of a review of the decision on its *planning* merits it is indisputable. But a review of the merits of the *decision-making process* is fundamental to the courts' jurisdiction. The power of review may even extend to a decision on a question of fact. As long ago as 1955 your Lordships' House, in *Edwards v Bairstow* [1956] AC 14, a case in which an appeal (from general commissioners of income tax) could only be brought on a question of law, upheld the right and duty of the appellate court to reverse a finding of fact which had no justifiable basis.

62 The reversal of a finding of fact in the field of planning would no doubt be highly unusual. I mention *Edwards v Bairstow* simply to illustrate the generosity with which the courts, including your Lordships' House, have interpreted their powers to review questions of law. A similarly broad and generous approach has been adopted in the development of judicial review extending as it does not only to points of law in the strict and narrow sense but to such matters as the rationality of the decision and the fairness of the decision-making process. One possibility canvassed in argument was that the powers of review as at present exercised by the courts might be enlarged in order to accommodate the requirements of the Human Rights Act 1998. For my part, at least in the context of the present case, I see no need for that.

63 My Lords, I have found it reassuring to read, in the judgments of the European Court of Human Rights and of the Commission in the cases of *Bryan* 21 EHRR 342, *ISKCON* 8 March 1994, *Chapman* (2001) 33 EHRR 399 and *Varey* 27 October 1999 the expression of views which to my mind strongly support the contentions of the Secretary of State. If, as I understand to be the case, your Lordships are unanimous in considering that the appeals should be allowed, I trust that the decision of your Lordships' House will be seen, not as in any way inconsistent with those decisions, but on the contrary as a contribution to the growth of Convention jurisprudence.

64 I would only add that the particular grounds of objection taken by some respondents to the role of the Secretary of State, such as the objection in *Alconbury* based on the ground of his having a financial interest in the matter, might if appropriate be raised as objections to the ultimate decision itself. They are insufficient to disqualify him in limine.

LORD HOFFMANN

The issue

65 My Lords, the issue in these three appeals is whether it is compatible with the Human Rights Act 1998 for Parliament to confer upon the Secretary of State the power to make decisions which affect people's rights to the ownership, use or enjoyment of land. The Divisional Court has decided that article 6 of the European Convention requires such decisions to be made by independent and impartial tribunals. This would mean radical amendment to the system by which such decisions have been made for many years. In view of the importance of the case, your Lordships have given leave for an appeal to be brought directly from the Divisional Court.

The facts

66 Although the principle must be of general application, the contexts in which the question has arisen in these appeals are planning, highway improvement and compulsory purchase. In the first appeal ("the *Alconbury* case"), a company has applied for planning permission to construct a distribution centre of national significance on a disused American air base near Huntingdon. It could generate 7,000 new jobs but would obviously affect the lives of many people living in the neighbourhood. In the second appeal ("the *Holding & Barnes* case"), the respondents have applied for planning permission to use land at Canvey Island for the storage and sale of wrecked cars. Again, the activity will generate employment but the site is close to some gas storage installations and the Health and Safety Executive thinks that this would create a danger to people living in the area. In the third appeal ("the *Legal and General* case"), the respondent owns land near the interchange between the M4 motorway and the A34 trunk road at Newbury. The Highways Agency, a branch of the department of the Environment, Transport and the Regions, has promoted a road improvement scheme which would involve taking the respondent's land.

67 In each of these cases the statutory decision maker is the Secretary of State. In the first two, this is by virtue of his exercise of a statutory discretion. In the *Alconbury* case, the application for planning permission has been refused by the Huntingdonshire District Council and the developer has appealed to the Secretary of State. The appeal could have been determined under Schedule 6 to the Town and Country Planning Act 1990 by an inspector appointed to conduct a public inquiry, but the Secretary of State has exercised his discretion under paragraph 3 of the Schedule to "recover" the appeal and decide it himself. In the *Holding & Barnes* case, the local planning authority was minded to grant permission but the Secretary of State has exercised his power under section 77 of the 1990 Act to "call in" the application and decide it himself. In the *Legal and General* case, the Secretary of State is the only statutory decision maker.

68 All three cases involve general social and economic issues. They concern the rights of individuals to use, enjoy and own their land. But the number of persons potentially interested is very large and the decisions involve the consideration of questions of general welfare, such as the national or local economy, the preservation of the environment, the public safety, the convenience of the road network, all of which transcend the interests of any particular individual.

Democracy and the rule of law

69 In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example: Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the general or special commissioners or the courts. On the other hand, sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.

70 There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

71 All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of the public interest. This is reflected in the terms of article 1 of Protocol 1 to the Convention:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> "The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

72 Thus, under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest so requires. And, under the second paragraph, the use of property may be restricted without compensation on similar grounds. Importantly, the question of what the public interest requires for the purpose of article 1 of the First Protocol can, and in my opinion should, be determined according to the democratic

principle—by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.

73 There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in article 1 of the First Protocol that a taking of property must be "subject to the conditions provided for by law". The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament. But this is not the occasion upon which to discuss the limits of judicial review. The only issue in this case is whether the Secretary of State is disqualified as a decision maker because he will give effect to policies with which, ex hypothesi, the courts will not interfere.

The question of principle

74 My Lords, these basic principles are the background to the interpretation of article 6(1): "In the determination of his 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." Apart from authority, I would have said that a decision as to what the public interest requires is not a "determination" of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as article 6 has in contemplation. The reason is not simply that it involves the exercise of a discretion, taking many factors into account, which does not give any person affected by the decision the right to any particular outcome. There are many such decisions made by courts (especially in family law) of which the same can be said. Such decisions may nevertheless be determinations of an individual's civil rights (such as access to his child: compare *W v United Kingdom* (1987) 10 EHRR 29) and should be made by independent and impartial tribunals. But a decision as to the public interest (what I shall call for short a "policy decision") is quite different from a determination of right. The administrator may have a duty, in accordance with the rule of law, to behave fairly ("quasi-judicially") in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires.

75 The distinction between policy decisions and determinations of right was put with great clarity by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, 398–399, when speaking of the decision to confirm a compulsory purchase order:

> "the functions of the minister in carrying these provisions into operation are fundamentally administrative . . . subject only to the qualification that, at a particular stage and for a particular and limited purpose, there is superimposed on his administrative character a character which is loosely described as 'quasi-judicial'. The language

A which has always been construed as giving rise to the obligations, whatever they may be, implied in the words 'quasi-judicial' is to be found in the duty to consider the objections . . . The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz, the decision whether or not to confirm the B order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue . . . on the substantive matter, viz, whether the order should be confirmed or not, there is a third party who is not present, viz, the public, and it is the C function of the minister to consider the rights and the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect of the public interest that the discretion that Parliament has given to the minister comes into operation . . . His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts." D

76 In principle, therefore, and apart from authority, I would say that article 6(1) conferred the right to an independent and impartial tribunal to decide whether a policy decision by an administrator such as the Secretary of State was lawful but not to a tribunal which could substitute its own view of what the public interest required. However, section 2(1) of the Human E Rights Act 1998 requires an English court, in determining a question which has arisen in connection with a Convention right, to take into account the judgments of the European Court of Human Rights ("the European court") and the opinions of the Commission. The House is not bound by the decisions of the European court and, if I thought that the Divisional Court was right to hold that they compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have F considerable doubt as to whether they should be followed. But in my opinion the Divisional Court misunderstood the European jurisprudence. Although the route followed by the European court has been a tortuous one and some of its statements require interpretation, I hope to demonstrate that it has never attempted to undermine the principle that policy decisions within the limits imposed by the principles of judicial review are a matter for G democratically accountable institutions and not for the courts.

The European jurisprudence

77 The main European authorities are four decisions, two of the Commission and two of the European court, which deal specifically with the English planning system. But before I analyse these important cases, I must give a more general account of the development of the jurisprudence on the H right to an independent and impartial tribunal.

78 As a matter of history it seems likely that the phrase "civil rights and obligations" was intended by the framers of the Convention to refer to rights created by private rather than by public law. In other words, it excluded even the right to a decision as to whether a public body had acted lawfully,

which English law, with that lack of a clear distinction between public and private law which was noted by Dicey, would treat as part of the civil rights of the individual. Sir Vincent Evans, in his dissenting judgment in *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, 36, said that an intention that the words should bear this narrow meaning appeared from the negotiating history of the Convention. In his dissenting judgment in *König v Federal Republic of Germany* (1978) 2 EHRR 170, Judge Matscher said that the primary purpose of article 6(1) was, by way of reaction against arbitrary punishments under the Third Reich, to establish the right to an independent court in criminal proceedings. The framers extended that concept to cases which, according to the systems of the majority of contracting states, fell within the jurisdiction of the ordinary courts of civil law. But there was no intention to apply article 6(1) to public law, which was on the continent a matter for the administrative courts.

79 These views of the meaning of "civil rights and obligations" are only of historical interest, because, as we shall see, the European court has not restricted article 6(1) to the determination of rights in private law. The probable original meaning, which Judge Wiarda said in *König's* case, at p 205, was the "classical meaning" of the term "civil rights" in a civilian system of law, is nevertheless important. It explains the process of reasoning, unfamiliar to an English lawyer, by which the European court has arrived at the conclusion that article 6(1) can have application to administrative decisions. The court has not simply said, as I have suggested one might say in English law, that one can have a "civil right" to a lawful decision by an administrator. Instead, the court has accepted that "civil rights" means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law.

80 The seminal case is *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455. This concerned an Austrian statute which required transfers of agricultural land to be approved by a District Land Transactions Commission with a right of appeal to a Regional Commission. In the absence of approval, the contract of sale was void. The purpose of the law was to keep agricultural land in the hands of farmers of small and medium holdings and the District Commission was required to refuse consent to a transfer which appeared to violate this policy. This was a classic regulatory power exercisable by an administrative body. The court nevertheless held that article 6(1) was applicable to its decision on the ground that it was "decisive" for the enforceability of the private law contract for the sale of land. Thus a decision on a question of public law by an administrative body could attract article 6(1) by virtue of its effect on private law rights. On the facts, the court held that article 6(1) had been satisfied because the Regional Commission was an independent and impartial tribunal.

81 The full implications of *Ringeisen* were not examined by the court until some years later. It led in *König v Germany* 2 EHRR 170 to a sharp disagreement between those members of the court who saw it as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals and those who regarded it as a potential Pandora's box and wanted to confine it as narrowly as possible. Dr König was a surgeon charged with unprofessional conduct before a specialist medical tribunal attached to the Frankfurt Administrative Court. It withdrew his right to

practice and run a clinic. He appealed to an administrative Court of Appeal and there followed lengthy and complicated proceedings. His complaint to the European court under article 6(1) was that he had been denied the right to a decision "within a reasonable time". But this raised the question of whether, in principle, article 6(1) applied to disciplinary proceedings before an administrative court. By a majority, the court held that it did. On the *Ringeisen* principle, it affected private law rights such as his goodwill and his right to sell his services to members of the public.

82 Judge Matscher delivered a powerful dissent, saying that it was unwise to try to apply the pure judicial model of article 6(1) to the decisions of administrative or domestic tribunals. They might share some characteristics with courts (e g requirements of fairness) but in other respects they were different. For example, one could not apply the imperative of a public hearing to a professional disciplinary body. A private hearing might be more in the public interest. If article 6(1) was going to be applied to administrative law, it would have to be substantially modified.

83 The majority view which prevailed in *König's* case has enabled the court to develop a jurisprudence by which it has imposed a requirement that all administrative decisions should be subject to some form of judicial review. Sweden, for example, has been held to be in breach of article 6(1) on a number of occasions because it lacked any procedure by which a government decision could be challenged in the courts: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; *Bodén v Sweden* (1987) 10 EHRR 367; *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309; *Allan Jacobsson v Sweden* (1989) 12 EHRR 56; *Pudas v Sweden* (1987) 10 EHRR 380; *Zander v Sweden* (1993) 18 EHRR 175; *Skärby v Sweden* (1990) 13 EHRR 90. In *Benthem v The Netherlands* (1985) 8 EHRR 1 the Netherlands was similarly held to be in breach because in constitutional theory the administrative court to which an appeal lay only tendered advice to the Crown which it was entitled to reject.

84 But the dissent of Judge Matscher in *König's* case 2 EHRR 170 has been vindicated in the sense that the application of article 6 to administrative decisions has required substantial modification of the full judicial model. The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision. But the European court, in deciding the *extent* to which such decisions should be open to review, has been in practice fairly circumspect. Its jurisprudence on this point has however been complicated by the apparent breadth of some statements in two cases concerning medical disciplinary proceedings in Belgium.

85 In *Le Compte, Van Leuven and De Meyere v Belgium* 4 EHRR 1 three doctors who had been suspended by a disciplinary tribunal sitting in private claimed that their right to a public hearing under article 6 had been infringed. They had a right of appeal to the Cour de Cassation, which did sit in public, but that was only on a point of law. The European court said, at para 51, that this was not good enough:

> "article 6 draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' and the right to a judicial determination of a dispute cover

questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault. It follows that article 6(1) was not satisfied . . ." A

86 In the later case of *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, in which a similar situation arose, the court said, at paragraph 29, that although disciplinary jurisdiction could be conferred upon professional bodies which did not meet the requirements of article 6(1) (e g because they were not "established by law" or did not sit in public): B

"None the less, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)." C

87 The reference to "full jurisdiction" has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be reviewable on its merits by an independent and impartial tribunal. It was certainly so relied upon by counsel for the respondents in these appeals. But subsequent European authority shows that "full jurisdiction" does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires. D

88 This emerges most clearly from the decisions on the English planning cases, which I shall analyse later in some detail. But the leading European authority for the proposition that it is not necessary to have a review of the merits of a policy decision is *Zumtobel v Austria* (1993) 17 EHRR 116. The Zumtobel partnership objected to the compulsory purchase of their farming land to build the L52 by-pass road in the Austrian Vorarlberg. The appropriate government committee heard their objections but confirmed the order. They appealed to an administrative court, which said that the government had taken proper matters into account and that it was not entitled to substitute its decision for that of the administrative authority. They complained to the Commission and the European court that, as the administrative court could not "independently assess the merits and the facts of the case", it did not have "full jurisdiction" within the meaning of the *Albert and Le Compte* formula. The European court said, at para 32, that its jurisdiction was sufficient in the circumstances of the case, "Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership." E F G

Enforcement proceedings in English law

89 This background should make it easier to follow the reasoning of the Commission and the European court in the four cases in which they have specifically considered the English planning system. But before I examine these cases, it is necessary to say something more about certain aspects of English planning law. Since the appointed day under the Town and Country Planning Act 1947 (1 July 1948), planning permission has been required in H

respect of any development of land: see section 12(1) of the 1947 Act and now section 57(1) of the 1990 Act. Development without planning permission is a "breach of planning control": see section 171A of the 1990 Act as inserted by section 4 of the Planning and Compensation Act 1991. But a breach of planning control does not in itself give rise to any criminal or civil liability. It is necessary for the local planning authority to take enforcement proceedings in accordance with Part VII of the 1990 Act.

90 In applying the distinction between policy decisions and the determination of rights, one would expect that, while the question of whether planning permission should be granted was a matter of policy, the question of whether a breach of planning control had taken place would involve a determination of right. It is no different in principle from a determination as to whether a person has contravened any other rule. No questions of policy are involved in the decision as to whether there has been a breach of planning control or not. So prima facie one would think that enforcement proceedings should fall within the category of decisions in which one was entitled to the judgment of an independent and impartial tribunal.

91 This was the view of Parliament when it enacted the 1947 Act. Section 23(1) provided that, if it appeared to a local planning authority that there had been a breach of planning control, it could within a period of four years of the breach serve an "enforcement notice" upon the owner and occupier of the land. The notice could require him to restore the land to its previous condition or discontinue any use of the land. The notice took effect after a specified period of not less than 28 days and, if the owner nevertheless failed to restore the land to its previous condition, the local planning authority could enter, take the necessary steps and require him to pay the cost. If he did not comply with a notice requiring him to discontinue a use of land, he could be prosecuted before the magistrates and fined: see section 24(1) and (3).

92 These enforcement provisions included a right for a person "aggrieved" by an enforcement notice to appeal to the magistrates on various grounds, including the grounds that planning permission had been granted or that no planning permission was required. There was a further right of appeal to quarter sessions. In addition, a person prosecuted for failure to discontinue a use in accordance with an enforcement notice could challenge the validity of the notice before the criminal court on any ground whatever, including those upon which he could have appealed to the magistrates when it was served upon him: *Francis v Yiewsley and West Drayton Urban District Council* [1958] 1 QB 478.

93 These provisions therefore made the question of whether there had been a breach of planning control entirely a matter for judicial decision. In addition, a person served with an enforcement notice could apply to the local planning authority for permission to retain or continue the offending structures or works, even if he had just applied and been refused. If he was refused (or again refused) by the local planning authority, he could appeal to the minister. An appeal against an enforcement notice (or resistance to a prosecution) proceeded in parallel with the application for planning permission, even though the quashing of the enforcement notice would make the planning application unnecessary and the grant of planning permission would invalidate the enforcement notice.

94 Enforcement of planning control under the 1947 Act was therefore extremely complicated, time-consuming and expensive. As a result, the whole system was radically recast by Part II of the Caravan Sites and Control of Development Act 1960. The appeal to the magistrates was abolished and instead, by section 33, a person served with an enforcement notice was given a right of appeal to the minister on a number of grounds. These included:

> "(a) that permission ought to be granted . . . for the development to which the enforcement notice relates . . . (b) that permission has been granted . . . (c) that no permission was required . . . (d) that what is assumed in the enforcement notice to be development did not constitute or involve development . . . (e) that the enforcement notice was not served on the owner or occupier of the land within the relevant period of four years"

and some other grounds. Section 33(8) then provided that the validity of an enforcement notice "shall not be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b), (c), (d) or (e) . . . except by way of an appeal under this Part of this Act". Section 34(1) gave a right of appeal from the minister's decision to the High Court, but only on a point of law. This right of appeal is now contained in section 289 of the 1990 Act.

95 My Lords, I draw attention to the significant changes made by the 1960 Act. First, it withdrew from the local planning authority the jurisdiction to deal with a planning application made in response to an enforcement notice. All such applications or deemed applications were to be treated as if they had been called in by the minister: section 33(2). Secondly, it withdrew the right to question an enforcement notice before a court on the grounds that there had in fact been no breach of planning control, because permission (or a deemed permission under the General Development Order) had been granted or because no permission was required. It transferred the right to decide these questions to the minister. Thirdly, it removed the right of a defendant prosecuted for failure to comply with an enforcement notice to challenge the validity of the enforcement notice on certain of the grounds which could have been raised by way of appeal to the minister. For present purposes, the second and third changes are the most important because they effectively vested in the minister, subject only to appeal on a point of law, the exclusive right to decide the question of whether there had been a breach of planning control for which the owner was ultimately, in the event of non-compliance with the notice, liable to criminal sanctions. The changes also meant that the minister could now have the dual function of deciding in the same proceedings the policy question of whether planning permission should be granted and the factual question of whether there had been a breach of planning control.

96 There have been further changes in the enforcement system since 1960 but the essential features, as now contained in the 1990 Act, remain the same. The grounds for challenging the validity of the enforcement notice by an appeal to the Secretary of State under section 174 have been somewhat extended and the grounds for challenge in any other proceedings have been further restricted: see *R v Wicks* [1998] AC 92.

97 The procedure for an appeal against an enforcement notice is prescribed by section 175 of the 1990 Act and Part III of the Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991

(SI 1991/2804, as amended by SI 1992/1492). The appellant and the local planning authority have the right to appear and be heard before an inspector, who makes his report and recommendations to the Secretary of State. If the Secretary of State is minded to disagree with the inspector on any material question of fact, he must notify the parties and give them the opportunity to make representations. Schedule 6 to the 1990 Act, which gives the Secretary of State power to confer power upon inspectors to hear and determine appeals (subject to recovery under paragraph 3), also applies to enforcement notice appeals.

European cases on the English planning system

98 My Lords, this background enables me to discuss the four cases to which your Lordships were referred in which the European court or the Commission have considered the English planning system. The first in time is *ISKCON v United Kingdom* (1994) 18 EHRR CD 133, a decision of the Commission on admissibility. ISKCON was an Hindu religious organisation which owned a large manor house at Letchmore Heath in the Hertfordshire Green Belt near Watford. It entered into a planning agreement with the local planning authority by which it agreed not to allow more than 1,000 visitors on any one day without the consent of the authority, which was given for six festival days in the year. When an average of 1,500 people started coming every Sunday, the planning authority served an enforcement notice. ISKCON appealed to the Secretary of State on ground (a) (that planning permission should be granted) and other grounds which were later dropped. The inspector conducting the inquiry considered that the special needs of the organisation did not outweigh the policy of preserving the Green Belt and recommended that the appeal be dismissed. The Secretary of State accepted the recommendation. ISKCON appealed to the High Court under what is now section 289 of the 1990 Act. The points of law relied upon were that the inspector and Secretary of State failed to have regard to relevant considerations and had been under a misapprehension about various facts. The judge dismissed the appeal, saying that the Secretary of State "was entitled to regard the inspector's conclusions as firmly founded".

99 ISKCON's complaint to the Commission alleged the breach of various articles of the Convention including article 6(1). The Commission assumed that the Secretary of State was an "administrative body" who did not himself comply with article 6 but held that the right of appeal on a point of law was sufficient. It recited the formula from *Albert and Le Compte's* case 5 EHRR 533, para 29 which required an appeal to "judicial bodies with full jurisdiction", went on to describe the principles of judicial review by which the English High Court decided whether the Secretary of State had erred in law and concluded that this jurisdiction was wide enough to satisfy the *Albert and Le Compte* formula. It added, at p 145:

> "It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency and where the courts do not refuse to examine any of the points raised: article 6 gives a right to a court that has 'full jurisdiction' (cf *Zumtobel v Austria* 17 EHRR 116, para 32)."

100 *ISKCON's* case is thus a decision that, at least when the ground of appeal against an enforcement notice is the policy ("expediency") question of whether planning permission should be granted, a decision by the Secretary of State subject to an appeal to the High Court satisfies article 6(1). It is fair to say that it does not address the question of whether this would also do for a decision on the factual question of whether there has been a breach of planning control. But the principle is sufficient for the purposes of the two planning appeals before your Lordships, which are both concerned solely with the question of whether planning permission should be granted.

101 The next case, and the most important of the four, is *Bryan v United Kingdom* (1995) 21 EHRR 342. Mr Bryan was a farmer at Warrington in Cheshire. He built two brick buildings on land in a conservation area without planning permission and the planning authority served an enforcement notice which required them to be demolished. He appealed to the Secretary of State on grounds (a) (that planning permission should be granted), (b) (that there had been no breach of planning control) and two other grounds. The Secretary of State appointed an inspector with power under Schedule 6 to hear and determine the appeal. He rejected the appeal on ground (a) because the buildings did not enhance or preserve the appearance of the conservation area. On ground (b), Mr Bryan contended that the buildings were "designed for the purpose of agriculture" and that planning permission for them was deemed to have been granted under article 3 of the Town and Country Planning General Development Order 1988 (SI 1988/1813). The planning authority said that they were not designed for the purpose of agriculture and drew attention to the fact that they looked like detached houses with Georgian windows and other domestic features. The inspector said that the question was one of fact and degree. He decided that the planning authority's view was correct and dismissed the appeal.

102 Mr Bryan appealed to the High Court under section 289. His notice of motion challenged the inspector's finding on ground (b) but the point was abandoned on the advice of counsel that, being a matter of fact and degree, it raised no arguable question of law. On ground (a) it was alleged that the inspector had failed to take into account a relevant factor, namely that Mr Bryan was entitled to erect agricultural buildings of much the same size and appearance within the conservation area. The judge said that this was a matter of planning judgment for the inspector and dismissed the appeal.

103 The complaint to the Commission was on the ground that these procedures did not satisfy article 6(1). The Commission held Mr Bryan's complaint admissible but decided, by a majority of 11 to 5, that there had been no breach of article 6(1). In order to understand the issues, it is convenient to start with the opinion of the minority, at p 356. They were entirely concerned with whether article 6(1) had been satisfied in relation to the question of whether the building "was indeed a barn designed and intended for agricultural use". This, they emphasised, was not a question of "expediency":

> "In the *Zumtobel* case 17 EHRR 110, para 32 the European Court of Human Rights referred to the 'respect which must be accorded to decisions taken by administrative authorities on grounds of expediency'.

A Whilst questions of expediency play a large role in matters relating to, for example, the public interest involved if a particular development is permitted, the present case concerns, at least in part, the fundamental factual issue of whether the building erected by the applicant was, or was not, designed for the purposes of agriculture and so had deemed planning permission. This factual issue was in dispute and in the circumstances of this case the High Court judge was not able to provide a 'determination' B of it. For us, this deprived the applicant of access to a 'tribunal' to which article 6(1) of the Convention entitled him."

104 There is, if I may respectfully say so, considerable force in the reasoning of the minority and, as the history shows, it accords with the view which Parliament took of the appropriate enforcement procedures in 1947. C But the purity of the 1947 system had turned out in practice to be unworkable and it therefore had to be replaced with the impure system which we have today. For present purposes, the important point to notice is that the minority had no difficulty in accepting limited judicial review of the "expediency" questions involved in deciding whether planning permission should be granted. There is nothing to suggest that they would have disagreed with the reasoning or decision in *ISKCON's* case.

D 105 The majority said, at para 46, that no complaint could be made about the limited right of appeal on ground (a) because it called for "respect on the grounds of expediency" and referred to *Zumtobel's* case. As for the ground (b) appeal, they accepted that it "would have raised matters of a more factual nature" but said that, as the point had not been argued, it was impossible to say whether judicial review would have been inadequate.

E 106 Both the majority and minority judgments proceeded upon the assumption that the inspector was not an "independent and impartial tribunal" and that the question was whether the High Court's jurisdiction under section 289 was a sufficiently "full jurisdiction" to satisfy article 6(1). But the opinion of Mr Nicolas Bratza, concurring with the majority, needs some attention because it introduced a new and original element into the reasoning, which, as we shall see, influenced the judgment of the European F court.

107 Mr Bratza started, at p 353, by saying that the only ground of appeal which Mr Bryan had pursued in the High Court, namely (a), "related to matters of planning policy" and that, in accordance with the reasoning in *Zumtobel's* case, article 6 did not require "that a court should have the power to substitute its view for that of the administrative authorities on matters of planning policy or 'expediency' ". On this point, therefore, all G members of the Commission were of the same mind. Mr Bratza then turned his attention to ground (b) and said that, in his view, the power of the High Court under section 289 was sufficient even for the purpose of fact-finding to amount to "full jurisdiction". He said, at p 354:

"It appears to me that the requirement that a court or tribunal should have 'full jurisdiction' cannot be mechanically applied with the result H that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned. Whether the power of judicial review is sufficiently wide to satisfy the requirements of article 6 must in my view depend on a

number of considerations, including the subject matter of the dispute, the nature of the decision of the administrative authorities which is in question, the procedure, if any, which exists for review of the decision by a person or body acting independently of the authority concerned and the scope of that power of review."

108 Mr Bratza pointed out, at pp 354–355, that an inspector hearing an appeal under section 174 acted in a quasi-judicial capacity and in accordance with prescribed procedures. Both parties were entitled to be heard and he gave a reasoned decision. It was true that, for the purpose of applying policy, the inspectors could not be said to be independent. They were chosen from the salaried staff of the Planning Inspectorate, "which serves the Secretary of State in the furtherance of his policies". But for the purposes of finding and evaluating the facts, he was sufficiently independent:

"there is . . . nothing to suggest that, in finding the primary facts and in drawing conclusions and inferences from those facts, an inspector acts anything other than independently, in the sense that he is in no sense connected with the parties to the dispute or subject to their influence or control; his findings and conclusions are based exclusively on the evidence and submissions before him."

109 Mr Bratza then discussed the breadth of the High Court's judicial review powers and said that this power of review, "combined with the statutory procedure for appealing against an enforcement notice", was sufficient to meet the requirement of "full jurisdiction" inherent in article 6(1).

110 Mr Bratza's particular insight, if I may respectfully say so, was to see that a tribunal may be more or less independent, depending upon the question it is being called upon to decide. On matters of policy, the inspector was no more independent than the Secretary of State himself. But this was a matter on which independence was unnecessary—indeed, on democratic principles, undesirable—and in which the power of judicial review, paying full respect to the views of the inspector or Secretary of State on questions of policy or expediency, was sufficient to satisfy article 6(1). On the other hand, in deciding the questions of primary fact or fact and degree which arose in enforcement notice appeals, the inspector was no mere bureaucrat. He was an expert tribunal acting in a quasi-judicial manner and therefore sufficiently independent to make it unnecessary that the High Court should have a broad jurisdiction to review his decisions on questions of fact.

111 I have spent some time on Mr Bratza's opinion because I think it is clear that it influenced and illuminates the reasoning of the European court. The court said, at para 38, that although the inspector was required to decide the appeal "in a quasi-judicial, independent and impartial, as well as fair, manner" he was still the creature of the Secretary of State, whose own policies were in issue and who could remove him at any time. Therefore:

"the review by the inspector does not of itself satisfy the requirements of article 6 of the Convention, despite the existence of various safeguards customarily associated with an 'independent and impartial tribunal'."

112 The court noted, at para 44, that:

"the appeal to the High Court, being on 'points of law', was not capable of embracing all aspects of the inspector's decision . . . In

particular, as is not infrequently the case in relation to administrative law appeals in 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."

113 The question was whether this limited jurisdiction was "full jurisdiction" for the purposes of the *Albert and Le Compte* formula 5 EHRR 533. The court considered grounds (a) and (b) separately. On ground (a) it agreed, at paragraph 47, with the Commission that the applicant's submissions "went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and in a conservation area' ". Judicial review was therefore, on the principle of *Zumtobel's* case 17 EHRR 116, a sufficiently full jurisdiction.

114 On ground (b), the European court noted what, in para 46, it described as:

> "the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality."

115 It went on to say, at para 47, that, if Mr Bryan had pursued his appeal on ground (b), the High Court, while not being able to substitute its own findings of fact, "had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational". This was enough to satisfy article 6:

> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states."

116 My Lords, I have discussed *Bryan's* case at length because the Divisional Court placed heavy reliance upon it and, in my view, seriously misunderstood it. The Divisional Court treated it as holding that, *whatever the issues*, the "safeguards" which the court enumerated in, para 46, as attaching to the functions of the inspectors were necessary before the existence of an appeal on a point of law or judicial review would satisfy article 6. But this is the very opposite of what the court was at pains to emphasise. It said, in para 45, in language echoing that of Mr Bratza's opinion:

> "in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

117 If, therefore, the question is one of policy or expediency, the "safeguards" are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the "safeguards" but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.

118 My Lords, I can deal much more briefly with the other two cases. In *Varey v United Kingdom* The Times, 30 January 2001 the Commission considered a complaint by gipsies against whom enforcement proceedings had been taken for stationing caravans on land without planning permission. They had applied three times for permission. On the first occasion, an appeal to the Secretary of State was dismissed. On the second occasion, the inspector said that there had been a change in circumstances and recommended that permission be granted but the Secretary of State disagreed. He said that the new circumstances were insufficient to justify overriding the Green Belt policy. On the third occasion, the inspector again recommended that permission be granted and for similar reasons the Secretary of State rejected his recommendation and dismissed the appeal. In no case did the applicants appeal to the High Court.

119 The Commission, following the *Bryan* case 21 EHRR 342, said that there had been no violation of article 6. The High Court's jurisdiction on appeal from the Secretary of State was sufficient. So the case adds little to *Bryan* itself. I would only comment that I find puzzling a remark of the Commission, at para 78, that:

> "the procedural protection afforded to the applicants' interests by the process of a public inquiry before a planning inspector, who had the benefit of inspecting the site and of receiving written and oral evidence and representations, must be regarded as considerably diminished by the rejection on two occasions by the Secretary of State of the inspector's recommendations."

120 The Secretary of State does not appear to have differed from the inspector on any finding of fact or evaluation of the facts. He disagreed because he did not think that the inspector had given sufficient weight to the importance of maintaining the Green Belt. This is a pure question of administrative policy or expediency. It has nothing to do with the issues on which it is essential for the inspector to be judicial and impartial. However, despite these remarks, the Commission concluded that, even though the safeguards had been diminished, the procedure still complied with article 6.

121 Finally there is *Chapman v United Kingdom* (2001) 33 EHRR 399, a decision of the Grand Chamber of the European court. This was another case of enforcement proceedings against a gipsy. Her appeal on ground (a) was dismissed by an inspector exercising the power to determine the appeal under Schedule 6. She did not appeal to the High Court and

A complained that the High Court would not have been entitled to determine the merits of her claim that she should have planning permission. The court stated briefly that, following the *Bryan* case, the scope of judicial review was sufficient to satisfy article 6.

122 My Lords, I conclude from this examination of the European cases on our planning law that, despite some understandable doubts on the part of B some members of the Commission about the propriety of having the question of whether there has been a breach of planning control determined by anyone other than an independent and impartial tribunal, even this aspect of our planning system has survived scrutiny. As for decisions on questions of policy or expediency such as arise in these appeals, whether made by an inspector or the Secretary of State, there has never been a single voice in the Commission or the European court to suggest that our provisions for judicial C review are inadequate to satisfy article 6.

The judgment of the Divisional Court

123 My Lords, I must now examine the reasoning of the Divisional Court. It considered the way in which decisions are made by the Secretary of State and came to the conclusion that he was not independent or impartial. D Even though the department has elaborate procedures to ensure that the decision-making process is not contaminated by reliance on facts which had not been found by the inspector or fairly put to the parties, the decision is bound to be influenced by the departmental view on policy. Mr Kingston, who appeared for the Huntingdonshire District Council, spent a good deal of time making this proposition good by examining the documents showing E how the department was, at various levels, involved in the development of policy for Alconbury. But this was entirely what I would have expected. It is the business of the Secretary of State, aided by his civil servants, to develop national planning policies and co-ordinate local policies. These policies are not airy abstractions. They are intended to be applied to actual cases. It would be absurd for the Secretary of State, in arriving at a decision in a F particular case, to ignore his policies and start with a completely open mind.

124 For these reasons, the Divisional Court said that the Secretary of State was not impartial in the manner required by article 6: "What is objectionable in terms of article 6 is that he should be the judge in his own cause where his policy is in play." (See para 86.) I do not disagree with the conclusion that the Secretary of State is not an independent and impartial G tribunal. He does not claim to be. But the question is not whether he should be a judge in his own cause. It is whether he should be a judge at all.

125 The Divisional Court then considered whether the requirements of article 6 were satisfied by the right to have an application for judicial review determined by a court. This was rightly described by Tuckey LJ as the crucial question. The answer he gave was that the procedure by which the Secretary of State arrived at his decision did not contain "sufficient H safeguards to justify the High Court's restricted power of review". The Secretary of State, having complied with the requirements of natural justice, was "free to make his own decision" and to take account of legal and policy guidance and recommendations from within the department "which are not seen by the parties". Therefore, said Tuckey LJ, at para 95:

"In terms of article 6 the decision on the merits, which usually involves findings of fact and planning judgment, has not been determined by an independent and impartial tribunal or anyone approaching this, but by someone who is obviously not independent and impartial."

126 There are three strands of reasoning here. First, there is the fact that the parties are not privy to the processes of decision making which go on within the department. These contain, on the one hand, elaborate precautions to ensure that the decision maker does not take into account any factual matters which have not been found by the inspector at the inquiry or put to the parties and, on the other hand, free communication within the department on questions of law and policy, with a view to preparing a recommendation for submission to the Secretary of State or one of the junior ministers to whom he has delegated the decision. The latter is standard civil service procedure and takes place, as Lord Greene MR said in *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, after the Secretary of State's quasi-judicial function has been concluded and when he is acting in his capacity as an administrator making a public policy decision. The constitutional relationship between the Secretary of State and his civil servants was analysed by Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75, 95:

"To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head."

127 Thus the process of consultation within the department is simply the Secretary of State advising himself. If the Secretary of State was claiming to be, in his own person, an independent and impartial tribunal, the fact that he received confidential advice and recommendations from civil servants in his department might throw some doubt upon his claim. But, since he not only admits but avers that his constitutional role is to formulate and apply government policy, the fact that both formulation and application require the advice and assistance of his civil servants is no more than one would expect.

128 The second strand concerns the facts. These are found by the inspector and must be accepted by the Secretary of State unless he has first notified the parties and given them an opportunity to make representations in accordance with rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. This is the point upon which, in my opinion, the *Bryan* case 21 EHRR 342 is authority for saying that the independent position of the inspector, together with the control of the fairness of the fact-finding procedure by the court in judicial review, is sufficient to satisfy the requirements of article 6.

A **129** Finally, the third strand is that of planning judgment. In this area the principle in the *Zumtobel* case 17 EHRR 116, as applied in the *ISKCON* and *Bryan* cases to questions of policy, does not require that the court should be able to substitute its decision for that of the administrative authority. Such a requirement would in my opinion not only be contrary to the jurisprudence of the European court but would also be profoundly undemocratic. The Human Rights Act 1998 was no B doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.

130 For these reasons I respectfully disagree with the Divisional Court's conclusion that decisions by the Secretary of State in planning cases are incompatible with Convention rights. Equally, the fact that the Department of Transport has promoted the road improvement scheme in the *Legal and* C *General* case does not mean that judicial review cannot satisfy aticle 6 unless the court can itself decide whether the scheme is a good idea. Nor do I think it makes any difference that in the *Alconbury* case the Ministry of Defence, another emanation of the Crown, has a financial interest in the proposed development. Once again, this is something which might be significant if the Secretary of State was claiming to be an impartial tribunal. But, as he is not, the remedy available by way of judicial review to quash a decision on the D ground that the Secretary of State has taken irrelevant matters into account is sufficient to satisfy article 6.

The Lord Advocate's intervention

131 Your Lordships were referred to the decision of the Court of Session in *County Properties Ltd v The Scottish Ministers* 2000 SLT 965 in which it E was decided that a decision on listed building consent by the Scottish Ministers was inconsistent with article 6 because they were not, as they acknowledged, an independent and impartial tribunal, and a court could not substitute its own decision on the questions of planning and aesthetic judgment which were central to the decision. This decision is on appeal to the Inner House but the Lord Advocate intervened in the argument before F your Lordships and appeared by counsel to put forward arguments as to why the case was wrongly decided.

132 For the reasons I have already given, I would accept this submission. The very notion that such questions should be decided by a court or any other independent tribunal rather than by ministers accountable to the Scottish Parliament seems to me contrary to the democratic principle. I must however deal with a separate argument put G forward by Mr Macdonald on behalf of the Lord Advocate, which he said provided a shorter route to the same answer.

133 Mr Macdonald submitted that article 6 has no application to the decision by the Scottish Ministers (or the Secretary of State in England). Their decisions do not involve the determination of anyone's civil rights or obligations. They are simply the exercise of legal powers which affect, perhaps change, civil rights and obligations, but do not determine them H within the meaning of article 6. The point at which rights or obligations are determined is in the proceedings by way of judicial review, which decide whether the exercise of power by the administrator was lawful or not. As that question is decided by a court which is undoubtedly independent and impartial, that is the end of the case. Mr Macdonald said that this analysis

was supported by the opinion of the Commission in *Kaplan v United Kingdom* (1980) 4 EHRR 64, which concerned a decision by the Secretary of State that the applicant was not a fit and proper person to be involved in running an insurance company. The Commission said, in para 154 of its opinion, that article 6 lays down

> "guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a 'civil' character) are to be resolved. A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

134 My Lords, this reasoning is in accordance with the way in which, at the outset of this speech, I suggested to your Lordships that, apart from European authority, the case ought to be decided. But it provides a short answer only if it is assumed that article 6 requires no more than that judicial review proceedings be decided by an independent and impartial tribunal. If, however, article 6 is construed as going further and mandating some minimum content to the judicial review jurisdiction, then it is necessary to ask, as I have done at some length, whether the extent of the judicial review jurisdiction available in England and Scotland is sufficient to satisfy the requirements of the European court jurisprudence. As appears from my analysis of that jurisprudence, there is no doubt that the European court has construed article 6 as requiring certain minimum standards of judicial review. This appears most clearly from the Swedish cases to which I have referred.

135 Once one accepts this construction, it makes little difference whether one says, as in *Kaplan*, that the administrative act does not fall within article 6 at all and the question is concerned only with the adequacy and impartiality of the judicial review, or whether one says, as the European court and Commission have done in other cases, that the administrative act does in theory come within article 6 but the administrator's lack of impartiality can be cured by an adequate and impartial judicial review. The former seems to me a more elegant analysis, but the latter may be necessary in order to explain, in the context of civilian concepts, why the administrative process can be treated as involving at any stage a determination of civil rights and obligations. So, tempting as it is, I am unable to accept Mr Macdonald's short cut.

Conclusion

136 I would therefore allow the appeals and declare that the impugned powers are not in breach of or incompatible with the Human Rights Act 1998.

A **LORD CLYDE**

137 My Lords, by section 77 of the Town and Country Planning Act 1990 the Secretary of State for the Environment, Transport and the Regions may give directions requiring applications for planning permission to be referred to him instead of being dealt with by local planning authorities. Section 78 provides for the making of appeals to the Secretary of State against planning decisions or the failure to take such decisions and section 79 B provides for the opportunity of a hearing before a person appointed by the Secretary of State for that purpose. By paragraph 3 of Schedule 6 to the Act the Secretary of State may direct that a planning appeal which would otherwise be determined by a person appointed by him shall instead be determined by the Secretary of State. By paragraph 4 he may revoke such a direction. Provision is made in sections 14, 16, 18 and 125 of the Highways C Act 1980 for the making of orders by the Secretary of State with regard to certain roadways and by paragraphs 1, 7 and 8 of Part I of Schedule 1 to that Act provision is made for the hearing of objections at a local inquiry and the subsequent making or confirmation of the order by the Secretary of State. Section 2(3) of the Acquisition of Land Act 1981 and paragraph 4 of Schedule 1 to that Act provide in relation to the making of a compulsory purchase order by a minister for the hearing of objections at a public local D inquiry and the subsequent making of the order by the minister. Under sections 1 and 3 of the Transport and Works Act 1992 the Secretary of State may make orders in relation to among other things railways and waterways and section 23(4) disentitles an inspector hearing objections to such orders from authorising compulsory acquisitions or the compulsory creation or extinguishment of rights over land. The Divisional Court has held that these E provisions are incompatible with article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. That decision is challenged in the present appeals.

138 At the heart of the challenge is the objection that the Secretary of State cannot compatibly with article 6(1) himself determine the various issues to which these statutory provisions can give rise. No complaint is made where the decision is made by an inspector appointed by him. The F objection is levelled against his taking upon himself the direct function of being the decision maker.

The planning context

139 The general context in which this challenge is raised is that of planning and development. The functions of the Secretary of State in the G context of planning may conveniently be referred to as "administrative", in the sense that they are dealing with policy and expediency rather than with the regulation of rights. We are concerned with an administrative process and an administrative decision. Planning is a matter of the formation and application of policy. The policy is not matter for the courts but for the executive. Where decisions are required in the planning process they are not made by judges, but by members of the administration. Members of the H administration may be required in some of their functions to act in a judicial manner in that they may have to observe procedural rules and the overarching principles of fairness. But, while they may on some occasions be required to act like judges, they are not judges and their determinations on matters affecting civil rights and obligations are not to be seen as judicial

decisions. Even although there may be stages in the procedure leading up to the decision where what used to be described as a quasi-judicial character is superadded to the administrative task, the eventual decision is an administrative one. As was long ago observed by Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, 399:

> "That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."

Moreover the decision requires to take into account not just the facts of the case but very much wider issues of public interest, national priorities. Thus the function of the Secretary of State as a decision maker in planning matters is not in a proper sense a judicial function, although certain qualities of a judicial kind are required of him.

140 Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems. As is explained in paragraph I of the Government's publication Planning Policy Guidance Notes, the need to take account of economic, environmental, social and other factors requires a framework which provides consistent, predictable and prompt decision making. At the heart of that system are development plans. The guidance sets out the objectives and policies comprised in the framework within which the local authorities are required to draw up their development plans and in accordance with which their planning decisions should be made. One element which lies behind the framework is the policy of securing what is termed sustainable development, an objective which is essentially a matter of governmental strategy.

141 Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament. The whole scheme of the planning legislation involves an allocation of various functions respectively between local authorities and the Secretary of State. In placing some functions upon the Secretary of State it is of course recognised that he will not personally attend to every case himself. The responsibility is given to his department and the power rests in the department with the Secretary of State as its head and responsible for the carrying out of its work. Within his department a minister may well take advice on law and policy (*Bushell v Secretary of State for the Environment* [1981] AC 75) and the Secretary of State is entitled to seek elucidation on matters raised by the case which he has to decide, provided always that he observes the basic rules of fairness. In particular he should in fairness give the parties an opportunity to comment if after a

A public inquiry some significant factual material of which the parties might not be aware comes to his notice through departmental inquiry.

142 There may be various agencies which will advise him on particular aspects of planning, as for example an agency skilled in the conservation of historic buildings. But it is a false analysis to claim that there is a lis between a developer and such an agency which will be heard and determined by the minister. As Lord Greene MR observed in the *Johnson* case [1947] 2 All ER B 395, 399, in relation to objections to a compulsory purchase order proposed by a local authority:

> "it is not a lis inter partes, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation . . . on the substantive matter, viz, whether the order should be confirmed or not, there is a third party who is not present, viz, the public, C and it is the function of the minister to consider the rights and interests of the public."

The minister is not bound to follow the view of any agency, nor is he bound to follow the desires or interests of any other government department. He is not bound to apply a particular policy if the circumstances seem to him inappropriate for its application. He is not independent. Indeed it is not D suggested that he is. But that is not to say that in making the decisions on the matters in issue in the present appeals he is both judge and party. It does not seem to me correct to say of the Secretary of State that he is judex in sua causa, at least in any strict sense of that expression. He is, as I have already sought to explain, not strictly a judge. Moreover the cause is not in any precise sense his own. No one is suggesting that he, or the officials in his E department, have any personal financial or proprietary interest in these cases. The concern of the Secretary of State and his department is to manage planning and development in accordance with the broad lines of policy which have been prepared in the national interest.

143 One criticism which is levelled at the system is that the minister has the functions both of making planning policy and of applying the policies which he has made. But that combination of functions does not necessarily F give rise to unfairness. The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. G Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers. Nor is this a point which can be made solely in relation to H the Secretary of State. In a variety of administrative functions, in addition to planning, local authorities may devise and implement policies of their own.

144 It is now argued that the planning process is flawed in so far as the decision maker is the Secretary of State. It is said that where he is making the decision the case falls foul of article 6 of the Convention. One possible

solution which is proposed is that in the cases where at present the Secretary of State is himself the decision maker, cases for the most part which are likely to give rise to issues of widespread or even national concern, which may well have a wide impact on the lives of many and involve major issues of policy, the decision should be removed from the minister, who is answerable to Parliament, to an independent body, answerable to no one. That would be a somewhat startling proposition and it would be surprising if the Convention which is rooted in the ideas of democracy and the rule of law should lead to such a result.

Applicability of the Convention

145 The first question is whether article 6 applies at all to decisions by planning authorities or by the Secretary of State. An attractive argument was presented on behalf of the Lord Advocate to the effect that article 6 was as regards civil matters concerned with the securing of justice in the resolution of a legal claim or dispute and not with the acts of an administrative body exercising a discretionary power. Article 6 would only come to affect matters of administrative discretionary decisions at the stage when a dispute arose on the grounds that the decision maker had acted unlawfully, exceeding the parameters of his lawful discretion and erring in law. This argument looks to the whole terms of article 6(1), which can readily be seen as designed to cover judicial proceedings. Counsel pointed to the French text of the article and the use of the word "contestations" which could be understood as relating to a dispute on civil rights and obligations and to litigation before a court of law. In support of this approach reference was made to a decision of the Commission in *Kaplan v United Kingdom* (1980) 4 EHRR 64, para 154 where, after referring to claims and disputes concerning legal rights and obligations of a civil character, the Commission stated:

> "A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

146 This approach provides a clean and simple solution to the present problem. But I do not consider that it is sound. The observations in *Kaplan* on which the argument was supported have not been taken up by the court and reflect an earlier stage in the development of the jurisprudence on the scope and application of article 6(1). In the developing jurisprudence of the European Court of Human Rights it became recognised that a narrow view of the scope of article 6(1) was inappropriate. In *X v United Kingdom* (1982) 28 DR 177, 186 the Commission held that a compulsory purchase order affected the applicant's private rights of ownership, that these were "civil rights", and that in challenging the making of the order she was

A entitled to the protection of article 6(1). Counsel recognised the difficulty which that decision presented for his argument and was constrained to contend that the decision was wrong. His proposition involves a narrow understanding of the scope of the article.

147 In considering the scope of article 6(1) it is proper to take a broad approach to the language used and seek to give effect to the purpose of the provision. In *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, para 94 the B phrase was taken to cover "all proceedings the result of which is decisive for private rights and obligations". This included cases where the proceedings concerned a dispute between a private individual and a public authority. In *Golder v United Kingdom* (1975) 1 EHRR 524, para 32 the court considered the French and English text of the article and concluded that the article covered a right of access to a court or "tribunal" without there being C already proceedings pending. The court held, in para 36, that "article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal". These two cases predate the decision in *Kaplan*. In *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, para 45 the court observed of the word "contestation":

D > "Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning besides, it has no counterpart in the English text of article 6(1)."

The court held that, even if the use of the French word implied the existence of a disagreement, the evidence showed that there was one in that case where E there were allegations of professional misconduct which were denied. The reference to a determination reflects the necessity for there to be a dispute. But it does not require to be a dispute in any formal sense. In *Moreira de Azevedo v Portugal* (1990) 13 EHRR 721 the court followed the approach taken in *Le Compte* and held that article 6(1) applied where the applicant had joined as an assistant in criminal proceedings with a view to securing financial reparation for injuries which he claimed he had suffered at the F hands of the accused but had not filed any claim in civil proceedings. The distinction noticed by the Commission in *X v United Kingdom* (1998) 25 EHRR CD 88, 96 is not to be overlooked, that is the distinction between:

> "the acts of a body which is engaged in the resolution of a dispute ('contestation') and the acts of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not G to resolve a legal claim or dispute."

But at least from the time when a power has been exercised and objection is taken to that exercise the existence of a dispute for the purpose of article 6(1) can be identified.

148 The scope of article 6 accordingly extends to administrative determinations as well as judicial determinations. But, putting aside H criminal proceedings with which we are not here concerned, the article also requires that the determination should be of a person's civil rights and obligations. The concept of civil rights in article 6(1) is an autonomous one: *König v Federal Republic of Germany* (1978) 2 EHRR 170. In *H v France* (1989) 12 EHRR 74, para 47 the court stated:

A "It is clear from the court's established case law that the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent state's domestic law and that article 6(1) applies irrespective of the parties' status, be it public or private, and of the nature of the legislation which governs the manner in which the dispute is to be determined; it is sufficient that the outcome of the proceedings should be 'decisive for private rights and obligations'."

B It relates to rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law": *James v United Kingdom* (1986) 8 EHRR 123, para 81. The rights with which the present appeals are concerned are the rights of property which are affected by development or acquisition. Those clearly fall within the scope of "civil rights". But there is no issue about the existence of these rights and no determination of the C rights in any strict sense is raised.

149 The opening words of article 6(1) are: "In the determination of his civil rights and obligations or of any criminal charge against him . . ." Here again a broad interpretation is called for. The decision need not formally be a decision on the rights. Article 6 will still apply if the effect of the decision is directly to affect civil rights and obligations. In *Le Compte, Van Leuven and* D *De Meyere* 4 EHRR 1, para 46 the court observed: "it must be shown that the 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was 'decisive' for such a right." The dispute may relate to the existence of a right, and the scope or manner in which it may be exercised (*Le Compte*, at para 49, also *Balmer-Schafroth v Switzerland* (1997) 25 EHRR 598. But it must have a direct effect of deciding rights or obligations. The court continued, at para 47: E

"As regards the question whether the dispute related to the above-mentioned right, the court considers that a tenuous connection or remote consequences do not suffice for article 6(1), in either of its official versions ('contestation sur'; 'determination of'): civil rights and obligations must be the object—or one of the objects—of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right." F

That case was followed in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, where, at para 80, the court noted that article 6(1) extended to a dispute concerning "an administrative measure taken by the competent body in the exercise of public authority". It is also said that the dispute must be "genuine and of a serious nature": *Benthem v The Netherlands* (1985) 8 EHRR 1, G para 32. In that case a genuine and serious dispute was held to have arisen "at least" from the date when the licence which the applicant had earlier obtained from the local municipality was cancelled by the Crown.

150 It is thus clear that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law H regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature. It applies then to the various exercises of discretion which are raised in the present appeals. But, while the scope of the article extends to cover such discretionary decisions, the particular character of such decisions cannot be

A disregarded. And that particular factor has important consequences for the application of the article in such cases.

Compatibility with the Convention

151 If one was to take a narrow and literal view of the article, it would be easy to conclude that the respondents are correct and that the actions of
B the Secretary of State are incompatible with the article. It is accepted that he does not constitute an impartial and independent tribunal. In the context of a judicial proceeding that may well be fatal.

152 The first point to be noticed here, however, is that the opening phrase in article 6(1), "in the determination", refers not only to the particular process of the making of the decision but extends more widely to the whole process which leads up to the final resolution. In *Zumtobel v*
C *Austria* (1993) 17 EHRR 116, para 64 the Commission under reference to *Ettl v Austria* (1987) 10 EHRR 255, paras 77 et seq, recalled that:

> "article 6(1) of the Convention does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the determination of civil
D rights by the tribunal envisaged in article 6(1) of the Convention."

It is possible that in some circumstances a breach in one respect can be overcome by the existence of a sufficient opportunity for appeal or review. While the failure to give reasons for a decision may in the context of some cases constitute a breach of the article, the existence of a right of appeal may provide a remedy in enabling a reasoned decision eventually to be given and
E so result in an overall compliance with the article. In the context of criminal cases article 6 will bite when a charge has been made, which could be long in advance of the trial or any subsequent appeal at which the actual resolution of the issue of guilt or innocence is made. In the civil context the whole process must be considered to see if the article has been breached. Not every stage need comply. If a global view is adopted one may then take into
F account not only the eventual opportunity for appeal or review to a court of law, but also the earlier processes and in particular the process of public inquiry at which essentially the facts can be explored in a quasi-judicial procedure and a determination on factual matters achieved.

153 Next, account has to be taken of the context and circumstances of the decision. Here an important distinction has been made by the European Court of Human Rights. The distinction was explained in the context of
G medical disciplinary proceedings in *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. In its the judgment the court observed, at para 29:

> "In many member states of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where article 6(1) is applicable, conferring powers in this manner does not in itself infringe the
H Convention. None the less, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

The court has recognised that planning decisions fall into a "specialised area" (*Chapman v United Kingdom* (2001) 33 EHRR 399) and has applied this distinction in relation to such decisions.

154 As regards the first of the two systems referred to in *Albert and Le Compte*, where the "jurisdictional organ" is the Secretary of State, it cannot be said that the requirements of article 6(1) are met. So it is the second system which falls to be considered in the present context. In the first place consideration has to be given to the expression "full jurisdiction". At first sight the expression might seem to require in every case an exhaustive and comprehensive review of the decision including a thorough review of the facts as well as the law. If that were so a remedy by way of a statutory appeal or an application to the supervisory jurisdiction of the courts in judicial review would be inadequate. But it is evident that this is not a correct understanding of the expression. Full jurisdiction means a full jurisdiction in the context of the case. As Mr N Bratza stated in his concurring opinion in the decision of the Commission in *Bryan v United Kingdom* (1995) 21 EHRR 342, 354:

> "It appears to me that the requirement that a court or tribunal should have 'full jurisdiction' cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned."

The nature and circumstances of the case have accordingly to be considered before one can determine what may comprise a "full jurisdiction". In the very different context of disciplinary proceedings a more exhaustive remedy may be required in order to satisfy article 6(1). In *Le Compte, Van Leuven and De Meyere v Belgium* 4 EHRR 1 in the context of medical disciplinary proceedings the court stated, at para 51:

> "For civil cases, just as for criminal charges, article 6(1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law."

In that case the article was held not to be satisfied since the Court of Cassation had no jurisdiction to rectify factual errors or to examine whether the sanction was proportionate to the fault.

155 I turn then next to consider whether in the circumstances of the present cases as they presently stand the opportunities for appeal and review are such as to constitute a full jurisdiction. Guidance here may be found in *Bryan v United Kingdom* 21 EHRR 342 where the court, echoing a passages from the opinion of Mr N Bratza in the Commission (see p 354), stated, at para 45, that in assessing the sufficiency of the review available

> "it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

A These three matters may be considered separately.

156 First, the subject matter of the decisions are in each case matters of planning determination in relation to proposed developments which are of some considerable public importance. As planning decisions, even if they were not of some size and importance, they fall within what the court has recognised as a specialised class of case: *Chapman v United Kingdom* 33 EHRR 399. The rights affected are principally rights to use land, which may B be the subject of development or of compulsory acquisition. Moreover the right to use land is not an absolute right. It is under the domestic law subject to the controls of the planning regime, whereby permission may be required for the carrying out of a development or for the making of some change of use. Planning permission is not in general a matter of right.

157 So far as the manner in which the decisions will be taken is C concerned it is to be noticed that in each case there will be a public inquiry before an inspector. That will be an occasion for the exploration of the facts, including the need and desirability of the development. The inquiry will be regulated by rules whose broad intention is to secure fairness in the procedure. The eventual decision in the present cases is to be taken by the Secretary of State. A remedy by way of appeal or judicial review is available, and there may be opportunities for judicial review at earlier stages as indeed D is demonstrated in the present appeals.

158 So far as the content of the dispute is concerned, the present point is that the Secretary of State should not be the decision maker. The challenge is advanced substantially as one of principle, although in relation to the Huntingdonshire case a variety of particular points were raised regarding the interest or involvement in the Alconbury proposals on the part of various E persons connected with the department or the government. But I find it unnecessary to explore these in detail. The Secretary of State is admittedly not independent for the purposes of article 6(1). I do not consider that it can be decided at this stage whether the interest or involvement of these other persons is going to provide grounds for challenging the legality of the eventual decision. Grounds for challenge which are at present unpredictable may possibly arise in due course. As matters presently stand the issue is F whether article 6(1) is necessarily breached because the decision is to be taken by the Secretary of State with the assistance of his department. The challenge is directed not against the individual but against the office which he holds. The question which arises is whether the Secretary of State or some person altogether unconnected with the Secretary of State should make the decision.

G 159 As I indicated at the outset, Parliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity in national planning can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not of law. They H are primarily matters for the executive and not for the courts to determine. Moreover as matter of generality the right of access to a court is not absolute. Limitations may be imposed so long as they do not so restrict or reduce the access that the very essence of the right is impaired: *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, para 72. Moreover the

limitation must pursue a legitimate aim and the relationship between the means employed and the aim sought to be achieved must be reasonably proportionate: *Ashingdane v United Kingdom* (1985) 7 EHRR 528. In the context of the present cases the aim of reserving to a minister answerable to Parliament the determination of cases which will often be of very considerable public interest and importance is plainly a legitimate one. In light of the considerations which I have already canvassed it seems to me that there exists a reasonable balance between the scope of matters left to his decision and the scope of the control possessed by the courts over the exercise of his discretionary power.

160 Accordingly as matters presently stand I find no evident incompatibility with article 6(1). That view seems to me to accord fully with the decisions of the European Court of Human Rights. A consideration of the cases on the specialised area of town and country planning to which I now turn suggests that the court has recognised the sufficiency of a limited appeal and the decisions fully support the view which I have expressed. It was correctly pointed out that the court is always careful to relate its decisions to the facts of the case before it. But that does not mean that the cases do not or cannot provide guidance by way of close precedent or principle. I turn first to *Bryan v United Kingdom* 21 EHRR 342.

161 *Bryan* concerned an enforcement notice for the demolition of two agricultural buildings which had the appearance of large detached houses. The scope of the appeal open to the applicant was on points of law. One ground of his complaints, referred to as ground (b), was on the decision as matter of fact and degree, whether the buildings could be considered to have been designed for the purposes of agriculture. That ground was not pursued before the High Court on appeal. It was a question of fact and degree. The European Court of Human Rights held that the other grounds had all been dealt with by the High Court, and continued, at para 47:

> "Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational."

It is evident from this decision that where there was an inquiry before an inspector who could not be regarded as "independent", but nevertheless with "uncontested safeguards" attending the procedure which were open to review by the High Court, the limitations of the eventual remedy by way of appeal, limitations which equate with those attending a judicial review, did not mean that the requirements of article 6(1) were not satisfied.

162 I do not consider that *Bryan* can be put aside as distinguishable on its facts, nor that its importance is confined to its own particular circumstances. The Divisional Court made a distinction between a decision taken by an inspector and one taken by the Secretary of State. That appears to have been one of the three considerations which weighed with the Lord Ordinary (Macfadyen) in *County Properties Ltd v The Scottish Ministers* 2000 SLT 965 in distinguishing the case. It seems to me that this difference is too slight to be of serious consequence. The Secretary of State is admittedly not independent. The inspector also lacks independence. As was pointed out by the Commission in their opinion in *Bryan*, at para 42, he was chosen

from the staff of the Planning Inspectorate which served the Secretary of State in the furtherance of the Secretary of State's policies, he was making the decision on behalf of the Secretary of State, and the Secretary of State's policies could be at issue in the appeal. The court held, at para 38, that the very existence of a power in the Secretary of State was "enough to deprive the inspector of the requisite appearance of independence". But that is not to say that the institutional link with the Secretary of State is not also of significance. The court in *Bryan,* at para 42, noted that a remedy would lie if the inspector showed some lack of independence of judgment, or had otherwise not acted fairly, or had been subjected to improper pressure. Those grounds should also apply to a review of a decision by the Secretary of State. In so far as the Divisional Court sought to distinguish *Bryan* I am not persuaded that it was correct. But in any event the case does not stand on its own.

163 In *ISKCON v United Kingdom* (1994) 18 EHRR CD 133, an enforcement notice had been served by the local authority on the grounds of an alleged change of use of land. Again the complaint was made by the applicant before the Commission that the review by the High Court was limited to questions of law. The Commission noted that the discretion of the local authority in taking enforcement proceedings was subject to certain statutory limitations, that the High Court had dealt with each of ISKCON's grounds of appeal and that a challenge was available on the grounds that the findings of fact were unsupported by the evidence, that actual facts had not been taken into account, or that account had been taken of immaterial facts, or that the decision was irrational. The Commission held that review by the High Court satisfied the requirements of article 6(1).

164 The decision in *Bryan* was followed in *Varey v United Kingdom* The Times 9 January 2001, where the Secretary of State had overruled recommendations made by inspectors after a public inquiry. Recalling *Bryan* the Commission, at para 86, had regard "in particular to the court's finding that in the specialised area of town planning law full review of facts may not be required by article 6(1)" and held that the scope of review available in the High Court was sufficient to comply with that article. The Commission stated: "the Secretary of State gave reasoned decisions on the basis of the facts found by the inspectors, and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court."

165 The recent decision in *Chapman v United Kingdom* 33 EHRR 399 is of particular interest because the complaint there was expressly that the High Court could not review questions of fact, nor questions of the weight given to the needs of the applicant and her family. The court however held, at para 124, following *Bryan*, "that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention" and that the opportunity to challenge the decision "on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors" afforded adequate judicial control of the administrative decisions in issue.

166 Two other cases may be mentioned where the concern was about the sufficiency of a remedy in the context of the compulsory acquisition of land. *Howard v United Kingdom* (1985) 49 EHRR 116 concerned the

requirement in article 13 of the Convention that everyone whose rights and freedoms are violated should have "an effective remedy before a national authority". The complaint was that in relation to a compulsory purchase order neither the statutory remedy nor judicial review extended to the content or substance of the decision, which was the object of the attack. The Commission took account of the opportunities which the applicants had of challenging the decision to make the order by way of judicial review, of making representations to an inspector at a public inquiry, and of making a statutory challenge to the confirmation of the order. They held that the limited review which was available satisfied the requirements of article 13.

167 *Zumtobel v Austria* 17 EHRR 116 concerned an order to expropriate land for the construction of a highway. The court held that the opportunity for challenge before the Constitutional Court was not sufficient to overcome the objection that the applicants had had no right to a fair and public hearing, because the jurisdiction of that court only extended to testing the constitutionality of the order. But the opportunity to challenge the order before the Administrative Court was sufficient, because (in distinction from *Obermeier v Austria* (1990) 13 EHRR 290, para 70) that court could consider whether a statutory precondition for the validity of the order had been met and were able to meet and deal with all the points raised by the applicants in their challenge.

168 It is also of significance that as matter of generality the state parties to the Convention treat a limited review as an appropriate remedy in administrative matters. In *Kaplan* 4 EHRR 64 the Commission recognised that where an individual's right had been adversely affected by action taken by a public authority article 6(1) entitled him to access to a court for such remedy as the domestic law might allow. The question then arose whether the limited right of judicial review was sufficient. The Commission noted that the limit to control of the lawfulness of the decision was fairly typical of many of the contracting states, and indeed the scope of protection afforded under article 173 of the EEC Treaty was similarly limited. The Commission observed, at para 161:

> "An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

In *Bryan* 21 EHRR 342 the court observed that while the High Court could not have substituted its own findings of fact for those of the inspector it was able to determine whether the findings or the inferences from them were perverse or irrational. The court continued, at para 47:

> "Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states."

The scope of judicial review

169 The suggestion was advanced that, if the respondents were correct in their contention that the present proceedings are in breach of article 6(1), the scope of judicial review might somehow be enlarged so as to provide a complete remedy. The point in the event does not arise, but I consider that it might well be difficult to achieve a sufficient enlargement to meet the stated purpose without jeopardising the constitutional balance between the role of the courts and the role of the executive. The supervisory jurisdiction of the court as it has now developed seems to me adequate to deal with a wide range of complaints which can properly be seen as directed to the legality of a decision. It is sufficient to note the recognition of the idea of proportionality, or, perhaps more accurately, disproportionality, and the extent to which the factual areas of a decision may be penetrated by a review of the account taken by a decision maker of facts which are irrelevant or even mistaken: *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, 344–345. But consideration of the precise scope of the administrative remedies is not necessary for the purposes of the present appeals.

The Divisional Court

170 The Divisional Court recognised that the Secretary of State could not disagree with the material findings of fact made by the inspector without giving the parties an opportunity of making representations. But what gave rise to concern, at para 94, was the consideration that he was then "free to make his own decision and does so after taking account of internal legal and policy 'elucidation' and the recommendation of the decision officer . . . which are not seen by the parties". It appears to be that consideration which led the Divisional Court to reach its conclusion. These matters bring me back to what I said at the outset of this speech. The Secretary of State is not entirely free to make his own decision. He cannot ignore what has passed at the inquiry. He cannot act in an arbitrary way. He has to proceed upon a reasonable assessment of the material before him. He has to respect the necessity to produce a decision which is not open to attack on grounds of legality. Nor is there anything wrong in seeking or taking into account advice which he may obtain from within his department, at least where that advice is sought to clarify or elucidate law or policy. If his decision is materially affected by some error of law or misconstruction of policy that may be open to review. The precise mechanics of the decision-making process in a large department are necessarily more complex than the process in which an inspector would engage if he was to make the actual decision. What is required is that there should be a decision with reasons. Provided that these set out clearly the grounds on which the decision has been reached it does not seem to me necessary that all the thinking which lies behind it should also be made available, whether the decision is made by an inspector or by the head of a government department.

Prematurity

171 The European Court of Human Rights tends to express its decisions in relation to a complete and concluded case. In the present appeals we are asked to form a view at a preliminary stage. It is not yet known what the

decisions will be. Far less is it known what grounds, if any, will emerge for dissatisfaction with the decision. But the practical advantages of testing the issue at this early stage are obvious. A very considerable expenditure of effort, time and money would have been spent in vain if the decision of the Divisional Court was correct. The Divisional Court followed the view taken by the Lord Ordinary in the *County Properties* case 2000 SLT 965 that to wait until the eventual decision after the whole planning process has run its course would be unsound and impractical. That view seems to me to be correct. It can at least at this stage be affirmed that for the purposes of section 6(1) of the Human Rights Act 1998 it is not necessarily unlawful for the decisions in question to be made by the Secretary of State.

172 I would accordingly allow the appeals. The cross-appeal which raised an issue regarding the application of section 6(1) and (2)(b) of the Human Rights Act 1998 does not then arise for determination.

LORD HUTTON

173 My Lords, in their applications to the Divisional Court the respondents submitted that the respective procedures whereby the Secretary of State for the Environment, Transport and the Regions "called in" and "recovered" planning applications and decided whether to make a compulsory purchase order were not in compliance with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This submission was accepted by the Divisional Court and the Secretary of State now appeals directly to this House pursuant to section 12 of the Administration of Justice Act 1969.

174 Article 6(1) of the Convention provides: "In the determination of his 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."

175 Prior to the incorporation of the European Convention into the law of England by the Human Rights Act 1998, the law in relation to the functions of a government minister in respect of planning applications and objections to compulsory purchase orders, as stated in the classic judgment of Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395, was clear. It was that, whilst a quasi-judicial duty to consider objections was superimposed on the minister, the functions which he performed were essentially of an administrative nature and his decision would be arrived at on grounds of public policy. Thus Lord Greene MR stated, at p 399:

> "The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz, the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."

See also p 397G–H.

A **176** Therefore the minister was entitled to overrule the objections of an individual citizen whose property was affected because of his views as to what the public interest required. But this did not mean that the citizen was subject to the decision of a minister which might be arbitrary and without oversight because, as Lord Greene MR observed, at p 399G–H, the minister was subject to the control of Parliament and he might have to defend his views and his decision in Parliament.

B **177** The respondents' submissions to the Divisional Court were that, when the Secretary of State made his decisions whether to uphold or reject their objections to a planning scheme and whether to make a compulsory purchase order, those decisions constituted determinations of their civil rights within the meaning of article 6(1). They further submitted that the Secretary of State was not an independent and impartial tribunal because he C would come to his decisions in the light of the policy which he had formulated or adopted on behalf of the government and was duty bound to promote.

178 The Divisional Court accepted these submissions. The reasoning of the court can be seen in the following passages of its judgment delivered by Tuckey LJ:

D "71. It is common ground that the independence required by article 6(1) is independence from the executive and from the parties.

"72. The Secretary of State is part of the executive as are all or any of his ministerial team or the civil servants involved in the decision-making process. The contrary is, we think, unarguable which no doubt explains the Secretary of State's stance in these proceedings . . .

E "84. There is no dispute about the position under domestic law. It is well stated in passages from *Supperstone & Goudie, Judicial Review*, 2nd ed (1997), para 9.21: 'In many administrative situations the possibility of bias is built into the system. Proposers of a scheme may have strong and carefully thought out views on the subject, and yet may have to hear and rule on objections to it. Administrators may have guidelines to help them in their day to day application of legislation. In such situations the F concept of a fair trial may be impossible and indeed undesirable to achieve. It has been pointed out . . . that the more indifferent to the aim in view the less efficient is the minister or civil servant likely to be. After all, it his job to get things done. So, while the obvious prejudgment of an issue is not allowed, a challenge to a decision on the grounds of departmental bias is unlikely to succeed. It is a minister's job to have a G policy and to support it in public' . . .

"85. But the question we have to answer is whether the position under domestic law can withstand the unqualified procedural right conferred by article 6. We do not think it can. The common law approach has inevitably been determined by the constraints imposed by legislation. The logic is that if legislation vests a decision in a person who is biased or provides for a decision to be taken in a manner which is not compatible H with the requirements of independence and impartiality, no breach of the requirements of fairness can be found. Such requirements of fairness as there may be must be accommodated to the relevant statutory scheme. But the question now is not how article 6 can best be accommodated in the interests of fairness given the existing statutory scheme, but rather

whether the scheme itself complies with article 6. To accept that the possibility of common law bias is inherent in the system and mandated by Parliament is merely to admit that the system involves structural bias and requires determinations to be made by a person who is not impartial.

"86. It must follow from these conclusions that the Secretary of State is not impartial in the manner required by article 6 because in each case his policy is in issue. This is not of course to say that there is anything wrong with his role as a policy maker. What is objectionable in terms of article 6 is that he should be the judge in his own cause where his policy is in play. In other words he cannot be both policy maker and decision taker."

179 The Divisional Court then turned to consider whether the procedures involved in these cases were saved by the High Court's powers of review. It observed, at paras 87–95 of its judgment, that decisions of this House have made it clear that the High Court is only concerned with the legality of the Secretary of State's decision; the merits of the case and questions of planning judgment are for the determining authority, not for the High Court. The court drew a distinction, at para 94, between the decision of an inspector and the decision of the Secretary of State, and, referring to the process followed where the Secretary of State makes the decision, it said, at para 95:

"We do not think this process contains sufficient safeguards to justify the High Court's restricted power of review. In terms of article 6 the decision on the merits, which usually involves findings of fact and planning judgment, has not been determined by an independent and impartial tribunal or anyone approaching this, but by someone who is obviously not independent and impartial."

180 In arriving at its decision the Divisional Court found support in the judgment of the Court of Session in *County Properties Ltd v The Scottish Ministers* 2000 27 SLT 965, which had come to a similar decision in a case concerning a "called in" application for listed building consent under Scottish planning legislation similar to the Town and County Planning Act 1990. In his judgment the Lord Ordinary (Macfadyen) stated, at para 26:

"It is the petitioners' Convention right to have their civil rights determined by an independent and impartial tribunal. In my view the respondents' decision to call in the application for their own decision has brought about a situation in which the determination of the petitioners' civil rights will be made by the respondents, who are admittedly not independent and impartial, and against whose decision there is only a limited right of appeal to this court. The limitations on the right of appeal are such that it may well be impossible for this court, although indisputably an independent and impartial tribunal, to bring those qualities to bear on the real issues in the case."

181 Before this House Mr Sumption, for the Secretary of State, accepted that the determination of planning applications involved a "determination of civil rights and obligations" within the meaning of article 6(1). Mr Roderick Macdonald, for the Lord Advocate, who intervened on behalf of the Scottish Ministers, submitted that article 6(1) only

A applied to claims or disputes concerning legal rights and obligations to be resolved by a judicial process, and not to the administrative process carried on by a minister when he decides a planning application. Viewed in the light of the common law there would have been obvious force in this submission. In addition there is support for the submission in some passages in the opinion of the European Commission of Human Rights in *Kaplan v United*
B *Kingdom* (1980) 4 EHRR 64, the Commission stating, at para 154:

> "In the Commission's view the essential role of article 6(1) in this sphere is to lay down guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a 'civil' character) are to be resolved. A distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts
C of an administrative or other body purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim,
D dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way."

See also paras 151–153.

182 However I think it is clear that the Commission and the European Court of Human Rights ("the European court") have departed from this
E view and have held in a number of subsequent cases that the determination of a planning application by an official or a minister falls within the ambit of article 6(1). In *Bryan v United Kingdom* (1995) 21 EHRR 342 in proceedings before the European court the applicant complained that the review by the High Court of an inspector's decision upholding an enforcement notice was insufficient to comply with article 6(1). Before the
F Commission the United Kingdom government had contended that the enforcement notice proceedings did not involve a determination of the applicant's "civil rights", but this contention was rejected by the Commission, which stated, at para 38:

> "The Commission recalls that the right of property is clearly a 'civil' right within the meaning of article 6(1) of the Convention, and the
G enforcement notice issued by the local authority and the subsequent enforcement proceedings were directly concerned with the way in which the applicant was entitled to use his land. Consequently, the proceedings in the present case determined a 'civil right'."

183 In its judgment the European court stated, at para 31:

H "Before the court the government did not contest, as they had before the Commission, that the impugned planning proceedings involved a determination of the applicant's 'civil rights'. On the basis of its established case law, the court sees no reason to decide otherwise. Article 6(1) is accordingly applicable to the facts of the present case."

184 A similar view has been taken in *Chapman v United Kingdom* (2001) 33 EHRR 399 and other decisions of the European court and this view is now clearly established in the jurisprudence of the court.

185 The decisions of the Divisional Court and the Court of Session that there would be non-compliance with article 6(1) in the proceedings which they were considering were largely influenced by the judgment of the European court in *Bryan v United Kingdom* 21 EHRR 342 and counsel for the respondents placed strong reliance on that judgment in their submissions to the House.

186 The reasoning of the European court in *Bryan* contained a number of stages which I enumerate as follows.

(1) Notwithstanding that the inspector was required to decide the applicant's planning appeal in a quasi-judicial, independent and impartial manner, the Secretary of State could at any time revoke his power to decide the appeal. In the context of planning applications the very existence of this power available to the executive, whose own policies might be in issue, was enough to deprive the inspector of the requisite appearance of independence, and, for this reason alone, the review by the inspector did not of itself satisfy the requirements of article 6(1) (para 38).

(2) The court then stated, in para 40:

> "As was explained in the court's *Albert and Le Compte v Belgium* judgment 5 EHRR 533, even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)'. The issue in the present case is whether the High Court satisfied the requirements of article 6(1) as far as the scope of its jurisdiction was concerned."

(3) The court noted, in paras 41–44, 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 and, 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."

However the court then observed that in addition to the classic grounds of unlawfulness under English law the High Court had power to quash the inspector's decision if the inspector had taken into account irrelevant factors or had omitted to take into account relevant factors, or if the evidence was not capable of supporting a finding of fact or if the decision was perverse or irrational.

(4) The court stated, in paras 45–46, that in assessing the sufficiency of the review available on appeal to the High Court, it was necessary to have regard to matters such as "the subject matter of the decision appealed against" and the manner in which that decision was arrived at, and the court referred to the uncontested safeguards attending the procedure before the

A inspector designed to ensure that the inspector came to his decision in accordance with principles of openness, fairness and impartiality.

(5) The court then stated, in para 47:

> "In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment by the
B applicant of his objection to the inspector's reasoning under ground (b). The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point. These submissions, as the Commission noted, went essentially to questions involving 'a panoply of policy matters such as development plans, and the fact that the property was situated in a Green Belt and a conservation area'.
C
> "Furthermore, even if the applicant had sought to pursue his appeal under ground (b), the court notes that, while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational.
>
> "Such an approach by an appeal tribunal on questions of fact can
D reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states. Indeed, in the instant case, the subject matter of the contested decision by the inspector was a typical example of the
E exercise of discretionary judgment in the regulation of citizens' conduct in the sphere of town and country planning."

The court therefore concluded that the scope of review by the High Court was sufficient to comply with article 6(1) and held that there had been no violation of that article.

F **187** There were two strands in the reasoning of the European court. One strand referred to the independent position of the inspector and to the procedure designed to ensure openness, fairness and impartiality on his part. The other strand laid emphasis on the consideration that it was a frequent feature throughout the Council of Europe member states that in specialised areas of the law, such as judicial control of administrative decisions, the review by a court of law did not extend to a review of a decision on its
G merits.

188 Counsel for the respondents submitted that the decision in *Bryan* was distinguishable from the present case because in this case the Secretary of State lacked the independence of an inspector and his decision-making process did not have the safeguards which related to the decision-making process of an inspector. In relation to the decision-making process of the Secretary of State counsel pointed to the input of views and
H recommendations from civil servants of which the objectors were unaware and to which they had no opportunity to reply. Counsel submitted that in *Bryan* the European court's reliance on the independence of the inspector was a crucial part of its reasoning and that, as the requisite independence did not exist when the Secretary of State made the decision, there would be non-

compliance with article 6(1) in the present cases; the consideration that it was a common feature of European systems of justice that a court did not review a planning decision on its merits was not sufficient to prevent a violation of article 6(1).

189 Whilst there is some weight in these submissions I do not think that they are of sufficient force to distinguish *Bryan* from the instant case. It is clear from para 47 of the judgment that it was in relation to fact finding that the European court referred to the safeguards attaching to the procedure before the inspector, and I consider that the second strand of the court's reasoning was the more important one. Moreover, the judgment cannot be viewed in isolation but must be considered in the light of other opinions of the Commission and judgments of the European court. I consider that the Strasbourg jurisprudence recognises that, where an administrative decision to be taken in the public interest constitutes a determination of a civil right within the meaning of article 6(1), a review of the decision by a court is sufficient to comply with article 6(1) notwithstanding that the review does not extend to the merits of the decision. Because it is a common feature of the judicial systems of the democratic member states of the Council of Europe that a court does not decide whether an administrative decision was well founded in substance, the Commission and the European court have held that article 6(1) does not guarantee a right to a full review by a court of the merits of every administrative decision affecting private rights, but that there is compliance with the article where there is a right to judicial review of such a decision of the nature exercised by the High Court in England.

190 This approach is clearly set out and explained in the opinion of the Commission in *Kaplan v United Kingdom* 4 EHRR 64:

> "159. The Commission has already noted that in the contracting states discretionary powers are frequently conferred on public authorities to take actions affecting private rights. It is also a common feature of their administrative law, and indeed almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited. In the *Ringeisen* case 1 EHRR 455 the majority of the Commission drew attention to this. They observed as follows: 'It is true that there is in all countries a legitimate concern to protect the citizen against arbitrary administrative action. This concern may result in the adoption of legislative or other rules concerning administrative procedure. It may result in the introduction of judicial review of administrative action, and the states members of the Council of Europe have for historical and other reasons adopted widely divergent systems of such judicial review. One common feature, however, seems to be that there are certain elements of administrative discretion which cannot be reviewed by the judge. If the administrative authority has acted properly and within the limits of the law, the judge can very rarely, if ever, decide whether or not the administrative decision was well founded in substance. To that extent, there is no possibility of bringing the case before an independent and impartial tribunal, even if there is a dispute ("contestation") between the citizen and the public authority.'
>
> "160. Following the court, the Commission does not conclude that article 6 is therefore altogether inapplicable. However, this factor cannot be left out of account in considering the content or scope of the rights

which article 6 guarantees. The Commission also recalls that its minority in the same case considered that it guaranteed only a right to judicial control as to the 'lawfulness' of administrative decisions affecting civil rights. It notes further that the limited scope of judicial review in many contracting states is also reflected in the scope of the jurisdiction afforded to the European Court of Justice under article 173 of the EEC Treaty. Under that provision the court has jurisdiction to review the legality of acts of the Council and Commission of the European Communities only on grounds of 'lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers'. These limited grounds of action appear fairly typical of those existing in a number of the contracting states.

"161. An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

191 As I have observed in considering the submissions of Mr Macdonald, the Commission in *Kaplan* gave a narrower meaning to the words "In the determination of his civil rights" than has been given in subsequent decisions, but the approach stated in *Kaplan*, in paras 159–161, has been adopted in a number of subsequent decisions, notwithstanding that those decisions have recognised that the administrative decisions of which the applicants complained involved the determination of civil rights within the meaning of article 6(1).

192 In *X v United Kingdom* (1998) 25 EHRR CD 88, where the applicant complained of the decision of the Secretary of State that he was not a fit and proper person to be the chief executive of an insurance company, the Commission held that the scope of judicial review by the Court of Session was sufficient to comply with article 6(1), and the Commission stated, at p 97:

"The subject matter of the decision appealed against in the present case was a classic exercise of administrative discretion. The legislature had charged the Secretary of State with the express function of ensuring, in the public interest, that only appropriate persons would become chief executive of certain insurance companies, and the contested decision in the present case was the exercise of that discretion."

193 In *Varey v United Kingdom* The Times, 30 January 2001 the applicants appealed against refusals of planning permission and inspectors held public inquiries and recommended that the appeals be allowed, but the Secretary of State decided to dismiss the appeals. The applicants complained that the decisions of the Secretary of State overruling the inspectors' recommendations concerning their appeals disclosed a violation of article 6(1) as the High Court was unable to substitute its own decision on the merits for that of the Secretary of State. In its response the government relied on the decision in *Bryan* 21 EHRR 342 as showing that the procedures complained of complied with the requirements of article 6(1). The Commission found that there had been no violation of article 6(1) and, in para 86 of its opinion, after referring to the decision in *Bryan* it stated:

"While the applicants argue that the scope of review prevents examination of the merits of their claims, the Commission notes that this does not contradict the position, as stated by the court, that the domestic courts will examine whether the Secretary of State had regard to all relevant factors. It is true that the procedures by the inspectors do not themselves satisfy the requirements of article 6(1), the inspectors being appointed by the Secretary of State who retains the power of decision, and that the safeguards provided by their quasi-judicial role in the process have been diminished in this case by the Secretary of State's dismissal of the applicants' appeals notwithstanding the inspectors' recommendations to the contrary (see para 78). However, the Secretary of State gave reasoned decisions on the basis of the facts found by the inspectors, and the matters relied on by him in overruling their recommendations could be challenged on appropriate grounds before the High Court. Consequently in these circumstances the Commission is satisfied that the power of review of that process by the High Court ensures adequate judicial control of the administrative decisions in issue. It finds that the applicants have not in the circumstances been deprived of a fair hearing by an independent and impartial tribunal in the determination of any of their civil rights and obligations. It would observe that matters concerning the compatibility of the subject matter of the planning decisions with the requirements of the Convention fall to be examined under its substantive provisions."

194 In *Chapman v United Kingdom* 33 EHRR 399 the applicant was refused planning permission and enforcement notices were issued against her. She appealed against the enforcement notices and after an inquiry an inspector dismissed her appeal. She claimed that there had been a violation of article 6(1) on the ground that she had no access to a court to determine the merits of her claims. Before the European court she argued that the court's case law did not support any general proposition that the right of appeal to the High Court on points of law caused planning procedures to be in compliance with article 6(1) and she submitted that *Bryan* was decided on its particular facts.

195 The European court did not accept the applicant's argument and held that there had been no violation of article 6(1) and stated, at para 124:

"The court recalls that in the case of *Bryan* 21 EHRR 342, paras 34–47 it held that in the specialised area of town planning law full review of the facts may not be required by article 6 of the Convention. It finds in this case that the scope of review of the High Court, which was available to the applicant after a public procedure before an inspector, was sufficient in this case to comply with article 6(1). It enabled a decision to be challenged on the basis that it was perverse, irrational, had no basis on the evidence or had been made with reference to irrelevant factors or without regard to relevant factors. This may be regarded as affording adequate judicial control of the administrative decisions in issue."

196 A central element in the argument advanced on behalf of the respondents, which was supported by Mr Howell as amicus curiae, was that, where there was the determination of a civil right within the meaning of

article 6(1), the article required that the determination should be carried out (whether initially or on review by a court) by an independent and impartial tribunal which had power to consider the merits of the case, and that this requirement included discretionary matters to be decided by an official or a government minister and which involved matters of government policy. I am unable to accept that submission and I consider that the decisions of the Commission and the European court make clear that the ambit of the review required by article 6(1) does not extend to the merits of such decisions.

197 I am further of opinion that the jurisdiction of the High Court by way of judicial review is sufficient to comply with article 6(1) in respect of any arguments that the Ministry of Defence has a financial interest in the Alconbury development and that the Department of Transport has promoted the road improvement scheme at Newbury.

198 Therefore I consider, with respect, that the Divisional Court erred in concluding that article 6(1) prohibited the Secretary of State from being both a policy maker and a decision taker. In *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395 Lord Greene MR recognised that in the democratic system of government in England a minister could properly perform both functions because he was answerable to Parliament as regards the policy aspects of his decision and answerable to the High Court as regards the lawfulness and fairness of his decision-making process. In my opinion the jurisprudence of Strasbourg also recognises that in a democracy, where the courts have jurisdiction to conduct a judicial review of the lawfulness and fairness of a decision, a government minister can be both a policy maker and a decision taker without there being a violation of article 6(1), and accordingly I would allow these appeals.

Appeals allowed.
Cross-appeals dismissed.
Declaration that "The impugned decisions of the original appellant are not in breach of or incompatible with the Human Rights Act 1998."

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