Judgment 15/2006 Johns v. Minister of the Environment Department (Civil Action File 866) – 20th March, 2006

Island Development (Guernsey) Law, 1966 – appeal against refusal of application by the then Island Development Committee – preliminary issues for determination by a Judge sitting alone – relevance of personal circumstances – held that the IDC decision was not Wednesbury unreasonable or otherwise 'Bailiff' unreasonable (see Walters v. Housing Authority (1997) 24 GLJ 76) – relevance of European Convention on Human Rights – held that Convention rights did not form part of Guernsey Law and could not be enforced in our domestic courts (The Human Rights (Bailiwick of Guernsey) Law, 2000 had not yet been brought into operation) – circumstances in which the Convention can be relied upon in Guernsey – appeal to be listed for hearing before the Jurats. (See also Judgment 51/2006)

IN THE ROYAL COURT OF GUERNSEY

The 20th day of March, 2006 before Richard John Collas, Esquire, Deputy Bailiff, sitting alone.

In the action of PETER DAVID JOHNS (hereinafter called "the Appellant") against THE MINISTER OF THE ENVIRONMENT DEPARTMENT (hereinafter called "the Defendant");

THE COURT having GRANTED LEAVE to the Appellant to file an Amended Cause herein and having heard Advocate J.A.S. White, Counsel for the Appellant and Advocate F. Raffray, Counsel for the Department on points of laws as outlined at paragraphs 4.28.1,4.28.2 and 4.28.3 of the Amended Cause, and Advocate J.A.S.White having conceded the position on paragraph 4.28.3, ADJOURNED the matter for Judgment to be handed down in due course;

THE COURT this day HANDED DOWN Judgment in the attached terms, ADJOURNED the Appeal for listing before

Jurats in due course; and RESERVED the question of costs, unless Counsel apply to the Court within fourteen days in this respect.

S.M.SIMMONDS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
(Sitting As A Full Court)

APPEAL UNDER SECTION 26 OF THE ISLAND DEVELOPMENT (GUERNSEY) LAW 1966

Between **Peter David JOHNS** **Appellant**

-v-

THE MINISTER OF THE ENVIRONMENT DEPARTMENT **Respondent**

Judgment handed down on 20 March 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Appellants: J A S White
Advocate for the Respondent: F Raffray

Cases, texts & statute referred to:

1 Walters v States Housing Authority [1997] 24.GLJ.76.
2 Reg v Ministry of Defence ex parte Smith [1996] QB 517
3 South Bucks District Council and another v Porter [2004] 4 All ER 775
4 Westminster City Council v Great Portland Estates plc [1984] 3 All ER 744.
5 The Island Development (Guernsey) Law, 1966 (as amended), Section 17
6 The Human Rights (Bailiwick of Guernsey) Law, 2000.
7 In re McKerr [2004] 1 WLR 807
8 Ahmed and Patel v Secretary of State for the Home Department [1999] Imm AR 22.

9 European Roma Rights Centre and others v Immigration Officer at Prague Airport and another [2003] 4All ER 247 Laws LJ.
10 R v Secretary of State or the Home Department, ex p. Brind [1991] 1 A.C. 696.
11 Law Officers of the Crown -v- Ogier. (Royal Court 30 November 2001)
12 Gillow -v- UK ECEHR 24 November 1986.
13 X -v- States Housing Authority (Royal Court 6 August 1999)

Introduction

1. Peter David Johns is appealing against the decision of the Island Development Committee made on 5 May 2004 refusing retrospective permission to convert a packing shed to a unit of residential accommodation at Le Courtil Banque Vinery, Les Barras Lane, Vale.

2. The Use Class of the premises is Horticultural and they are zoned in the Rural Area Plan (Phase 1) as an Area of Landscape Value (Green Zone 2) within an Enhancement Target Area. The packing shed is presently being used as residential accommodation.

3. Before this appeal can proceed to a hearing before Jurats, counsel for the parties identified some points to be considered by a judge sitting alone and I agreed to hear them as preliminary issues (following *Walters v States Housing Authority* [1997] 24.GLJ.76 and the guidance set out therein as to the distinction between "Bailiff points" and "Jurat points").

4. Counsel agreed the preliminary "Bailiff" issues are the grounds of appeal set out in the following paragraphs of the cause:

   28.1 Personal circumstances, such as the Appellant's need for a home, are considerations that could have been taken into account by the IDC when making its decision.

   28.2 The ECHR is a relevant consideration that should have been taken into account by the IDC when making this discretionary decision.

   28.3 If the IDC should have taken account of the ECHR when making its decision on the merits of the Appellant's application, it failed to do so, and thereby made a decision that was wrong and ultra vires.

5. Argument was confined to paragraphs 28.1 and 28.2 of the Cause because at the start of the hearing Advocate White, on behalf of the Appellant, conceded that having regard to the decision of the English Court of Appeal in *Reg v Ministry*

of Defence ex parte Smith [1996] QB 517, the issue raised in paragraph 28.3 of the cause could not be sustained.

6. At page 558D-E of *Smith* Sir Thomas Bingham MR (as he then was) said:

> *"Article 8 of the European Convention on Human Rights provides:*
>
> > *"1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*
>
> *It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and secure compliance with this article is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning that exercise of discretion".*

In the light of that decision Advocate White correctly withdrew paragraph 28.3 of the Cause as she could not argue the IDC's decision was *ultra vires.*

The refusal of consent

7. The planning history of the Appellant's property shows that a number of planning applications had previously been made in respect of the site. Most recently, on 1 July 2002, the IDC refused permission for the conversion of the packing shed into permanent residential accommodation. On 2 February 2004 Advocate White applied to the IDC requesting a reconsideration of the 1 July 2002 decision. It is that application which is the subject of this appeal.

8. In her letter, Advocate White addressed each of the reasons given in the IDC's previous rejection. The IDC had drawn attention to Policy HT8 of the Rural Area Plan (Phase 1) which provides that:

> *"Proposals to change the use of glasshouses and ancillary horticultural buildings will not normally be permitted".*

9. In relation to Policy HT8, Advocate White submitted the following:

"Policy HT8

- *While this policy provides that a proposal to change the use of this packing shed to housing will not normally be permitted, such a change of use is not precluded.*
- *The explanation for this policy (para 5.15 of RAP 1) is that growers who may wish to extend their operations are experiencing difficulty finding suitable sites.*
- *The aim of the policy is therefore to protect existing horticultural sites from change.*
- *This proposal would not permanently remove this site and its building from horticultural use, should the horticultural industry ever revive to such an extent that this site would be in demand for such a use.*
- *My client owns both the land on which the shed is sited and the surrounding land.*
- *In weighing up the factors for or against granting permission, the presumption that this change of use will not normally be permitted is outweighed in the particular circumstances of this case by the fact that Mr & Mrs Johns cannot find other affordable accommodation in the island. The Committee will be aware of the problems faced by local residents on low incomes, or on benefit, in finding affordable accommodation on the island. The cheapest accommodation Mr Johns has found to be on offer is a one room bedsit with an electric meter at £120 per week, which he cannot afford.*
- *Any decision by the Committee to refuse Mr & Mrs Johns permission to live in this property would be a disproportionate interference with their right to a home under Article 8 of the European Convention of Human Rights.*
- *My client's need for a home is a more pressing need than the need to protect this site for future horticultural use, although, as submitted above, that horticultural use is not permanently lost".*

10. In its Refusal of Consent, the IDC said, inter alia:

> *"Policy HT8 sets out a general presumption against allowing proposals to change the use of glasshouses and ancillary horticultural buildings to other uses. With regard to Policy HT8 it is considered that the circumstances put forward on behalf of the applicant do not justify overriding the general presumption against allowing a change of use of the former packing shed to a dwelling. The Committee in determining not to exercise its discretion to allow a change of use has also taken into consideration the preclusion of the erection of new housing in Areas of Landscape Value under Policies CE6 and H14".*

Personal circumstances

11. Miss White submitted that the IDC could take into account, and should in this case have taken into account, the Appellant's personal circumstances. That is, in particular, his and his wife's need for a home and their inability to find other affordable accommodation. She relied upon the House of Lords' decision in *South Bucks District Council and another v Porter* [2004] 4 All ER 775 approving *Westminster City Council v Great Portland Estates plc* [1984] 3 All ER 744. In *Porter* Lord Brown said (at page 787c):

> "*That personal circumstances are themselves capable of being a material consideration in a planning case is well established".*

12. Advocate Raffray, for the IDC, urged me not to follow *Porter*. He submitted that the statutory position in England is different from Guernsey. Section 70(2) of the Town and Country Planning Act 1990 directs a planning inspector to have regard *"to the provisions of the development plan and to any other material consideration"* (emphasis added). The factors to be considered by the IDC are those set out in section 17(a) – (f) of the Island Development (Guernsey) Law 1966. They do not include *"any other material consideration"*. He argued that the list of factors is exhaustive. Under the Housing (Control of Occupation) (Guernsey) Law 1994 (and previous Housing Laws), the Housing Department in its consideration of housing licence applications is directed to take into account *"such other factors as it may deem necessary or expedient"* (section 6(5)(e) of the 1994 Law). But there is no similar provision in the 1966 Law applicable to planning applications.

13. I was initially persuaded that the factors set out in section 17(a) to (f) of the 1966 Law are an exhaustive list and that the IDC should take nothing else into account. However, I cannot ignore what Lord Scarman said in *Great Portland Estates* at page 750e:

> "*Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our development the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases".*

14. In my judgment it would be inhuman pedantry to direct the IDC that it must always ignore the human factor and that it must never take account of exceptional or special personal circumstances.

15. The question then for me at this stage of this appeal is whether it was *Wednesbury* unreasonable or otherwise 'Bailiff' unreasonable for the IDC to conclude that the Johns' family's personal circumstances were not so special or exceptional as to justify overriding the general presumption against allowing the change of use requested. If I were to answer that question in the affirmative I would allow the appeal without referring it to the Jurats (following the guidance of the Guernsey Court of Appeal in *Walters v States Housing Authority* [1997] 24.GLJ.76 per Beloff JA at page 46F). However, I do not find that the IDC's decision was *Wednesbury* unreasonable or otherwise "Bailiff unreasonable". The Jurats will in due course have to decide whether as a question of fact the decision was unreasonable and I will be directing them that it is only in exceptional or special cases that personal circumstances can be considered a relevant factor as an exception to the general rule that they are not to be taken into account.

16. Miss White also relied on a provision of the Strategic and Corporate Plan 2003 identifying the needs of a "*backlog of potential new householders*" (para 10.3.5) and directing that affordable housing is to be provided for people whose financial resources are such that they cannot compete for accommodation in the open housing market (para 10.3.16 and Strategic Policy 6). Section 17(a) of the 1966 Law states that the provisions of the Strategic and Corporate Plan are a factor to be considered by the IDC. However, in my opinion the parts of the Strategic and Corporate Plan on which the Appellant relies give strategic guidance to the IDC to be taken into account in the preparation, for example, of a Detailed Development Plan. They are not intended to guide an individual planning decision. Consequently the IDC was not required to take account of the provisions upon which Miss White relies in this case.

European Convention on Human Rights

17. The second "Bailiff point" for me to consider was in paragraph 28.2 of the Cause, namely:

> *"The ECHR is a relevant consideration that should have been taken into account by the IDC when making this discretionary decision".*

18. In its Refusal of Consent the IDC said the following:

> *"With regard to Article 8 of the European Convention on Human Rights, the Committee has had regard to the Island Development (Guernsey) Law, 1966 (as amended) and the decision of the Committee is in pursuance of the legitimate aim of conserving and enhancing the rural environment of Guernsey. It is also noted that there are procedural safeguards available in determining whether the Committee has acted within its margin of appreciation".*

19. The Human Rights (Bailiwick of Guernsey) Law, 2000 was registered on the records of this island by Act of the Royal Court dated 22 January 2001 with a provision that "*this Law shall come into operation on such date as the States may by Ordinance appoint"* (Section 18(2)). The States have not yet appointed a date for the law to come into operation. The Law will incorporate into our domestic law the rights established in the European Convention on Human Rights. Or, to quote Lord Hoffmann in *In re McKerr* [2004] 1 WLR 807 at page 826D, the Law will "create domestic rights expressed in the same terms as those contained in the Convention". Guernsey is therefore in a position similar to that which existed in the United Kingdom prior to the coming into force of the Human Rights Act 1998.

20. In *McKerr* Lord Nicholls at page 815E emphasised:

> *"the distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this*

> *country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created in the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law."*

21. In Guernsey, as our Law of 2000 has not been brought into force, the Convention rights do not form part of our law and as such they can not be enforced in our domestic courts.

22. Until the Human Rights Law of 2000 is brought into force, there will be no binding obligation on the States or its decision makers to act in accordance with the Convention and there will be no domestic remedy available in this Court if they fail to do so, unless specific legislation says otherwise. To hold differently would mean that the Royal Court is giving primary jurisdiction to itself to enforce the Convention rights before the States of Deliberation intend the Court to have that jurisdiction. Until the Human Rights Law is enacted, the only primary judicial role in relation to the Convention lies with the European Court of Human Rights at Strasbourg. (See Henry L J In *Reg v Ministry of Defence, Ex p. Smith [1996] Q.B. 517 at 564 c to e).*

23. It follows that the Royal Court cannot set aside a discretionary decision of the IDC on the ground of it being in breach of rights contained in the Convention.

Legitimate expectation

24. Advocate White argued forcefully that the ratification of the Convention gave rise to a legitimate expectation that the IDC would take account of an applicant's rights under the Convention when considering a planning application.

25. This line of argument was considered by Lord Woolf, obiter, in *Ahmed and Patel v Secretary of State for the Home Department [1999] Imm AR 22* in relation to a prerogative exercise of discretion granting an extra-statutory concession to enable an immigrant to remain in the country. Lord Woolf said:

> *"He [counsel for the applicants for judicial review] relies on the act of entering into a treaty as giving rise to a legitimate expectation upon which the applicants are entitled to rely. I will accept that the entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken. This is very much the approach adopted by the High Court of Australia in the immigration case of Minister of State for Immigration and Ethnic Affairs v Teoh [1995] 183 CLR 273. The case was concerned with Article 3 of the UN*

Convention on the Rights of the Child. In that context at p.291 in a judgment which I find wholly convincing, Mason CJ and Deane J said":

> *"Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act (45), particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention (46) and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it…..*
>
> *The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door".*

"If it was necessary for me to do so I would also happily adopt the approach of Toohey J in the same case at p. 300-302.

However, there are insuperable difficulties in the way of Mr Kadri obtaining any benefit for his clients from such a legitimate expectation. By making the policies DP/2/93 and DP/3/96 the Secretary of State has made clear his approach. This being so, as long as those policies are policies which he can legitimately have, it cannot be said that by entering into the conventions, the executive has created a legitimate expectation which is in conflict with those policies. In addition there is a difficulty that the Secretary of State in relation to the applicants made it clear that he was taking Article 8 of the ECHR into account and in relation to the UN Convention there is also the reservation to which I have already made reference.

I am afraid that Mr Kadri's point on the prerogative is devoid of merit. As Mason CJ and Deane J made clear, to give effect to it in this situation would be to make the convention part of our domestic law by the back door and this is something which cannot be done".

26. In *European Roma Rights Centre and others v Immigration Officer at Prague Airport and another [2003] 4All ER 247* Laws LJ in a dissenting judgment said at page 277b:

> *"The proposition that the act of ratifying a treaty could without more give rise to enforceable legitimate expectations seems to me to amount, pragmatically to a means of incorporating the substance of obligations undertaken on the international plane into our domestic law without the authority of Parliament. In Chundawadra v Immigration Appeal Tribunal [1988] Imm AR 161 this court held that ratification of the European Convention on Human Rights created no justiciable legitimate expectation that the convention's provisions would be complied with. In Behluli v Secretary of State for the Home Department [1998] Imm AR 407 a like conclusion was arrived at in this court in relation to the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin; TS 72 (1997); Cm 3806 (the Dublin Convention). Beldam LJ said (at 415)":*
>
> > *"In… Minister for Immigration and Ethnic Affairs v Teoh [1995] 3 LRC 1 … it was said that in that jurisdiction ratification of a Convention was to be regarded as a positive statement by the executive Government and its agencies that they would act in accordance with the Convention and that that positive statement was an adequate foundation for a legitimate expectation in the absence of statutory or executive indications to the contrary. But as is clear from [Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, [1991] 1 AC 696], that is not the law in this country".*

27. I respectfully agree that the ratification of the Convention does not, without more, give rise to a legitimate expectation enforceable by the Appellant in this Court to set aside the decision of the IDC. To hold otherwise would be to incorporate the Convention rights into our law "through the back door" which the Court can not do.

28. The reasons given by the IDC for its decision indicate that consideration was given to the Appellant's arguments in relation to his rights under Article 8 of the Convention. The 1966 Law does not require the IDC to take account of such rights and it is not open to this court to grant any remedy to the Appellant if the IDC has unreasonably attached insufficient weight to those rights. I will direct the Jurats accordingly.

29. There will be situations where the Convention may be relied upon in Guernsey. For example where a statutory provision is unclear or ambiguous it may be necessary to have regard to the Convention so as to ensure the statute is interpreted in a manner that does not conflict with the Island's international obligations (see *R v Secretary of State for the Home Department, ex p. Brind*) [1991] 1 A.C. 696).

30. There may be other circumstances such as those considered by Lt-Bailiff Talbot QC in *Law Officers of the Crown –v- Ogier* where it may be of assistance to have regard to the Convention. Advocate Raffray also submitted that following *Gillow -v- UK* and *X –v- States Housing Authority* [1999] 27.GLJ.41 decisions under the Housing Laws may be required to take account of human rights issues because the Housing Department are required to have regard to any "other material factor" (Section 6(5)(e) of the 1994 Law).

Conclusion

31. This appeal must now be listed for a hearing before the Jurats for them to decide as a question of fact whether the IDC's refusal of the Appellant's application was an unreasonable exercise of its powers. In relation to the issues raised by counsel as preliminary "Bailiff" points I will give directions to the Jurats that are consistent with my rulings in this Judgment.

32. I propose that the question of costs be reserved unless counsel apply within 14 days.

