Judgment 24/2009 **Kinley v Housing Department – Royal Court (Civil Action File 1300) – 28 May 2009**

Housing (Control of Occupation) (Guernsey) Law, 1994 (s.56) – appeal from refusal of application for housing licence – whether unreasonable exercise of the Department's powers – confusion as to the relevance of the "Excellent Teacher Scheme" – held the application should firstly have been considered on employment related grounds (s.6 (2)(a) of the Law) – failure to notify the appellant that her application had not been considered under s.6 (2)(a) – European Convention on Human Rights (Art. 8) – right to respect for private and family life, home etc – held that the Dept had failed to demonstrate, pursuant to Art. 8 (2), that the interference with the right under Art. 8(1) was justified – reliance on the Housing Needs Survey – held that the Department had failed in its duty to exercise meticulous care in arriving at the decision under appeal – reasons for rejection of application not properly explained – held that he decision was so unreasonable that it must be set aside

Approved Judgement
28 May 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **Jane KINLEY**

Appellant

- v -

THE MINISTER OF THE HOUSING DEPARTMENT

Respondent

Date of hearing: 18th May 2009

Judgment handed down: 28th May 2009

Before: Richard John COLLAS Esq., Deputy-Bailiff

and

Michael Henry De La Mare, Michael John Tanguy and Peter Sean Trueman Girard Esquires, Jurats of the Royal Court

Advocate for Appellant: Advocate P T R Ferbrache
Advocate for Respondent: Crown Advocate R T Sewards

Cases, texts and statutes referred to:

1) The Housing (Control of Occupation) (Guernsey) Law, 1994.
2) The Human Rights (Bailiwick of Guernsey) Law, 2000.
3) *Ward v States Housing Authority [1995] 20.GLJ.94*.
4) *Walters v States Housing Authority [1997] 24.GLJ.76*.
5) *In Re W (1971) AC 682*
6) *Thomas v the Minister of the States of Guernsey Housing Department Royal Court 26 February 2008*
7) *Gillow v United Kingdom (1986) 11 EHRR 335*
8) *Matheson v States Housing Authority [1998] 26.GLJ.82*.
9) Human Rights Law and Practice, Second Edition by Lester and Pannick
10) *Niemietz v Germany (1992) 16 EHRR 97*

Introduction

1. This is an appeal under Section 56 of the Housing (Control of Occupation) (Guernsey) Law, 1994 ("the 1994 Law") against a decision of the Board of the Housing Department refusing to grant a Housing Licence to the Appellant.

2. The Board considered the application at its meeting on 3 July 2008 and by letter dated 19 August 2008 signed by the Director of Housing Control, the Appellant was advised that her application had been rejected (Tab 3, page 82). References in this judgment are to documents contained either in the bundle entitled "*Final Hearing Bundle*" or the bundle entitled *"The Appellant's authorities"*. We refer to the Respondent, including its predecessor the States Housing Authority, as the "Department".

3. Section 56(1) of the 1994 Law provides that the grounds for an appeal against a decision of the Department are that the decision was *ultra vires* or was an unreasonable exercise of the Department's powers. The latter is the only ground relied upon in this appeal.

4. This is the decision of the Court. Pursuant to Section 14(2) of the Royal Court (Reform) (Guernsey) Law, 2008 the Deputy Bailiff did not sum up to the Jurats in open Court, but instead retired with the Jurats. The Deputy Bailiff reminded the Jurats of their respective roles; the Deputy Bailiff as the sole judge of questions of law and procedure and the Jurats as the sole judges of questions of fact.

5. The Deputy-Bailiff directed that, save in respect of Article 8 of ECHR, the burden of proof is on the Appellant (Section 56(3) of the 1994 Law) and the standard of proof is the civil standard of the balance of probabilities; to establish something on the balance of probabilities means to prove that something is more likely so than not so. In relation to Article 8 of ECHR, the Deputy-Bailiff's direction is later in this judgment.

Facts

6. The Jurats took account of the facts presented to the Department in connection with its decision. The key facts include that:

    a) The Appellant, who was 41 years of age, was born and educated in Northern Ireland but has lived away from Northern Ireland since the age of eighteen; she lived for no more than three or four years in any one place until she moved to Guernsey.

b) The Appellant is a qualified teacher and moved to Guernsey in January 2001 to take up a teaching post at Vauvert Primary School.

c) From January 2001 the Appellant had always held a housing licence granted in connection with her employment.

d) The first housing licence was issued to her dated 31st January 2001 on condition that "*this licence will remain valid provided that the licensee continues to be employed on a full time basis as a Teacher Responsible for Humanities at Vauvert Primary School by the States Education Council in Guernsey"*. The licence was valid only until 31 August 2006 (document 28).

d) On 12 November 2001 a second licence was granted to the Appellant because she had moved to a new rented dwelling. The licence was subject to the same conditions as her first licence. (Document 35)

e) On 1 November 2002, the Appellant wrote to the Housing Authority enquiring as to what kind of property she might be permitted to purchase to which the Department replied on 14 November 2002 (documents 36 and 37).

f) In 2003, the Appellant purchased her own property, Rosaire Cottage, Duveaux Lane, St Sampson. It is a modest unit of accommodation suitable for one person only as described in a letter dated 18 June 2008 from Cooper Brouard, Estate Agents who said the accommodation amounts to approximately 500 square feet in total and, in effect, comprises two habitable rooms for the purpose of the housing licence regulations (document 72).

g) On 2 May 2003, the Department advised the Appellant that her application for a housing licence to occupy Rosaire Cottage had been granted and would be valid from 27 May 2003 until 31 August 2006 "*provided that you continue to be employed on a full time basis as teacher responsible for humanities at Vauvert Primary School by the States Education Council in Guernsey"* (page 45).

h) On 13 May 2005, the Education Department wrote to the Department requesting a two year extension to the Appellant's licence on the grounds, *inter alia*, that she "*is an able teacher who has made a considerable contribution to the work being undertaken at the school. She has taken on responsibility for History and Geography and is engaged in developing these areas of the curriculum"*. It was clear from Education's letter that the Appellant was a valued member of staff who, for several reasons, they did not wish to lose (pages 48 and 49).

i) By letter dated 26 July 2005, the Department advised that the Appellant's application for a licence extension had been granted on condition that: "*This licence will remain valid until 31 August 2008, provided that you continue to be employed on a full time basis as a Key Stage 2 teacher at Vauvert Primary School by the Education Department in Guernsey".* (Pages 50 and 51)

j) On 22 August 2005, the licence was amended by the Department to correct the fact that she had become a Key Stage I teacher and, again, was valid until 31 August 2008 (document 53 and 54).

k) The total period of time during which the appellant held an employment-related licence was 7 years and 8 months; from January 2001 to August 2008.

7. On 10 March 2008 the Appellant began the process that led to the decision that is the subject of this appeal. She wrote to the Department (page 55) enquiring about the possibility of a further licence to enable her to stay in Guernsey on the basis that her Head Teacher would like her to continue working at Vauvert Primary School and he was aware that the

Department and the Education Department were discussing an "*Excellent Teacher Scheme which would attempt to allow excellent teachers to remain within Guernsey*". The letter advised that if the scheme was in place, her Head Teacher would make an application on her behalf as he did not want to lose her as a valued member of staff (document 55).

8. By letter dated 19 March 2008, the Department advised the Appellant that an 'Exceptional Teacher Policy' was being finalised with the Education Department. However, any request under that scheme must be made by the employer i.e. the Education Department, rather than the licence holder.

Exceptional Teacher Scheme

9. We will now digress and explain the Exceptional Teacher Policy because the Jurats consider that it led to considerable confusion in the mind of the Appellant who believed she would be eligible to remain in the Island under the terms of that policy. Her Headteacher also appears to have been confused by it because he wrote to the Department, on official Education Department notepaper, saying that the Appellant met all the criteria (letter dated 10 June 2008, document 70) even though Crown Advocate Sewards said it was not the headteacher's responsibility to assess all the criteria; a headteacher was only responsible for assessing the Band One Criteria and the Band Two Criteria were for the Education Department officials to consider, not the schools. The Court was told that the policy was only in draft form when the Appellant applied and a copy is at Tab 4 of the Bundle, marked "March 2008 Draft". We were not told whether the policy has ever come into force.

10. The draft policy states that a request to extend the housing licence of a teacher/lecturer will be based on a high score on the Band One Criteria; those criteria relate to the teaching skills and all-round contribution of the teacher/lecturer. In broad terms, the Band One Criteria are designed to assess whether he/she is an exceptional classroom teacher. Then, the individual will be scored on the Band Two Criteria; these relate to the difficulty in recruitment and whether there are candidates with local residential qualifications.

11. The Court has seen nothing in writing from the Education Department to explain why the Education Department would not put her name forward. Document 71 is a file note of a meeting the Appellant attended with Esther Ingrouille, the Director of Housing Control at the Department on 13 June 2008. The note records that :

> *"Despite many attempts to explain to Miss Kinley that the Education Department had indicated that she could not be put forward under the scheme (I had previously spoken with Jocelyn Dorey who confirmed that Miss Kinley had been informed that she would not be put forward), she seemed reluctant to accept this fact saying that her ineligibility for the scheme was a complete shock."*

12. The point is considered in a report prepared by L Ward, an official of the Department, for the benefit of Board members (Document 76 and 78). The report suggests the reason Education would not consider the Appellant was because *"there was no shortage of returning Primary School teachers".*

Basis for the Application

13. At the meeting of 13 June, the Appellant was advised by Ms Ingrouille that her letter of 31 May would be treated as a request for a 'compassionate' licence. It seems to the Jurats that the Appellant accepted that advice; perhaps with some reluctance as she wanted a housing licence not only so that she could remain in her teaching post at Vauvert School but also to continue living in her house which she regarded as her home and to continue her life in Guernsey.

14. The Appellant's letter of 31 May had sought a housing licence for one year as a *"compassionate extension on my current licence until the Excellent Teacher Scheme is ratified"* (pages 68 and 69). In that letter, the Appellant described her responsibilities and achievements as a member of the staff of Vauvert Primary School, explained her salary, described her background and summarized the work she has undertaken to participate in a number of charitable events on behalf of the wider community. The Appellant also stated that, although born in Northern Ireland, she has never worked there and has no links to the world of education in Northern Ireland and thought it was very unlikely she would find an appointment there. The letter explained that she considered her home to be in Guernsey and said: *"Thus, I would be without a home and without a means of supporting myself should I be forced to leave Guernsey"*. It was supported by letters confirming her value to the school, to the community and testifying as to her qualities as a teacher:

    - from her Head Teacher;
    - from a GP who knew her personally and who knew the quality of her work through a number of his patients whose children attend the school "*and they invariably speak very highly of her";*
    - from her line manager at Vauvert Primary School;
    - from a fellow teacher at the school;
    - from the Divisional Secretary of the Guernsey Teacher's Association of the National Union of Teachers testifying as to the work that she had done as a member of the Executive of the Guernsey Branch of the Union;
    - from the Minister of the Church of Scotland;
    - from a member of the Vauvert School PTA; and
    - from the Music Subject Leader at the school.

15. A further letter was sent by her Head Teacher on 10 June 2008, stating that he would have made a request to the Education Department for her to be granted an extension of licence as, in his opinion, she met all the relevant criteria.

16. After her meeting with Ms Ingrouille and a colleague at the Department on 13 June 2008, she wrote again to the Department with more information about her work and personal circumstances and requesting *"an extension to my current licence on compassionate grounds. The delay and confusion of suitability for the 'Excellent Teacher Scheme' has left me in a most unenviable position."*

17. The letter concluded in the penultimate paragraph (at page 75):

    > *"I appreciate that you may have other applications of this nature. I do not make appeals lightly, but my life is under threat. My home is here and it is threatened. I did not expect for Guernsey to become my home in the time I was here. Initially I expected to stay approximately three years as I had done in other positions, but my residence became my home. I am an excellent teacher. I am an asset to the community and I belong here. I know that exceptions have been made for my colleagues because they have young families, so, should I be treated unfairly because I do not have a family? I am further penalised by not having a significant enough relationship breakdown, which I know has engendered compassion towards colleagues"*.

18. The report prepared for consideration by the Board at its meeting on 3 July 2008 was headed *"Miss J G Kinley – request for compassionate licence"* and advised that the Appellant was

seeking a compassionate licence. So, the members of the Board did not consider whether to grant a further licence on employment-related grounds. Several inter-connected issues arise from that fact, including whether the Board wrongly failed to consider the application under the provisions of section 6(2) (a) of the 1994 Law and whether the decision can be criticised by reason of having incorrectly applied a policy, when it was wrong to do so.

Section 6(2)(a) of the 1994 Law

19. Section 6(2)(a) of the 1994 Law provides that the Department *"shall **firstly*** (emphasis added) *consider where the application is made in order to enable a person to occupy a dwelling so that he may undertake employment in Guernsey, all or any of the following matters…"***.**

20. Advocate Ferbrache argued that was a mandatory requirement that the Department wrongly ignored by giving no consideration to section 6(2)(a).

21. Crown Advocate Sewards submitted that section 6(2)(a) is conditional in that the Department is only required to consider it where an application is made in order to enable the applicant to occupy a dwelling in order to undertake employment in Guernsey.

22. The Appellant's application was not considered under section 6(2) (a) for the reason that, as we have already explained, the Appellant was told or persuaded to apply on compassionate grounds only because Education would not put her name forward under the 'Excellent Teacher Scheme'.

23. Advocate Ferbrache referred to a passage in the judgment of Beloff JA in ***Matheson*** at page 4C, where he said that the then Housing Authority *"can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; a policy can not modify, extend, still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it should not be applied in a particular case and in consequence, in appropriate circumstances to make exceptions to it."*

24. When the Appellant wrote to the Department on 31 May 2008, she believed she was applying for a licence in connection with her employment; that is evidenced by the contents of her letter, the supporting letters and especially the letter from her headteacher. She was entitled to expect that the application would be considered by the Board of the Housing Department under section 6 (2) (a) of the 1994 Law.

25. The reason she was not considered under that sub-section is because officials of the Department understood that Education were not prepared to put her forward under the 'Excellent Teacher Scheme'. The Court is of the view that was wrong in a number of respects.

26. Firstly, it appears to transfer responsibility for deciding which teachers are entitled to an employment-related licence from the Housing Department to the Education Department. The 1994 Law bestows responsibility for such a decision on the Department; it is understandable and entirely lawful that the Department should seek the views of Education before considering such applications from teachers employed by Education but Education can only advise and recommend, the decision to grant or refuse such a licence must be taken by the Department. The Department must not fetter its discretion by relying solely on the opinion of Education.

27. Secondly, officials appear to have decided that because the Appellant did not meet the criteria of the 'Excellent Teacher Scheme', that was decisive. If so, they failed to satisfy the second of the two conditions identified by Beloff J.A. in ***Matheson*** quoted above; they had an obligation to consider disapplying the policy when appropriate.

28. Thirdly, the policy was only in draft.

29. Fourthly, if the policy had been adopted it would have applied to the holders of a five year housing licence and the Appellant held a licence of 7 years 8 months' duration. So the policy would not have applied to the Appellant.

30. Fifthly, the view seems to have been taken that only an employer could apply for an employment-related licence. The 1994 Law does not contain any such restriction. It may be the Department's policy only to consider such applications if supported by the employer but, if so, such policy must satisfy the two conditions identified in ***Matheson*** and the Department must be prepared to depart from the policy when appropriate. The Department's officials could properly advise an applicant that an application is unlikely to be successful if it is not supported by the employer but they must not fetter the Department's discretion by saying that an employment-related application can only be considered on compassionate grounds if it is not so supported.

31. Another failing was that, in the Department's letter of 19 August 2008 informing her of its decision, the Appellant was not informed that it had not considered the application under section 6(2)(a); having applied for a licence on the grounds, *inter alia* of her employment, the Appellant was entitled to be told it had not been considered on that basis and to be told why not. In fact, if the Department had written that it would not consider the Appellant on such ground because her application was not supported by Education, that would immediately have highlighted the fact that the Department was unduly fettering its decision making responsibility.

32. Crown Advocate Sewards argued that the appeal cannot now be pursued on the basis of a failure to consider it under section 6(2)(a) because that would be *ultra vires* and the only ground pleaded in the appeal is that the decision was unreasonable. Such a defect could be overcome by amendment and it would not be too late, even at this stage, to allow Advocate Ferbrache to amend. However, we do not need to do so because there are other grounds on which the appeal may succeed.

Article 8 of the European Convention on Human rights ("ECHR")

33. Article 8(1) confers upon the Appellant: *"The right to respect for her private and family life, her home and her correspondence"*.

34. The Human Rights (Bailiwick of Guernsey) Law 2000, which came into force on 1 December 2006 ("the Human Rights Law"), incorporated Article 8 into our domestic law. Section 3 of the Human Rights Law requires all legislation, including the 1994 law, to be read and given effect in a way which is compatible with the Convention Rights. Section 2 of the Human Rights Law requires the court, on this appeal, to take into account judgments of the European Court of Human Rights and certain opinions and decisions of the Commission.

35. The parties are agreed that Article 8(1) is engaged because the Department's decision is an interference with the Appellant's rights thereunder. The parties are also agreed, and the Deputy-Bailiff directed the Jurats, that the burden of proof moves to the Department to demonstrate that its decision is justified under Article 8(2). That is in accordance with the earlier decision of the Royal Court handed down by Finch LB on 26 February 2008 in *Thomas v the Minister of the States of Guernsey Housing Department* where, at paragraph 37, he held that there was no tension between the provisions of Article 8(2) and Section 56(3) of the 1994 Law. He said that the Department has the burden of justifying that the interference under Article 8(1) is justified and at the end of the day, the Appellant has the burden in the housing appeal.

36. The Appellant is not seeking a declaration that the 1994 Law is incompatible with the European Convention on Human Rights ("ECHR"). The European Court has decided that our Housing Laws are Human Rights compliant (*Gillow v United Kingdom*) but the Department must interpret it in a manner which is compatible with the ECHR. The Appellant asserts that the Department has failed to do so in this case by failing properly to apply Article 8(2).

37. Article 8(2) provides that:

> *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."*

38. The concept of private life is to be widely interpreted and has not been clearly defined, but the Deputy Bailiff directed the Jurats to take account of the following passage at paragraph 4.8.18 of Human Rights Law and Practice Second Edition by Lord Lester of Herne Hill QC and David (now Lord) Pannick QC:

> *"In the leading case of Niemietz (1992) 16 EHRR 97, the ECt HR, pronounced that:*
>
> > *'The court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.*
> >
> > *'There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world … especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given time.'*
>
> *An individual's right to relate socially with others is part of the right to develop and fulfil one's own personality and to lead one's life as one chooses. However, the concept spreads wider as identified by the ECt HR in the case of Pretty v United Kingdom when it stated:*
>
> > *'[T]he concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person ….It can sometimes embrace aspects of an individual's physical and social identity … Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by art 8… Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside worlds … Though no previous case has established as such any right to self-determination as being contained in art 8 of the Convention, the court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'."*

39. As for the notion of 'home', at paragraph 4.8.70, the learned authors wrote:

> *"The use of the term "home" appears to invite a pragmatic consideration whether the question is that where a person 'lives and to which he returns and which forms the centre of his existence'. 'Home' is not a legal term of art and art 8 is not directed to the protection of property interest."*

40. The Deputy Bailiff directed the Jurats that they might find it helpful to see how the European Court of Human Rights applied Article 8 in its decision in the case of *Gillow*. The Court summarised the principles in paragraph 55 of its judgment:

> *"55. As to the principles relevant to the assessment of the necessity of a given measure in a democratic society, reference should be made to the Court's case law. The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued. In addition, the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved. In the instant case, the economic well-being of Guernsey must be balanced against the applicants' right to respect for their home, a right which is pertinent to their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government."*

41. Next, the Court asked whether the Gillows' obligation to obtain a housing licence complied with those principles and it concluded:

> *56. ".....Whilst recognising the relevance of the facts relied on by the applicants, the Court considers that the Guernsey legislature is better placed than the international judge to assess the effects of any relaxation of the housing controls. Furthermore, when considering whether to grant a licence, the Housing Authority could exercise its discretion so as to avoid any disproportionality in a particular case. It follows that the statutory obligation imposed on the applicants to seek a licence to live in their home cannot be regarded as disproportionate to the legitimate aim pursued.*
>
> *There has accordingly been no breach of Article 8 as far as the terms of the contested legislation are concerned."*

42. Then the Court considered whether in the circumstances of the Gillows' case the refusal of a housing licence was proportionate to the legitimate aim of the legislation.

> *"57. There remains, however, the question whether the manner in which the Housing Authority exercised its discretion in the applicants' case – refusal of permanent and temporary licences, and referral of the matter to the Law Officers with a view to prosecution – corresponded to a pressing social need and, in particular, was proportionate to the legitimate aim pursued.*
>
> *The statistics submitted to the Court show that, during the relevant period – 1979 and 1980 – the population of the island had been kept within the levels of recent years, having even marginally declined, and the availability of houses for occupation had not suffered any significant deterioration. Against this background, whilst not overlooking the fact that the average population per square mile of the island was still high in comparison with other countries, the*

Court considers that insufficient weight was given to the applicants' particular circumstances. They had built Whiteknights as a residence for themselves, and their family. At that time, they possessed residence qualifications and continued to do so until the entry into force of the Housing Law 1969, so that during that period they were entitled to occupy the house without a licence. The property was Mr. and Ms. Gillow's place of residence for two years before they left Guernsey in 1960. Thereafter, they had retained ownership of the house and left furniture there. By letting it over a period of eighteen years to persons approved by the Housing Authority, they contributed to the Guernsey housing stock. On their return in 1979, they had no other home in the United Kingdom or elsewhere; Whiteknights was vacant and there were no prospective tenants.

As for the refusals of the temporary licences, the decisions of the Housing Authority were, despite the granting of certain periods of grace, even more striking. Whiteknights needed repairs after eighteen years of rented use, with the result that it could not be occupied in the meantime by anyone other than the applicants.

Finally, as regards the referral of the case to the Law Officers with a view to prosecution, the Government stated that the Housing Authority deferred taking this course on several occasions. This, however, in the Court's view did not materially alleviate Mr. and Mrs. Gillow's already precarious situation.

58. The Court therefore concludes that the decisions by the Housing Authority to refuse the applicants permanent and temporary licences to occupy Whiteknights, as well as the conviction and fining of Mr. Gillow, constituted interferences with the exercise of their right to respect for their home which were disproportionate to the legitimate aim pursued."

43. The *Gillow* decision shows that the European Court expressly identified that the pressing social need to be protected was the economic well-being of the Island. In the present case, Advocate Ferbrache has criticised the Department for not making clear the pressing need it identified. He says the Appellant has inferred that it is the Island's economic well-being although it could be the protection of the rights and freedoms of others.

44. The Court agrees that in explaining the reasons for its decision, the Department should state expressly the grounds on which it considers that it is entitled to interfere with an applicant's Article 8(1) rights.

45. In seeking to protect the Island's economic well-being, the Department has relied upon statistical information; not population statistics as in *Gillow*, but the Housing Needs Survey.

Housing Needs Survey

46. The Housing Needs Survey was published in September 2007 and reproduced as an appendix to the Billet d'Etat XXV in December 2007. Crown Advocate Sewards appeared to submit to the Court that, because the Housing Needs Survey was published as an appendix to a Billet d'Etat, it represented an approved policy of the States of Deliberation. The Deputy Bailiff directed the Jurats that a report which is merely published as an appendix to the States of Deliberation is not ordinarily debated and hence is not approved by the States. A Department that wants a report to be formally approved may table it for debate with an appropriate proposition. Or, if it does not do so, any two members of the States may propose and second a motion calling for it to be debated. The Jurats consider that given the importance the Department attached to the Housing Needs Survey it would not have been surprising if the

Department had sought formal approval from the States. However, neither the Department nor any other States' members sought a debate so the Survey was never debated and it cannot now be elevated to the status of a formal policy of the States of Deliberation.

47. In its letter to the Appellant of 19 August 2008, the Department said the following about the Housing Needs Survey:

> "*The report indicated that new or 'emerging' households were being formed in the Island at a rate of 489 households per year with 81% of those new households being single people or couples without dependant children. When compared to the number of households that cease to exist, this leaves a net shortfall in supply of 340 new homes each year. This compared with a net shortfall of only 179 households per year based on the findings of a similar survey conducted in 2001.*
>
> *Therefore, the board concluded that there was a need to ensure that the limited supply of housing available within the Island was prioritised for those new households where the householder is either a qualified resident or an existing licence holder who is permitted to occupy a controlled dwelling in their own right."*

48. Advocate Ferbrache criticized the Board's interpretation of the findings of the Survey. He said the Survey calculated the net increase in the number of new households that are being created each year and equated that figure to a shortfall in the supply of new homes, without taking into account the number of new homes that become available as a result of the construction of new properties or the conversion and renovation of old properties.

49. At paragraph 1.4 of the Survey Report (Tab 5, page 5), it states: "*The study was comprehensive in considering the different components of housing requirements and supply"*. An uninformed reader might assume that "*supply"* includes new developments and conversions. However, the final sentence explains: *"These gross housing requirements were offset against the likely supply of housing within the* ***existing*** *stock to yield a net requirement for additional housing"* (emphasis added).

50. On closer reading it is thus clear that the Survey does not take into account new constructions and conversions. However, when calculating any shortfall in the requirement for one-bedroom accommodation, the Court accepts Advocate Ferbrache's comments that if it is considering the economic well-being of the Island by reference to the number of dwellings required to cope with an increase in households, the Department should take account of supply of new dwellings. That is especially important because a number of States' Departments, not least the Housing Department, have adopted policies to ensure new dwellings are created. Advocate Ferbrache argues that if the supply of new dwellings exceeds the demand, there would be no justification in displacing the Appellant from her home.

51. A further issue raised by Advocate Ferbrache is that the Department appear to have taken into account the total number of new households each year, 340, whilst ignoring the fact that the Survey concludes that only 187 of those require just a single bedroom (page 76 of the Survey at Tab 5).

52. Advocate Ferbrache submitted that the States Cadastre will be able to provide information as to the number of new units that have been created in any one year and so that information would have been available to the Department. Crown Advocate Sewards did not refute that suggestion but merely stated that the Housing Needs Survey demonstrated that the problem has become much worse since an earlier survey was conducted in 2001.

The Need for Meticulous Care

53. The Court was referred to a number of earlier appeals such as ***Ward*** and ***Walters*** in which the Courts have observed that our Housing Laws are formidable enactments that place great and unusual powers in the hands of the Department. At paragraph 34 of ***Ward***, Sir Godfray Le Quesne, JA, said:

> *"We wish to emphasise, however, that such drastic power calls for meticulous care in its exercise and scrupulous balancing of the conflicting interests which it affects."*

54. The documents produced to the court in connection with the present appeal indicate that staff members of the Department have exercised meticulous care in the handling of the Appellant's case and they have tried to be as helpful as they can when assisting her in the presentation of her application. However, the Jurats are concerned that the documentation does not demonstrate that the members of the Board of the Department, who were responsible for taking the decision to reject the Appellant's application, have approached the matter with the same degree of meticulous care that such a drastic interference with her life merits and demands. It begs the question whether there was any, or any adequate, discussion and consideration by the Board of the conflicting interests before it reached its drastic conclusion.

55. Evidence of the attention devoted to the matter by the Board is to be found in three documents. First of all, the Board paper (at page 76) is annotated in two places with the words *"yes - application rejected"*, initialled by an official and dated 3rd July 2008. It thus appears to be a contemporaneous note of what took place when the application was discussed by the Board. It records the Board's decision, but does not record any matters discussed.

56. The next document, at page 79, is headed "*Case Work Meeting – minutes of the meeting held on 3 July 2008"*. It appears to be an extract of minutes of the meeting of the Board of the Department that day and excludes a number of items not relevant to the appeal. Six Board members were present although two left when the Appellant's application was discussed, having declared an interest in the matter. Also present were six officers of the Department. The minutes summarize the factual basis for the application, but they do not record any discussion or questioning of the application, or the basis upon which the decision is to be reached, or any other matters that would normally be expected if the Board were approaching the matter with meticulous care and scrupulously balancing the conflicting interests. The minutes record that the Board agreed with the recommendation to refuse the licence, but they do not state whether that was unanimous, or by a majority with dissenting votes or abstentions. In short, they lack the characteristics of a full and comprehensive set of minutes.

57. Crown Advocate Sewards advised the court that the minutes had been approved by the Board at its subsequent meeting, but there was no written evidence disclosed to show that that was correct, or even to show that the minutes had been seen by any members of the Board.

58. The third document is the letter from the Department dated 19 August 2008 to the Appellant advising her of the decision. It is signed by the Director of Housing Control, not by the Minister or any other member of the Board. Advocate Ferbrache questioned why the letter took so long to prepare and no explanation has been provided as to why it took from 3 July to 19 August to advise the Appellant of the Board's decision.

59. In some of the earlier judgments of the Court of Appeal and the Royal Court, the Department has been criticised for giving only the briefest of reasons to explain why an application had been rejected. In this case, the Court accepts that the Department has clearly taken steps to improve that unsatisfactory position. Crown Advocate Sewards made a number of comments about what is required of the decision letter including the need for it to be expressed in terms

that can be understood by a lay person so that it be intellectually accessible. He commented that a twenty-five page letter would not necessarily be any better than a shorter letter.

60. In the respectful view of the court, Crown Advocate Sewards may have misunderstood the main purpose of the letter which is to explain the reasons for the Board's decision, as well as informing the applicant of the decision. The applicant is entitled to know the precise reasons why the Board rejected an application. If the decision maker has misunderstood the application, or has taken account of irrelevant material, or has failed to take account of relevant material it should have taken into account, or has misunderstood or misapplied the law, or if the decision making process is otherwise fundamentally flawed, the applicant is entitled to be told. Otherwise, he or she cannot properly exercise his or her legitimate right of appeal. As the Court of Appeal said in ***Ward*** at paragraph 25: *An Applicant who is not told the full reasons for the refusal of the application cannot exercise this right of appeal effectively."*

61. The Board has a responsibility to inform the Appellant of the full reasons for its decision; if the discussion by the Board was so detailed that it could fill a 25 page letter then that was what the Appellant should have received. Instead, the impression given is that of an abject failure by the Board to consider the matter properly or, if it did so, a failure properly to explain the reasons for the refusal of the housing licence.

62. So, the main purpose of the Department's letter dated 19 August 2008 was to inform the Appellant of the reasons why the Board decided to reject her application at their meeting on 3rd July 2008. It was not the purpose of the letter to seek to bolster the decision making process by attributing reasons to the Board that they did not in fact give or by explaining their decision in more favourable terms in the hope of rendering the decision appeal-proof.

63. Having carefully considered the documents, the Jurats have concluded that the Board failed in its duty to exercise meticulous care and to balance scrupulously the conflicting interests.

The Department's Reasons

64. The reasons given by the Department in its letter dated 19 August 2008 for concluding that it was justified in interfering with her Article 8 rights are at pages 84 and 85 of Tab 3.

65. The Board noted that the property purchased in May 2003 was regarded by the Appellant as her home, but stated that from the very outset she had known her occupation of it would be time limited and never had any legitimate expectation of being able to remain in it. Mindful of the Housing Needs Survey showing that the type of property that she occupies would fall *"into the category of those for which there was the greatest demand to provide for the needs of emerging households"* the Board concluded that interference with her Article 8(1) right to her home was justifiable under the provisions of Article 8(2).

66. The Department then considered the effect the decision would have on her right to respect for private and family life under Article 8(1). The Board noted that her financial circumstances were such that she would not be able to afford an open market dwelling and hence would have little alternative but to relocate from Guernsey. It said:

> *"However, once again the board considered that the extent of its interference was proportionate and justifiable……as a result of the findings of the Housing Needs Survey."*

The Test of Reasonableness

67. The Deputy Bailiff reminded the Jurats of the guidance given by Beloff JA in *Walters v States Housing Authority [1997] 24.GLJ.76* at page 47B, quoting the words of Lord Hailsham LC *in Re W (1971) AC 682* at page 700:

> *"Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individuals judgment with his own…".*

The court's decision in respect of Article 8

68. The Jurats have concluded that the Department has failed to show that the extent of its interference with the Appellant's Article 8 rights was proportionate and justified. The Board acknowledged that the Appellant's financial circumstances were such that its decision would result in her leaving the Island as she could not afford to remain here.

69. The Department has failed to show that it considered the Appellant's family life and home in the very broad context in which those concepts have been interpreted by the European Court in the cases we have quoted above. The Department appears to have placed too much emphasis on the fact that the Appellant knew she held housing licences that are limited in time, without looking at the wider notions of 'private life' and 'home'.

70. The Department failed to state the basis it relied upon in interfering with her rights, but if the basis was the economic well-being of Guernsey, the Department placed too much emphasis on the findings of the Housing Needs Survey without taking into account the supply of new housing stock.

71. The Appellant has persuaded the Jurats that the Department failed to treat her application with the meticulous care it demanded and that it did so unreasonably.

Section 6(2)(b)(i) of the 1994 Law

72. Section 6(2)(b)(i) of the 1994 Law requires the Department to have regard to the strength of the Appellant's familial or like connections with the Guernsey.

73. The Deputy-Bailiff directed the Jurats that in this context, 'familial connections' is taken to mean an applicant's connections by blood and marriage. The Appellant has no relatives in Guernsey, she is unmarried and hence she has no familial connections with the island; her parents live in Northern Ireland although no longer in the area where she was born and she feels she no longer has any real connection with Northern Ireland.

74. As for her 'like' connections, counsel had not suggested a definition and the Deputy-Bailiff was reluctant to do so although the Department apparently interpreted the phrase by referring to the connections she has built up in the Island through her work and socially. The Department noted such connections on page 1 of its letter at page 82 of Tab 3.

75. The definition is certainly no wider than the definition of 'family life' adopted by the European Court and so, in the light of the Jurats' conclusion in respect of her Article 8 rights, section 6(2) (b) (i) need not be considered further.

Section 6(2)(b)(ii) of the 1994 Law

76. Section 6(2)(b)(ii) requires the Department to consider *"the periods during which and the circumstances in which [the Appellant] has been resident in Guernsey or elsewhere"*. Advocate Ferbrache criticised the Department for having treated this as a purely arithmetic exercise, looking only at the length of her residence in Guernsey, 7 years and 8 months, and comparing it with the length of her period of residence elsewhere, 34 years, without looking at the circumstances thereof (as required by the sub-section) and without taking into account that since leaving Northern Ireland for university she had lived nowhere for more than three or four years until coming to Guernsey. Furthermore, she had remained in Guernsey longer than she might otherwise have done because the Education Department asked her to stay on and the Department agreed that she could and extended her housing licence by two years.

77. The Deputy Bailiff directed the Jurats that the exercise required of the Department is more than an arithmetic calculation comparing the period of time spent in Guernsey with the period of time spent elsewhere. If the view of the Department is correct that it is a relevant circumstance that the Appellant's housing licences have always been limited in time and that the Department has never given her any reason to expect that she will be entitled to remain in Guernsey indefinitely, then the scope of this sub-section is significantly narrower than the consideration required in respect of Article 8. Consequently, in light of the Jurats' conclusion in respect of her Article 8 rights, section 6(2) (b) (ii) need not be considered further.

Section 6(5)(e) of the 1994 Law

78. The Department also considered the application under Section 6(5)(e) which requires consideration of "*such other factors as it may deem necessary or expedient"*. The Department referred to the Appellant's confusion over her eligibility under the "Excellent Teacher Scheme" and noted that the Education Department had not requested a further licence for the Appellant under the terms of the scheme, a fact of which it said she should have been aware. So, her application had to be considered on her personal circumstances rather than based on her employment.

79. We have already quoted what the Board said about the findings of the States of Guernsey Housing Needs Survey. The letter then added:

> *"After considering all the matters set out above, the Board resolved that when your familial and like connections were considered having regard to your periods and circumstances of residence, together with the other factors set out above, the grant of a housing licence to enable you to continue to occupy a controlled dwelling in Guernsey was not justified"*.

80. We have already set out the Jurats' comments on the Housing Needs Survey and the Department's apparent misunderstanding or misdirection. It follows that the Board's findings under section 6(2)(e) are unreasonable.

Conclusion

81. The Appellant had held employment-related licences for a total of 7 years and 8 months and wanted to continue in her teaching post in Guernsey, the Island where she had made her home and had established meaningful professional, social and personal relationships. In 2001 she was granted a housing licence for 5 years and 8 months and in 2006, the Education Department requested, and the Housing Department granted, an extension of the licence to 7 years 8 months on the grounds of her employment. In 2008 she believed she would be eligible for a 15 year licence under the 'Excellent Teacher Scheme' and she was encouraged in that view by her headteacher. On 13 June 2008 she was surprised to be told by an officer

of the Housing Department that the Education Department would not put her name forward under the scheme; she was then advised that she could be considered for a licence on compassionate grounds.

82. When it considered her application, the Board of the Housing Department was aware that a refusal of an extension to her licence would require her to leave Guernsey. Yet it failed to treat her application with the meticulous care that the circumstances demanded; in the view of the Jurats, such lack of care was unreasonable.

83. The lack of meticulous care is evidenced in part by a failure to provide the Appellant, and the Court, with a proper record of the deliberations of the Board of the Department that properly explains the reasons why the members of the Board decided to reject the application and to require her to leave Guernsey; a decision that, in another case, the Court of Appeal described as a 'drastic step'.

84. The Department acknowledged that it was interfering with her rights under Article 8 of the European Convention on Human Rights and it had to justify that such interference was proportionate. The Jurats have concluded that the Department is unable to demonstrate that it correctly balanced the conflicting demands.

85. The Department relied upon the findings of the Housing Needs Survey as to the net annual increase in the number of new households without taking account of the availability of newly-built and converted properties.

86. In all the circumstances, the Jurats have concluded that the decision is so unreasonable that the appeal must be allowed and the decision must be set aside.

87. The Deputy-Bailiff will sit alone to hear any applications arising from the judgment but he reminds the parties that costs normally follow the event.

