u.k. environmental law association e-journal

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www.ukela.org ***issue 7 – January 2002***

Contents

Chairman's Report

I am happy to report that Nabarro Nathanson has offered to organise the 2002 UKELA Conference in Sheffield on 28th - 30th June. Details have yet to be finalised, but please make sure the dates are in your diaries.

As far as raising the profile of UKELA is concerned, we are starting to issue press releases on a number of subjects and are taking steps to pursue fruitful partnerships with influential partners.

It has been a good year for UKELA with much activity in the working parties and regional groups. Here's to an exciting New Year and a UKELA going from strength to strength.

Pamela Castle,
CMS Cameron McKenna

Garner Lecture

18.00 Thursday 31st January 2002

UKELA Presents

Jonathan Porritt

SUSTAINABLE DEVELOPMENT – THE CHALLENGE OF GOOD GOVERNANCE

at

The Old Hall, Lincoln's Inn, London, WC2A

Fines for Environmental Offences

A comment in relation to the level of fines imposed by Magistrates' Courts for environmental offences. The maximum fine possible in these Courts is £20,000 per offence (and unlimited in the Crown Courts) and/or custodial offences yet the average fine for the last year was in the region of £4,000, albeit with some rare exceptions. Fines for illegal dumping of waste can be as low as £50-£100, at a time when the Government is showing considerable concern on how to deal with the ever-increasing generation of waste in a proper and responsible manner. Indeed, the Cabinet Office Performance & Innovation Unit is to review the national waste strategy with a view to increasing waste minimisation, recycling, composting etc.

Furthermore, the Environment Agency, as enforcement agency is doing its utmost to enforce the law on fly-tipping and other environmental pollution, but it is being undermined by the Courts. The issue has been brought to the attention of the Magistrates Association, with seemingly little effect. What do we have to do to change this attitude?

Pamela Castle,
CMS Cameron McKenna

Letter from Japan

".....maybe interesting for you that the Japanese are quite advanced in some areas for recycling but not in others like pollution control and emissions and particularly noise (there are no noise regulations that's why the right wing can blast high volume propaganda throughout the city at all hours). A few recent big court cases over the last ten years with for example chemical companies dumping highly toxic waste into local rivers leading to deformed babies etc. Yet there is no real environmental green lobby in Japan just as the concept of charity is not a concept which sits with the Japanese mentality, on the basis that if you are in need of charity you should be embarrassed.....

Basically you cannot throw anything away without paying for the local government to come and collect it for which you pay a set fee, everything from TV's to fridges, and dead pets. Daily garbage is strictly regulated with set days for collection of plastic, metal, non recyclable, household etc."

UKELA West Midlands Meeting

Monday 11th February 6 pm

West Midlands Regional Waste Strategy
talk by David Bridgewood
Stoke City Council.

David Bridgewood was one of the key players in producing this strategy and has agreed to talk to us about the proposals for the area, which will form part of the Regional Planning Guidance

Venue - Pinsent Curtis Biddle, 3 Colmore Circus, Birmingham

Contact Richard Kimblin at 3 Fountain Court Chambers Birmingham if you would like to attend (**richard.kimblin@3fc.co.uk**)

Conference Notices

2002 QUEENSLAND ENVIRONMENTAL LAW ASSOCIATION CONFERENCE
'Piecing Together the Legislative Jigsaw'
May 1 - 4, 2002, Twin Waters Resort, Sunshine Coast, QLD, Australia

For more information on the conference:

- Call for Papers
- Sponsorship Opportunities
- Expressions of Interest

The Conference web site will be found at http://www.conventionhouse.com/qela2002/reg.asp

If you would like further information, please contact QELA.

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ENVIRONMENTAL LAW FOUNDATION

This year ELF celebrates its first decade of working for environmental justice on behalf of local communities.

To mark this anniversary, launch ELF's Ten Year Review and thank institutions and individuals who have supported the charity, Lord Alexander of Weedon, ELF's patron, is hosting a Reception in the Cholmondeley Room of the House of Lords.

UKELA members are warmly invited to join ELF for this significant event.
However, numbers are limited and early booking is recommended. The is no
charge for attending the reception, however, as a mark of your support for ELF in expanding its activities, outreach and pro bono work with local communities, a donation to the charity is welcome.

For more details please contact Jade Khilji at ELF on 020 7404 1030 or
email. info@elflaw.org.

PUBLICATION OF 6TH INDEX OF CORPORATE ENVIRONMENTAL ENGAGEMENT

A major business conference to launch the 6th Business in the Environment Index of Corporate Environmental Engagement will be held on Tuesday, February 26, 2002 at Cabot Hall, Cabot Place, Canary Wharf, London E14 5AB.

Speakers at the Conference include:

- John Elkington, Chairman, SustainAbility
- Professor Prabhu Guptara, Group Director, Organisational Learning and Transformation, UBS
- Lord Holme of Cheltenham, Policy Adviser, Rio Tinto plc
- David Jackson, General Counsel & Company Secretary, Powergen plc
- Tony Juniper, Director Designate, Friends of the Earth
- Rob Lake, Hendersons Investors
- Jeff Randall, Business Editor, BBC
- Keith Whitsun, CEO, HSBC

The conference will focus on environmental responsibility in the wider context of corporate social responsibility.

The BiE Index benchmarks companies against their peers and industries against each other, on the basis of their strategic environmental management and management of impact in key areas. Information on participation (or not) is incorporated in the National Association of Pension Funds Voting Issues Service.

The BiE Index is increasingly recognised as the leading benchmark of corporate environmental engagement, partly on the basis of the high level of participation. In all, 184 companies in the FTSE 350, Dow Jones Sustainability Group Index, BITC membership and BiE leadership team participated in the 5th Index, published in February 2001. The number participating has grown again this year - as it has every year since the Index was launched.

Enquiries to:
Elizabeth Forbes,
Tel: 020 8673 7461/020 7566 8705

CONTAMINATED LAND PLANNING ADVICE

The long-awaited Planning Advice for Development on Land Affected by Contamination is expected to be published in draft form in January/February. The guidance will be less detailed and comprehensive than the PPGs of recent years. The draft will be subject to a three-month consultation period.

The British Urban Regeneration Association (BURA) is planning seminars in five locations to assist with the consultation and dissemination process.

Specialist speakers from DTLR and the Environment Agency have been invited to speak together with a range of public and private sector experts – planners, lawyers and surveyors - who will comment on the draft Planning Advice and lead the discussions.

The seminars will also provide an opportunity to learn about the progress being made by local authorities in implementing Contaminated Land Strategies under the Part IIA Regulations.

The seminars are being planned to take place between 5 March and 21 March in London; Keyworth near Nottingham; Warrington or Wigan; Newcastle, and at the Earth Centre near Doncaster. The cost is £90 plus VAT, with concessions.

For more information contact BURA on Freephone 0800 0181 260, Fax 020 7821 9553
e-mail info@bura.org.uk

SEMINAR DATES AND VENUES

- 5 March, Keyworth, Near Nottingham
- 7 March, Newcastle
- 13 March, Warrington or Wigan
- 19 March, London
- 21 March Earth Centre, Doncaster

COSTS: £90 plus VAT with concessions.

BOOKING: Contact BURA on Freephone 0800 0181 260, Fax 020 7821 9553 or e-mail info@bura.org.uk

HATTON v UK: HUMAN RIGHTS AND THE ENVIRONMENT

By Martha Grekos, Barrister, Research Assistant to the Chairman of the Law Commission

Environmental protection has developed into a critical area of law, both domestically and in Europe. Most recently, the authority of *Hatton and Others -v- United Kingdom* in the European Court of Human Rights, Third Section, 2nd October 2001, dealt with breaches of human rights in relation to noise levels generated from Heathrow Airport and found that there had been breaches of both Article 8 and Article 13 of the European Convention on Human Rights.

The facts of that matter relate to the increase in the level of noise caused by aircraft using Heathrow Airport since 1993 at night time, and the applicants' alleged violation of Article 8 (respect for private and family life).

There were three consecutive applications for judicial review, and two appeals to the Court of Appeal. Following the first application for judicial review, the scheme at Heathrow was found to be contrary to the Civil Aviation Act 1982 section 78 (3), which required that a precise number of aircraft be specified as opposed to a noise quota. A second judicial review found that the Government's consultation exercise had been conducted unlawfully: *R v Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1994] 1 WLR 74; [1995] ELR 390. There was also a further application for judicial review following the publication of a further consultation paper. The Court of Appeal decided that the Secretary of State gave adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at night because of other countervailing considerations to which he was, in 1993, willing to give greater weight. By June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational: *R v Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 WLR 1460. The House of Lords dismissed a petition to the local authorities for leave to appeal against the decision of the Court of Appeal.

In *Hatton*, the Court noted that Heathrow Airport and the aircraft which used it were not owned, controlled or operated by the Government or by any agency of the Government, and as such the UK could not be said to have "interfered" with the applicants' private or family life.

However, the Court found that the applicants' complaints should be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8(1). The State was required to protect citizens, and the Court will have regard to a fair balance, which has to be struck between the competing interests of the individual and that of the community as a whole. Most importantly, in relation to environmental protection issues, the

mere reference to the economic well being of the country was not sufficient to outweigh the rights of others. This is an important principle which relates to environmental matters.

The Court noted what they referred to as "modest steps" by the airport authorities in reducing the harm caused by night noise. However, the Court did not accept that these steps were appropriate and sufficient to protect the rights of citizens not to have their private or family life disturbed. The majority of judges (5:2) were strongly of the view that the State had failed to strike a fair balance between the UK's well being and the applicants' effective enjoyment of their homes and private and family life.

The Government has sought a referral to the Grand Chamber of the ECtHR (it had until 1st January 2002 to respond) dealing with this part of the judgement. Firstly, it is argued that the Court departed from the approach adopted in earlier cases under Article 8 where questions of social and economic policy arose in the context of a claim for environmental protection. For example, in *Powell and Rayner v UK* (1990) 12 EHRR 345 the Court allowed the State a wide margin of appreciation recognising that "[i]t is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere". The Government argues that the Court has allowed the UK either no margin of appreciation or a very narrow margin of appreciation. Secondly, it is argued that if the Government had failed to carry out a sufficient evaluation, this may explain why the UK failed to strike the right balance (if it did), but it does not follow from such a failure that the UK struck the wrong balance. The Court failed to go on to balance the economic benefit to the general community of night flights against the complaints of the applicants, and so failed to carry out the exercise which would have enabled it to decide whether the balance struck by the Government was right or wrong.

There have only been two previous cases where the Court has declared a breach of Article 8 for environmental degradation having harmful effects for an applicant. The first case was *Lopez Ostra v Spain* (1994) 20 EHRR 277. The applicant had suffered from the effects of fumes and smells from a waste treatment plant. The regulators did little or nothing to mitigate the environmental effects. The Court reasserted the proposition from *Powell and Rayner* and decided that in the circumstances of the case and notwithstanding the margin of appreciation, a fair balance had not been struck between the interest in the town's economic well being and the "effective enjoyment" of the Article 8 right. The second case was *Guerra v Italy* (1998) 26 EHRR 357. An Italian village successfully complained about the Government's maladministration in respect of a nearby dangerous chemical works. The Court held that the local government failed to give the locals essential information that would entitle them to assess the risks they and their families might run if they continued to live there and this amounted to a breach of Article 8. Article 8 could also impose positive obligations. The wide margin of appreciation did not operate in these two cases to leave the correctness of the "balancing" in the hands of the State. These two cases, as well as *Hatton*, can be seen as ones in which the Court did in fact exercise the "powers of supervision" but precisely because the State had failed, judged by its own mechanisms, to strike the required balance.

Article 13 was also considered by the Court, and was observed to have been consistently interpreted as requiring a remedy in domestic law only in respect of grievances which could be regarded as arguable in terms of the Convention. Critically to their consideration under Article 13, the Court observed that section 76 of the Civil Aviation Act 1982 prevented actions in nuisance in respect of excessive noise caused by aircraft at night. As such, it seems that the applicants did not have a remedy at national level to "enforce the substance of the Convention rights … in whatever form they may happen to be secured in the domestic legal order". Although the Court noted that judicial review proceedings were capable of establishing that the night flight scheme was unlawful, the scope of that review was limited to what the Court referred to as "classic English public law concepts such as irrationality, unlawfulness and patent unreasonableness". Judicial review did not allow consideration of

whether the increase in night flights represented a justifiable violation of the Article 8 rights of the applicants. As such, the ECtHR found (6:1) in favour of the applicants under Article 13.

However, the importance of this case goes much further, both in terms of its support for the rights of the individual, and its implications for night-time flights, whether at Heathrow or elsewhere. The decision is a significant affirmation of the rights of the individual under Article 8 and shows the limitations of using "economic well-being" as a blanket defence. Far more detailed evidence will be needed and, as is stated in the judgment, this work must actually precede the project. Environmental rights, and in particular procedural rights, would enable persons and groups to challenge action detrimental to the environment. One problem of environmental law, be it European, international or domestic, relates to standing to challenge infringements of that law, so that enforcement of treaties, directives of regional authorities and domestic law is largely left in the hands of the States and other bodies. This casts doubt on the capacity of national courts to provide enforcement of EC rights. Environmental rights as procedural rights enable access to environmental justice and participation in environmental decision-making. So, environmental rights go beyond redundancy and can allow for better enforcement of environmental law itself.

Litigation under a human rights instrument where such litigation involves activities implicating the environment contemplates the use of human rights provisions as "effective means to the ends of conservation of environmental protection". This approach, it is submitted, can give rise to propositions which, as part of the meaning of any litigated right could, albeit, indirectly, promote environmental protection. Thus "interference" in "private and family life" as it appears in Article 8 of the ECHR can mean polluting the atmosphere so as to injure and thus interfere with the litigant's right.

It also makes it very clear that (contrary to popular belief) judicial review is not the water-tight answer that many lawyers thought to an Article 13 violation point, and practitioners should be encouraged to be bold when drafting arguments under this Article. It confirms Lord Slynn's view in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 that proportionality is now a valid head of review if there is an arguable human right point. The case raises questions about the scope of judicial review and may well force the UK courts to address the issue in the near future.

It seems that there are already many ways in which connections at the levels of concepts and methods have and continue to be made between human rights and environmental law. These connections have certainly contributed to the development of human rights law into new and interesting directions. One connection is the increasing stress on internationalisation in both fields. Human rights law and environmental law started out primarily as forms of national law, but now we have come to discover that their aims could not be fulfilled within the scope of national boundaries. A second connection is that human rights have moved away from a focus on the assertion of individual rights towards the protection of the rights of the most disadvantaged groups in society. The last connection is the way in which European environmental lawyers have not only sought to make use of economic and social human rights standards, but also civil and political rights. This is a development of human rights law by pressing institutions to think more deeply about the positive side or rights obligations. In a complex society, it is not enough for States to see such rights as purely rights to be left alone by the State; States will frequently have the knowledge and resources to reduce the risks to their citizens' health/well-being. In this "risk society" (Ulrick Beck), it can be argued that a State that closes its eyes to risks is failing to respect the rights of its citizens.

Previous cases do not reveal a Human Rights Court actively promoting the protection of the environment through its fundamental rights jurisprudence. The *Hatton* decision has meant, so far, that questions have started to be asked as to the reason for this, and also about the desirability of judicial assertiveness or activity in the area.

The conclusion is that the provisions of the ECHR do give scope for "environmental claims", despite the fact that the Convention organs have often been reluctant to entertain such claims, as alleged breaches of the rights litigated. This reluctance is due to deference to the national authorities of the Defendant State, expressed through the legal device of "margin of appreciation". It is contended that the rights set out in the ECHR could, supplemented by the use of European and international environmental law, give environmental protection albeit through the vindication of the human right litigated. It can be observed that the "margin of appreciation" is at the heart of virtually all major cases that come before the Court, whether the judgement refers to it explicitly or not. The evolution of the doctrine, and its application, has not been a model of clarity so that neither the nature of the right nor the type of restriction attaching to specific rights, appears to determine whether or not the "margin of appreciation" will hold sway. Where the Court decides to vindicate the right, it has emphasised a "European supervision" which "overtakes" the margin of appreciation. Yet, this is a curious way in which to refer to the Court's duty to apply the Convention Article litigated before it. The Court has to be brave to assert its power, or duty, to supervise the national authorities. Against the perception that policy considerations justify a "hands off" approach, especially on the part of international judges not best placed to appreciate what is in the public interest in a state, it is argued that it is precisely "policy decisions" and certainly those of the Executive that demand access to judicial body and adjudication of the disputed policy decisions.

CASE UPDATE - Hatton II

Government to seek referral of Hatton case on night flights to the Grand Chamber of the European Court of Human Rights.

William Upton, Barrister, Eldon Chambers, London.

The arguments over night flights at Heathrow, and the proper interpretation of article 8, are not yet over. The UK government has decided to seek a referral of the European Court of Human Rights' landmark decision in Hatton that there had been a violation to the Grand Chamber. The Government had until 1 January 2002 in which to do so. Until the matter is resolved, it will be difficult to rely upon the initial decision in Hatton in the UK courts.

The Third Section of the European Court of Human Rights issued its decision on Hatton and others v United Kingdom (Application no.36022/97) on 2 October 2001. In accordance with Article 43 of the European Convention, a Government can request that such a case should be referred to the Grand Chamber. The Government considers that serious questions regarding the interpretation and application of the Convention are in issue, and that the case is one of great importance.

The government's brief letter to the Court sets out two grounds for the referral. Firstly, in holding (para 97 of the Judgment) that "*States are required to minimise, as far as possible, the interference with (the applicants') rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights*" the Court departed from the approach adopted hitherto in cases under Article 8 where questions of social and economic policy arise in the context of a claim for environmental protection. The Court had always allowed the State a wide margin of appreciation (e.g. contrast Powell and Rayner -v- United Kingdom (Series A, No 172)). This is indeed a major point of general importance.

Secondly, the UK government alleges that having regard to the wide margin of appreciation which should be allowed to the United Kingdom and having regard to the evidence as to the economic benefits of night flights, the Government struck the right balance in introducing and implementing the nightflights scheme. The Court does not appear to have carried out its own balancing exercise, and it is not sufficient to say (at para 106) that because the United Kingdom did not carry out a sufficient evaluation prior to introducing the night flights scheme, the Government failed to strike the right balance between the interests of the applicants and the interests of the community as a whole. This will be a more difficult point to argue, but it does allow the UK to re-argue the issue and to seek to convince

the Grand Chamber that a different balance should be struck. It may yet be held that there has been no violation in this case.

REMINDER

UNITED KINGDON ENVIRONMENTAL LAW ASSOCIATION

Annual General Meeting

will be held at the offices of
Ashurst Morris Crisp
Broadwalk House, 5 Appold Street, London, EC2A 2HA
at
1.30pm, Wednesday 20th February 2002

AGM Agenda

1 Apologies for absence
2 Minutes of AGM for 2001
3 Chairman's Report
4 Adoption of the Accounts for 2001
5 Re-appointment of the Auditors
6 Elections to the Council of Management 2001-2
7 Any other business

NEXT EDITION OUT IN MARCH 2002 WITH AN ENERGY THEME including an article on of offshore wind powered electricity generation.

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Offers of other articles on the subject of energy will be welcome.
Email to catherine.davey@stevens-bolton.co.uk

MEMBERSHIP ENQUIRIES
to Richard Bines

Email: richard@sharpsredmore.co.uk
Fax: 01473 730030

E - LAW

The editorial team want letters, news and views from you for the next edition due to go out in January 2002.

All e-law contributions, be they letters, articles, book reviews, case reports etc should be dispatched to Catherine Davey as soon as possible by email at:

catherine.davey@stevens- bolton.co.uk

Letters to the editor will be published, space permitting

Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

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See also the web site at

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for more information about working parties and events, including copies of all recent submissions.