Injunctions, Planning Enforcement and Human Rights

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The recent judgment of the Court of Appeal in South Bucks District Council v Porter\(^1\) raises – but does not fully answer – several significant questions concerning the impact of the Human Rights Act on authorities’ capacities to respond to breaches of planning controls. At the core of the case lies the issue of the nature of the county court and High Court’s jurisdiction when faced with a planning authority’s attempts to enforce planning controls through use of injunctions in a fashion that engages Article 8 ECHR. Lying in the margins of the litigation is the question of whether the procedures used in this field of government activity can satisfy Article 6 ECHR. And pervading both questions is the more systemic issue of the way in which indigenous principles of administrative law are able to accommodate rather than be overridden by the requirements of the Human Rights Act.

Injunctions as a tool of planning enforcement

Porter joined four cases in which local authorities had invoked their powers under the Town and Country Planning Act 1990 (hereafter TCPA) section 187B(1), which provides that;

(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any other of their powers under this part.

Prior to enactment of section 187B in 1991, councils could deal with alleged breaches of planning law in two ways. The ‘ordinary process’ was (and remains) for a council to issue an enforcement notice under TCPA 1990 section 172. That notice is then subject to an appeal (section 178) on all matters of fact and law to the

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\(^{1}\) [2002] 1 All ER 425.
Secretary of State (a jurisdiction generally delegated to an Inspector), and thereafter to appeal on a point of law to the High Court (section 289). A landowner’s non-compliance with a valid enforcement notice constitutes a criminal offence per TCPA section 179 for which a fine could be imposed. In practice, the process often proved complex and time-consuming, and ill-suited to dealing with cases raising urgent environmental problems.

Councils could also seek to enforce planning rules through the use of injunctions using their general litigation power in the Local Government Act 1972 section 222. But authorities invoking section 222 in these circumstances found it a circumscribed remedy, which – as construed by the courts – rarely empowered councils to sidestep the constraints of the TCPA regime.

In *Stafford Borough Council v Elkenford Ltd*, Sir Roger Ormrod suggested that the injunction should be a remedy of last resort;

\[\text{[I]t is ordinarily proper to ask whether the authority has . . . first exhausted the statutory [ie TCPA] remedies because in the ordinary cases it is only because those remedies have been invoked and found inadequate that one can draw the inference, which is the essential foundation for the exercise of the court’s discretion to grant an injunction, that the offender is . . . ‘deliberately and flagrantly flouting the law’. . . .}\]

Similarly, in *Runnymede BC v Smith*, the court indicated that injunctions would not be granted if the authority had not already employed TCPA procedures unless the breach of planning law in issue would cause substantial and irreparable damage. Then, in *Doncaster BC v Green*, a case decided as section 187B was completing its parliamentary passage, the Court of Appeal held that an injunction could not be granted regarding breaches of planning control still subject to appeal under the TCPA procedures.

Two elements of the Court of Appeal’s judgment in *Mole Valley DC v Smith, Reigate and Banstead BC v Brown* are significant. Firstly, it was held that the court had no legitimate role to play in second-guessing the authority’s decision on the planning issue which had led it to seek the injunction. Secondly, the Court suggested that an injunction should only be granted if this was the sole measure likely to prevent the defendant flouting the law. The case is ambivalent about the readiness that a local authority might expect a court to display in granting an injunction. That a court should not address the planning merits of the case, nor the applicant’s circumstances, would no doubt facilitate matters from the authority’s perspective. Yet the judgment also implies that an injunction would be a remedy of last resort, available only when ordinary planning powers had proven ineffective.

Section 187B was enacted on the recommendation of a 1989 report – *Enforcing Planning Control* – undertaken for the (then) DoE by Robert Carnwarth QC. Carnwarth’s report criticised the delays inherent in the ordinary TCPA regime. The 2

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2 (1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area –
(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . .

On the background to s 222 see B. Hough (1992) ‘Local Authorities as Guardians of the Public Interest’ *Public Law* 131 at p 134.

3 [1977] 1 WLR 324 at 332.


7 *per* Lord Donaldson MR at 498; ‘where the balance of the public interest lies is for the respondent council to determine and not for this court’. 

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report concluded that the ultimate penalty which lay at the end of the enforcement process was often too insignificant to amount either to an effective individual or general deterrent to people or companies intent on flouting planning rules.

Section 187B emerged from recommendation 11 of the report. The section 187B sanction is potentially a severe one. Breaching an enforcement notice is not an imprisonable offence: breach of an injunction could expose a defendant both to fines and committal to prison for contempt. The power is also evidently well-suited for urgent cases. Literally construed, section 187B is not limited to situations where ordinary TCPA procedures have been exhausted. Nor indeed is there any requirement that such processes even be initiated. The authority’s belief (and in practice the issue may be delegated either to the planning committee or to [senior] officers) that a breach of controls has occurred or may occur triggers the power. Literally construed, section 187B sweeps away the ‘last resort’ and ‘irreperable damage’ constraints that had attended use of section 222 proceedings in the planning context. When construed by the courts however, section 187B proved to have a much less dramatic effect.

Judicial approaches to section 187B – the pre-Human Rights Act position

The defendant in *Guildford BC v Smith* had breached a section 187B injunction ordering him to remove 15 mobile homes sited without planning permission. The council applied to have the defendant committed for contempt. The Court of Appeal held that committal should not follow automatically from breach of an injunction. Steyn LJ put the point most forcefully, sugesting that; ‘[If] compliance with the order would not be within [the defendants’] reasonable capacity, it would be an affront to the civilised values of our society to accede to the local authority’s invitation’. The Court recognised that a situation in which an injunction was granted but not enforced was far from satisfactory, as it undermined the integrity not just of the planning process but also of the judicial process. But this was considered a lesser evil than either refusing to grant an injunction at all, or enforcing an injunction by imprisonment without regard to the defendant’s circumstances.

What the judgment does not do clearly is identify the extent of the court’s jurisdiction over the authority’s decision on the planning merits, nor does it indicate whether section 187 is a weapon of last resort. But if one were to accept that both of those questions were (by omission) implicitly answered in the authority’s favour, one is left with the curious conclusion that while a council might expect an injunction to be granted, it could not expect that the injunction would be effectively enforced.
The trial judge in Hambleton DC v Bird\textsuperscript{12} attempted to answer one of the questions raised by Smith by assuming a jurisdiction to form his own view of whether granting an injunction was ‘necessary or expedient’. The Court of Appeal subsequently described this approach as ‘erroneous’, characterising it as addressing a matter of policy which Parliament wished the council to settle. The judgment did not indicate however that a court should necessarily imprison a defendant who breached an injunction.

Planning authorities might reasonably have concluded on the basis of this case law that the courts had substantially undermined section 187B’s effectiveness by signalling that defendants would not be committed for non-compliance. Before greater clarity could be lent to this situation, the Human Rights Act 1998 had come into force.

The Porter litigation

The four cases joined in Porter – South Bucks DC v Porter; Chichester DC v Searle; Wrexham County BC v Berry; and Hertsmere BC v Harty – had various common elements. All concerned defendants who, without planning permission, lived in caravans on green belt land that they owned. In Porter, the local authority began enforcement proceedings in 1987, and became embroiled in a long-running saga of applications for permission, enforcement notices and appeals. Berry and Harty raised similar issues. Mrs Searle, in contrast, had been occupying her mobile homes for only a few days when the council deployed section 187B against her. Mrs Searle apart, the defendants all claimed to be gypsies. The applicant authorities were granted injunctions against the defendants in county court proceedings begun in 2000 and 2001.

The Court of Appeal framed the question before it in narrow terms;

At the heart of these appeals lies art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. . . .The central issue for determination on the appeals is the extent to which the court itself on a section 187B application should exercise an independent judgment in deciding whether or not to grant an injunction.\textsuperscript{13}

Counsel for the various parties offered three answers to this question. Three authorities contended that a council’s decision to seek an injunction should be regarded as a ‘policy’ issue in the Alconbury sense.\textsuperscript{14} From this viewpoint, it would not be appropriate for a court to give detailed attention to the planning merits of the application or the impact that granting an injunction would have on the defendants: in effect, the local authority’s application should be refused only if its wishes were irrational. The second view, offered by the fourth authority, was that an injunction should issue only if the court would fine or imprison the defendant if the injunction

\textsuperscript{12} [1995] 3 PLR 8 (CA).
\textsuperscript{13} [2002] 1 All ER 425 at 430; \textit{per} Simon Brown LJ. Art 8 is cast in the following terms;
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.
\textsuperscript{14} \textit{R} (on the application of Alconbury v DETR) [2001] 2 WLR 1389. The point being that if a ‘policy’ as opposed to operational matter is in issue, then the orthodox grounds of review rather than a more intrusive proportionality standard might suffice to satisfy the requirements of the ECHR. \textit{Strictu sensu}, Alconbury was not directly in point in Porter, since it was argued as an Art 6 case rather than an Art 8 case. The Art 6 issues implicit in Porter are addressed below.
granted was breached, and also maintained that the merits of the case were a matter for council to determine subject only to orthodox grounds of review. The third perspective, offered by the appellants, was that a court entertaining a section 187B application should exercise a proportionality-based jurisdiction over the merits before deciding to grant an injunction.

A proportionality test

Simon Brown LJ delivered the only substantive judgment.\textsuperscript{15} He accepted that the Human Rights Act necessitated reconsideration of the courts’ section 187B responsibilities. Simon Brown LJ rejected the suggestion that the Human Rights Act required courts to reach their own conclusions on the precise planning merits of a section 187B application. However he also concluded that courts should not grant injunctions if not prepared to imprison defendants who breached them, and crucially, that a court could no longer validly reach that conclusion unless it scrutinised the merits with sufficient intensity to conclude that imprisonment would not be a disproportionate response in the circumstances.

The requisite proportionality test was formulated in familiar terms;

Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest sought – here the safeguarding of the environment – but also that it does not impose an excessive burden on the individual whose private interests are at stake.\textsuperscript{16}

Simon Brown LJ attached greater specificity to this rather broad principle by offering a (presumably illustrative rather than exhaustive) list of factors which would be taken into account when this balancing exercise was performed. On one side, factors such as the health and education of the occupants of the land should be considered. On the other, the degree and flagrancy of the breach of planning rules was pertinent, as was the duration of the breach, the urgency of ending it, whether the authority had also used mainstream enforcement procedures, and the need to maintain the integrity of the planning process overall.\textsuperscript{17} On reviewing the facts of each case, Simon Brown LJ concluded that the judges in all but Harty had failed to appreciate that the Human Rights Act required them to exercise an ‘independent judgment’\textsuperscript{18} on whether an injunction should be granted.

Planning authorities should not necessarily assume that Porter further undermines the utility of section 187B. In analytical terms, the judgment appears to use the Human Rights Act to effect an explicit and constitutionally defensible reading down of section 187B’s literal meaning to a level which more closely accords with the situation that pertained to section 222 prior to 1991. Smith arguably achieved much the same de facto result in a rather less legitimate fashion. As such, Porter at least lends the law greater transparency. The case also suggests that the issues of the grant of an injunction and its enforcement by committal if breached are more tightly linked than before. An authority would be rash to assume

\textsuperscript{15} Peter Gibson and Tuckey LJJ concurring.
\textsuperscript{16} \textit{ibid} at 443–444.
\textsuperscript{17} One point of potentially great significance which remains to be resolved is whether courts will accept that a situation of urgency arises in respect of developments which are not per se especially harmful, but which – if not quickly dealt with – send a signal to other individuals or groups that they too could engage in the same behaviour.
\textsuperscript{18} \textit{ibid} at 447.
that injunctions will now invariably lead to the defendant’s committal if breached, but Simon Brown LJ’s methodology indicates that the grant of an injunction carries it with a strong, if not wholly irrebuttable, presumption that a defendant who breaches it will find herself behind bars.

Councils will certainly have to be selective in using section 187B, reserving it for egregious breaches of planning rules. But they should perhaps take heart from Simon Brown LJ’s concluding comments in Porter that the ‘remarkable planning history’ of the Harty case made issuing an injunction entirely proportionate, and that: ‘There are, of course, factors even in the first three cases which will undoubtedly present the appellants with real difficulty if and when the respondent authorities seek fresh injunctive relief’.

The reach and implications of the judgment

Porter raises several broader issues. Firstly, what significance does the ECtHR’s ‘margin of appreciation’ doctrine have in the context of planning enforcement? Secondly, when will use of section 187B raise substantive issues under Art 8(1) ECHR? Thirdly, does section 187B raise procedural issues under Art 8? And fourthly, what significance does Art 6 ECHR have for this aspect of an authority’s decisionmaking procedures?

On the relevance of the margin of appreciation doctrine

Simon Brown LJ also dealt helpfully with the application of the margin of appreciation principle in Human Rights Act cases, an issue which has generated some confusion among lawyers and may bedevil local authority decisionmaking for some time to come. Within ECHR jurisprudence, the ‘margin of appreciation’ is a device to measure the acceptability vis à vis the Convention of a nation’s treatment of a given issue. The principle cannot easily be transferred from the international arena to domestic law as a yardstick against which domestic courts should gauge the compatibility of executive decisions or legislation with the Convention. One reason for the ECtHR according states a broad discretion in relation to some Convention values lies in that Court’s unfamiliarity with the cultural and moral norms of the State concerned. That is obviously not a relevant factor in the purely domestic context. British courts’ early case law on the standard of review required under the Human Rights Act has eschewed the ‘margin of appreciation’ label in favour of a notion of ‘deference’ to executive or legislative judgment. Quite how much ‘deference’ a governmental body is granted in particular circumstances will be influenced, but not determined, by the ECtHR’s margin of appreciation jurisprudence.

19 ibid at 448.
21 cf Lord Hope in R v DPP, ex parte Kebilene [2000] 2 AC 326; Lord Woolf in R v Lambert, Ali and Jordan [2001] 2 WLR 211; and especially Lord Steyn in R v Secretary of State for the Home Dept, ex parte Daly [2001] 2 WLR 1622. For an incisive analysis of the relevant law see P. Craig (2201) ‘The Courts, the Human Rights Act and Judicial Review’ LQR 589.
In Article 8 cases, one can readily point to ECtHR judgments which allow nations a small margin of appreciation. In *Cremieux v France*, the ECtHR permitted only a very narrow margin of appreciation, observing that: ‘The exceptions provided for in Article 8(2) are to be interpreted narrowly, and the need for them in a given case must be convincingly established’.22 The narrowness of the margin of appreciation arising under Article 8(2) was a direct consequence of the egregious interference with the rights protected under Article 8(1); search and seizure powers by state authorities which severely compromised the applicant’s privacy rights. The margin of appreciation was even more tightly construed in *Mentes v Turkey*,23 a case concerning the razing by Turkish security forces of some Kurdish villages. The ECtHR could not see any necessity at all for the Turkish government’s decision to destroy Kurdish villages and expel their inhabitants. No margin at all therefore existed for the government.

Equally, one can identify cases where that margin has been broadly defined. In *Buckley v United Kingdom*,24 a case involving the eviction of a claimant from a ‘home’ occupied without planning permission, the ECtHR held that states should enjoy a wide margin of appreciation in cases involving interference with a home if two conditions were satisfied: firstly that ‘a multitude of local factors’ were inherent in the public authority’s policy choices; and secondly that the authority’s implementation of policy in individual cases was subjected to exacting judicial supervision.25 More recently, in *Chapman v United Kingdom* the ECtHR held that the Article 8(2) question raised by an interference under Article 8(1) occasioned by a local authority’s decision to take enforcement action against an individual who did not have planning permission for her home;

will involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities.26

In *Porter*, counsel for the local authorities sought to persuade the Court of Appeal that the wide margin of appreciation granted to the United Kingdom in *Buckley* and *Chapman* under the Convention should be translated into a similarly expansive grant of discretion by domestic courts to local authorities under the Human Rights Act. Simon Brown LJ was unimpressed by this argument;

the real point to make about *Chapman*’s case is that it is a decision by an international court which by its nature is exercising a supervisory and supranational jurisdiction. To my mind it casts very little light on the realtively narrow point now arising as to the extent of the court’s discretion on a section 187B application for coercive relief’,…. The essential contrast being struck there is between the European Court and ‘the national authorities’, not between the domestic planning authorities and the national courts.27

To put the point in different terms, from the perspective of the ECtHR the domestic courts are as much a ‘national authority’ in planning matters as is a local council, or indeed the DfETR or Parliament. If the domestic courts form the view that the correct degree of deference to be extended to government opinions is one of proportionality rather than *Wednesbury* irrationality, so be it.

25 *ibid* at para 76.
26 [2001] 33 EHRR 399, para 104.
27 [2002] 1 All ER 425 at 439.
Substantive issues under Article 8(1) ECHR – interference with a person’s ‘home’ and ‘private and family life’

Article 8 contains a bundle of substantive rights, which can be separated for analytical purposes into two parts.

The meaning of ‘home’

Until the recent judgment of the Court of Appeal in Qazi v Harrow LBC,28 planning authorities might sensibly have thought that a defendant in section 187B proceedings could not successfully invoke the protection of Article 8 in respect of her ‘home’ if she did not have a legal interest in either the residence concerned or the land where it was located. Starmer’s European Human Rights Law makes the following assertion;

The word ‘home’ in article 8(1) includes any premises or shelter used by an individual as his/her home and in which s/he has a legal interest. It can also extend to premises or shelter which an individual is occupying unlawfully, so long as s/he has a legal interest either in the premises or shelter, or in the land on which they stand; (emphasis added).29

Several ECmHR and ECtHR decisions point to the correctness of this proposition. In Wiggins v United Kingdom the ECmHR observed that;

The Commission notes that the applicant lawfully bought the dwelling in 1970. He immediately started to renovate the house and then lived in it together with his wife. The spouses continued inhabiting the house during their marriage. The Commission is of the view that it must thus be considered as having been their ‘home’ within the meaning of Article 8(1).30

More clearly, in S v United Kingdom,31 the ECmHR held that the absence of any contractual relationship between an applicant and the owner of a property indicates that the residence could not be the applicant’s home. The applicant had been the same-sex cohabitee of a deceased council tenant;

[T]he applicant was occupying the house, of which her partner had been the tenant, without any legal title whatsoever. Contractual relations were established between the local authority and the deceased partner and that contractual agreement may or may not have permitted long term visitors. The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and the local authority was entitled to possession so that the house could no longer be regarded as ‘home’ for the applicant within the meaning of Article 8(1).32

The ECtHR has generally identified legal interests in either the residence or the land as a pertinent issue in deciding if the residence is the applicant’s ‘home’.33 Two decisions seem of particular relevance to the facts raised by Porter. The applicant in Buckley v United Kingdom had been subject to enforcement proceedings because she was living without planning permission in a caravan on land that she owned. The ECmHR concluded that Mrs Buckley’s ‘home’ was affected by enforcement proceedings because; ‘the applicant has been subject to

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30 (1978) 13 DR 40 (ECmHR) at 44.
31 (1986) 47 DR 274 (ECmHR).
32 (1986) 47 DR 274 (ECmHR) at para 4.
33 See especially GIIow v United Kingdom (1986) 11 EHRR 335 at para 46.
enforcement measures and has been prosecuted in respect of her failure to cease occupying her land in her caravans’; (emphasis added).34 Similarly, in Chapman v The United Kingdom, the ECtHR observed that;

Having regard to the facts of this case, it [the Court] finds that the decisions of the planning authorities refusing to allow the applicant to remain on her land in her caravans and the measures of enforcement taken in respect of her continued occupation constituted an interference with her right to respect for her private life, family life and home… (emphasis added).35

In Qazi, however, the Court of Appeal concluded that the ECtHR’s judgments in Buckley and Chapman indicated that a person’s residence could be her home even if she had no legal interest in it. She might be a squatter, a guest, or – like Mr Qazi – a former joint tenant whose legal interests had been extinguished when another joint tenant had unilaterally terminated the tenancy.36 Whether the residence was her home was a matter of fact in the light of all relevant circumstances, such as, for example, the length of the person’s occupancy, whether she had a home elsewhere, and whether she had come into occupation in a lawful manner.

The tests seem benevolent from an applicant’s perspective. But it would still appear defensible to suggest that a claimant who has only recently established a residence which is in breach of planning controls will not be able to sustain the claim that the residence is her ‘home’ for Article 8 purposes. In those circumstances, it may be that Article 8(1) is not engaged and neither the authority nor the court will consequently be required to justify the granting of an injunction on the basis of the Porter proportionality test outlined. However, respect for ‘the home’ is not the only interest protected by Article 8.

The meaning of private and family life

It would not seem a bold proposition to assert that a residence could not be a person’s ‘home’ if she had never occupied it. However, a local authority which deploys section 187B – or indeed any other TCPA enforcement mechanisms – in a pre-emptive fashion to prevent a breach of planning control which would be occasioned by the siting of gypsy caravans without permission could still engage Art 8. This point was clearly made by the ECtHR in Chapman;

73. The Court considers that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. . . . Measures which affect the stationing of her caravans have therefore a wider impact than on the right to respect for her home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition’.

Procedural issues: an Article 8 problem?

It is easy to forget that Article 8 provides procedural as well as substantive entitlements. The point was not explicitly addressed in Porter,37 but may be

35 [2001] 33 EHRR 399 at para 78.
37 The issue is perhaps implicitly dealt with in the passage quoted at fn 42 below.
invoked to persuade courts that it would be inappropriate to issue a section 187 injunction. The procedural entitlements created by the ECHR in civil proceedings are most readily associated with Article 6; namely the explicit requirements that, in respect of their civil rights and obligations, individuals are entitled to a ‘fair trial before an independent and impartial tribunal established by law’. The implications of Article 6 for present purposes are considered below. The ECtHR has also consistently concluded however that Article 8 contains implicit procedural protections, best be characterised as ‘participation rights’. Several Art 8 judgments espouse a broad principle that the Convention does not permit a person to be deprived of an important Article 8 interest by a legal process in which he/she has no entitlement to participate and which may be undertaken without either his/her consent or knowledge. Two cases illustrate this principle.

In *W v United Kingdom*, the Court considered the compatibility with Article 8 of an adoption order relating to W’s child made without W’s consent. W also argued that he had not been given sufficient opportunities to participate in the relevant social services authority’s decisionmaking process which culminated in the order. The Court was broadly supportive of this argument;

‘It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority’s decisionmaking process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary’. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8. The ECtHR held that so substantial an interference with an Article 8 right demanded that individuals be afforded a high level of procedural protection; that parents ‘had a right to be heard and fully informed’ and were entitled to ‘secure that their views and interests are made known to and duly taken account by the local authority’. That presumption could be rebutted – and the level of procedural protection granted diluted – on the basis of the provisions of Article 8(2). On the facts of *W*, the ECtHR concluded that the substantive issue at stake was ‘so sensitive’ that W’s presumptive entitlement to be informed of and participate in the decisionmaking process could be limited.

The claimant father in *Keegan v Ireland* was unaware that adoption proceedings in respect of his child had begun. (The father had not been married to the child’s mother, and Irish law did not automatically grant unmarried fathers any legal interest in the child’s upbringing). The ECtHR concluded that such a secret process breached Article 8(1) and that the father’s complete lack of participatory rights under Irish law could not be justified under Article 8(2).

The cases seem to sustain the proposition that;

1. a decisionmaking process which substantially compromises a person’s legal interest in an Article 8 entitlement contravenes Article 8(1) unless the person affected is entitled to participate meaningfully in that process; but
2. that presumption may be rebutted – and the extent of participation diluted -in accordance with the provisions of Article 8(2); but

39 *ibid* at para 62; (emphasis added).
40 *ibid* paras 61 and 63.
41 (1994) 18 EHRR 342.
3. such dilution cannot justify keeping the affected person in complete ignorance of the process except in the most ‘sensitive’ of circumstances.

In essence, the cases indicate that two distinct Article 8 issues may arise in respect of a single decision; one concerned with substance, the other with procedure. A decision which breaches Article 8(1) in both substantive and procedural terms may well be justifiable under the Article 8(2) derogations in the substantive sense, and yet not be defensible under Article 8(2) from a procedural perspective. The point is no different from that raised by the interplay of administrative law’s traditional grounds of review. A governmental decision that survives attack on the grounds of illegality or irrationality may nonetheless be found unlawful on the basis of procedural irregularity.

Where a section 187B injunction is sought to remove someone from her home – or is used in a way that undermines respect for a person’s private and family life – an important Article 8 interest is being compromised. It would also seem clear that such issues are not ‘sensitive’ in the *W v United Kingdom* sense. In such circumstances, defendants would have to be afforded a meaningful opportunity to have participated in the decisionmaking process if that process is to survive Article 8 scrutiny.

It might be suggested that the relevant ‘decision’ in issue for Article 8 purposes under section 187B is that of the court. The planning authority is in effect doing no more than requesting the court to reach the decision. One might therefore instinctively assume that the defendant necessarily has adequate rights of participation. She may appear in court, and alone or with counsel’s assistance, make representations to the court and respond to the case presented by the local authority.

However, the adequacy of those participatory rights is substantially contingent on the extent of the court’s jurisdiction under section 187B to address the detailed merits of the council’s application. The greater the distance the court maintains from the detailed merits, then the greater the amount of relevant information not addressed at the hearing, and so the more diluted in real terms are the participatory rights that the applicant enjoys.

If the court exercised a jurisdiction over all issues of fact and law, the scope afforded by the authority to applicants at the pre-court stage of the process would be irrelevant for these purposes: her participatory entitlements before the court itself would be adequate. In contrast, a court which limited its jurisdiction to *Wednesbury* review would exclude so much relevant material from its own decisionmaking process that the procedural demands of Article 8 would almost certainly be breached. Whether the proportionality review evidently favoured by the Court of Appeal in *Porter* satisfies the participatory rights entitlements of Article 8 is unclear. The answer may depend on the way in which the council conducts the pre-court stage of proceedings. Simon Brown LJ did suggest that this matter would be a pertinent factor in judging the issue of necessity under Article 8(2), even though he did not address the issue explicitly. One relevant factor to which a court should have regard was; ‘whether the defendant had and properly took the opportunity to make his case for at least a temporary personal planning permission’.42

Planning authorities might be well advised to permit applicants to participate meaningfully in the authority’s own pre-court decisionmaking process. In this respect, domestic law on the issue of procedural fairness has obvious relevance.

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42 [2002] 1 All ER 425 at 443.
There is little indication in the ECtHR’s case law that the level of procedural rigour required by Article 8 is especially stringent, and it is likely that an authority could meet them in the section 187B context by following the prescriptions of cases such as Board of Education v Rice\(^{43}\) and Local Government Board v Arlidge.\(^{44}\) What an authority manifestly should not do is initiate proceedings without having afforded the putative defendant any opportunity to make representations to the authority.

**An Article 6 problem?**

A point neither raised by counsel nor considered by the Court in Porter is the relevance of Art 6 ECHR to section 187B proceedings. This issue may well be picked up by claimants contesting the use of injunctions to remedy breaches of planning controls which do not involve either a home, or private and family life, and so fall outwith Article 8.

The Court of Appeal’s analysis in Porter of the court’s role regarding section 187B applications is that the court is not exercising a jurisdiction over all pertinent matters of fact and law, but is simply subjecting a council’s decision to review on the basis of proportionality. Proportionality is a substantially more rigorous standard of review than Wednesbury irrationality; but it is still a reviewing jurisdiction, and not one which permits a court to exercise a power to substitute its own judgment for that of the local authority as if the court were exercising an ‘appellate’ jurisdiction\(^{45}\) over a first instance judgment.

If the court exercised an ‘appellate’ jurisdiction, the claimant’s Article 6 entitlements would clearly be satisfied. The County Court or High Court are manifestly fora established by law, independent of the local authority and impartial as between the authority and the applicant. Under a proportionality jurisdiction, the compatibility of the section 187B procedure with Article 6 is less clear.

It was settled by the ECtHR in Bryan v United Kingdom that a court jurisdiction limited to the orthodox grounds of judicial review would satisfy of Article 6 when the overall decisionmaking process in issue is ordinary TCPA enforcement proceedings.\(^{46}\) In those circumstances, however, the ‘overall process’ is a three stage affair: an initial decision by a local authority; merits appeal to a DETR inspector; and ‘appeal on a point of law’ (ie judicial review on orthodox grounds) to the High Court.\(^{47}\) The ECtHR in Bryan stressed that the jurisdiction of the Inspector – who is a fully independent and impartial tribunal as between the claimant and the council – to re-evaluate all the council’s factual conclusions was

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\(^{43}\) ‘But I do not think they [the Board] are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain any information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view’; [1911] AC 179 at 182, *per* Lord Loreburn LC.

\(^{44}\) ‘Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. . . . [C]ertain ways of and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitae those of Courts of Justice is wholly unfounded’; [1914–15] All ER Rep 1 (HL) at 9, *per* Lord Shaw.

\(^{45}\) ‘Appellate’ is used here in the orthodox sense, and not the sense of the ‘appeal on a point of law’ jurisdiction created by many statutes which is properly seen as being coterminous with judicial review.


\(^{47}\) Indeed, one might add a fourth stage if one then goes on to consider the authority’s powers to initiate a criminal prosecution under s 179 for non-compliance with an enforcement order.
crucial to its decision that the High Court’s limited reviewing powers amounted to the ‘full jurisdiction’ required by Article 6. 

**Alconbury** confirms that an Inspector lacks those attributes as between the claimant and the Secretary of State, because of the intimate institutional connection between Ministers and Inspectors. Thus when we are dealing with call-ins or recovered appeals, the High Court’s orthodox review powers only amount to ‘full jurisdiction’ when matters of ‘policy’ are in issue. The Article 6 question arising under section 187B is whether the court’s acceptance of proportionality based review suffices to compensate for the removal of the Planning Inspectorate from the decisionmaking process; i.e. a process which has become a two stage affair in which only the local authority is competent to investigate and evaluate all relevant questions of fact.

**Alconbury** could perhaps be invoked to justify an affirmative answer to that question when ‘policy issues’ arise. But that proposition, even if correct, offers little assistance to authorities in respect of the micro rather than macro planning matters raised in Porter. It is doubtful that the pre-litigation steps that an authority might take to render the overall process compatible with the procedural requirements of Article 8 ECHR would suffice to ensure compliance with Article 6. No matter how rigorous (or, to use a loaded term, ‘fair’) an authority’s internal decisionmaking procedures might be, their very internality militates against them satisfying the ‘independent and impartial’ demands of Article 6. Domestic courts may therefore face the choice of concluding either that proportionality review does amount to ‘full jurisdiction’ in this context or of issuing a declaration of incompatibility.

**Conclusion**

As evidenced by the House of Lords’ prompt reversal of the Divisional Court’s radical conclusion in **Alconbury**, first impressions of the impact of the Human Rights Act on the planning system may be overstated. Nonetheless, local authorities may increasingly find that that the broadly benign legal culture which the courts have constructed around local authority decisionmaking is disappearing. Twenty years ago, Lord Scarman in an oft-quoted dictum in **Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment**48 indicated that courts should be reluctant to accommodate individual rights in a manner that compromised effective enforcement of planning policy;

> Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. . . . It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation.49

Such sentiments may prove of declining significance. The challenge now facing local planning authorities is how best to manage that decline in fashion which convinces the domestic courts that the greater consideration that now must be paid to individual entitlements within the planning system does not lead simplistically to an inappropriate curb on local authorities’ powers to manage their local environment in the best interests of local people.

49 *ibid* at 358.