

## Case Law Update Karen Steyn

The breadth of work undertaken by modern local authorities is such that the choice of cases to mention in a brief update of this kind is overwhelming. Any selection is bound to appear, and no doubt be, somewhat arbitrary. Nevertheless, an attempt has been made to identify some of the key decisions and key themes in local government cases, leaving aside those which will be addressed in the specialist papers which will follow.

### (1) INFORMATION LAW

#### (a) *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47

The case-law of the Information Tribunal is rapidly expanding, but decisions by the higher courts are still relatively few and far between. *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 is one of just two cases that have reached the House of Lords since the Freedom of Information Act 2000 (and the Freedom of Information (Scotland) Act 2002) came into force.<sup>1</sup> The requester asked the Common Services Agency (“the CSA”) to provide him with the details, by reference to small geographical areas (census wards), of leukaemia statistics. The CSA considered that that information was likely to constitute “personal data” and was exempt. The Commissioner found that the information sought was personal data, and that it was exempt because disclosing it would breach the first data protection principle, but he required the CSA to provide the information in “barnardised” (ie anonymised) form.

The case raised three main issues: (i) whether the information which the Commissioner ordered the CSA to release was held by the CSA at the time of the request, (ii) if so, whether it constituted personal data and whether its release would be in accordance with the data protection principles and (iii) whether the information also constituted “sensitive personal data” and if so whether its release would be in accordance with at least one of the conditions in Schedule 3 to the Data Protection Act 1998.

The House of Lords rejected the CSA’s contention that the Commissioner had required it to create new information. The effect of barnardisation was to apply a form of camouflage to information that was undoubtedly held at the time of the request. But barnardised information may still be personal data. This is because information will be personal data if, taken together with other information which is or might come to be in the possession of the data controller, it enables a living individual to be identified. Unless the barnardised information was exempt, it would have to be released.

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<sup>1</sup> The other House of Lords decision is *BBC v Sugar* [2009] UKHL 9, which addressed the issue of information held by a hybrid public authority.

Whether the proposed barnardisation disguised the information so that it became data from which a living individual could no longer be recognized was a question of fact for the Commissioner. If it was personal data, it could only be released in response to a freedom of information request if such release did not contravene any of the data protection principles. In considering the application of the s.40(2) exemption, the observations of their lordships regarding the relationship between the Freedom of Information Act and the Data Protection Act are important. Whereas in other FOIA contexts there may be a presumption in favour of release of information, the House of Lords made it abundantly clear that no such presumption applies in respect of a request for another person's personal data: see per Lord Hope at 7, 28 and 40 and Lord Rodger at 67-68.

Finally, the House of Lords rejected the Commissioner's contention that the definition of "sensitive personal data" was a self-standing one, finding that it incorporated the definition of "personal data". Their lordships made no finding as to whether this was sensitive personal data, but Lord Hope observed that if the barnardised information was personal data, given that it was about children's health, it was only a short step to find that it was also sensitive personal data. If the conditions in schedules 2 and 3 were not met, the information – even in barnardised form - would be exempt.

(b) *BERR v O'Brien and Information Commissioner* [2009] EWHC 164 (QB)

In *BERR v O'Brien* Wyn Williams J considered an appeal by a public authority against the Tribunal's rejection of its reliance on sections 35 and 42. The interesting aspect of the decision is the Court's consideration of the Tribunal's case law on the legal professional privilege exemption. The Court held that, although there was nothing in the statutory language which indicated that legal professional privilege should be accorded a greater inbuilt weight than any of the other qualified exemptions, the Tribunal was right to regard the inherent public interest in non-disclosure of legally privileged information as being of significance.

Whereas the approach of the Tribunal in cases since *Bellamy* could be seen as having watered down the initially strong statement of the generic public interest in maintaining legal professional privilege, Wyn Williams J considered that the Tribunal had adopted a consistent approach. In his view, the supposed differences between *Bellamy* and decisions such as *Mersey Tunnel* were linguistic rather than substantive. Thus the High Court has effectively endorsed the approach taken in *Bellamy*.

The Judge also made it clear that it was not necessary for the public authority to demonstrate any specific prejudice or harm from disclosure of the requested information. The Tribunal's reliance on the lack of specific prejudice was indicative of its failure to attach significant weight to the inbuilt public interest in withholding information to which legal professional privilege attaches.

## 2. BIAS

### (a) *Helow v AG for Scotland* [2008] UKHL 62

In *Helow* the House of Lords once again applied the *Porter v Magill* test for bias ie whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.

The appellant was a woman of Palestinian ethnicity. She had claimed asylum in the United Kingdom on the basis that she had been politically involved with the Palestinian Liberation Organisation and that she held political opinions that placed her at risk if she was returned to Lebanon. Asylum had been refused. Her appeal against a notice of removal to Lebanon had been dismissed and permission to appeal had been refused. She had sought a review of the refusal of permission to appeal and the Lord Ordinary, dealing with the matter on the papers, had affirmed the decision.

Subsequently, as a result of internet research, the appellant discovered that the Lord Ordinary was a member of the International Association of Jewish Lawyers and Jurists and was a founder member of the Scottish branch of that association. The appellant believed that the association, as evidenced by its policy statements and the content of its quarterly publication "Justice" was anti-Palestinian and had a strong commitment to causes and beliefs at odds with her own causes and beliefs.

The House of Lords rejected the appeal. The fictitious observer described by Lord Hope, far from being the man on the Clapham omnibus, or the Tube, appears to be very model of a perfect judge. Lord Hope said the observer is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. She will take the trouble to inform herself on all matters that are relevant, is able to put whatever she has read or seen into its overall social, political or geographical context and will appreciate that context forms an important part of the material she must consider before passing judgment.

Although it was possible to conceive of extreme circumstances in which a member of an organisation might be expected to resign or disassociate himself from the words or conduct of leaders of the organisation, ordinarily mere membership of an organisation would not given rise in the eyes of a fair-minded observer to a real possibility of a member, particularly a judge who is trained to analyse large quantities of material, being unconsciously influenced by the more extreme views expressed by the association.

Lord Walker dismissed the appeal less readily than other members of the judicial committee. Ultimately, he accepted that there was no evidence that the Lord Ordinary endorsed the views of the president of the association, but he cautioned against the complacency of treating the fact of having taken the judicial oath as a panacea.

(b) *R (Lewis) v Persimmon Homes Teesside Ltd* [2008] EWCA Civ 746

The decision in *R (Lewis) v Persimmon Homes Teesside Ltd* is the latest word from the Court of Appeal on the elusive distinction between predisposition and predetermination in the planning context, that is, the distinction between having an open, but not necessarily empty, mind and having a closed mind.

The case concerned a plan for the major revelopment by the local authority of a common and the surrounding area. The respondents were appointed as the authority's development partners. The decision as to whether to grant planning permission for the project came before the planning committee shortly before the local government elections. The planning committee granted consent. The applicant argued successfully at first instance that the decision was tainted by apparent bias and apparent predetermination.

In response to the contention that members may have supported the proposal for political advantage, rather than reasons related to the underlying planning merits, Pill LJ observed that the members of the planning committee would be entitled and expected to have, and to have expressed, views on planning issues. They were not required to cast aside views on planning policy they have formed when seeking election or when acting as councillors. There was little evidence that the committee members were any more politically motivated than would normally be expected from elected policy makers.

The test was a very different one from that to be applied to those in a judicial or quasi-judicial position. A decision maker in the planning context was not acting in a judicial or quasi-judicial role but in a situation of democratic accountability. He had to address the planning issues before him fairly and on their merits, even though he might approach them with a predisposition in favour of one side of the argument. The notion that a planning decision was suspect because all members of a single political group had voted for it was an unwarranted interference with the democratic process.

(c) *R (Ortona) v Secretary of State for Communities and Local Government* [2008] EWHC 3287

Planning inspectors, unlike members of local authority planning committees, are treated in the same way as judges. In *Ortona* the applicant company applied to quash a decision of the Secretary of State upholding a refusal of planning permission for the development of a site previously used as a bus station. The main objector to the company's proposal was the county council. The planning inspector who heard the appeal had been employed in the county council's planning department until four years prior to the inquiry. The company's representatives queried whether he should proceed to hear the appeal.

Collins J held that it could not possibly be said that the circumstances of the instant case would not give rise to the possibility of a reasonable, informed observer taking a view that there was a possibility of bias. Although the inspector had not worked for the county council for some four years, the policies

relied on by the county council in the appeal were policies which were in being at the time he worked for them. It was at least possible and perhaps probable that he had concerned himself with such policies.

Planning inspectors should adopt the same approach that judges would adopt in deciding whether they should recuse themselves

### 3. POSSESSION PROCEEDINGS

#### (a) *Doherty v Birmingham City Council* [2008] UKHL 57

*Doherty v Birmingham City Council* is the latest in a line of decisions from the House of Lords which seek to give article 8 of the European Convention on Human Rights minimal effect in the context of summary possession proceedings. In *Harrow LBC v Qazi* [2003] UKHL 43 the House of Lords held by a bare majority that article 8 could never qualify or interfere with the property rights of a local authority landlord with an absolute right to possession under the general law. The House of Lords recognised that the point of automatic possession proceedings is generally to provide a quick and reliable way for a public authority to evict tenants whose lease has been terminated by the operation of law. It would be contrary to that purpose to create a procedure which gives a discretion to the court by requiring it to consider whether, having regard to art.8, the making of the order would be proportionate.

But doubt was thrown on *Qazi* by the decision of the Strasbourg Court in *Connors v UK* (2005) 40 EHRR 9. The matter came back before the House of Lords in *Lambeth London Borough Council v Kay* [2006] UKHL 10. A seven judge court reached another bare majority decision. The conclusion was that *Qazi* remained good law save in cases where either: (a) the law giving the landlord the right to possession was itself being challenged as contrary to article 8, in which case the court exercise the interpretative or make a declaration of incompatibility (“gateway (a)”); or (b) the occupier wished to contend that the landlord’s decision to seek possession was unlawful on conventional judicial review grounds (“gateway (b)”).

However, another ECHR decision, *McCann v UK* (2008) 47 EHRR 40, threw the decision in *Lambeth LBC v Kay* into doubt because it seemed to require that an occupier should always be entitled to challenge the factual basis on which possession was sought so that the proportionality of the interference with his article 8 right could be addressed. The European Court of Human Rights endorsed the reasoning of the minority in *Lambeth v Kay*.

The decision in *McCann v UK* came out after argument but before judgment in *Doherty*, so the House of Lords received written submissions on its effect. Once again the House of Lords sought to hold the line drawn in *Kay*.

The facts of *Doherty* were that the appellant traveller sought to overturn an order for his eviction from a caravan site owned by the local authority on the basis that his removal would violate his article 8

right. He and his family had been resident on the site for 17 years when the local authority served its notice to quit.

The House of Lords held that the basic rule remained as laid down by the majority in *Qazi* and reaffirmed by the majority in *Kay*, and county court judges should continue to follow the guidance given in *Kay*. Their lordships considered that practical recognition could be given to the principles laid down in the Strasbourg judgments by applying and developing the reasoning of the majority in *Kay*. In effect, the majority seem to have held that the decision in *McCann* can be accommodated by focussing on gateway (b) ie the public law challenge, brought collaterally in the county court. Lord Hope, giving the leading majority judgment, indicated that adequate procedural protection could be provided by allowing *Wednesbury* review of the decision to serve notice to quit. The minority considered that full-scale proportionality review was required.

(b) *Doran v Liverpool City Council & Secretary of State for Communities & Local Government* [2009] EWCA Civ 146

The Court of Appeal had an opportunity to consider *Doherty* in *Doran* and held (i) if a licensee wished to advance public law grounds for not making a possession order, he or she had to show a “seriously arguable” case that the local authority's decision to recover possession was one which no reasonable person would consider justifiable; (ii) there was no formulaic or formalistic restriction of the factors which might be relied upon by the licensee in support of an argument that the local authority's decision to serve a notice to quit, and seek a possession order, was one which no reasonable person would have taken; and (iii) *Doherty* decided that the question whether the local authority's decision was one which no reasonable person would have made was to be decided by applying public law principles as they had been developed at common law, and not by reference to the Convention.

(c) *McGlynn v Welwyn Hatfield District Council* [2009] EWCA Civ 285

In *McGlynn v Welwyn Hatfield DC* a summary possession order against a local authority was set aside by the Court of appeal because the local authority had indicated that it would not seek a possession order unless it was satisfied that a serious breach of the tenancy agreement had occurred.

In view of the lapse of time after service of the notice to quit and before the issue of possession proceedings, it was seriously arguable that a reasonable local authority would not have issued the possession proceedings unless satisfied that there had been some significant further breach by the tenant. The local authority were not required to conduct the equivalent of a judicial investigation to be satisfied about that, but the question was whether it was seriously arguable that the local authority had not done enough to satisfy itself that there had been some significant further breach. There had been insufficient information available to the district judge about the local authority's decision-making process for him to conclude that the tenant's defence was not seriously arguable.

(d) *Bracknell Forest BC v Green* [2009] EWCA Civ 238

A further indication that possession is no longer automatic was given by the Court of Appeal in *Bracknell Forest BC v Green*, upholding the decision of a recorder that it was not reasonable to seek a possession order against a 50 year old unmarried man, who had lived in the house all his life, even though the accommodation was more extensive than he reasonably required and the council was offering reasonable alternative accommodation. This decision may suggest that while the courts are purporting to apply the *Wednesbury* standard, they are perhaps edging closer towards the proportionality review that the Strasbourg cases appear to require.

(e) *Alexander-David v Hammersmith v Fulham LBC* [2009] EWCA Civ 259

In *Alexander-David* the Court of Appeal considered the difficulties caused by the fact that in accordance with the Law of Property Act 1925 minors (including 16 and 17 year olds) are not capable of holding a legal estate in land.

The appellant was 16 years old and homeless. The local authority, in accordance with its duty under the Housing Act 1996, granted her a non-secure tenancy. However, following complaints about the appellant's behaviour at the premises, the local authority served a notice to quit on D in accordance with the terms of the agreement. Possession proceedings were subsequently commenced and the local authority was granted a possession order.

The Court of Appeal held that the authority had granted a tenancy to a minor which was effective in equity. Consequently, the local authority held the premises on trust for the appellant and could not lawfully destroy the subject matter of the trust by serving a notice to quit.

The Court of Appeal expressed the view that it should not be too difficult for local authorities to avoid this problem arising again. The court suggested that in discharging its local housing authority and social services functions the local authority should co-ordinate matters so that, whether by providing in the agreement for attention or services, or by permitting inspection of the premises by those charged with a child's welfare and thereby preventing the grant of exclusive possession, any agreement with a 16 or 17-year-old was not merely expressed to be, but was in fact the grant of a licence rather than a tenancy. An agreement to grant a lease for the period until an applicant turned 18, rather than the grant of a lease, might also be an option. Whatever course was adopted, it was important that the inability of a minor to hold the legal estate was expressly recognised and that any agreement with a 16 or 17-year-old expressly stated that because an applicant was a minor, the local authority was not granting a legal estate, but was ensuring that accommodation was available by granting something other than such an estate.

#### 4. HOUSING PRIORITY

(a) *R (Ahmad) v Newham* [2009] UKHL 14

In *Ahmad* the House of Lords considered a challenge to a local authority's scheme for prioritising the allocation of housing. The scheme involved two different methods of offering properties, namely the choice-based letting arrangement (CBL) and the direct offer arrangement. Applicants subject to the latter arrangement effectively took priority over those subject to the CBL. Applicants admitted to the CBL were placed in one of three categories whilst the direct offer arrangement comprised five categories. The issues Court of Appeal had found that the scheme was unlawful because (i) it did not accord priority as between "reasonable preference" applicants by reference to the relative gravity of their needs and (ii) the CBL involved allocating a small but significant proportion of housing to a class of applicants who did not satisfy any of the requirements in paras (a) to (e) of s.167(2), namely tenants seeking a transfer.

The House of Lords allowed the local authority's appeal, holding that section 167 did not require a local housing authority to accord priority as between "reasonable preference" applicants by reference to the relative gravity of their needs. The opening words of s.167(2), when read together with the ensuing five paragraphs, its closing sentence and the first phrase of s.167(2A) all showed that an authority was not statutorily obliged to rank all reasonable preference applicants by reference to the strength of their respective cases. Further, as a general proposition, it was undesirable for the courts to get involved in questions of how priorities were accorded in housing allocation policies. Of course, there would be cases where the court had a duty to interfere, for instance if a policy did not comply with statutory requirements or if it was plainly irrational. However, it was unlikely that the legislature could have intended that judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances.

Housing allocation policy was a difficult exercise which required not only social and political sensitivity and judgment but also local expertise and knowledge. It would be impossible to argue that an authority's allocation scheme was unlawful unless the basis on which it accorded priority as between those applicants who satisfied one or more of paras (a) to (e) of s.167(2) was irrational.

The scheme in this case was not irrational. In the first place, it plainly satisfied the express statutory requirements. The main argument for the respondent was that it was irrational to include every applicant who satisfied one or more of paras (a) to (e) of s.167(2) in the same band, and then to select successful applicants by reference to how long they had satisfied that criterion. It was undoubtedly a rough and ready system. However, it had many advantages over a more nuanced system: it was very clear, relatively simple to administer and highly transparent. If an authority had a number of different bands based on degree of need, or the degree to which the s.167(2) factors were satisfied, the banding exercise would be much more expensive, time-consuming, opaque and based

on value judgments. It would also require much more monitoring, as applicants' circumstances would inevitably be liable to change.

There was nothing inherently absurd or arbitrary about prioritising those who satisfied s.167(2) by reference to time on the waiting list, subject to having a very small preference group, and nothing in the evidence supported a contrary conclusion. The House of Lords stressed that if a housing allocation scheme complied with the requirements of s.167 and any other statutory requirements, the courts should be very slow to interfere on the ground of alleged irrationality.

Further, it had been argued that those in the groups set out in s.167(2) had to be given preference in relation to every property which was let under the scheme. The problem with that argument was that s.167(2) only required that those groups be given a "reasonable preference". It did not require that they should be given absolute priority over everyone else. Still less did it require that an individual household in one of those groups should be given absolute priority over an individual household which wished to transfer.

(b) *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7

In *Holmes-Moorhouse* the House of Lords gave guidance on the approach to be followed by local housing authorities in determining whether an applicant for assistance under the Housing Act 1996 Pt VII who had been granted a shared residence order by the family court was a person with whom dependent children "might reasonably be expected to reside", pursuant to s.189(1)(b).

The local authority appealed against a decision that it erred in finding that the respondent father did not have a priority need for housing because he was not a person with whom dependent children "might reasonably be expected to reside" (s.189(1)(b) Housing Act 1996). When the father and his partner had separated, they had agreed to a shared residence order in respect of the children. The Court of Appeal held that once a court had decided in contested proceedings that residence should be shared, the housing authority could not deny that the children "might reasonably be expected to reside" with their father.

The House of Lords allowed the local authority's appeal. A housing authority, in deciding whether children could reasonably be expected to reside with a homeless parent, was dealing with a different question to the family court. The Court of Appeal had erred in holding that the fact that housing was a scarce resource was irrelevant to the question whether the children could reasonably be expected to live with their homeless father. Only in exceptional circumstances would it be reasonable to expect children who had a home with one parent to be provided under Pt VII with another so that they could also reside with the other parent.

The House of Lords warned that it was not the business of the family court to try to exert pressure upon a housing authority to allocate its scarce resources in a particular way.

## 5. HIGH COURT PLANNING PROCEDURE

(a) *Secretary of State for Communities and Local Government v Bovale Ltd* [2009] EWCA Civ 171

In *Bovale* the Court of Appeal gave an important ruling on High Court planning procedure, overturning the decision of Collins J, given as Lead Judge of the Administrative Court.

Collins J had sought to lay down general matters of procedure for the future, where applications were made under CPR Part 8 to quash a planning decision under s.288 of the Town and Country Planning Act 1990. Collins J indicated that a defendant in a s.288 case ought to serve both evidence and grounds of resistance within a period of 10 weeks from service of the claim. Furthermore, he indicated that where the defendant chose not to put in any grounds of resistance there would be costs consequences and the sequential exchange of skeleton arguments should be reversed with the defendant being required to serve his skeleton first.

The Court of Appeal ruled that Collins J had not had power to vary the rules or practice directions generally. He had purported by his judgment to change the rules under CPR Part 8 and CPR PD 8, which he was not entitled to do. Nor was he free to seek to enforce his rule change by ordering a reversal of the sequence of skeleton arguments or costs consequences.

Accordingly, there is no general requirement for grounds of resistance in such claims and evidence continues to be governed by the relevant parts of the CPR Part 8 Practice Direction.

## 6 LOCAL AUTHORITY POWERS

(a) *Birmingham City Council v Shafi* [2008] EWCA Civ 1186

Finally, in *Birmingham City Council v Shafi* the Court of Appeal effectively shut the door on the possibility of local authorities seeking to restrain antisocial behaviour by way of injunctions rather than antisocial behaviour orders.

The Court of Appeal upheld the judge's refusal to grant the local authority injunctions to restrain members of a gang from committing criminal offences and/or public nuisance. The Court held that where a local authority sought an injunction in circumstances in which an antisocial behaviour order would be available, the court should not, save perhaps in an exceptional case, grant an injunction but should leave the local authority to seek an antisocial behaviour order so that the detailed checks and balances developed by Parliament and in the decided cases would apply.

The court had jurisdiction to grant the injunctions but it would be wrong in principle for the court to exercise its discretion by doing so. The critical factor was that, whether the local authority sought an injunction in aid of the criminal law or on the basis of an alleged public nuisance, the essential remedy sought was an antisocial behaviour order. Save in exceptional circumstances it would not be just and convenient to exercise the discretion to grant an injunction under s.37 of the Supreme Court Act 1981.

Where Parliament had legislated the courts should not indulge in parallel creativity by the extension of general common law principles.

Further, given that the order sought was essentially the same as an antisocial behaviour order, the judge was correct to apply the same standard of proof as would be applied in proceedings for an antisocial behaviour order, namely whether he was sure that the individuals against whom the injunctions were sought had acted in an antisocial way.

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