

**LOCAL AUTHORITIES**

**ANNUAL REPORT - 2011 – UNITED KINGDOM**

*(May 2011)*

**Christopher KNIGHT**

*Barrister*

---

**INDEX**

**1. INTRODUCTION**

**2. NON-JUDICIAL CONTROL OF LOCAL AUTHORITIES**

**3. JUDICIAL CONTROL OF LOCAL AUTHORITIES**

*3.1 Building Schools for the Future Litigation*

*3.2 Witness Evidence and Irrelevancy*

*3.3 Article 8 ECHR and Provision for the Destitute*

*3.4 Misfeasance in Public Office*

**4. ELECTION LAW**

## **1. INTRODUCTION**

The position of local authorities in the United Kingdom is complex and closely regulated by a variety of pieces of primary and secondary legislation. To an already difficult area of law is added a further layer of complexity by the fact that there are usually distinct differences of local authority law between England, Scotland, Wales and Northern Ireland. The nature of devolution in the UK means that a good deal of flexibility is retained in different parts of the country. Scotland and Northern Ireland are governed by essentially separate legal systems and the control of local authorities in those parts of the country is a matter of specialist knowledge. Since the creation of the Welsh Assembly, local authorities in Wales are usually subject to broadly the same position as English local authorities but with important differences of detail, reflecting the concerns – or simply differences in drafting – of the Welsh Assembly.

For ease of reference this report will focus on developments in the law relating to local authorities in England in the past year. In particular, it will focus on the control of local authorities through both judicial and non-judicial means by highlighting some of the more interesting recent decisions of the courts.

It is important to flag a future change to local authority law in England. The Localism Bill is currently progressing through Parliament and will make significant changes to the powers of local authorities, the way in which local authorities exercise their powers, and the political themes underlying the triangular relationship between central government, local authorities and the electorate. A future report will address the changes made by the Localism Bill when it is passed into law.

## **2. NON-JUDICIAL CONTROL OF LOCAL AUTHORITIES**

One of the most important forms of non-judicial control over the conduct of local authorities is the ability of members of the public to make a complaint to the Local Government Ombudsman („LGO“). This is invariably a cheaper and quicker method of

having one's grievance heard by an impartial person where there is an allegation of maladministration.

The problem for individuals is that LGO Reports do not have legally binding effect. Even when the LGO has upheld the complaint, the substance of the dispute between the individual and the authority may continue to persist if the authority refuse to implement the Report or certain of its recommendations.

A recent example of this was seen in *R (Gallagher) v Basildon District Council* [2010] EWHC 2824 (Admin) where Basildon DC had published the personal details, including medical and educational needs, of a group of travellers (gypsies). The travellers complained that the publication was contrary to data protection law and to Article 8 ECHR. The LGO agreed, making a finding of maladministration and recommending a payment of £300 to each affected person. Basildon DC apologised but declined to make the payments. Kenneth Parker J noted that the amount of LGO Reports which were not implemented by local authorities had dropped to just 1%.

However, the judge rejected a requirement upon authorities to have cogent reasons not to implement the recommended remedy in the LGO Report. At paragraph 27 he reasoned that:

„there is more scope for genuine disagreement on what, if any, steps are required to remedy a particular injustice. There may be a number of options, with varying effects on the use of scarce resources. Local authorities are, of course, accountable to their electors for the use of such resources. It seems to me that Parliament intended that local authorities should be entitled to consider the impact on the fair and efficient allocation of scarce local resources in deciding whether to accept a recommendation of the LGO and, in an appropriate case, to reject such a recommendation because of a disproportionate effect on such resources.“

In the *Gallagher* case itself, the court found that the authority had unlawfully failed to implement the LGO Report because it had failed to take into account relevant considerations, took into account irrelevant considerations, and gave manifestly

disproportionate weight to certain considerations. Basildon DC had therefore acted irrationally.

### **3. JUDICIAL CONTROL OF LOCAL AUTHORITIES**

#### ***3.1 Building Schools for the Future***

In *R (Luton Borough Council and others) v Secretary of State for Education* [2011] EWHC 217 (Admin), Holman J quashed the withdrawal of funding from Building Schools for the Future (BSF) projects on procedural grounds. The claims against the Secretary of State (SoS) by six local authorities succeeded, and the SoS has been required to reconsider his decisions, although he is not required to restore cancelled funding. Quashing of the SoS's decision to cancel funding for these projects was ordered on several grounds which the Judge summarised as being concerned with a failure by the SoS to consider the individual local authorities and their projects in a sufficiently case-specific way. The SoS had applied a "strict rules-based approach".

First, the Judge held that the SoS had unlawfully failed to consult with the authorities as to the effect on their individual projects of his possible decision options. Applying *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 775, there was a procedural legitimate expectation of such consultation, even though there had been no relevant promise or practice of consultation, because of the "pressing and focussed impact" which the Department for Education past conduct had had upon the claimants. In short, because of the very large sums involved, and the way in which the authorities had continued to act and spend significant sums of money in reliance on the stage that they had reached in the approval process, along with the fact that they had been engaged in continuing dialogue with Partnerships for Schools, stopping the projects without prior consultation was so unfair as to amount to an abuse of power. There was no justification for dispensing with it altogether.

Secondly, Holman J held that the SoS had failed to comply with his statutory equality duties - specifically, the duties to have due regard to the need to eliminate unlawful race, sex and disability discrimination, to promote equality of opportunity between men and women, different racial groups and disabled persons and others, and to take steps to account of disabled persons' disabilities and to promote positive attitudes towards them (now found in section 149 of the Equality Act 2010). It was said in evidence that the SoS had been aware, as a general proposition, that the earlier (and already funded) waves of BSF investment were likely to have delivered funding for schools with greater proportions of disabled or ethnic minority pupils, the Judge said that such a generalised approach "[did] not begin to discharge the equality duties `in substance [and] with rigour'", as required by *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506. It would appear that the Judge did consider that the SoS should have been prepared to engage in case by case consideration of the relevance of particular pipeline projects to equalities issues before deciding which ones to cancel, at any rate to the extent that any special equality considerations pertaining to particular projects had been highlighted in the consultation that should have taken place. There had been no equality impact assessment (EIA) at the time of the decision.

Thirdly, although his ultimate conclusion is expressed in terms of lack of consultation and breach of equality duties, it would seem that Holman J would also have characterised the case as one in which the SoS had unlawfully fettered his discretion under the grant-making power, section 14 of the Education Act 2002. Here, whilst the SoS had been entitled to adopt rules, each project was an individual case, to which the SoS should have been prepared to give individual consideration for the residual exercise of discretion, at any rate in marginal cases or those where consultation of authorities was required. Instead, the rules had been applied in a rigid and hardedged manner. Open-minded consultation would have avoided any such fettering.

Importantly, attempts to challenge the decisions on rationality grounds were robustly rejected by Holman J. Given the heavy macro-economic and political content of the decision, the Judge's view was that to scrutinise the SoS's reasoning, beyond being satisfied that it was not inherently irrational, would have been "a grave and exorbitant

usurpation by the court of the minister's political role". The Judge also rejected the suggestion that the claimants had had a substantive legitimate expectation that funding would continue to be made available. The basis for the alleged substantive expectation was put slightly differently by different authorities according to their own particular facts, but the essential point in each case was that the authority had reached a certain stage in the approval process, or had been encouraged by correspondence to think that approval would be forthcoming, without having reached the stage at which a final business case had been approved and a promissory note issued on behalf of the Government. Holman J acknowledged that high hopes had been raised, but held that no legitimate expectation was created that any given project would definitely proceed. The decision was quashed on grounds which went to the manner in which it had been reached, rather than to its substantive content.

The judgment will be of considerable interest in the current climate of austerity - whether at central government level, as in the BSF case, or by local authorities themselves, or by other public bodies charged with the distribution of funds. On the one hand, the BSF judgment suggests that rationality challenges are only likely to succeed in such cases where some logical flaw in the approach taken more or less leaps off the page - even where the challenge is to the manner in which available funds have been distributed, as opposed to the more obviously politico-economic decision about how much money should be spent. On the other hand, the case illustrates that authorities which do not think carefully about the procedure to adopt before reaching such decisions may find themselves vulnerable to attack. The funding constraints to which authorities are subject (and the relatively short period which may elapse between knowing what resources they have available and the point at which budgets have to be set) may create real pressure for urgency in decision-making, but more haste may make for less speed if it leads to judicial review. The judgment is also a reminder of the importance which the Courts attach to the equality duties in decision-making, and to the degree of stringency with which at least some Judges will require equality implications to be analysed. One suspects, cynically, this may be because it enables a decision to be made quickly without having to trespass into the more politically treacherous waters of a substantive challenge to how public funds should be spent. The

*Luton* decision will undoubtedly be a regularly cited decision during the upcoming phase of plentiful challenges to public authority decisions on funding cuts.

### ***3.2 Witness Evidence and Irrelevancy***

In *Lancashire County Council v Environmental Waste Controls Ltd* [2010] EWCA Civ 1381 the Court of Appeal held that where a local authority officer had given evidence that he had ignored an irrelevant consideration when assessing a tender, and the Judge had found him to be an honest witness, the Judge had not been entitled to conclude that the officer's decision had been subconsciously affected by the irrelevant consideration. Although in an appropriate case a Judge could be entitled to find that the decision maker was influenced by an irrelevant consideration, even though honestly not aware of being influenced, it was vital that the suggestion was put to him in cross-examination in the plainest terms. It will, of course, be a very unusual case in ordinary judicial review proceedings with cross-examination (or even live witness evidence) at all, but there will be many other proceedings (such as public procurement) in which this will be relevant. If the tender process was found to be honestly operated, as in the instant case, it was extremely difficult to go on to find that the process was defective by reason of regard to an irrelevant consideration.

### ***3.4 Article 8 ECHR and Provision for the Destitute***

Any person who is unlawfully present in the UK within the meaning of paragraph 7 of Schedule 3 to the Nationality Immigration and Asylum Act 2002 who is destitute can be (apart from Schedule 3) eligible for assistance from the responsible local authority. In *Birmingham City Council v Clue* [2010] EWCA Civ 460 the Court of Appeal emphasised, at paragraph 27, that Article 8(1) of the European Convention on Human Rights protects 2 distinct rights: the right to respect for family life, and the right to respect for private life. It went on to hold that the local authority must decide whether and, if so, the extent to which

it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights. If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically Article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin – and if the only problem is funding for transport the authority should arrange it.

There is, the Court of Appeal recognised, a fundamental difference between the immigration functions of the Home Office and the social security functions of local authorities. Local authorities are required to make an assessment of immigration status in certain respects. Nevertheless, it would be contrary to the division of functions provided by Parliament to require local authorities to decide for the purposes of Schedule 3 of the 2002 Act whether a non asylum-seeking applicant is entitled to leave to remain. A local authority could not justify a refusal to provide assistance where to do so would deny to the claimant the right to pursue an arguable application for leave to remain on Convention grounds. It is not for the local authority to attempt to step into the Home Office's shoes and determine substantive asylum appeals, unless the claim is obviously hopeless or abusive.

Of particular importance to local authorities in a period of funding cuts and national austerity Dyson LJ further said, at paragraph 75:

„local authorities may not invoke Article 8(2) by reference to budgetary considerations and the rights of others if the effect of so doing will be to require an applicant to return to his country of origin and thereby forfeit his claim for indefinite leave to remain.”

### ***3.5 Misfeasance in Public Office.***

---



Misfeasance in public office is a tort claim which can only be made against an official of the State, including officials of local authorities. It requires a high level of *mens rea*, and as such is not often successfully used. In *R (Khazai) v Birmingham City Council* [2010] EWHC 2576 (Admin) a local authority's direction to members of its staff concerning its treatment of homelessness applications that was unlawful on its terms did not give rise to a claim for misfeasance in public office: the staff member responsible for the direction had not acted in bad faith or reckless indifference to its illegality.

#### **4. ELECTION LAW**

Following the 2010 General Election a highly unusual court challenge was launched by the defeated Liberal Democrat candidate against the victorious Labour Member of Parliament, Phil Woolas. It was argued that campaign literature used by Mr Woolas had made a number of untrue and damaging allegations against his opponent, who went on to lose the election by only 103 votes, and that those allegations placed Mr Woolas in breach of section 106 of the Representation of the People Act 1983, which governs the conduct of elections. Section 106 provides that a person who, before or during an election, for the purpose of affecting the return of a candidate at the election, makes or publishes any „false statement of fact” in relation to the candidate's „personal character or conduct” shall be guilty of an „illegal practice”, unless he can show that he had reasonable grounds for believing, and did believe the statement to be true.

Upon appeal from a specially-convened Election Court, the Divisional Court decision in *Woolas v Parliamentary Election Court* [2010] EWHC 3169 (Admin) (paragraph 87) summarised what was clearly established by the cases in relation to the meaning of the above expression as being that: (1) no Court has laid down a general definition; (2) a distinction must be drawn between a false statement of fact which relates to the personal character or conduct of the candidate and a false statement which relates to the political or public position, character or conduct of the candidate; (3) the facts of some cases illustrate what can clearly be viewed as statements in relation to political conduct; (4)

some statements may without much argument be said to relate to personal character or conduct; and (5) what may in certain circumstances be perfectly innocent statements may come within the prohibition if spoken about a candidate without reference to a political issue. The Divisional Court observed (paragraph 105) that Article 10 ECHR does „not protect a right to publish statements which the publisher knows to be false”, and continued (paragraph 106):

„The right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true. It matters not whether such a statement relates to the political position of a candidate or to the personal character or conduct of a candidate when the publisher or maker makes that statement dishonestly. The right to freedom of expression under Article 10 does not extend to a right to be dishonest and tell lies, but s.106 is more limited in its scope as it refers to false statements made in relation to a candidate’s personal character or conduct.”

The Divisional Court departed from the Election Court to the extent that (paragraph 109) they did not consider that earlier authorities justified the adoption of the construction of section 106 that a false statement can at the same time relate both to a candidate’s public and personal character, and said:-

„110 In our view, the starting point for the construction of s.106 must be the distinction which it is plain from the statutory language that Parliament intended to draw between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct. It was as self evident in 1895 as it is today, given the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election. The statutory language makes it clear that Parliament plainly did not intend the 1895 Act to apply to such statements; it trusted the good sense of the electorate to discount them. However statements as to the personal character of a candidate were seen to be quite different. The good sense of the electorate would be unable to discern whether such statements which might be highly

damaging were untrue; a remedy under the ordinary law in the middle of an election would be difficult to obtain. Thus the distinction was drawn in the 1895 Act which is re-enacted in s.106 and which is reflected in the decisions to which we have referred ...

111. In our judgment, as Parliament clearly intended that such a distinction be made, a court has to make that distinction and decide whether the statement is one as to the personal character or conduct or a statement as to the political position or character of the candidate. It cannot be both.

112. Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate.”

This led the Divisional Court to conclude that 2 of the 3 statements for which Mr Woolas accepted responsibility were false statements in relation to the petitioner’s personal character or conduct, but that the third was not. Mr Woolas was disqualified from his seat in Parliament, barred from standing for election for three years and fined £5,000.<sup>1</sup>

---

<sup>1</sup> I gratefully acknowledge the assistance I have gained from my colleagues at 11 King’s Bench Walk in this Report and their work in various papers written for seminars, and in the updating supplements to the looseleaf publication *Local Government Law*, to which I am a contributor.