

Letter on *Holding and Barnes* in 151 NLJ 595 (27 April)

The Divisional Court decision in *R (on the application of Holding and Barnes plc) v Secretary of State for the Environment, Transport and the Regions and other applications*, reported in your issue of February 2 at page 135, overlooks a crucial point. This is that it can be argued that Article 6.1 (right to a fair trial) of the European Convention on Human Rights as applied by the Human Rights Act 1998 (HRA) ought not to be held to apply to decisions based not on ordinary legal rights but on government policy.

In an article published on January 12 in *Current Law Week* (available on my website www.francisbennion.com) I pointed out that planning policy is an aspect of general government policy, which may be contrasted with the policy of the law or legal policy. Recognition of the former may be called the government policy principle.

I said that it had always been accepted in the United Kingdom that under the government policy principle the executive, which sets planning policy and is answerable to Parliament for it, must be conceded the right, through an appropriate minister or official, to take decisions in pursuance of that policy - for example on whether a site should be developed in a particular way.

I believe the HRA allows our courts to uphold this salutary principle, and that they should do so even if (which is doubtful) this means departing from what the European Court of Human Rights would hold. The Lord Chancellor said in a debate on the Bill for the HRA that "[o]ur courts must be free to develop human rights jurisprudence by taking into account European judgments and decisions, but they must also be free to distinguish them and to move out in new directions in relation to the whole area of human rights law".

This concept of moving out in new directions, which was clearly the intention of Parliament in framing the HRA in the way it did, was overlooked by the Divisional Court. It is to be hoped it will not also be overlooked when the House of Lords comes to review their decision.

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