

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
(Mr Justice Richards)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2004

Before :

LORD JUSTICE WALLER
LADY JUSTICE ARDEN
and
MR JUSTICE PUMFREY

Between :

	The Queen on the Application of Christopher John Whitmey	<u>Appellant</u>
	- and -	
	The Commons Commissioners	<u>Respondent</u>

The Appellant in person (on the first issue) and (on other issues) **P. Greatorex** (instructed by **Pro Bono Counsel**) for the **Appellant**
J. Karas and **R Reed** (instructed by **Legal Services General, DEFRA**) for the **Department for the Environment, Food and Rural Affairs**, an Interested Party

Hearing dates : 30 and 31 March 2004

Judgment

Lady Justice Arden :

1. This is an appeal with the permission of Carnwath LJ from the order dated 7 August 2002 of Richards J. By his order the judge refused a renewed application by the appellant, Mr Christopher John Whitmey, for permission to bring proceedings for judicial review in respect of the decision of the Commons Commissioners dated 13 January 2003 that they had no jurisdiction to consider disputed applications for the registration of land as a town or village green pursuant to section 13 of the Commons Registration Act 1965 (“the 1965 Act”). I refer to a town or village green for the purposes of the 1965 Act as a “green”. A green is essentially an area of land over which the inhabitants of a locality have, or may have, acquired certain rights of recreation: see section 22(1) of the 1965 Act (as now amended) set out below. We are not concerned with the content of those rights on this

appeal. Carnwath LJ further directed that the application for judicial review should proceed in this court pursuant to CPR 52.15(4).

2. The Commons Commissioners do not appear on this appeal and take a neutral attitude to the outcome of these proceedings. There are a number of interested parties to Mr Whitmey's application. However, only the Department for the Environment, Food and Rural Affairs ("DEFRA") appears on this appeal.
3. Mr Whitmey is a director and charity trustee of the Hereford Diocesan Board of Finance ("HDBF"). He has brought this application in his personal capacity because one of the interested parties, Mr Stephen Tunnicliffe, has applied for the registration as a green of land vested in the HDBF. His application receives a measure of support from an article written by the Chief Commons Commissioner, Edward F Cousins, in his personal capacity, and published under the title of "Village greens, non-statutory public enquiries" in (2003) RWLR (Rights of Way Law Review) 41 to 49. However, the application was rejected on paper by Sullivan J. Richards J rejected the renewed application on the grounds that the statutory scheme in the 1965 Act and regulations made thereunder was clear. The question whether a green should be registered was a question for the registration authorities, as defined in the 1965 Act; the question did not have to be referred to the Commons Commissioners appointed under the 1965 Act to determine other questions arising under that Act. Richards J also held that, where the registration authority set up an inquiry under an independent person, the procedure for registering greens did not violate article 6 of the European Convention on Human Rights ("the Convention") as that procedure would be subject to the supervisory role of the court in judicial review proceedings
4. The appellant seeks permission to raise a point not argued before Richards J, namely the question whether an application under section 13 must relate back to an entry to the register of greens made before 3 January 1970. This is a question of the construction of the 1965 Act, and it is the first issue to be determined on this appeal. Accordingly, as the next step, I will examine the relevant provisions of the 1965 Act.

The 1965 Act

5. The 1965 Act deals with the registration of both common land and greens and of the persons who own them: section 1. In the case of common land, provision is also made for registration of rights of common: section 1. No land capable of being registered under the 1965 Act is now a green unless it is registered: section 1(2) and Commons Registration (Time Limits) Order 1966 SI 1966/1470 as amended by SI 1970/383. The registration authorities are county councils, the councils of metropolitan counties and, in the case of Greater London, the London borough councils: section 2.
6. This appeal concerns the definition of "town or village green" in section 22(1) of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act"). This definition is to be read with sub-section (1A) as inserted by the 2000 Act:-

“‘town or village green’ means land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] which falls within subsection (1A) of this section.

(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either:

(a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.” ([a], [b] and [c] added to signify the different potential classes of green.)

7. Before the amendment made by the 2000 Act, a class [c] green in the definition of “town or village green” in section 22(1) of the 1965 Act was land “[c] on which the inhabitants of any locality have indulged in such sports or pastimes as of right for not less than twenty years.” This category of village green was new in the 1965 Act.
8. The 1965 Act sets out a system of provisional registration with the period for applications being a period which was to expire not less than three years after the commencement of the Act as specified by the Minister: section 4. This period expired on 2 January 1970. The Act provides for notice of the provisional registration to be given to the public and a period is allowed for the receipt of objections to registration: section 5. The registration authority must give notice of the objections to the applicant: section 5(4). Unless the applicant so requests or, if there is no applicant, the registration authority thinks fits, the question of registration must be referred to a Commons Commissioner if an objection is made: section 5(5), (6). The Commons Commissioner must enquire into the matter and confirm or refuse to confirm the registration: section 6(1). Upon confirmation, the provisional registration becomes final. Likewise the provisional registration becomes final if there is no objection to registration or all objections are withdrawn: section 7. An appeal lies on a point of law from a decision of a Commons Commissioner to the High Court by way of case stated: section 18.
9. Land registered as a green for which no owner is registered may, if a Commons Commissioner is satisfied that no person is the owner, be vested in the registration authority: section 8.
10. Section 10 of the 1965 Act provides that registration as a green is conclusive evidence of the matters registered.
11. The register of greens may be amended, if land becomes a green, in accordance with regulations made under section 13 of the 1965 Act. Section 13 itself makes no reference to objections to amendments. Under section 14 of the 1965 Act, if the register is so

amended, the High Court can direct rectification of the register if:-

“(b) ... it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;

and, ... the court deems it just to rectify the register.”

12. Section 17 of the 1965 Act provides for the appointment of Commons Commissioners and the Chief Commons Commissioner.

The first issue

13. The argument on this issue was presented skilfully by Mr Whitmey in person before the court. The argument was inspired by observations of Carnwath LJ (granting permission on the appellants’ notice of appeal as lodged) to the effect that the purpose of the inclusion of class [c] in the definition of “town or village green” in section 22(1) of the 1965 Act was to facilitate the process of registration by making it easier to prove the existence of rights.
14. Mr Whitmey further submits that an analogy is to be drawn between “waste land of a manor”, an expression used in the definition of common land in section 22(1) of the 1965 Act, and the definition of green. The House of Lords has held that the former is land of manorial origin: *Hampshire County Council v Milburn* [1991] 1 AC 325. Accordingly, like words should be written into the definition of green. I will deal with this submission at this point. Waste land of a manor is of very different historical origin from greens. There is no reason for greens to be on land of manorial origin as with waste land of a manor. Accordingly, to write in the limitation which Mr Whitmey proposes would go far beyond interpretation of section 22(1). It would rewrite it, and this the courts are not permitted to do.
15. In my judgment, the 1965 Act does not limit the registration of greens to those which were registered by 3 January 1970. That date was the cut-off date for the registration of greens which had been greens before that date. However, the Act contemplates that land may become village greens after 3 January 1970. Section 13 is concerned with this possibility since it provides for the amendment of the register of greens where “any land becomes ... a town or village green”. This provision cannot be limited to land becoming a green by way of substitution for some land previously registered as a green.
16. Moreover, in *R v Oxfordshire County Council ex parte v Sunningwell Parish Council* [2000] AC 335 (“the *Sunningwell* case”), Lord Hoffmann, with whom the rest of the House agreed, accepted that the Act applied to lands which become village greens after 3 January 1970. Despite the “once-and-for-all-national-enquiry” instituted by the 1965 Act,

“... a class c green could come into existence upon the expiry of any period of 20 years’ user. This might be after the original registration period had expired. Section 13, therefore, provided for the amendment of the register in various situations including where ‘(b) any land becomes common land or a town or village green ...’

” (page 348).

17. Accordingly I would refuse permission to appeal on this point. Carnwath LJ was not giving any considered view on the interpretation of the 1965 Act but hypothesising the purpose of the introduction of class [c] greens. As I read his observations, his reference to registration is not confined to registration in the initial registration period and includes registration as a result of an amendment to the register of greens under section 13. The 2000 Act substitutes the requirements of section 22(1A) for the requirement in the 1965 Act as originally enacted to prove user “as of right” for not less than twenty years. The 2000 Act therefore facilitated registration of class [c] greens by making it clear what was required for this purpose.

The second issue

18. The second issue to be determined on this appeal is whether disputes as to whether a green should be registered under section 13 can be referred to a Commons Commissioner. This again is a question of construction of the Act. The argument turns on section 5(7), which provides that an objection to the registration of “any land” as a green is to be treated also “as an objection to any registration (whenever made) under section 4 of this Act of any rights over the land”. This would trigger a compulsory reference to a Commons Commissioner under section 5(6). However, in my judgment, section 5(7) applies only to objections to the registration of any land under section 5, and not any objections under section 13. Accordingly, the Commons Commissioners have in my judgment no jurisdiction in a dispute arising under section 13.
19. The further question arises whether section 5(7) should be construed so as to permit the applications under section 13 to be referred to the Commons Commissioners in order to give effect to the appellant’s right of access to court under article 6 of the Convention. In my judgment it is not necessary to read section 5(7) in this way in the light of my conclusion on the third issue.

The third issue

20. The third issue is whether the registration authority has authority to decide disputes, and, if it does not, whether registration of a green by amendment of the register of greens under section 13 is provisional only, as in the case of registrations under section 4 of the 1965 Act. Mr Paul Grotorex, for Mr Whitmey, submits that disputes as to whether a green should be registered involve the determination of a private right. Thus section 13 engages article 6 of the Convention. Article 6 provides:-

“Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

...”

21. On Mr Greatorex’ submission, it would be anomalous for a registration authority to determine a private right. Accordingly, he submits that the registration authority has no such jurisdiction.
22. Mr Greatorex draws support for this contention from regulation 6 of the Commons Registration (New Land) Regulations 1969 (“the 1969 Regulations”) which deals with applications for the registration of land becoming a village green after 2 January 1970. This sets out the procedure which registration authorities are to adopt when considering the application and objections thereto. In particular, they must not reject any application without giving the applicant an opportunity to deal with objections and

“any other matter in relation to the application which appears to the authority to afford prima facie grounds for rejecting the application.” (regulation 6(3))
23. On Mr Greatorex’ submission, regulation 6(3) clearly indicates that a registration authority must desist from registering an application if there are prima facie grounds for rejecting it. In my judgment, that submission reads requirements into regulation 6 which are simply not there. The context in which prima facie grounds are referred to is that of ensuring that the applicant is given a chance to respond to matters which the registration authority might consider preclude registration. This is simply an application of the rules of natural justice.
24. Mr Greatorex’ further submission relies on the notes to the statutory form for an application under section 13 of the 1965 Act, scheduled to the 1969 Regulations, which advise that (in the case of a class c green) the application should normally be accompanied by a court declaration to that effect. In my judgment, this submission likewise does not demonstrate that a registration authority cannot proceed to registration in the face of an objection. The real question is how it must deal with any objection.
25. Mr Greatorex on this point calls in aid the jurisprudence concerning the exercise by the chief land registrar of his power to determine matters affecting the registration of land. Thus, in *Re Dance’s Way* [1962] Ch.490, this court held that the chief land registrar should not decide the construction of an instrument, under the power conferred on him by rule 298(1) of the Land Registration Rules, where there was a dispute of the fact as to the surrounding circumstances, but that he should refer the matter to the court in pursuance of the power conferred on him by rule 298(2) of those Rules. However, this jurisprudence does not demonstrate that a registration authority cannot determine a dispute as to amendment of a register under section 13 of the Act. The position is not that the chief land registrar did not have jurisdiction to determine a dispute under rule 298, but that in the particular circumstances it was not appropriate for him to exercise it. Likewise, here, the registration authority, in my judgment, has power to effect a registration, even if there is a dispute as to the factual basis for registration. There may be circumstances in which it is not satisfied that it ought to proceed to registration, in which case the matter will have to be resolved by a court. I do not consider that the registration authority should act on the basis of any presumption that an entry *should* be registered. Given the status accorded to entries on the register by section 10 of the 1965 Act, and the need in the public interest, in any

event, for statutory registers to be accurate, it seems to me that Parliament cannot have intended the registration authority to proceed to registration simply because there was an apparently sustainable application, but only if it was satisfied that the application was duly made.

26. In my judgment, there are three ways in which disputes as to whether land should be registered as a green under section 13 can be determined. First, there can be an application to the court at any time for a declaration that a property is or is not a village green for the purposes of the Act. Second, the registration authority could itself determine the matter. Third, following registration a dissatisfied party can apply to the court for rectification of the register under section 14(b) of the 1965 Act.
27. I need say no more about the first option, except that, in my judgment, it would not be an abuse of process for a land owner to go straight to the court rather than await the outcome of an application for registration. The right to take proceedings constitutes an alternative to applying for registration, and on this I agree with the views to this effect expressed by Lightman J in *Oxfordshire County Council v Oxford City Council* [2004] 2 WLR 1291 at [6].
28. As to the second option, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by a judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs (as the Commons Commissioners are able to do: section 17(4) of the 1965 Act). However, the registration authority must act reasonably. It also has power under section 111 of the Local Government Act 1972 to do acts which are calculated to facilitate, or are incidental or conducive, as to the discharge of their functions. This power would cover the institution of an inquiry in an appropriate case.
29. In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the land or indeed on any person who might be held to have caused damage to a green and thus to have incurred a penalty under section 12 of the Inclosure Act 1857. (There may be other similar provisions imposing liability to offences or penalties). Likewise, if it wrongly rejects the application, the rights of the applicant will not receive the protection intended by Parliament. In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application (c.f. paragraphs 30 and 31 below), it should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry.
30. One advantage of such an inquiry is that the proceedings can take place with some degree of informality and utilising a flexible approach to procedure. Moreover, those conducting the inquiry may be able to take account of evidence which is not strictly admissible (see

generally *Corpus Christi College v Gloucestershire County Council* [1983] 1 QB 360, 366 to 367 and 379). This may be a valuable feature of an inquiry, given the period of time over which actions of local inhabitants may have to be investigated. The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest. Moreover, if the status of a green confers any rights on persons who are not owners of the land, they are rights which are capable of being enjoyed by a section of the public. In those circumstances, I would adopt the observations of Slade LJ in *Re West Anstey Common* [1985] Ch.329 at 341 with respect to an inquiry by a Commons Commissioner under section 5 of the 1965 Act, that the public also has an interest in the outcome of the inquiry.

31. On the other hand, if legal proceedings are pending or threatened in which the issue whether land is common land or a green will be determined, the authority may take the view that it is not right for it to proceed to registration and that it should make no decision on the application pending the determination of the court.
32. Likewise, where the registration authority has a conflict of interest because it also owns the land in question (or may acquire it under section 8 of the 1965 Act), it may well be that the right course is to allow any dispute to be determined by the courts. Alternatively, it can appoint an independent legal expert to conduct a non-statutory inquiry into the factual position and make findings.
33. The question arises whether, if the authority were to hold an independent non-statutory inquiry, there would be any violation of the applicant's right of access to court under article 6 of the Convention. I would answer this question in the negative. The procedure for the inquiry is not specifically provided for by law and the inspector who is appointed by the registration authority would not be regarded as an independent tribunal for the purposes of article 6. However, an inquiry held by a registration authority would not preclude a subsequent application to the court. If the application was refused, the application could be by way of judicial review. This would not be a full review on the merits because it would have to be shown that the registration authority had acted in a way which was irrational or unreasonable or beyond its statutory powers. However, the supervisory role of the court by way of judicial review can for instance be invoked if the treatment by the registration authority, or by the inquiry set up by it, of material evidence was irrational. Moreover, if new evidence emerged, the applicant could make a fresh application to the registration authority: there is no bar on further applications. Fresh evidence would include a declaration obtained in subsequent proceedings brought against a trespasser or an objector. If the application was accepted, the objectors would have a right of access to court under the third option considered below.
34. As I have explained, in judicial review proceedings the review by the court, which is the independent tribunal for the purposes of article 6, is subject to limitations: it is not a full review on the merits. However, in my judgment, it does not follow that article 6 is violated. Parliament has, in my judgment, given registration authorities the power to decide whether to accept applications to amend the register. The court has extensive powers to control the exercise by registration authorities of their powers. In those circumstances, if it were necessary to decide the point, I would hold that the fact that an applicant may only challenge the refusal by the registration authority (having acted in

accordance with what I have said above) of an application under section 13 by way of judicial review does not violate article 6 (see generally *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295).

35. Mr Greatorex submits that, since the inquiry established by the authority is not established by law, registration also violates his right to property under article 1 of the First Protocol to the Convention. The respondents submit that article 1 cannot apply. Article 1 states:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principle of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”

36. For DEFRA, Mr Karas submits that, although registration as a green confers “rights on the local inhabitants ordinarily incident to the status of such a green”, these rights are conferred by prescription and not by registration. In my judgment, this argument cannot be a complete answer to a claim under article 1 since registration gives rise to a conclusive status under section 10 of the 1965 Act. Alternatively, Mr Karas submits that the rights are only qualified by registration, since they have been acquired by prescription, and thus the owner cannot be said to have been deprived of anything. In my judgment, this cannot prevail for the same reason. Mr Karas further submits that article 1 is also not engaged because prescription is inherent in a property right and is a matter of private law. In my judgment, as this point has not been fully argued, the court should assume in Mr Whitney’s favour that this argument too cannot succeed on the basis that, even by allowing prescription, the state is providing for a limitation on a property right, and that it should make this assumption notwithstanding *J.A.Pye v Graham* [2001] Ch.804 (reversed on other grounds [2003] 1 AC 819), as the contrary views there expressed were obiter.
37. Mr Karas also submits that there must be a substantial interference with a right to constitute the deprivation of property and that deprivation is therefore not satisfied merely by the control of property. In this regard he cites *Chassagnou v France* (1999) 29 EHRR 615, but in that case the European Court of Human Rights said that there was an interference with enjoyment of the rights of the owners of the property in question. So too, in my judgment, in this case there is an infringement of an owner’s right to enjoyment of his land as a result of registration of his land as a green since certain activities on a green are prohibited or made illegal which would not be so prohibited or made illegal if it could be shown that the land was not in fact a green.
38. However, even if article 1 is engaged, in my judgment, Mr Karas rightly submits that the conditions in the second paragraph to article 1 are satisfied. The provisions of the 1965 Act for the registration of greens were introduced for carefully considered reasons of public policy: see generally Megarry and Wade, *The Law of Real Property* (6ed) (2000) at

para. 18-179.

39. The third option is that (the registration authority having formed the view that the application should be accepted) amendment to the register takes place and there is an application by the dissatisfied party to the High Court under section 14(b) of the 1965 Act for rectification of the register. A number of points arise on this section. First, it is drafted in wide terms and accordingly would permit a full review of the facts. Second, the existence of section 14(b) does not create any presumption in favour of registration that applications should necessarily be registered. The reason for having a reference in the 1965 Act to an application for rectification is that the Act creates a statutory register, entry on which constitutes conclusive evidence as to the matters registered as at the date of registration. Since the register is created by statute, it is necessary to provide in the statute for a means of altering the register. Third, since section 14(b) contains no limitation on the court's jurisdiction, it is not necessary to apply some strained meaning in order to make it compatible with the rights of any person affected under article 6 of the Convention. No time limits are specified, and the existence of equitable time bars would not of themselves involve a violation of article 6: *Stubbings v UK* (1997) 23 EHRR 213. There is no basis on which it could be said that the court would be bound by the findings of fact by any inspector appointed by the registration authority.
40. Accordingly, in my judgment, the registration authority has power to amend a register under section 13 even if there is a dispute as to the factual basis for the application. However, the objectors and (if registration is refused) the applicant have the right to seek the remedies set out above from the court.

Further submissions

41. Subsequent to the hearing of this appeal, Mr Whitmey drew the attention of the court to a decision of the House of Lords handed down after the hearing of this appeal, namely *Bakewell Management Ltd v Brandwood* [2004] 2 WLR 955. This case concerned the very different question of whether a right of way could be acquired by prescription where the qualifying user involved a criminal offence under section 193(4) of the Law of Property Act 1925. The speeches of the members of the House of Lords in this case do not establish or indicate that a new approach is to be taken to the interpretation of statutes, and thus I do not consider that the decision lends further assistance to Mr Whitmey's submissions on the issues of statutory construction in this case. However, Mr Whitmey also submits that it supports his general submission that the assumptions made as to the pre-existing law when enacting a statute cannot alter that law, but that proposition is established by other authority already cited. Mr Whitmey further submits that, unlike the position in the *Bakewell* case, the position here is that the rights claimed in relation to a class [c] green are of doubtful legal origin, and that therefore there should in this case be no presumption that they are lawful in origin. My response to this submission is that, since Parliament has provided for the registration of class [c] greens, there cannot be anything unclear or unlawful about the origin of such a green. For like reason, a proper application for amendment cannot be denied registration, even if the applicant's purpose can be criticised as motivated by a personal desire to frustrate development of the land in question by its owner.

Disposition

42. For the reasons given above, I would dismiss the application for permission to appeal referred to above, the appeal and the application for judicial review.

Lord Justice Waller :

43. I agree with my Lady's judgment and the reasons she gives, and will accordingly express my own views shortly.
44. The appeal is concerned with an application made to the Shropshire County Council (SCC) to register a piece of land as a village green under the Commons Registration (New Land) Regulations 1969 (the New Land Regulations). The applicant a Mr Tunncliffe relied on Section 13 of the Commons Registration Act 1965 (the 1965 Act) as providing the power to register any land which "becomes ... a town or village green, and on the land in question having become a village green by virtue of it being land "on which for not less than twenty years a significant number of the inhabitants of [the locality... have indulged in lawful sports and pastimes as of right, and . . . continue to do so..." [see Section 22 (1A) of the 1965 Act as amended by the Countryside and Rights of Way Act 2000].
45. Under the New Land Regulations notice was given to the owners of the land, a charity called the Hereford Diocesan Board of Finance of which Mr Whitmey is a director and charity trustee. Notice of objection was sent to the SCC, and there was thus a dispute as to whether the land in question should be registered as a village green.
46. Neither the 1965 Act nor the New Land Regulations prescribe a procedure for resolving disputed applications of this nature. It has been the practice of registration authorities, dealing with applications which are contested, either to have the dispute decided by an appropriate committee of elected members advised by their officers as necessary, in which event in some instances the interested parties appear and give evidence, or for those authorities to arrange for a public inquiry to be held by an independent expert, such as an expert barrister, whose role would be to provide a report and recommendation to the authority.
47. Following the above procedures the authority has taken their decision whether to amend the register or not. If the decision is to amend the register by including the land as a village green, then it is provided by the 1965 Act that the matter can be reviewed by the court. Section 14(b) of the 1965 Act, provides that "The High Court may order a register maintained under this Act to be amended if-... (b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act and the court deems it just to rectify the register."
48. If however the decision is to refuse to register then there is no statutory provision allowing for review by the court. The appropriate remedy available to the applicant would appear to be judicial review.

49. It seems that the SCC had it in mind to appoint an independent expert to hold an inquiry, but Mr Whitmey (in a personal capacity) in June 2002 communicated with the Assistant Clerk of the Commons Commissioners and suggested that an application to register a new village green under Section 13, which was the subject of an objection and disputed, could and should be referred to the Commons Commissioners under Section 5 of the 1965 Act. Without going into the detail of the exchange of communications following this suggestion, suffice it to say that the Chief Commons Commissioner saw force in Mr Whitmey's suggestion, and ultimately published in a personal capacity an article arguing in favour of the Commons Commissioners having jurisdiction in such cases. But the Department for Environment, Food and Rural Affairs (DEFRA) who keep the need for legislation in this area under review and seek to ensure that "it remains appropriate and effective, and reflects the policy objectives"[see Mr Hopkinson's statement paragraph 17 page 148], took the view that the present legislation did not provide the jurisdiction to the Commons Commissioners. Furthermore, although this can only be of marginal relevance, DEFRA at present take the view that the present method of resolving the disputes as to whether land should be registered, through a public inquiry, is the best way rather than by a reference to the Commons Commissioners, because they have concluded that "local decision making is more appropriate in this regard.." [see paragraph 58 of the Common Land Policy Statement 2002 page 224].
50. It was in this context that Mr Whitmey launched the proceedings for judicial review, seeking to obtain a declaration that the Commons Commissioners had jurisdiction under the 1965 Act in relation to applications under Section 13. It was furthermore in this context that DEFRA became the party resisting Mr Whitmey's application, and the Commons Commissioners decided to take a neutral stance.
51. It was furthermore in this context, as part of the argument in favour of construing the legislation so as to provide jurisdiction to the Commons Commissioners, that Mr Whitmey's case was that the present procedures allowing for the registration authority to take the decision in a disputed application, albeit after a public inquiry or some form of hearing by a committee, infringed Article 6 of the Convention on Human Rights. The argument put shortly is that the registration authority by deciding that a piece of land is a village green, thereby determines the civil rights of the owner of the land, but Article 6(1) is infringed because the authority is not an independent and impartial tribunal as required by that Article.
52. The above fairly describes the ambit of the application for judicial review which was before Richards J. He found that the Commons Commissioners did not have jurisdiction to deal with disputed applications under Section 13. He further found that the procedures used by the registration authorities, of using an independent expert to conduct an inquiry, taken together with the supervision of the court through judicial review, would be Convention compliant. Surprisingly he does not refer to Section 14(b) which as I have said gives express and wide power to the court to review where the decision is to register.
53. When the matter came before us, an application was made to take a much more fundamental point which would render all others points otiose. Mr Whitmey wished to argue that Section 13 did not give the power to amend the register in respect of land used for sport and pastimes over twenty years unless the green had been duly registered by 3rd January 1970. Without objection from those representing DEFRA, Mr Whitmey was allowed to argue in full the merits of this point, on his application for permission to amend

his application for Judicial Review. He indeed argued this point personally whereas Mr Grestorex, acting pro bono, in case that fundamental point failed, argued the other points.

54. Mr Grestorex put his other arguments slightly differently from the way they were put before the judge. His submissions are summarised conveniently in paragraph 3 of his skeleton as follows:-

“(1) the analysis set out in the appendix provides the correct background to this case which is crucial for a proper understanding of the Claimant’s submissions;
(2) this shows that the determination of applications for registration of a village green involves the determination of private law land rights between individuals;
it cannot have been intended by Parliament, nor can the statutory scheme be construed in such a way, that such disputes over such rights can be determined by local authorities by way of a discretionary, non-statutory and ad hoc procedure:
such a construction would be contrary to Article 6, because it does not provide for the determination of civil rights by a tribunal established by law;
such a construction and result is inconsistent with the way disputed applications made before 1970 were determined, as well as the way in which disputed applications for the registration of analogous rights such as easements were dealt with before 2003, and are now to be dealt with under the new Land Registration Act 2002;
it would be appropriate and consistent with the Human Rights Act for such rights to be determined by the Commons Commissioners, and since it is possible to construe the statutory material so as to produce this result, such a construction should be adopted;
if this is not accepted, this does not indicate determination by Registration Authorities is lawful or proper, rather that such disputes must remain where it always had been, i.e. in the Courts.”

55. There are thus three stages in the argument. First that it should be assumed that Parliament did not intend that private law land rights should be decided by a discretionary, non statutory and ad hoc procedure, because such a process would be contrary to Article 6. Second that it would therefore be appropriate to have such decisions taken by the Commons Commissioners and construe the 1965 Act to so provide. Third if the 1965 Act is not open to the construction that the Commons Commissioners have jurisdiction, consistency with Article 6 demands that disputed applications be decided by the court, before Registration.

56. I would start by quoting from the speech of Lord Hoffmann in *Reg v Oxfordshire, Ex p Sunningwell* [2000]1 A.C. 336 at 347H -348G

“The main purpose of the Act of 1965 was to preserve and improve common land and town and village greens. It gave effect to the Report of the Royal Commission on Common Land 1955-1958 (1958) (Cmnd.462) which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.

The Act of 1965 dealt with these problems by creating local registers of common

land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority. Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By section 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered.

In the case of greens in classes a or b, this meant that unless they were registered within the prescribed time-limit, they could not be registered as such thereafter. (There is a question about whether non-registration of a class a green also extinguished the prior statutory rights of exercise and recreation, but that need not detain us now.) But a class c green could come into existence upon the expiry of any period of 20 years' user. This might be after the original registration period had expired. Section 13 therefore provided for the amendment of the register in various situations including where "(b) any land becomes common land or a town or village green . . ." The Sunningwell Parish Council applied to the Oxfordshire County Council, as registration authority, for an amendment to add the glebe to the register on the ground that it had become a village green by 20 years' use ending on 1 January 1994.

The Board objected to the application. The regulations made under section 13, the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1943), prescribe no procedure for resolving disputes over applications for amendment. The jurisdiction of the Commons Commissioners was limited to disputes arising out of the original applications, all of which have now been determined. The county council was left free to decide upon its own procedure for dealing with an application to amend. It decided to hold a non-statutory public inquiry and appointed Mr. Vivian Chapman, a barrister with great experience of this branch of the law, to act as inspector. Mr. Chapman sat for two days in the village hall, received written and oral evidence and heard legal submissions. He submitted a report to the county council in which he made various findings of fact which the county council accepted.

57. There are various points to note. First that Lord Hoffmann recognised that the jurisdiction of the Commons Commissioners related to and was limited to what he describes as the once and for all nationwide inquiry into commons, common rights, and town and village greens intended to resolve what were commons, what rights existed and what were town or village greens as at 3 January 1970. He further recognised however that the 1965 Act provided for a category of village green, class [c] village greens, which could come into existence upon the expiry of any period of 20 years' use. He noted that the registration authority was free to decide upon its own procedure for dealing with an application, and noted without any sign of disapproval, the appointment of an independent barrister experienced in this branch of the law to carry out a non-statutory public inquiry. In that case the independent barrister found facts which the registration authority accepted and advised that the village green should not be registered, which advice the registration authority accepted.

58. The above is of course inconsistent with both Mr Whitmey's fundamental argument on which he seeks leave to amend. It is also inconsistent with any argument that the Commons Commissioners have jurisdiction to deal with Section 13 applications in relation to class [c] greens. It could be said however that the question of jurisdiction of the Commons Commissioners, and in particular, what is fundamental to all stages of Mr Grotorex's argument, that a decision by the registration authority to register land as a village green is bound to infringe Article 6, was not argued and therefore not considered. I will come back to the Article 6 point but say first that the Article 6 argument in no way impinges on Mr Whitmey's fundamental point. In agreement with my Lady and unsurprisingly following the above dictum of Lord Hoffmann, in my view there is no merit in Mr Whitmey's argument that an application to amend the register to add a town or village green must relate back to an entry made before 3 January 1970, and I agree that the application to amend to take that point should be refused for the reasons given in paragraph 12 to 16 of my Lady's judgment.
59. Because the success or otherwise of the point has an impact on the construction of the 1965 Act and the New Land Regulations, it is convenient to turn next to the question whether the decision making of the registration authority would infringe Article 6. Even accepting for present purposes that a registration of a new green does affect the civil rights of the land owner, I do not think that the process of deciding, or the decision to register, infringes Article 6. It seems to me that since that decision (as opposed to a decision not to register) can clearly be reviewed by the court under Section 14(b) that will provide full compliance with the requirements of Article 6. That will particularly be so where the decision to register has been taken after the holding of a public inquiry. It seems to me that a decision whether to register a piece of land as a village green or not after such an inquiry is very akin to a planning decision. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, HL (E), the House of Lords considered the question whether planning decisions following a planning inquiry infringed Article 6. The question in that case was whether the procedures adopted in the holding of an inquiry together with the availability of judicial review was Article 6 compliant. What is required is that either "the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)" –see *Albert and Le Compte v Belgium* 5 EHRR 533 cited by Lord Hoffmann at paragraph 86. As Lord Hoffmann explains in the context of the court through judicial review being the available "judicial body that has full jurisdiction", full jurisdiction does not mean "full decision making power"; it means "full jurisdiction to deal with the case as the nature of the decision requires" (paragraph 87). If findings of fact are material to a decision the question may arise as to whether judicial review is adequate, but the question is ultimately whether the decision making process as a whole has met the requirements of Article 6, and the appointment of a planning inspector to find the facts together with the control of the courts through judicial review was found to be Article 6 compliant.
60. It seems to me that Section 14(b) empowers the court to examine the facts and envisages a review that is wider than would be the case on judicial review. That power is certainly as wide as the nature of the case requires. I would add that if judicial review were the only method of control, as may well be the case if registration were refused following an independent inquiry, the reasoning in *Alconbury* would support the view that Article 6 would have been complied with.

61. There is thus no “infringement of Article 6” base from which to launch an attack on the construction of the 1965 Act and the New Land Regulations. I am doubtful whether even if there had been that base the 1965 Act could have been construed so as to provide jurisdiction to the Commons Commissioners to decide Section 13 disputed applications. My Lady deals with the argument on construction in paragraphs 17 and 18 and I see no answer to it. But on any view, without a starting point of an infringement of Article 6 if the registration authority takes the decision to register, the argument is hopeless.
62. It also follows that it is unnecessary, even if possible, to strain the construction of the New Land Regulations so as to provide that an amendment under Section 13 should only be allowed after a court has ruled and declared that a piece of land has become a village green following twenty years of user. There is no reason why the Regulations should not be construed in accordance with their natural meaning which allows the registration authority to take the decision, of course acting reasonably in the way in which it chooses to take that decision. Where there is a serious dispute that will normally under present procedures be by conducting a non-statutory public inquiry through an independent expert, and having regard to what I say below should I suggest almost invariably be so.
63. I would add for the avoidance of doubt that because no procedures are identified in the regulations as to the way in which disputes must be resolved, I in agreement with my Lady can see no reason why a landowner who does object to his land being registered should not in fact bring proceedings in court to obtain a declaration prior to registration.
64. There are certain further points which I would make. First regulation 6(2) and 6(3) of the New Land Regulations provide for the registration authority to do the following:-
 - “(1) to consider every statement in objection to an application which it receives before considering the application;
 - (2) send the applicant a copy of any such statement, and
 - (3) give the applicant a reasonable opportunity of dealing with the matters in such statements;
 - (4) give the applicant a reasonable opportunity of dealing with any other matter in relation to the application which appears to the authority to afford prima facie grounds for rejecting the application.”
65. It is certainly not correct to construe “prima facie” as suggested in paragraph 18 of Mr Grotorex’s submissions as an indication that the registration authority should only register in plain and obvious cases. The regulations provide for the applicant having the opportunity to deal with matters which might “prima facie” afford a grounds of rejection and that gives no indication as to the proper approach of the decision maker. The registration authority indeed should in my view bear in mind that not only is the registration going to affect the landowner, but a refusal to register may affect the local inhabitants claiming a user for twenty years. If the green is registered, Section 14(b) provides a review by the court at the behest of the landowner, but a refusal to register leaves the applicants or those local inhabitants who are using the green without that statutory right of review by the courts. Proceedings by such persons for some form of declaratory remedy once there has been refusal to register seems to me to have difficulties because such persons have no proprietary interest in the green even if they could establish twenty years user for pastimes or sports. Their only realistic remedy would seem to be judicial review which for reasons already given would be Article 6 compliant if a proper

procedure has been adopted, but it will involve a more constrained review than would take place under Section 14(b).

66. I make these points because the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration.
67. I too therefore would dismiss the appeal.

Mr Justice Pumfrey :

68. I agree with both judgments.