Report on the Human Rights Implications of the Planning Procedures and Installation of Phone Masts Prepared for the Northern Ireland Human Rights Commission

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1. Scope of this Report

I am asked, generally:

1. to advise on the question of whether there are any human rights issues; and
2. to make recommendations on any proposals for action on this issue

I am also asked to advise on the following specific questions:

1. whether there has been a violation of human rights in the planning procedure for, and the erection of, phone masts, including whether the planning authority should consider as material planning matters the potential effect on health, especially where there are objectors arguing that having a mast close to their home and/or to a school violates article 2,6,8 and Article 1 Protocol 1;

2. whether phone mast companies may be said to be functional public authorities in their provision of telecommunications services and therefore be obliged to comply with the Human Rights Act 1998; and

3. whether there is any civil right or obligation engaged and particularly whether the State's positive duty under article 2 could be argued and if so, on which public authority/ies this impacts and what they would be required to do to be compliant with their duties under the Human Rights Act 1998.

2. General Advice: whether this matter involves any human rights issues

The specific questions posed raise the more general question of whether the planning processes for, and/or the erection of, phone masts impinge on applicable human rights norms. In turn, this general question gives rise to issues which concern the relationship between applicable human rights norms, legislation and the common law.

The current legal position is that, with effect from October 2000, the provisions of the Humans Rights Act came into effect. The Act provides, in s 3(1) that "primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights". The express objective of this provision is to require a purposive form of statutory interpretation - although by s 3(2)(b) this requirement is not intended to "affect the validity, continuing operation or enforcement of any incompatible primary legislation" - with the result that the courts cannot override legislation merely if it is held to be in conflict with human rights principles. Accordingly, any valid legislation may lead to outcomes which are contrary to a strict application of the Convention rights, but this variance alone will not permit a court to declare that the legislation is invalid or ineffective. In such circumstances the court is merely empowered under s 4(2) to make a declaration of incompatibility – which does not, under s 4(6) affect the essential validity of the legislation.

This limitation is based on maintaining the legislative supremacy of Parliament, but in *The Queen v A Special Commissioner ex parte Morgan Grenfell and Co Ltd* [2000] EWHC Admin 415 Buxton LJ explained:

> "The rule of [Legal Professional Privilege] is not only important in itself, but important also because it is, or at least was accepted before us as being, one of the fundamental, virtually constitutional, rules that are protected by what has recently come to be referred to as the principle of legality. That principle places limitations on the power of Parliament to legislate to abrogate or undermine those fundamental rules. True to the doctrine of Parliamentary sovereignty the principle remains a rule of construction, and not itself a fundamental constitutional rule, but it is a rule of construction of striking force…Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overriden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries

> where the power of the legislature is expressly limited by a constitutional document."

As such, the specific provisions of the Convention have not become binding rules of United Kingdom law, and it is vital to recognise that the Human Rights Act has not established a novel class of legal rules along the lines of a "common law of human rights". The Convention rights are, instead, salutary aids to the interpretation of legislation. However, as the Human Rights Act provides, and as Buxton LJ makes clear, Convention rights cannot be negated by general or ambiguous words contained in legislation. Without express language, or a necessary implication to the contrary, the courts must presume that general words are intended to be subject to the fundamental rights of the individual.

How, therefore, have the courts given effect to this requirement? In fact, there had already been some caselaw decided before the Human Rights Act came into effect, concerning the Convention-compatibility of the reforms to civil procedure introduced by Lord Woolf MR, in *General Mediterranean Holdings v Patel* [1999] 3 All ER 673 per Toulson J. More particularly, and in relation to the common law of trespass (which is of some relevance to the present cases) and Convention Article 11 which secures the freedom of assembly, in *Director of Public Prosections v Jones* [1999] 2 All ER 257 the House of Lords demonstrated that the common law was already beginning to develop alongside Convention norms - even before the full implementation of the Human Rights Act in October 2000. Lord Irvine LC said:

> "In my judgment it is none to the point that restrictions on the exercise of the right of freedom of assembly may under Article 11 be justified where necessary for the protection of the rights and freedoms of others…Unless the common law recognises that assembly on the public highway may be lawful, the right contained in Article 11(1) of the Convention is denied. Of course the right may be subject to restrictions… But in my judgment our law will not comply with the Convention unless its starting-point is that assembly on the highway will not necessarily be unlawful. Thus, if necessary, I would invoke Article 11 to clarify or develop the common law in the terms which I have held it to be; but for the reasons I have given I do not find it necessary to do so."

Lord Hope said:

> "Article 1 of the First Protocol states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The precise effect of these provisions in regard to the right of a landowner to exclude trespassers from his property was not explored in the course of the hearing before us. But I do not think that it would be right to regard the Convention as providing unqualified support to the argument that the public's right of access should be enlarged so as to enable the public to exercise what Article 11(1) of the Convention describes as "the right to freedom of peaceful assembly" wherever there is a public right of access to a highway. Such an enlargement would be bound to result in loss of the protection of the owners of land which the existing state of the law gives to them. In that sense and to that extent it could be said that they were being deprived of their right to the quiet

> enjoyment of their possessions contrary to Article 1 of the First Protocol…It seems to me therefore that what I can best describe as the horizontal effect of the appellants' argument as to the Convention in regard to the private rights of landowners gives rise to questions of considerable difficulty. I am not persuaded that the balance which is struck in private law between the rights of the public and those of landowners is in need of adjustment in order to enable members of the public to exercise their freedom of assembly…I do not think that the Convention requires us to attempt to reform the private law relating to trespass on which section 14A relies in order to mitigate the effects of its application to trespassory assemblies which are held in breach of an order obtained under that section."

Lord Slynn stated:

> "Reference was also made to the European Convention on Human Rights and Fundamental Freedoms, not, of course, as in itself governing the legal position in the United Kingdom, but as indicating what our law should now be. It is desirable to look at the Convention for guidance even at the present time, but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is...I accept that it is arguable that a restriction on assembly even on the highway may interfere with the right of assembly in some situations, as the decisions of the European Court of Human Rights, which have been referred to, show, but I am not satisfied that there was here such a violation either by the law relating to access to the highway as it stands, or in its application to the facts of this case which should compel us to change the law as I believe it to be."

In this case, although the House of Lords accepted the need to consider Convention rights in reaching its decision, their Lordships did not accede to the argument that the existence of rights under the Convention necessarily required the modification or reinterpretation of the existing common law. Accordingly, in *DPP v Jones* the House of Lords' comments - as to the pre-eminence of private property - indicated a conventional approach towards the established common law, even when applying human rights norms.

3. Has there been a violation of human rights in the planning procedure for, and the erection of, phone masts - including whether the planning authority should consider as material planning matters the potential effect on health, especially where there are objectors who argue that having a mast close to their home and/or to a school violates article 2,6,8 and Article 1 Protocol 1?

In the present case the nature of the objections to the planning process for, and the erection of, phone masts are comparable to the objections recently considered by Mr Justice Carnwath in *R v Tandridge District Council ex parte Mohamed Al Fayed* [1999] EWHC Admin 31.

In *R v Tandridge District Council ex parte Mohamed Al Fayed* it was held that Applicant was not entitled to an order quashing the Respondent Council's decision to grant planning permission for the erection of a radio telephone base station tower. The Applicant (Mr Al Fayed) feared that the erection of a phone mast might result in harmful effects to his health, and objected as part of the normal planning process. In due course Mr Al Fayed brought proceedings against the Council on the grounds that, inter alia, the Council failed to give adequate consideration to all material considerations – specifically considerations as to matters of health and safety associated with RF radiation.

On the general question of relevant considerations Carnwath J said this:

> "…it is clearly right that on a technical issue such as this, they should give great weight to the advice of the expert bodies having particular statutory responsibility for such matters. This is particularly so when one is dealing with what I assume is intended to be part of a national telecommunications network. The operators of such network can reasonably expect planning decisions to be guided by a consistent and scientifically informed national policy approach. Indeed, if a particular local authority departs from such national policy guidance and such national technical advice without good reason, it risks being overturned on appeal and being ordered to pay the costs."

Although Carnwath J held that there had been a flaw in the decision-making process of the Council in that the Council had not put all of the material provided by the objector (Mr Al Fayed) to the Health and Safety Executive (whose advise the Council considered in making its planning decision), in the judgment of Carnwath J that defect was not serious enough to warrant the order for substantive relief applied for by Mr Al Fayed. His Honour held that the court would not quash a decision of this kind unless the flaw was one of practical significance, in the sense that there could be a realistic possibility that the decision might have been different if the matter had been handled correctly.

The facts of this case and the facts of the matters presently under consideration for the purposes of this report, analogous as they are, would (without more) suggest that any challenge to the relevant Northern Ireland Councils' planning processes, or grants of

permission, for phone masts would be unsuccessful. However, there are two additional considerations, one of fact and the other of law, which may be found to differ materially from the facts and the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed*, and as such it is necessary to take into account these differences in determining whether the present parties may be entitled to an order quashing or injuncting a Council's decision to grant planning permission for the erection of phone masts. The first potential material difference, essentially a question of fact, might be put in this way: Has there been any further evidence, since the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed*, which is relevant to the issue of the potential health risks associated with phone masts and RF radiation? The second potential material difference, as a question of law, is whether the enactment of the Human Rights Act has had the effect of imposing any additional duty on a planning authority with respect to its functions in relation to assessing the impact created by phone masts.

On the question of the factual evidence, the matter can be summarised in this way: Has there been any further evidence, information or expert advice relevant to the issue of the health risks associated with phone masts and RF radiation? Specifically, what factual material and/or advice is available relevant to the objection, and what weight, if any, should be given by a planning authority to the objection in light of such factual material or advice?

Since the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed* there has been a detailed expert investigation and report into the question of the potential health risks associated with RF radiation and phone masts.

The Government has had in place guidelines established by the National Radiological Protection Board (NRPB) on the maximum levels of exposure to RF radiation, which were established in 1993 (when mobile phone technology was in its early development). In 1999, a European Council Recommendation established new guidelines, which set the maximum level of exposure for the public at about five times lower than the NRPB level. Whilst the UK has agreed in principle to the EC Recommendation, it has not as yet been incorporated into statute. Also in 1999, the Department of Health commissioned the Independent Expert Group on Mobile Phones (IEGMP), chaired by Sir William Stewart, to carry out a wide-ranging review of the possible health effects of mobile telecommunications. The group published its report on 11 May 2000, and on the same day the Government issued its initial response to the report and to its specific recommendations.

The Stewart Report asserts that, despite public concern about the safety of mobile phones and base stations, there is little relevant research upon which to make sound judgements. It is suggested in the report that this may reflect the fact that it is only in recent times that mobile phones have been widely used by the public and, as yet, there have been few opportunities for the health effects to become observable. However, on the basis of research that does exist, the expert group drew two significant conclusions: firstly, that the balance of evidence suggested that exposure to RF radiation below the NRPB or the new EC Recommendation guidelines does not cause adverse health effects to the general population; and secondly that there was scientific evidence which suggested that there may be biological effects occurring at exposures

below these guidelines. This judgment was qualified, however, by saying that this did not necessarily mean that these effects lead to disease or injury.

The report states that, notwithstanding the relative lack of evidence, it is not possible at present to say that exposure to RF radiation, even at levels below national guidelines, is totally without potential adverse health effects, and that gaps in knowledge are sufficient to justify a "precautionary approach". In the light of this, the fundamental recommendation of the Stewart Report is that a precautionary approach to the use of mobile phone technologies be adopted until much more detailed and scientifically robust information on any health effects becomes available.

In relation to the adoption of a "precautionary approach" relevant to phone masts and planning approval procedures, the Report's main recommendations to the government were:

- To adopt the EC recommended guideline level for public exposure rather than the NRPB level.

- To leave it as a guideline rather than incorporate it into statute, as future research is likely to result in the level changing.

- To introduce changes to the development planning process so that all base stations, including those with masts less than 15 metres, should be subject to the normal planning process. This is in recognition that, despite the lack of evidence of risk to the health of people living near to base stations, due to their very small exposures, there can be indirect adverse effects on their well-being in some cases, for example, through stress and worry.

- To establish clearly defined physical exclusion zones around base station antennae related to exposure guidelines.

- That in relation to main base stations sited in or near school grounds ('macrocell' stations), the beam of greatest intensity should not fall on any part of the school grounds or buildings without agreement from the school or parents. Whilst evidence suggests that exposure might still otherwise be very low, certainly well within guidelines, there is concern about unknown health effects and whether, with the increased use of mobile telecommunications, their output will have to rise.

- The establishment of a national database of all antennae and their emissions and an independent, ongoing audit to check compliance, particularly near schools and other sensitive sites.

- That an ombudsman be appointed to provide a focus for decisions on the siting of base stations where agreement cannot be reached.

The Government, in its initial response on 11 May 2000, welcomed the report and generally accepted all the recommendations (including the general exhortation to adopt a precautionary approach) - with the significant exception of those

recommendations related to planning issues where the Government expressed a desire to carry out further study on the subject of full planning permission for new masts.

I note that I am instructed by the Commission that the Commission is unaware of any further governmental reports on the effects of living close to phone mast installations. I also note that in an appendix (entitled "Supporting Guidance) to the Department for Transport, Local Government and the Regions' publication *Planning Policy Guidance Note 8: Telecommunications* it states:

> **97.** Health considerations and public concern can in principle be material considerations in determining applications for planning permission and prior approval (*Newport B.C. v S.S. for Wales and Browning Ferris Environmental Services Ltd* [1998] Env. LR at 174 and [1998] JPL 377.). Whether such matters are material in a particular case is ultimately a matter for the courts. It is for the decision-maker (usually the local planning authority) to determine what weight to attach to such considerations in any particular case.
>
> **98.** However, it is the Government's firm view that the planning system is not the place for determining health safeguards. It remains central Government's responsibility to decide what measures are necessary to protect public health. In the Government's view, if a proposed mobile phone base station meets the ICNIRP guidelines for public exposure it should not be necessary for a local planning authority, in processing an application for planning permission or prior approval, to consider further the health aspects and concerns about them.

Unaccommodating as the Government's reaction to the issue of phone masts and planning is, it is nevertheless the position, and in this (in my opinion) the above "Guidance" note does not misrepresent the decision in *Newport B.C. v S.S. for Wales and Browning Ferris Environmental Services Ltd*, that planning authorities may not be compelled to consider health concerns as material planning issues in any or every particular case.

In *R v Tandridge District Council ex parte Mohamed Al Fayed* it was significant that the applicant, Mr Al Fayed, did not adduce any evidence of a medical or scientific nature in relation to his own health. His claim was based solely on perceived threats and uncertainties. I note that the evidence which is provided to me in connection with health concerns in the present cases is correspondingly largely tentative in its character. (The question of evidence of harm is addressed in more detail below, along with the consideration of whether any civil duty is engaged.) Although the Stewart Report, and to a lesser extent the Government response thereto, may be of some support here, its terms are far from unambiguous – particularly in relation to how the concept of a precautionary approach relates to planning processes. Therefore, on the

facts made available to me, in my opinion, there is not sufficient specialised medico-scientific evidence at present to significantly distinguish the facts of the present cases from the facts in *R v Tandridge District Council ex parte Mohamed Al Fayed*.

On the question of the law, because *R v Tandridge District Council ex parte Mohamed Al Fayed* was decided before the Human Rights Act came into operation, the question of whether there had been any violation of human rights in the planning process was not addressed by the court. The issue, therefore, might be put like this: Would the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed* have been different if the Human Rights Act had been in operation?

I am therefore specifically asked to comment upon the impact of particular Convention rights, all the time bearing in mind that the specific provisions of the Convention have not become binding rules of United Kingdom law, and that the Human Rights Act has not established a novel class of legal rules along the lines of a "common law of human rights": that instead the Convention rights are merely aids to the interpretation of legislation.

Considerations in respect of the impact of Article 2, are dealt with, below, along with the considerations in relation to whether any civil duty is engaged and whether the State's positive duty may be invoked.

In relation to Article 6 of the ECHR, which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

the issue would appear to centre upon whether or not the outcomes of planning processes constitute a "determination of … civil rights and obligations". In *Ringeisen v. Austria* (1971) 1 EHRR 455 para 94 the European Court of Human Rights held that Article 6(1) "covers all proceedings the result of which is decisive for private rights and obligations". It has long been argued by planning authorities that the planning processes, as such, do not explicitly determine the private rights of individual objectors to proposed developments, but this is no longer a valid argument.

The right to the fair administration of justice is so important that Article 6 is to be given a broad and purposive interpretation: *Delcourt v. Belgium* (1970) 1 EHRR 355 para 25; *Moreira de Azevedo v. Portugal* (1990) 13 EHRR 721 para 66. In *Fayed v. United Kingdom* (1994) 18 EHRR 393 it was said that for an individual to be entitled to a hearing before a tribunal, there must exist a dispute or 'contestation'. In light of the decision of the House of Lords in *R (Alconbury Ltd & Ors) v Secretary of State for the Environment, Transport and the Regions* (2001) 2 WLR 1389, there is no reason in principle, in an appropriate case, why the scope of Article 6 should not

extend to the administrative decision making process relating to a third party's objection to the grant of planning permission, provided it directly affects that third party's civil rights. However, in *Fayed v. United Kingdom* the Court went on to say: "It follows, so the Court's case law has explained, that the result of the proceedings in question must be directly decisive for such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6(1) into play." Recent cases have shown that planning processes may indeed, in appropriate circumstances, be subject to Article 6 requirements. In *Friends Provident Life & Pensions Ltd v. The Secretary Of State For Transport, Local Government and the Regions & Ors* [2001] EWHC Admin 820 (30th October, 2001) Neutral Citation Number: [2001] EWHC Admin 820, Forbes J held that the proprietary rights of the applicant third party objector were, in that case, sufficiently affected to warrant the engagement of Article 6 in relation to local authority planning processes.

On this ground it is at least arguable that the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed* may well have been decided differently if the Human Rights Act had been in operation. However, if it is determined that Article 6 applies, then there would be a further question of whether, in any case, the planning process in relation to the siting of phone masts was in fact Article 6 compliant. In *Friends Provident Life & Pensions Ltd v. The Secretary Of State For Transport, Local Government and the Regions & Ors*, where the planning procedures were not materially different to that of the relevant authorities in the present cases, Forbes J held that the local authority's processes were, in the event, Article 6 compliant. See also *Langton & Anor, R (on the Application of v Department for the Environment, Foodand Rural Affairs & Anor* [2001] EWHC Admin 1047 (17th December, 2001) and *Adlard, R (on the application of) v Secretary of State for the Environment, Transport & the Regions & Ors* [2002] EWHC 7 (Admin) (17th January, 2002). I would also draw attention to the observations of Richards J in *R (on the application of Kathro and others) v Rhondda Cynon Taff County Borough Council* (unrep. 6 July 2001) where he made these comments in the course of his judgment:

> "Looking at the overall tenor of the speeches in *Alconbury* and at the underlying decisions of the Strasbourg court, however, I accept that the finding that the Secretary of State's decision-making process was compatible in principle with article 6 was based to a significant extent on the fact-finding role of the inspector and it attendant procedural safeguards. By contrast, there is no equivalent in the decision-making process of a local planning authority. That process includes a right to make representations and to submit evidence, and persons may be heard orally at a meeting of the relevant committee. But there is nothing like a public inquiry, no opportunity for cross-examination and no formal procedure for evaluating the evidence and making findings of fact. The report of the planning officer is to the committee generally contains an exposition of relevant facts, including any areas of factual dispute, but does not serve the same function as an inspector's report. In general there will be no express findings of fact by the committee itself. All of this considerably reduces the scope for effective scrutiny of the planning decision on an application for judicial review. It makes it more difficult, if not impossible, to determine whether the decision has been based on a misunderstanding or ignorance of an established and relevant fact, or has

> been based on a view of the facts that was no reasonably open on the evidence…For those reasons there is in my view a real possibility that, in certain circumstances involving disputed issues of fact, a decision of a local planning authority which is not itself an independent and impartial tribunal might not be subject to sufficient control by the court to ensure compliance with article 6 overall."

For these reasons I am of the opinion that there may be grounds for arguing a breach of Article 6 rights in the present cases. As to the remedy for such a breach, it is likely that (at most) there would be an order requiring the Planning Service to remake its decision in a way which was Article 6 compliant. This issue is addressed more fully below along with the consideration of whether any civil duty is engaged.

In relation to Article 8 of the ECHR, which provides:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

and,

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

there have been, in recent years, a number of matters where Article 8 rights have been raised in support of claims made by objectors to planning approvals on the basis of health concerns. In *R v. Leicester County Council Hepworth Building Products Ltd and Onyx (UK) Ltd Respondant Ex Parte Blackfordby and Boothcorp Action Group Ltd* [2000] EWHC Admin 304 (15th March, 2000) Richards J rejected an argument that Article 8 was breached where there was to be some increase in levels of noise and dust, but where it was not shown that the operations authorised by the permission would have any material effect on the health or that the operations authorised by the permission would have a substantially greater adverse effect than those carried on pursuant to existing consents. A similar finding was made by Turner J in *Furness & Ors v Thames Water Services Ltd* [2001] EWHC Admin 1058 (17th December, 2001).

On the evidence I am provided with, I am not of the opinion that the parties on whose behalf this report is prepared are able to demonstrate the provable form of harm which these cases establish as the threshold for the invocation of Article 8 rights.

Even if it was established, at a prima facie level, that there was a breach of the principal rights enshrined in article 8 then it is highly likely that the Planning Service would be able to avail itself of the defensive proviso (expressly contained within Article 8) of the legal and necessary demands of "economic well-being" in relation to national telecommunications service provision. In *R (On The Application Of Prytherch) v. Conwy Borough Council* [2001] EWHC Admin 869 (19th October, 2001) Turner J rejected a claim that sought a quashing order in respect of the decision

of the defendant to grant conditional planning permission for the construction of a landfill leachate treatment plant. Given the environmental objective which the treatment plant and pipe were designed to achieve, the grant of permission was held to be objectively justified even if the claimant had been successful in demonstrating that any relevant right had been infringed. It should be noted, all the same, that in *R (On The Application Of Prytherch) v. Conwy Borough Council* the Council was able to justify its interference with Article 8 rights on the defensive proviso of "protection of health". Because, in the present cases, any defensive justification to justify an interference with Article 8 rights would be based, instead, on "economic well-being" it is possible that a court may apply a different justificatory standard, and for this reason it may be asserted that there is, albeit slight, an opportunity to for arguing a breach of Article 8 rights.

In relation to Article 1 Protocol 1 to the ECHR, which provides that "Every natural or legal person is entitled to peaceful enjoyment of his possessions" and that "No person shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law", it is improbable that there is a breach of human rights. This is because:

Firstly, the facts of the present cases do not indicate that there is any relevant deprivation of possessions. In general terms, a relevant deprivation of possessions will be required to be a permanent deprivation and not merely an interference with use: *Handyside v United Kingdom* (1976) 1 EHRR 737.

Secondly, the facts of the present cases do not indicate that there is any actionable interference with the peaceful enjoyment of possessions. Interferences with the peaceful enjoyment of possessions are normally actionable under either the law of trespass or the law of nuisance. Insofar as the law of nuisance protects against interferences with the peaceful enjoyment of possessions it is necessary for a plaintiff to show harm or at least apprehended harm. (The question of evidence of harm and the law of nuisance is further addressed in more detail below, along with the consideration of whether any civil duty is engaged.) In relation to the law of trespass the plaintiff must show, inter alia, that the defendant caused some object or matter to rest upon or traverse across the plaintiff's land. There has never, to my knowledge, been any authority which has suggested that any form of transient electro-magnetic radiation could constitute a trespass. Given the courts' traditionalist approach towards the common law with respect to proprietary rights, expressed by the House of Lords in *DPP v Jones*, in my opinion it is unlikely that the assimilation of human rights norms will have the effect of significantly expanding the compass of these common law actions. In *J.A. Pye (Oxford) Ltd & Anor v Graham & Anor* [2001] EWCA Civ 117, for example, the Court of Appeal held that Article 1 Protocol 1 to the ECHR did not affect the law of adverse possession, which is based (in part) on the law of trespass.

In the context of Article 1 Protocol 1, the European Court has stated in *Mellacher v Austria* [1989] 12 EHRR 391 at paragraph 45:-

> "[Laws to control the use of property in accordance with the general interest] are especially called for and usual in the field of housing, which in our modern societies is a central concern of social and

> economic policies. In order to implement such policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The Court will respect the legislature's judgement as to what is in the general interest unless that judgement be manifestly without reasonable foundation."

On the basis of this analysis of the law, since the enactment of the Human Rights Act, it would appear that it is possible to distinguish the decision in *R v Tandridge District Council ex parte Mohamed Al Fayed*. It should be noted, however, that while it may be contended that there is an prospect for arguing breaches of Article 6 and 8 rights, that this prospect is, for the reasons I have stated, somewhat remote.

4. May phone mast companies be said to be functional public authorities in their provision of telecommunications services and therefore be obliged to comply with the Human Rights Act 1998?

Section 6 of the Human Rights Act 1998 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

There is an argument, therefore, that phone mast companies may be held to be "functional public authorities" by virtue of s 6(3)(b) where it can be shown that their acts or functions "are functions of a public nature". Where this is the case, phone mast companies shall be obliged to comply with the Human Rights Act in that under s 6(1) it shall be unlawful for such companies to act in a way which is incompatible with Convention rights. Alternatively, and as provided by s 5, where such acts or functions can be shown to be of a private nature then phone mast companies shall not be held to be public authorities, and the attendant duty shall not apply.

In *Donoghue v. Poplar Housing And Regeneration Community Association* Ltd [2001] EWCA Civ 595 (27th April, 2001) Case No: 2000/3758 (Neutral Citation Number: [2001] EWCA Civ 595), a case involving a local housing authority and a private company to which that authority delegated many of its functions, Lord Woolf said:

> "…the definition of who is a public authority, and what is a public function, for the purposes of section 6, should be given a generous interpretation…The fact that a body performs an activity which otherwise a public body would be under a duty to perform, cannot mean that such performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public."

His Lordship went on:

> "Section 6(3) means that hybrid bodies, who have functions of a public and private nature are public authorities, but not in relation to acts which are of a private nature...The purpose of section 6(3)(b) is to deal with hybrid bodies which have both public and private functions. It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed."

Lord Woolf also considered, in this regard, the decision of the European Court of Human Rights in *Costello Roberts v United Kingdom* [1993] 19 EHRR 112 where the European Court made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the headmaster of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body: it would remain a private body. The local authority would, however, not escape its duties by delegating the performance to the private school, so that if there were a breach of the Convention, then the responsibility would be that of the local authority (and not that of the school).

Lord Woolf, in conclusion, stressed:

> "What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body

> may be deemed public but the activities of the body which is regulated may be categorised private."

Although the court in *Donoghue* held that a private company was a public authority (because of the public nature of its acts) it is significant that Lord Woolf stated that "In a borderline case, such as this, the decision is very much one of fact and degree".

There is, of course, ample judicial authority in the jurisprudence of judicial review for the proposition that private companies may be held to be public authorities by virtue of the "public nature" of their acts. In particular, there have been many instances where the functions of private and privatised corporations have been held to be "public" for the purposes of the judicial review since the decision of the Court of Appeal (the judgment of Lloyd LJ) in *R v Panel of Takeovers and Mergers, ex p. Datafin* [1987] QB 815. Correspondences, particularly with respect to the test for determining which bodies are susceptible to judicial review are supportive to the argument that phone mast companies are "public authorities", given that one purpose of judicial review is to ensure that public bodies are subject to high standards of conduct. There is also an analogy with the test which is being developed in EC law for determining whether a body is a public body, specifically whether "a body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the state, for providing a public service under the control of the state, and has for that purpose special powers beyond those which result from the normal rules applicable in relation to individuals": *Foster v British Gas*, case C188/89 [1990] ECR1/3313 ECJ.

Analogies with the jurisprudence of judicial review must, all the same, not be taken to finally determine the question. As the Court of Appeal cautioned in *Wallbank v. Parochial Church Council Of Aston Cantlow And Wilmcote With Billesley, Warwickshire* [2001] EWCA Civ 713 (17th May, 2001) Case No: A3/2000/0644 Neutral Citation Number: [2001] EWCA Civ 713:

> "[It was submitted] that the test of what is a public authority for the purposes of s.6 is function-based. There is plainly force in this in relation to the "hybrid" class of public authority created by s.6(3)(b), which depends on the performance of "functions of a public nature". But it does not follow that this governs the principal category of "public authority", though it may well have a bearing on it. The long title of the Human Rights Act 1998 describes it as "An Act to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights ...", and Article 1 of the Convention, though for obvious reasons not scheduled to the Act as a Convention right, obliges each High Contracting Party to secure the Convention rights to everyone within its jurisdiction. Article 34 limits the status of potential victim of a breach of the Convention to "any person, non-governmental organisation or group of individuals". In other words, the Convention assumes the existence of a state which stands distinct from persons, groups and non-governmental organisations. It is in order to locate that state for the Act's purposes that the concept of a public authority is used in s.6. For this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or of the hybrid class of public authority."

Notwithstanding this, it remains strongly arguable that phone mast companies may be held to be public authorities by virtue of the "public nature" of their provision of telecommunications services. This finding will depend, as indicated by Lord Woolf in *Donoghue,* on questions of fact and degree unique to the circumstances of the functional operations of phone mast companies. However, even accepting the proposition that where the acts of phone mast companies are supervised by a public regulatory body this will not necessarily indicate that they are of a public nature, where it is found: (i) that the acts of such companies are done under statutory authority; and (ii) that there is a high degree of control over these functions exercised by another body (which is a public authority), then these facts will point towards the relevant acts being public in their nature for the purpose of demonstrating that phone mast companies are "functional public authorities" by virtue of s 6(3)(b). As such, it is highly likely that phone mast companies may be held to be public authorities by virtue of the "public nature" of their acts and functions.

5. Is any civil right or obligation engaged, and particularly may the State's positive duty under article 2 be invoked, and if so on which public authority/ies would this impact, and what might such a body be required to do to be compliant with their duties under the Human Rights Act 1998?

Rights of action at common law, as a general proposition, depend for their existence on the commission of a legal wrong by some party. The law of negligence and the law of nuisance, for instance, require that a party suffer a legally recognised form of injury, and that that harm can be causally connected with the wrongful act and/or breach of duty of or by the defendant.

Turning to the distinctive facts of the present cases where local residents have raised health issues as a basis of objection to the erection of phone masts, I note that the evidence which is provided to me in connection with health concerns is comparatively restricted, both in its extent and in its specificity. In respect of the Reid family I note that there is a letter from Dr Hinds, dated 28 June 2001, which states that, in his opinion, the children suffer from an allergy to diary products and low immune systems, and that they have a low resistance to infective agents. Dr Hinds also states "It is my opinion that these children would be more vulnerable than average to radiation from such a mast which could potentially cause long term complication to their health." There is no other evidence, provided to me, which links the health of the Reid children with phone mast RF radiation. In respect of Jamie Partridge I am not provided with any material evidence which causally links the health of the client with phone mast RF radiation.

In my opinion there would need to be significantly more evidence of relevant harm, or at least especial vulnerability, before there could be any serious consideration of the relative chances of success in any proposed civil action on the basis of physical harm to the health of the parties on whose behalf this report is prepared. Such evidence would need to be of an unambiguous and specialised medico-scientific nature, and it would need to be evidence which causally links phone masts and RF radiation to the particular individual who suffers the relevant harm.

The common law, in its equitable jurisdiction, also provides for interlocutory orders which may be granted in circumstances where there is an apprehended breach of civil rights and obligations. Such orders are frequently sought where, for example, a party fears that they will suffer harm if another party is not prevented from doing some act which (allegedly) will harm the first party.

In this regard it is important to note that an interlocutory injunction is an order sought before all the evidence has been presented and before all the arguments in a matter have been put to the court. Interlocutory injunctions are generally sought by applicants who wish to preserve a status quo, pending the main hearing of a matter. Plaintiffs may, for example, claim that unless there is immediate action then their position will be irreparably damaged. Plaintiffs in these circumstances usually emphasise the preventative function of the interlocutory relief. Such applications are

frequently opposed by defendants - who will naturally claim that they are being punished before the violation has been proved, or perhaps that the "interlocutory" relief will have the practical effect of "finally" determining the matter. These are therefore serious and difficult matters which courts are often required to decide upon with a considerable degree of swiftness.

Because of the temporary nature of the interlocutory injunction, the grounds upon which such orders may be awarded differ from those which apply to final forms of relief. Obviously some of the criteria for the award of the interlocutory injunction are the same as those for final injunctions, and they include: the adequacy of damages; issues relating to the conduct of the parties; and the question of hardship on the defendant. It is apparent, however, that the courts are often more willing to award interlocutory injunctions than final injunctions because of their non-permanent nature. This liberality is reflected in the standard of justification which is required at this level being merely the "balance of convenience". On the other hand, because an interlocutory injunction will still, inevitably, have the effect of inhibiting a party's freedom of action (particularly in the commercial sphere) the courts are often reluctant to restrain a party from engaging in their normal activities. This is the second crucial difference: an interlocutory injunction will not be awarded unless it can be shown that irreparable damage to the plaintiff will result from the failure to grant the order. The interlocutory applicant must therefore establish their prima facie case for success in the final hearing. This, it seems, means the establishment of a case which indicates that the chances of the plaintiff succeeding at trial are serious and substantial rather than merely speculative.

On this last point, that concerning the establishment of a prima facie case which indicates that the chances of the plaintiff succeeding at trial are serious and substantial rather than merely speculative, there has been some controversy. In *American Cyanimid Co v Ethicon Ltd* [1975] AC 396 the House of Lords held that rather than look for a prima facie case the tribunal determining the application for an interlocutory injunction should instead look for evidence of whether there exists "a serious case to be tried". There is some academic and judicial controversy over which is the correct test, or indeed whether there is a difference between the two tests, or even if there is an inconsistency between the tests whether it makes any practical difference anyway.

Turning again to the distinctive facts of the present cases, I note that the evidence which is provided to me in connection with health concerns is still, in my opinion, considerably less than might reasonably be expected to form the basis of an application for an interlocutory order. While the relevant standard, expressed to be the "balance of convenience", is more easily attainable by an applicant, it will still be necessary for the evidence adduced in support of any application for interlocutory relief to demonstrate that there is a prima facie case and/or that there is a serious case to be tried involving potentially irreparable damage to the applicant. Again, although the Stewart report may be of some assistance here, on the facts made available to me in my opinion there is not enough evidence to sustain such an application. Again, such evidence would need to be of a specialised medico-scientific nature, and it would need to be evidence which causally links phone masts and RF radiation to the particular individual or individuals who are likely to suffer the relevant harm.

I am also asked to advise whether the State's positive duty under Article 2 of the ECHR may be invoked.

Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

It has been accepted by the courts that this article places a positive duty on the State to protect the lives of its citizens. The recognition that this duty arises from Article 2 is a recent development, and was enunciated in the case of *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 where it was held, at paragraphs 115-116: "The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction." However, the jurisprudence of the European court also demonstrates that where positive obligations arise they are not absolute. Additionally, in *Osman v United Kingdom* the court recognised that such obligations must be interpreted in way which does not impose an impossible or disproportionate burden on the authorities. This qualification is analogous to the common law defence that all reasonable precautions were put in place so as to minimise risk of harm.

Accordingly, where it can be shown that there is a risk to the lives of citizens the State, through its agencies, is under an obligation to take all reasonable precautionary steps to minimise that risk. As I have indicated, however, the evidence provided to me appears to fall short of establishing either a prima facie or serious and substantial case of risk to life, or alternatively that all reasonable precautions have in fact been taken by the relevant public authority/ies. Consequently I would advise that, in my opinion, the grounds for an invocation of the State's positive duty under Article 2 of the ECHR do not exist.

If it is possible to invoke the State's positive duty under Article 2 of the ECHR, then I am also asked to advise as to which public authority or authorities it is likely that such an invocation would impact upon. Assuming that it is possible to invoke the State's positive duty under Article 2 of the ECHR, then the public authority upon which such an invocation would impact would be the Department of the Environment, Planning

Service. In addition, depending upon whether phone mast companies are held to be "functional public authorities" (on which point see above), it may be that phone mast companies, including BT Cellnet, would also be subject to the effect of Article 2 of the ECHR.

I am further asked to advise what such a body might be required to do in order to be compliant with the Human Rights Act, 1998. Assuming that there is a breach of a civil right, and/or that it is possible to invoke Art. 2 ECHR (and that this invocation impacts upon the operations of a relevant public authority or authorities), then there would be clear grounds for an order quashing the decisions to grant planning approval and requiring that the matters be reconsidered and decided in light of such supplementary evidence, as exists, of any breach or potential breach of a civil or statutory duty of care.

However, if the relevant decisions were to be quashed, and the matters were to go back to the Planning Service, the question would then have to arise, again, as to whether they should grant or refuse permission. In making that decision they would, most likely, have to take into account the advice of the NRPB, the Stewart report and any other relevant material put forward by the objectors. If the authority decided to refuse permission, the further question would arise as to whether the authority would be willing to issue enforcement notices to discontinue the use. On the basis of the evidence which I have been shown, in my opinion it is difficult to see how a reasonable authority could take the view that these considerations would justify a refusal of permission, or (alternatively) if they refused it that they would be able to uphold their decision on an appeal by the phone mast companies. Allowing for the positive cases for the proposals, which the authorities clearly accepted to begin with, and which are required for the purposes of the development and expansion of the existing national telecommunications network (in line with approved communications policies), in my opinion there is only a modest possibility that, if the decisions were quashed, the ultimate result would be any different.

6. Recommendations on any proposals for action on this issue

I do not recommend that the Northern Ireland Human Rights Commission pursue these matters. This is because, on the evidence presented to me for consideration, and while it is arguable that there are potential breaches of Articles 6 and 8 of the ECHR, in the absence of detailed and specialised medico-scientific evidence of phone mast caused risks or injuries to the health of the objectors there does not appear to be a reasonable prospect of success in any application for an order quashing or injuncting the planning approval.

As I have also indicated, even if the planning decisions were to be quashed, and the matters were remitted for reconsideration, in remaking the decision the Planning Service would most likely, for the reasons stated, not alter their initial determination. Again, this response might be different if there was detailed and specialised medico-scientific evidence of phone mast caused risks or injuries to the health of the objectors available, but at this stage I am not confident that such evidence presently exists.