

TYNWALD COMMISSIONER FOR ADMINISTRATION

Refusal to investigate a Complaint – Statement of Reasons

Case TCA1818

1 This is a statement, pursuant to section 14 of the Tynwald Commissioner for Administration Act 2011, of my reasons for refusing to investigate a complaint challenging the legal validity of actions connected to planning control in the Department of the Environment, Food & Agriculture (DEFA). I accept that the complaint was duly made and that the complainant has the necessary connection with the matters complained of.

2 Because it concerns an issue of general interest, I am laying this statement before Tynwald pursuant to section 21(5) of the 2011 Act, and for that reason I am referring to the complainant in anonymous terms as 'Mr R'.¹ It goes without saying that my conclusions do not affect the investigation of any complaint, or part of a complaint, which concerns *a failure to comply* with the law.

The complaint

3 The complaint at issue is, in summary, that the arrangements operated in the Department in regard to planning approvals are unlawful, namely, the existence of the Planning Committee and decisions taken by them, and the validity of the Town & Country Planning (Development Procedure) (No 2) Order 2013.

4 In more detail, the complaint is that:

- (i) There are no *vires* in the Town & Country Planning Act 1999 for the formation of a Planning Committee;
- (ii) Section 3 of the Government Departments Act 1987, under which the Planning Committee is currently formed, provides only for a power of delegation. It does not empower the Minister to form a Planning Committee, to appoint a chairman of a Planning Committee or the members of a Planning Committee. The Minister's acts in forming a Planning Committee under section 3, appointing its chairman and members are therefore *ultra vires* and void.

- (iii) In *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, Lord Reid said:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity."

"If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity."

¹ The complainant has in fact objected to being referred to anonymously, but I consider that it is for the person concerned to identify themselves publicly if they so wish.

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5 Mr R therefore claims that he has suffered injustice due to DEFA's act of maladministration, by making a decision on a planning application in which he claimed an interest, under the provisions of the Town & Country Planning (Development Procedure)(No 2) Order 2013. That is because statutory provision was not included in the 1999 Act for making the Development Procedure Orders until 2016, almost three years after the No 2 Order was made, so that the No 2 Order was *ultra vires* and unlawful.

6 In my judgment, while there is necessarily a factual matrix in which the issues are raised, the questions raised are ones of pure law and, as such, they are not issues concerning administration. I am satisfied from enquiries I have made and information supplied to me by Mr R that, on all these questions, the Department has sought and acted on the advice of the Attorney General, or his chambers, on the questions of legality raised in the complaint.

7 My jurisdiction derives exclusively from the Tynwald Commissioner for Administration Act 2011. My powers of investigation are specified in the Act generally, but they are referred to in section 7 (1) as relating to "action alleged to have been taken, or an alleged service failure"; subsection (3) provides "It is for the Commissioner to decide whether to initiate, continue or discontinue an investigation". The instant complaint made to me by Mr R was properly made pursuant section 10(1)(c) of the 2011 Act.

8 My reason for declining to investigate the complaint is that, subject to what is said in paragraphs 11 & 12, I consider that there is no *prima facie case* of maladministration or service failure where the action complained of has been taken in accordance with the official legal advice, which those concerned with the administration of the 1999 Act are bound to follow.

9 Each Department is headed by a Minister in whom the legal powers conferred on the Department are in general vested, and action taken by the Department is taken by the Minister, or on the Minister's behalf, or at the Minister's direction. Where appropriate, the Minister's powers may – pursuant to section 3(2) of the Government Departments Act 1987 – be delegated to named officials, to officials holding certain positions, to political Members of the Department or to any other person.

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10 The Minister is an appointed member of Her Majesty's government in the Isle of Man and is, by the constitution, advised by her Majesty's Attorney General on matters of law. It is not the purpose or jurisdiction of the Tynwald Commissioner for Administration to investigate the accuracy in law of that advice.

11 I accept however that there may, as a matter of strict theory, be wholly exceptional circumstances in which it is right to ask whether a Department should question advice from the Attorney General. Thus, for example, it may be alleged that advice has been tendered on a mistaken or incomplete understanding of the relevant facts, and it may then be proper to examine that issue. There may be other exceptional examples of situations where it is right that a Department should ask for advice to be confirmed, before acting on it.

12 Even more exceptionally, it may be the case that the advice is apparently wrong. I cannot envisage, as a practical matter, that this is ever likely to be the situation and it is certainly not within the scheme or powers of the 2011 Act for the Commissioner to adjudicate on the matter. I will not speculate on what would be needed in such circumstances to justify the Commissioner's involvement, or even whether it would be appropriate at all, given that disputed issues of law are a matter for the courts to resolve. I have, however, seen nothing in the complaint I have described which would in any way lead it to fall within these exceptional cases.

13 For the sake of completeness I add that, along with this complaint raising issues of law, there was in addition an issue concerning administration which is within the Commissioner's jurisdiction, and it has been accepted for investigation.

Malachy Cornwell-Kelly
Tynwald Commissioner for Administration
13 December 2018