

Yes minister, but *audi alteram partem*

The Court of Appeal's guidance on lobbying by MPs is a must read for ministers exercising a quasi-judicial function, says **Isabella Tafur**



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It is a fundamental principle of English common law that a decision-maker should listen to, and take into account, both sides of an argument. This principle is encapsulated in the Latin phrase *audi alteram partem*, or 'Let the other side be heard as well'.

It is also a maxim with which Andrea Leadsom MP and Karl Hopkins MP will no doubt be very familiar, following the Court of Appeal judgment in *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 562.

The case concerned a proposal to erect a wind farm in the district of South Northamptonshire. There was strong local opposition to the proposal and Sir Eric Pickles MP, the then secretary of state for communities and local government, elected to 'recover' the matter for determination by

himself. Following a two-week inquiry in October 2013, the inspector recommended that planning permission be granted, but contrary to that recommendation the secretary of state ultimately decided to refuse permission in December 2014, having delegated the decision-making task to the then parliamentary under secretary of state, Kris Hopkins MP.

The local MP was Andrea Leadsom. She had campaigned actively against onshore windfarms throughout her political career and opposed the development. After the close of the inquiry she wrote to Hopkins on a number of occasions reiterating the strong local opposition to the development. In those letters she also referred to two conversations between herself and Hopkins regarding the proposed development in the House of Commons tea room and lobby. No other party had been informed of the written or oral communications or given the opportunity to comment on any of the matters raised therein.

Following a freedom of information request, *Broadview Energy Developments Ltd* applied to quash the secretary of state's decision on the basis that it had been taken in breach of the rules of natural justice and was vitiated by apparent bias arising from the contact between Leadsom and Hopkins. While the issue arose in the context of a planning decision, this case raises

wider issues about the duty of fairness owed by political decision-makers generally in exercising quasi-judicial functions.

In the High Court, Mr Justice Cranston – himself a former MP – said that the lobbying of ministers by MPs was part and parcel of the representative role of a constituency MP and that it would be quite wrong for a court to conclude that there was anything wrong with it as a matter of law. Ministers who were 'buttonholed' in the tea room or the lobby by an MP could not avoid being on the receiving end of oral representations about constituency matters.

While upholding the first instance judgment, the Court of Appeal was not so sanguine in its approach to ministerial lobbying by MPs. The written representations from Leadsom were clearly repetitive of matters raised during the inquiry and the minister was not required to circulate representations that simply repeated matters raised during the inquiry.

However, it was not easy to say the same about her oral representations. Any judge was acutely aware of the difference oral advocacy could make, particularly if it occurred in the absence of the other side. As such, it was incumbent on ministers to make clear to any person who tried to make oral representations to them about their planning decisions that

they could not listen to them.

Lord Justices Longmore and McCombe both distanced themselves from Cranston J's suggestion that the lobbying of ministers by MPs was permissible even when the minister was making a quasi-judicial decision. Indeed, McCombe LJ recorded his 'emphatic disagreement' with such an approach. In their view, MPs should not be in any different position from other interested parties. Once an issue fell to be decided by a minister in a quasi-judicial role, fairness required that no party should have access to the decision-maker to make representations in a manner not afforded to their opponent.

In this case, the court found that there had been a breach of natural justice in failing to cut off the conversation, but on the specific facts – where the tea-room conversation had taken place almost a year before the secretary of state's decision – it was a technical breach which could not have made any difference to the ultimate decision.

However, ministers exercising quasi-judicial powers and interested parties seeking to influence their decisions would do well to heed the advice of the Court of Appeal, and not allow themselves to be lobbied or to lobby outside the formal decision-making process to protect against allegations of bias or apparent bias. **SJ**