

FULL COURT

(Lord McGhie, J Kinloch, D J Houston)

Mrs Margaret Jean MacKintosh v The Crofters Commission

Record No: SLC/125/99 -- Order of 7 August 2000

The applicant applied to the Crofters Commission to decroft the croft owned and occupied by her at 22 Airds Bay, near Taynuilt. The reason given was set out as follows: *"Croft is my main asset. I cannot realise full value (house, buildings, fences and other improvements) without a decrofting direction."* After their normal procedures, the Crofters Commission concluded that the application should be refused. The present application is an appeal under section 25(8) of the Crofters (Scotland) Act 1993 against the proposed decision to that effect.

The Court heard the case at Oban on 12 July 2000 and Members of the Court individually visited the subjects and surrounding area on 11 and 12 July. (It was not suggested in this case that anything turned on the detail of the physical characteristics of the croft except its size in relation to other areas decrofted, which we discuss further below. Our inspections were directed only to ensuring that we had an adequate understanding of the nature of the subjects and their general setting.) At the hearing and throughout the proceedings before the Commission and the written stages in the Court process, the applicant was represented by her son, Donald MacKintosh. There was no objection to this. The Commission were represented by their solicitor, Mr Donald Smith.

On receipt of the application for decrofting -- which was dated 3 November 1998 -- the Commission, in accordance with their normal practice, instructed newspaper intimation and also sent standard questionnaires to the Clerk to the Grazings Committee and to the area assessor, They received various replies to the advertisement and had the benefit of the applicant's comments on these replies. Mr Goodfellow of the Scottish Office, Agriculture Environment and Fisheries Department met the applicant and Donald MacKintosh on 1 March 1999 and examined the croft. He prepared a report for the Commission. By letter of 17 June 1999 the Commission gave intimation of their intention to refuse the application and advised of the right to a public hearing. A hearing was held on 11 August 1999 and a report prepared. The recommendation for refusal was on the following grounds:

"The reasons for the request for decrofting were "the croft is my main asset. I cannot realise full value ... without a crofting direction". (sic) This in itself is not a sufficient reason for approving the decrofting.

There have been strong objections to the application and expressions of demand for the tenancy of the croft. The Clerk to the Grazings Committee confirmed that his Committee was wholeheartedly against decrofting in this instance and the Assessor in his own consultation found that the crofting community did not support the application.

The croft is situated in an active crofting community and decrofting would not be in the best interests of this community as it will deplete the amount of croft land available for young interested families wishing to acquire a croft tenancy. The Grazings Clerk and others in the community have confirmed that there is a demand for crofts within the area."

It was agreed by parties that we should deal with the matter *de novo* after proof. This, of course, means that we must consider the application afresh. It is accordingly unnecessary for us to refer in any detail to the evidence before the Commission or to carry out any assessment of the above statement of reasons. We require to consider the matter on the basis of the whole evidence led before us. We are not simply reviewing the exercise of discretion made by the Commission.

Mr MacKintosh gave evidence for the applicant. For the most part, he adopted the assertions of fact and submissions contained in the comprehensive written material submitted by him at various stages. He gave detail of the background of the applicant's purchase of the croft. The solicitor acting had apparently not advised them of the right to apply to the Commission under section 16A of the Crofters (Scotland) Act 1955, now sec 25(4) of the 1993 Act, for a direction that the land should cease to be a croft on purchase. It was asserted that, had he done so, there would have been no problem. It was pointed out to Mr MacKintosh that, of course, the Commission would have had to apply the same approach to such proceedings as to the present. He said that his point was that the applicant might not have made the purchase had she known that decrofting would be refused. We heard no further evidence on this matter and, in any event, do not consider it an issue relevant to the present application.

In his evidence Mr MacKintosh emphasised his contention that there was an unfair inconsistency in the attitude of neighbouring crofters. Several, who objected to the present application, had themselves decrofted parts of their crofts or had not objected to other applications. More ground had been decrofted locally without objection than was involved in the applicant's holding. He contended that Parliament could not have intended that people would be entitled to decroft their own land and still have a right to object to a neighbour's application. Natural justice, he said, required consistency.

It is clear that an appeal under section 25(8) relates to the proposed disposal of the application originally made to the Crofters Commission and, plainly, the statement of reason is an important part of the original application. The reason advanced forms the basis of their deliberation. It is that application which is the subject of the appeal. However, to ensure that there was no room for misunderstanding, we invited Mr MacKintosh to explain more fully the applicant's reason for seeking to decroft. He emphasised that the croft was the applicant's main asset. She could not realise its proper value as it was a croft and therefore subject to reletting. He gave no specific evidence of the financial implications of decrofting as opposed to the potential for disposal subject to crofting tenure. He confirmed that the applicant was aware that she had a right to decroft the house site.

In answer to questions by the Court, he said that he could see no reason why decrofting of the applicant's croft would affect the community. The crofters could carry on as they did at present. In cross examination, he made the point that there was a large, well established community at Taynuilt which did not depend on crofting. Crofting activity affected comparatively few crofters.

In cross-examination, Mr Smith led evidence from Mr MacKintosh of certain matters of fact relative to the croft and the common grazings. Mr Smith then went on to lead evidence from Lord Gray who was landlord of the remaining tenanted crofts at Ardchattan and Muckairn. He was able to give evidence of local crofting matters. Evidence was led from John Archibald MacAskill, Chairman of the Commission, who had been directly involved in the present application and had chaired the public

meetings. He was, accordingly, able to give evidence, both direct, and at second hand, of local matters and to give evidence from his wide experience of crofting generally. Mr Smith also led evidence from Mr John Garvie, the Clerk to the local Grazings Committee, who also dealt with details of crofting in the vicinity including use made of common grazings and other communal activities of local crofters.

In the event, there was no real dispute over matters of detail and the relevant background as it emerged from the whole evidence, can be set out shortly. The applicant's croft lies to the east of Taynuilt and to the north of the A85 road. It was described as extending to some 2.68 acres and although our impression was that this was an underestimate, nothing turns on the precise figure. It is of an irregular shape which, for present purposes, can adequately be described as taking the form of an elongated rectangle. The croft house and related buildings are situated in the southwest corner of the croft. The applicant holds two grazings shares in Airds, Kirkton and Balindoe (Achnahannait) Common Grazings, situated to the south of the main road. The applicant does not use these shares. We did hear some evidence of difficulties she had faced in attempts to obtain copies of the Grazings Regulations and we had an impression of some bad feeling on one side or another. However nothing turns on this and it is unnecessary for us to make any findings about this matter.

The applicant succeeded to the tenancy in 1967 and bought the croft in 1980. She applied in 1990 for a decrofting Order, This was refused and, for reasons which do not concern us, she did not appeal. She made the current application in November 1998. Following the advertisement referred to above, there was objection by the neighbours on both sides of her croft and by the Clerk to the Grazings Committee, He gave evidence that all the members of the Grazings Committee had attended a meeting on 23 November 1998 and indicated unanimous opposition to the application. That opposition has been maintained. The Grazing Committee consists of eight crofters who are active users of the grazings. They have been involved in a variety of communal crofting activities including a regeneration scheme for the grazings and the construction of cattle handling and loading facilities.

We are entirely satisfied that there is an active local crofting community. Although the applicant's croft is situated centrally she takes no part in the crofting community activities. About half of those who do take part are tenants. The others are owner occupiers of crofts.

We are also satisfied on the evidence that there would be a demand for the croft by suitable tenants if it became available for let. Lord Gray gave evidence of his awareness of three local new entrants to crofting who would be suitable and able to take over. This was not directly challenged and was broadly supported by Mr Garvie who, indeed, spoke of five potential applicants. We also heard evidence of persistent enquiry as to availability of crofts in the area. Further, we accepted Mr MacAskill's evidence that there would be a wide demand for crofts such as the applicant's croft. He gave evidence of his experience of crofting generally. Although there was now a wide general demand for crofts, he accepted that this was not true of all parts of the crofting counties. However there was no doubt of such demand in the relevant area.

We have had occasion to consider aspects of the proper approach to section 25 in course of the recent decisions in Gammie v Crofters Commission 1998 SLCR 49; Ferguson v Crofters Commission 1999 SLCR 77 and Knight v Crofters Commission also in 1999 SLCR at 102. It is unnecessary for us to repeat the observations made in these cases, It is sufficient to refer to Knight at page 115 where we stressed the importance of determining whether the application falls to be dealt with under section

25(1)(a) of the Act or under the general power conferred by section 24. That is a question which turns on whether the reason for decrofting can be said to be a 'reasonable purpose' as that term is specifically defined by section 20. Although that section specifies a list of purposes which are to be deemed to be included as 'reasonable purposes', the fundamental test is that the purpose should have relation to the good of the croft or of the estate or to the public interest.

We find no basis in the evidence, including the written material adopted by Mr MacKintosh, which would justify a finding that the present application was for a "reasonable purpose" falling within the statutory definition. We accordingly have to consider whether decrofting is appropriate under the broad discretion conferred by section 24(3) and to do so by balancing the relevant factors as best we can. We cannot put ourselves in the position of attempting to exercise a discretion on behalf of the Commission. We must make our own decision on the evidence presented to us.

It follows, therefore, that the various criticisms of the Commission made by the applicant in his submissions to the Court and in written form, are not relevant to our present deliberations. We explained in open Court our doubt as to the relevance of the reference to Article 6 of the European Convention on Human Rights in relation to an application to the Crofters Commission. However that may be, we have heard the case anew and consider that we are free to determine the present issue simply in terms of the 1993 Act.

In assessing the matter, it is clear that we must have regard to the general interest of the crofting community in the district and the demand for a tenancy as set out in section 25(2). As we have already indicated, we have had no difficulty in this case in holding that there is a crofting community in the district and that there is persuasive evidence of suitable demand. Mr MacKintosh appeared to recognise this in his final submissions which stressed that the application should be granted unless some harmful effect on the local community was proved. He submitted that there was no evidence of this. We accept that this is the issue which is at the heart of the present case.

We heard evidence from Mr MacAskill and Mr Garvie that they considered that the loss of the land would clearly be harmful to the local community. We recognise the force of Mr MacKintosh's submission that there was no evidence of any particular way in which it would make a positive difference. He also founded on the evidence of decrofting which had taken place without objection.

It is convenient to deal first with the latter point. Although there was evidence of various applications which had led to decrofting directions, it appeared that all previous applications had been for a "reasonable purpose" within the meaning of section 25(1)(a). If so, it would be clear that such applications could not be directly compared with the present one. In any event, we heard no positive evidence that any such prior applications were indeed comparable and no reliance can be placed on them. Mr MacKintosh accepted that in every case a balancing exercise would be involved and without detail of the specific facts it is impossible to say whether that exercise was carried out correctly or whether it has any bearing on the present application. For that reason we do not require to deal with the submission that Parliament could not have intended a person who had himself obtained a decrofting direction to be able to object to a neighbour's application. It is obvious that, unless the purposes of the applications were the same, there could be no substance in this point. In any event we are satisfied that, although inconsistency of approach is a matter to be reflected in the weight to be given to an objector's evidence, it does not, in itself render such evidence inadmissible.

On the other side of the coin, we did have evidence about a croft Bruachrue, near Dalrnally, which had been decrofted for housing in 1988. As a result of pressure from local crofters, including Mr Garvie, the Commission, in respect that no housing development had in fact taken place, made a direction in terms of section 25(3) returning the land to crofting. We accept that this showed the positive interest of local crofters in maintaining croft land. However we did not hear detail of the nature of the land in question and accordingly cannot place much weight upon this particular evidence.

In Knight, supra we said: *“The main consideration is the general interest of the crofting community in the district, If such a community exists and no good reason for decrofting has been established, it may take little to persuade the Commission that the balance tends in favour of refusal of the application”*. Similarly, when we ourselves have to make an assessment, we consider that where there is clearly a crofting community in the district, little is required to tip the balance towards refusal.

The Court has frequently accepted the general proposition that maintenance of a pool of crofting land is in the interests of the community: Steven v Crofters Commission 1984 SLCR 30; Fox v Crofters Commission 1991 SLCR 38. Anything which provides a potential opportunity for active crofting will, of itself, tend to be in the interests of the local crofting community. It is, we think, unnecessary to be more specific.

It can be said in relation to the evidence in this case that although the local crofters appear at present to have a solidly based active communal identity, communal activities are often dependent on the efforts of a few individuals. Where numbers are comparatively small, the pool of individuals available to take part is limited, The potential benefit from each croft unit is important even if there is little evidence of actual benefit. Any potential for admission of a new active crofter is of value even if that potential is comparatively slight.

In the present case there was some discussion of the Commission’s policy in relation to owner-occupiers and reference to the assurance that the applicant would not be forced to let the subjects as long as she was occupier. However, it must be kept in mind that the decrofting direction was not requested in order to facilitate her use of the land but to allow her to realise its full value free of crofting control. In other words the effect of a successful application would positively be to reduce the potential crofting community in the district.

In submission Mr Smith advanced argument that to grant this application would be a precedent making it difficult to resist subsequent applications. We do not find this bald formulation of the argument persuasive and it was not part of Mr MacAskill’s approach. If there is, indeed, no reason for refusal of a case on its merits, the argument based on precedent should not alter the result. We consider that the real justification for refusal of an application, even where the area involved is small and it is difficult to say in positive terms what the actual consequences of the Order may be, is that any decrofting direction does decrease the available stock of crofting land. This can properly be seen as harmful to the interest of those who are anxious to use that stock for crofting purposes. That is sufficient justification for refusal unless outweighed by the reasons advanced for granting of the direction in any particular case.

It is relevant to have regard to the question of what would happen if other cases were dealt with on the same basis as the first, not because of its effect as a legal

precedent, as such, but because the effect of removal of an individual croft is in itself harmful and we are entitled to have regard to the cumulative effect of a succession of such harmful effects to counter the argument that the degree of harm in an individual case should simply be ignored as too small to be of significance.

We accept that weight should also be given to what was referred to by Mr Garvie in terms of "attitude". His evidence was to the effect that crofters derive support and encouragement from their knowledge that the system of crofting tenure has an important part to play in the Highlands and Islands and that land will not be lost to crofting without reason. Quite apart from the positive encouragement that they are contributing, by their efforts, to something worthwhile, it discourages distracting speculation as to whether it would be "safer" to try to decroft their own land. These considerations are elements of benefit underpinning continuation of active crofting.

We have had to consider whether any weight should be given to the suggestion that the applicant is currently obliged to allow her croft to be kept open for wintering of stock held on the common grazings. There was no positive evidence of the terms of the grazing regulations on this point but such obligations are not uncommon and we would not be surprised if one existed in the present case. If it did, it would appear likely to be beneficial to both the immediate neighbours to have the croft retained subject to crofting control. The three crofts could easily be worked together in winter. Mr Garvie gave some evidence to that effect but this matter was not explored in any detail before us and the issues are not entirely free from difficulty. We have concluded that this matter cannot play any part in our decision.

In short, although the factors pointing against decrofting in any individual case, such as the present, might not be entitled to be given much weight to set against any evidence of positive prejudice to an applicant, they are of sufficient weight, in our view, to tip the balance against decrofting where no significant degree of prejudice has been established in evidence.

We conclude, therefore, that the present application should be refused.